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# TABLE OF CASES REPORTED

## A.

<b>Ætna L. Ins. Co., Damet v. (Okla.)</b>	<b>484</b>
<b>Albuquerque v. Water Supply</b>	
Co. .... (N. M.)	519
<b>Allen, Skillings v. .... (Minn.)</b>	<b>922</b>
<b>Ankrom, Pittsburgh &amp; W. Va.</b>	
Gas Co. v. .... (W. Va.)	1157
<b>Arkin v. Page .... (Ill.)</b>	<b>216</b>
<b>Armstrong, B. &amp; Co., Kee v. (Okla.)</b>	<b>1349</b>
<b>Armstrong, L. &amp; Co., Baltimore</b>	
& O. R. Co. v. ... (Ohio)	1117
<b>Atchison, T. &amp; S. F. R. Co.,</b>	
Kennedy v. .... (Kan.)	149

## B.

<b>Baltimore v. Sackett .... (Md.)</b>	<b>915</b>
<b>Baltimore &amp; O. R. Co. v. Arm-</b>	
strong, L. & Co. (Ohio)	1117
Bond v. .... (W. Va.)	201
<b>Bank, Citizens' Nat., v. First</b>	
Nat. Bank .... (Colo.)	587
First Nat., Citizens'	
Nat. Bank v. ... (Colo.)	587
Home Sav., Los Angeles	
Invest. Co. v. ... (Cal.)	1193
<b>Bank &amp; T. Co., Kentucky Title</b>	
Sav., Kentucky Lum-	
ber & Mill Work	
Co. v. .... (Ky.)	391
<b>Banks v. State .. (Tex. Crim. App.)</b>	<b>600</b>
<b>Barbour, Compton v. .... (Va.)</b>	<b>465</b>
<b>Barrett, D'Utassy v. .... (N. Y.)</b>	<b>979</b>
<b>Barton v. Woodward .... (Idaho)</b>	<b>1090</b>
<b>Baumhover, Knowlton v. ... (Iowa)</b>	<b>841</b>
<b>Bay State Street R. Co., Board</b>	
of Survey v. ... (Mass.)	24
<b>Beach v. Hayner .... (Mich.)</b>	<b>1052</b>
<b>Beeler v. Standard Invest. Co.</b>	
(Wash.)	363
<b>Beeten, Klein v. .... (Wis.)</b>	<b>1237</b>
<b>Bergland, Re .... (Cal.)</b>	<b>1363</b>
<b>Berkshire Street R. Co., Hull v.</b>	
(Mass.)	1330
<b>Bertin &amp; Lepori v. Mattison .. (Or.)</b>	<b>590</b>
<b>Bidwell, Dartnell v. .... (Me.)</b>	<b>1820</b>

## Birchett, Norfolk & W. R. Co.

v. .... (C. C. A.)	1028
<b>Bjornquist v. Boston &amp; A. R.</b>	
Co. .... (C. C. A.)	951
<b>Blanchard, Green v. .... (Ark.)</b>	<b>84</b>
<b>Bliss v. Spencer .... (Va.)</b>	<b>619</b>
<b>Blue Licks Springs Co., Clarke</b>	
v. .... (Ky.)	234
<b>Board of Education, Mattox v. (Ga.)</b>	<b>568</b>
<b>Board of Survey v. Bay State</b>	
Street R. Co. ... (Mass.)	24
<b>Bond v. Baltimore &amp; O. R. Co.</b>	
(W. Va.)	201
<b>Boston &amp; A. R. Co., Bjornquist</b>	
v. .... (C. C. A.)	951
<b>Boston Elev. R. Co., Knowles</b>	
v. .... (Mass.)	1255
<b>Brewer v. Warner .... (Kan.)</b>	<b>385</b>
<b>Bridgham, Rhode Island Hos-</b>	
pital Trust Co. v. (R. I.)	185
<b>Brooker v. Silverthorne .... (S. C.)</b>	<b>1283</b>
<b>Brown, People ex rel. Downs</b>	
v. .... (Ill.)	563
<b>Browns Valley, McClure v. (Minn.)</b>	<b>1168</b>
<b>Burbidge, Kennedy v. .... (Utah)</b>	<b>1682</b>
<b>Burch, Graves v. .... (Wyo.)</b>	<b>1216</b>
<b>Burghardt v. Detroit United</b>	
R. Co. .... (Mich.)	1333

## C.

<b>C—— v. C—— .... (Wis.)</b>	<b>1013</b>
<b>Carr, Louisville &amp; N. R. Co. v. (Fla.)</b>	<b>102</b>
<b>Carter, State ex rel., v. Kall (Mont.)</b>	<b>1309</b>
<b>Cavanagh v. Hoboken Land &amp;</b>	
Improv. Co. .... (N. J.)	933
<b>Chaudier v. Stearns &amp; C. Lum-</b>	
ber Co. .... (Mich.)	1673
<b>Chesapeake &amp; O. R. Co., Gates</b>	
v. .... (Ky.)	507
<b>Childs Dining Hall Co., Friend</b>	
v. .... (Mass.)	1100
<b>Citizens' Nat. Bank v. First</b>	
Nat. Bank .... (Colo.)	587
<b>Clarke v. Blue Licks Springs</b>	
Co. .... (Ky.)	234

Cleaver, Omaha Crockery Co. v. .... (Kan.)	1537	Florida Constr. & Realty Co. v. Pournell ..... (Fla.)	685
Cochran, Pease v. .... (S. D.)	936	Forty-Four Cigar Co., Fox v. .... (N. J.)	723
Columbia, McLendon v. .... (S. C.)	990	Fountain v. State ..... (Md.)	908
Compton v. Barbour ..... (Va.)	465	Fox v. Forty-Four Cigar Co. (N. J.)	723
Coniglio v. Connecticut F. Ins. Co. .... (Cal.)	805	Friend v. Childs Dining Hall Co. .... (Mass.)	1100
Connecticut F. Ins. Co., Coniglio v. .... (Cal.)	805	Funk v. Young ..... (Ark.)	79
Corson, Roberts v. .... (N. H.)	1172	Furst Store, Garland v. .... (N. J.)	275
Cosson, State ex rel., v. Shores-Mueller Co. .... (Iowa)	1305	G.	
Costello v. Sykes ..... (Minn.)	250	Garfield, Newman v. .... (Vt.)	1507
Country Club v. State ..... (Tex.)	1185	Garland v. Furst Store .... (N. J.)	275
Crocker v. Crocker ..... (Mass.)	1617	Gates v. Chesapeake & O. R. Co. .... (Ky.)	507
Crump, Diehl v. .... (Okla.)	1272	Georgia R. & Power Co. v. Railroad Commission ..... (Ga.)	1
Cunningham, Independent Order of Foresters v. .... (Tenn.)	1569	Gilbert, State ex rel. Wilcox v. .... (Minn.)	1449
Curling, Sullivan v. .... (Ga.)	124	Globe Malleable Iron & Steel Co. v. New York C. & H. R. R. Co. (N. Y.)	1648
Curtis (P.) Ko Eune Co. v. Manayunk Yarn Mfg. Co. .... (Pa.)	1483	Goans, Morgan County v. ... (Tenn.)	198
D.		Graves v. Burch ..... (Wyo.)	1216
Damet v. Aetna L. Ins. Co. (Okla.)	434	Huston v. .... (Mo.)	423
Dartnell v. Bidwell ..... (Me.)	1320	Great Atlantic & Pacific Tea Co., Ward v. ... (Mass.)	242
Detroit Taxicab & Transfer Co., Fessler v. ... (Mich.)	983	Green v. Blanchard ..... (Ark.)	84
Detroit United R. Co., Burghardt v. .... (Mich.)	1333	Guaranty Oil Co., Higgins Oil & Fuel Co. v. .... (La.)	411
Dickerson v. Perkins ..... (Iowa)	374	Gulf, C. & S. F. R. Co. v. Lemons ..... (Tex.)	943
Diehl v. Crump ..... (Okla.)	1272	H.	
Donahoo, Moore v. .... (C. C. A.)	675	Hadden v. Hand ..... (N. J.)	1463
Donahue, State v. .... (Or.)	1121	Ham v. Massasoit Real Estate Co. .... (R. I.)	440
Downs, People ex rel., v. Brown ..... (Ill.)	563	Hamilton, Stark v. .... (Ga.)	1041
D'Utassy v. Barrett ..... (N. Y.)	979	Hand, Hadden v. .... (N. J.)	1463
E.		Hedden v. .... (N. J.)	1463
Eaton v. Eaton ..... (Mass.)	1426	Harlan, Lessenger v. .... (Iowa)	1523
Ebner v. Steffanson ..... (N. D.)	1261	Harris, Young v. .... (N. C.)	477
Emerson v. Taylor ..... (Md.)	1045	Hayner, Beach v. .... (Mich.)	1052
Escalle v. Mark ..... (Nev.)	1512	Hedden v. Hand ..... (N. J.)	1463
Ewell v. Sneed ..... (Tenn.)	303	Henderson v. Shreveport .... (La.)	516
Ex parte Murray ..... (S. C.)	1152	Hendren v. Neepor ..... (Mo.)	927
F.		Higgins Oil & Fuel Co. v. Guaranty Oil Co. .... (La.)	411
Fargo, State ex rel., v. Wetz (N. D.)	731	Hoboken Land & Improv. Co., Cavanagh v. ... (N. J.)	933
Feder v. United States .. (C. C. A.)	370	Hogan, Washington F. Ins. Co. v. .... (Ark.)	1585
Federal L. Ins. Co. v. Lewis (Okla.)	1637	Holland-North America Mortg. Co., Prins v. ... (Wash.)	451
Fessler v. Detroit Taxicab & Transfer Co. .... (Mich.)	983	Home Life & Acci. Ins. Co., Watkins v. .... (Ark.)	791
Finnie v. Walker ..... (C. C. A.)	831	Home Sav. Bank, Los Angeles Invest. Co. v. .... (Cal.)	1193
First Nat. Bank, Citizens' Nat. Bank v. .... (Colo.)	587	Hughes v. Léonard ..... (Colo.)	817
Flack, Sherman v. .... (Ill.)	456		

Hull v. Berkshire Street R. Co.  
(Mass.) 1830  
Huston v. Graves ..... (Mo.) 423

I.

Independent Order of Forest-  
ers v. Cunningham  
(Tenn.) 1569  
Industrial Acci. Commission,  
Whiting-Mead Com-  
mercial Co. v. .. (Cal.) 1518  
Ingle System Co. v. Norris (Tenn.) 1578  
Iowa Loan & T. Co. v. Polk  
County ..... (Iowa) 1532  
Insurance Co., Aetna L., Damet  
v. .... (Okla.) 434  
Connecticut F., Coniglio  
v. .... (Cal.) 805  
Federal L., v. Lewis (Okla.) 1637  
Home Life & Acci., Wat-  
kins v. .... (Ark.) 791  
Standard F., v. Smith-  
hart ..... (Ky.) 972  
Washington F., v. Ho-  
gan ..... (Ark.) 1585  
Interurban Transp. Co., Sum-  
ner County v. .. (Tenn.) 765

J.

John, State v. .... (La.) 407

K.

Kall, State ex rel. Carter v. (Mont.) 1309  
Kee v. Armstrong, B. & Co. (Okla.) 1349  
Kennedy v. Atchison, T. & S.  
F. R. Co. .... (Kan.) 149  
v. Burbidge ..... (Utah) 1682  
Kentucky Lumber & Mill Work  
Co. v. Kentucky  
Title Sav. Bank &  
T. Co. .... (Ky.) 391  
Kentucky Title Sav. Bank &  
T. Co., Kentucky  
Lumber & Mill  
Work Co. v. .... (Ky.) 391  
Kibbe, Smith v. .... (Kan.) 483  
Kidder Equity Exch. v. Nor-  
man ..... (S. D.) 1180  
King, Wileman v. .... (Miss.) 584  
Kinkel, Trimboli v. .... (N. Y.) 1385  
Kipp, Laun v. .... (Wis.) 655  
Kirstein v. Philadelphia & R.  
R. Co. .... (Pa.) 1646  
Klein v. Beeten ..... (Wis.) 1237  
Knowles v. Boston Elev. R. Co.  
(Mass.) 1255  
Knowlton v. Baumhover .. (Iowa) 841  
Krauss v. Potts ..... (Okla.) 1213  
Kress v. Lane ..... (Iowa) 1376

L.

Lake Chelan Land Co., Re  
(C. C. A.) 557  
Lane, Kress v. .... (Iowa) 1376  
Laun v. Kipp ..... (Wis.) 655  
Lemons, Gulf, C. & S. F. R.  
Co. v. .... (Tex.) 943  
Leo, Ogden City v. .... (Utah) 960  
Leonard, Hughes v. .... (Colo.) 817  
Lessenger v. Harlan .... (Iowa) 1523  
Lewis, Federal L. Ins. Co. v.  
(Okla.) 1637  
Lingenfelter, Phillips (T. W.)  
Gas & Oil Co. v. .. (Pa.) 1495  
Lloyd Cotton Mills, Reynolds  
v. .... (N. C.) 284  
Long v. Long ..... (Ohio) 1343  
Los Angeles Invest. Co. v.  
Home Sav. Bank  
(Cal.) 1193  
Louisville & N. R. Co. v. Carr (Fla.) 102  
Lyman, Zerbst v. .... (C. C. A.) 377

M.

Macan v. Scandinavia Belting  
Co. .... (Pa.) 1502  
McClain & Norvet v. Torkelson  
(Iowa) 1665  
McClure v. Browns Valley (Minn.) 1168  
McGowin v. Menken ..... (N. Y.) 794  
McKinney v. Street ..... (N. C.) 1070  
McLendon v. Columbia .... (S. C.) 990  
Manayunk Yarn Mfg. Co.,  
Curtis (P) Ko Eune  
Co. v. .... (Pa.) 1483  
Mangum v. Norfolk & W. R.  
Co. .... (Va.) 346  
Mark, Escalle v. .... (Nev.) 1512  
Marvel v. State ex rel. Morrow  
(Ark.) 1458  
Massasoit Real Estate Co.,  
Ham v. .... (R. I.) 440  
Mattison, Bertin & Lepori v. (Or.) 590  
Mattox v. Board of Education (Ga.) 568  
Maxwell v. Page ..... (N. M.) 155  
Menken, McGowin v. .... (N. Y.) 794  
Merton, Puffer v. .... (Wis.) 1288  
Millett v. Pearson ..... (Minn.) 256  
Mincey, United States v. (C. C. A.) 211  
Monette v. Toney ..... (Miss.) 261  
Moore v. Donahoo .... (C. C. A.) 675  
Morgan County v. Goans .. (Tenn.) 198  
Morrow, State ex rel., Marvel  
v. .... (Ark.) 1458  
Murray, Ex parte ..... (S. C.) 1152

N.

Neeper, Hendren v. .... (Mo.) 927  
Newman v. Garfield ..... (Vt.) 1507

New York, C. & H. R. R. Co.,  
Globe Malleable  
Iron & Steel Co. v.

(N. Y.) 1648

Norfolk & W. R. Co. v. Birchett  
(C. C. A.) 1028

Mangum v. .... (Va.) 346

Norman, Kidder Equity Exch.  
v. .... (S. D.) 1180

Norris, Ingle System Co. v.  
(Tenn.) 1578

### O.

Ogden City v. Leo ..... (Utah) 960

Okanogan Power & Irrig. Co.  
v. Quackenbush (Wash.) 966

Olive v. Tyler ..... (C. C. A.) 557

Omaha Crockery Co. v. Cleaver  
(Kan.) 1537

Opinion of Justices, Re .... (Me.) 1407

Re ..... (Me.) 1412

### P.

Page, Arkin v. .... (Ill.) 216

Maxwell v. .... (N. M.) 155

Paine, Sabine v. .... (N. Y.) 1444

Pearson, Millett v. .... (Minn.) 256

Pease v. Cochran ..... (S. D.) 936

People ex rel. Downs v. Brown  
(Ill.) 563

Perkins, Dickerson v. .... (Iowa) 374

Phares, Sigler v. .... (Kan.) 141

Philadelphia & R. R. Co., Kir-  
stein v. .... (Pa.) 1646

Phillips (T. W.) Gas & Oil Co.  
v. Lingenfelter .. (Pa.) 1495

Pittsburgh & W. Va. Gas Co. v.  
Ankrom ..... (W. Va.) 1157

Polk County, Iowa Loan & T.  
Co. v. .... (Iowa) 1532

Potts, Krauss v. .... (Okla.) 1213

Pournell, Florida Constr. &  
Realty Co. v. .... (Fla.) 685

Price, State v. .... (W. Va.) 1247

Prins v. Holland-North Amer-  
ica Mortg. Co. (Wash.) 451

Public Service Commission,  
Puget Sound Traction,  
Light & P. Co.

v. .... (Wash.) 30

Puffer v. Merton ..... (Wis.) 1288

Puget Sound Traction, Light  
& P. Co. v. Public  
Service Commission

(Wash.) 30

v. Reynolds ..... (U. S.) 13

Puterbaugh, Re ..... (Pa.) 1277

### Q.

Quackenbush, Okanogan Power  
& Irrig. Co. v. .... (Wash.) 966

Quillin v. State (Tex. Crim. App.) 778

### R.

Railroad Commission, Georgia  
R. & Power Co. v. (Ga.) 1

Railroad Co., Baltimore & O.,  
Armstrong, L. &

Co. v. .... (Ohio) 1117

Baltimore & O., Bond v.  
(W. Va.) 201

Boston & A., Bjornquist  
v. .... (C. C. A.) 951

Louisville & N., v. Carr  
(Fla.) 102

New York C. & H. R.,  
Globe Malleable Iron  
& Steel Co. v.

(N. Y.) 1648

Railway & Power Co., Georgia,  
v. Railroad Commis-  
sion ..... (Ga.) 1

Railway Co., Atchison, T. & S.  
F., Kennedy v. .. (Kan.) 149

Bay State Street, Board  
of Survey v. .. (Mass.) 24

Berkshire Street, Hull v.  
(Mass.) 1330

Boston Elev., Knowles v.  
(Mass.) 1255

Chesapeake & O., Gates  
v. .... (Ky.) 507

Detroit United, Burg-  
hardt v. .... (Mich.) 1333

Gulf, C. & S. F., v. Lem-  
ons ..... (Tex.) 943

Norfolk & W., v. Birchett  
(C. C. A.) 1028

Norfolk & W., Mangum  
v. .... (Va.) 346

Philadelphia & R., Kir-  
stein v. .... (Pa.) 1646

Tamaqua & P. Electric,  
St. Clair v. .... (Pa.) 20

Re Bergland ..... (Cal.) 1363

Lake Chelan Land Co.  
(C. C. A.) 557

Opinion of Justices .. (Me.) 1407

Opinion of Justices .. (Me.) 1412

Puterbaugh ..... (Pa.) 1277

Wendel ..... (N. Y.) 177

Reed v. Stevens ..... (Conn.) 1081

Reynolds v. Lloyd Cotton Mills  
(N. C.) 284

Puget Sound Traction,  
Light & P. Co. v. (U. S.) 13

Rhode Island Hospital Trust  
Co. v. Bridgman (R. I.) 185

Rixey, Compton v. .... (Va.) 465

Roberts v. Corson ..... (N. H.) 1172

Rochester, Stubbs v. .... (N. Y.) 1396

Rowe v. Tuck ..... (Ga.) 113

Rubin v. Strandberg ..... (Ill.) 133

Ryder, State ex rel. Wilcox v.  
(Minn.) 1449

S.

Sabine v. Paine .....	(N. Y.)	1444
Sackett, Baltimore v. ....	(Md.)	915
St. Clair v. Tamaqua & P. Electric R. Co. ..	(Pa.)	20
Sanford, Taylor v. ....	(Tex.)	1660
Savings & T. Co., Woodward v. ....	(N. D.)	1561
Scandinavia Belting Co., Ma- can v. ....	(Pa.)	1502
Sellick v. Sellick .....	(Mich.)	1621
Sherman v. Flack .....	(Ill.)	456
Shores-Mueller Co., State ex rel. Cosson v. ..	(Iowa)	1305
Shreveport, Henderson v. ..	(La.)	516
Sigler v. Phares .....	(Kan.)	141
Silverthorne, Brooker v. ..	(S. C.)	1283
Skillings v. Allen .....	(Minn.)	922
Smith v. Kibbe .....	(Kan.)	483
Smithhart, Standard F. Ins. Co. v. ....	(Ky.)	972
Sneed, Ewell v. ....	(Tenn.)	303
Snow, Woodward v. ....	(Mass.)	1381
Spencer, Bliss v. ....	(Va.)	619
Standard F. Ins. Co. v. Smith- hart .....	(Ky.)	972
Standard Invest. Co., Beeler v. .....	(Wash.)	363
Stark v. Hamilton .....	(Ga.)	1041
State, Banks v. (Tex. Crim. App.)		600
Country Club v. ....	(Tex.)	1185
v. Donahue .....	(Or.)	1121
Fountain v. ....	(Md.)	908
ex rel. Wilcox v. Gilbert .....	(Minn.)	1449
v. John .....	(La.)	407
ex rel. Carter v. Kall (Mont.)		1309
ex rel. Morrow, Marvel v. ....	(Ark.)	1458
v. Price .....	(W. Va.)	1247
Quillin v. (Tex. Crim. App.)		773
ex rel. Wilcox v. Ryder .....	(Minn.)	1449
ex rel. Cosson v. Shores- Mueller Co. ..	(Iowa)	1305
ex rel. Fargo v. Wetz (N. D.)		731
ex rel. Wilcox v. Whit- ford .....	(Minn.)	1449
Stearns & C. Lumber Co., Chaudier v. ....	(Mich.)	1678
Steffanson, Ebner v. ....	(N. D.)	1261
Stegmann v. Weeke .....	(Mo.)	1060
Stevens, Reed v. ....	(Conn.)	1081
Strandberg, Rubin v. ....	(Ill.)	133
Street, McKinney v. ....	(N. C.)	1070
Stringer, Whitehead v. ..	(Wash.)	358
Stubbs v. Rochester .....	(N. )	1396
Sullivan v. Curling .....	(Ga.)	124
Sumner County v. Interurban Transp. Co. ....	(Tenn.)	765
Sykes, Costello v. ....	(Minn.)	250

T.

Tamaqua & P. Electric R. Co., St. Clair v. ....	(Pa.)	20
Taylor, Emerson v. ....	(Md.)	1045
v. Sanford .....	(Tex.)	1660
Thien, Wiese v. ....	(Mo.)	1552
Thompson v. Thompson ..	(Iowa)	710
Toney, Monette v. ....	(Miss.)	261
Torkelson, McClain & Norvet v. ....	(Iowa)	1665
Trimboli v. Kinkel .....	(N. Y.)	1385
Tuck, Rowe v. ....	(Ga.)	113
Tudor v. Tudor .....	(Vt.)	549
Tyler, Olive v. ....	(C. C. A.)	557

U.

United States, Feder v. ..	(C. C. A.)	370
v. Mincey .....	(C. C. A.)	211

W.

Walker, Finnie v. ....	(C. C. A.)	831
Ward v. Great Atlantic & Pa- cific Tea Co. ...	(Mass.)	242
Warner, Brewer v. ....	(Kan.)	385
Washington F. Ins. Co. v. Ho- gan .....	(Ark.)	1585
Water Supply Co., Albuquerque v. ....	(N. M.)	519
Watkins v. Home Life & Acci. Ins. Co. ....	(Ark.)	791
Weeke, Stegmann v. ....	(Mo.)	1060
Wendel, Re .....	(N. Y.)	177
Wetz, State ex rel. Fargo v. (N. D.)		731
Whitehead v. Stringer ....	(Wash.)	358
Whitford, State ex rel. Wilcox v. ....	(Minn.)	1449
Whiting-Mead Commercial Co. v. Industrial Acci. Commission .....	(Cal.)	1518
Wiese v. Thien .....	(Mo.)	1552
Wilcox, State ex rel., v. Gilbert .....	(Minn.)	1449
State ex rel., v. Ryder .....	(Minn.)	1449
State ex rel., v. Whit- ford .....	(Minn.)	1449
Wileman v. King .....	(Miss.)	584
Woodill & H. Electric Co. v. Young .....	(Cal.)	1296
Woodward v. Savings & T. Co. .....	(N. C.)	1561
Barton v. ....	(Idaho)	1090
v. Snow .....	(Mass.)	1381

Y.

Young v. Harris .....	(N. C.)	477
Funk v. ....	(Ark.)	79
Woodill & H. Electric Co. v. ....	(Cal.)	1296

Z.

Zerbst v. Lyman .....	(C. C. A.)	377
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# AMERICAN LAW REPORTS

## ANNOTATED

VOL. 5

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GEORGIA RAILWAY & POWER COMPANY, Plff. in Err.,  
v.  
RAILROAD COMMISSION OF GEORGIA et al.

*Georgia Supreme Court — March 15, 1919.*

(— Ga. —, P.U.R.1919D, 546, 98 S. E. 696.)

**Carrier — fares — power of Railroad Commission.**

1. In the absence of a valid, subsisting contract and ordinance upon the subject of fares, it was the duty of the Railroad Commission, upon application by the Georgia Railway & Power Company, a street railroad company, to fix and determine the rates of fare upon the lines of the street railroad in the city, in accordance with the law defining the powers and duties of the Commission.

[See note on this question beginning on page 36.]

**— fares — power to regulate.**

2. Under the proviso contained in the 5th section of the act approved August 23, 1907, now embodied in Civil Code 1910, § 2662, the Railroad Commission of this state was without authority to exercise the powers conferred and extended by that act, so as to determine or fix fares upon lines of street railroads within the limits of any town or city between which and the street railroad company operating such lines there was a valid, subsisting contract at the time of the passage of the act.

(a) There was such a contract between the city of College Park and the Georgia Railway & Power Company, and between that company and the city of Decatur as to one line running from Decatur to Atlanta.

(b) But as between the cities of At-

lanta and East Point and the Georgia Railway & Power Company there was no such contract.

(c) But there was a contract covering the subject of transfers, which provided that upon the payment of one full fare a transfer should be given; and the Railroad Commission was without jurisdiction to deal with the matter of transfers.

**Municipal corporation — power to fix fares.**

3. "A grant of power to a municipal corporation must be strictly construed; and such a corporation can exercise no powers except those which are expressly given, or are necessarily implied from express grants of other powers." Applying this principle to the facts contained in this record, the city of Atlanta was without authority to pass an

ordinance fixing the rates of fare upon the lines of the street railroad company which it had constructed within the limits of the municipality, and any attempt by the municipality to pass such ordinances was nugatory.

[See 19 R. C. L. 768.]

**Carriers — regulation of fares — police power.**

4. The regulation of passenger tariffs and the fixing of rates upon street railways is a matter falling within the police power.

[See 19 R. C. L. 857 et seq.]

**Constitutional law — police power — right to abridge.**

5. Neither the legislature nor a municipal corporation can by ordinance or contract abridge the police power.

[See 6 R. C. L. 192.]

**Contract — affecting police power — validity.**

6. It is not incompetent for a municipal corporation to make a contract in reference to a subject-matter falling within the police power, where the state has not seen fit to exercise the police power in reference thereto.

— **constitutional power.**

7. Where the Constitution requires

consent of the municipality to the construction of a railway upon its streets, it may contract as to the conditions upon which the railway shall be permitted to be constructed.

— **for fares — validity.**

8. Where the state has not exercised and is not seeking to exercise its police power over the subject of fares upon street railways, the municipality, whose consent to the construction of such railway is required by the Constitution, may contract with the railway company with respect to the fares which it will charge.

[See 19 R. C. L. 1159.]

**Constitutional law — impairment of contract — street car fares.**

9. The legislature may extend the power of the Railroad Commission over street railway fares in a municipality at any time, regardless of existing contracts between the municipality and the railway company.

[See 19 R. C. L. 768.]

**Municipal corporation — validity of ordinance.**

10. A municipal ordinance passed without authority cannot have the effect of a law, but is void and without effect.

(Fish, Ch. J., dissents, and Hill, J., dissents in part.)

**ERROR** to the Superior Court for Fulton County to review a judgment refusing to issue a writ of mandamus requiring the Commission to take jurisdiction in the matter of fixing street car rates. *Reversed in part.*

The facts are stated in the opinion of the court.

Messrs. King & Spalding, C. T. Hopkins, L. C. Hopkins, J. L. Hopkins, Brewster, Howell, & Heyman, Colquitt & Conyers, and Rosser, Slaton, Phillips, & Hopkins for plaintiff in error.

Messrs. James K. Hines, James L. Mayson, Reuben R. Arnold, S. D. Hewlitt, E. E. Pomeroy, and C. E. Cotterill, for defendants in error:

In a statutory enactment giving a tribunal created by statute certain jurisdiction over designated subjects, a proviso which excepts from the operation of this extension of jurisdiction certain named subjects is equivalent to a command to this statutory tribunal not to exercise jurisdiction over the subjects named in the proviso.

State ex rel. Illinois C. R. Co. v. Orleans Levee Dist. 109 La. 403, 33 So. 398.

The Commission has no jurisdiction over the subject-matter of contract rates.

Dix v. Dix, 132 Ga. 630, 64 S. E. 790; Cutts v. Scandrett, 108 Ga. 620, 34 S. E. 186.

When a valid contract rate appeared, it was the Commission's duty to decline to act.

Powell v. Cheshire, 70 Ga. 359, 48 Am. Rep. 572.

Contracts between cities and street railroads as to rates may well be treated as a class by themselves, which the legislature would be loath to disturb.

Crabb v. State, 88 Ga. 584, 15 S. E. 455; Butler v. State, 89 Ga. 821, 15 S. E. 763; Thomas v. State, 92 Ga. 1, 18 S. E. 44; King v. State, 136 Ga. 709, 71 S. E. 1093; McGinnis v. Ragsdale, 116 Ga. 245, 42 S. E. 492.

A contract such as that between Atlanta and the street railway is perfectly valid until the state steps in, in the exercise of its sovereign power, and changes the rate so contracted for.

(— Ga. —, P.U.R.1919D, 546, 98 S. B. 696.)

Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, 4 A.L.R. 956, P.U.R.1916E, 184, 161 Pac. 151; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 172, 26 Sup. Ct. Rep. 23, 45 Fla. 600, 84 So. 631, 47 Fla. 338, 36 So. 174; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 60 L.R.A. 822, 66 N. E. 436; Sternberg v. State, 36 Neb. 307, 19 L.R.A. 570, 54 N. W. 553; Public Service Commission v. Westchester Street R. Co. 206 N. Y. 209, 99 N. E. 536; De Lucas v. New Orleans & C. R. Co. 38 La. Ann. 930; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146, 166 N. W. 998; Superior v. Douglas County Teleph. Co. 141 Wis. 363, 122 N. W. 1023; Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, L.R.A.1915F, 732, 150 N. W. 411; Huntington v. Burdeau, 149 Wis. 263, 135 N. W. 850; Kittinger v. Buffalo Traction Co. 160 N. Y. 377, 54 N. E. 1081; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; Barre v. Barre & M. Power & Traction Co. 88 Vt. 304, 92 Atl. 237; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; People ex rel. Dwight v. Chicago R. Co. 270 Ill. 278, 110 N. E. 400.

Even without an excepting clause, contracts as to rates, entered into by cities and street railway companies, are without the jurisdiction of a railroad commission.

Superior v. Douglas County Teleph. Co. 141 Wis. 365, 122 N. W. 1023; Quinby v. Public Service Commission, 223 N. Y. 244, 3 L.R.A. 685, P.U.R. 1918D, 30, 119 N. E. 435.

Messrs. A. C. Brown and G. M. Watkins also for defendants in error.

Beck, P. J., delivered the opinion of the court:

The plaintiff in error, hereafter called the railway company, filed a

petition to the Railroad Commission of Georgia, for an increase in street railway fares. In the application it was claimed that an increase of rates for street car and suburban fares was absolutely essential in order for the applicant, in view of the unusual war conditions which had prevailed for more than a year, to effectively discharge obligations of the company to the public. The facts upon which this claim of the necessity for a raise in the rates of street car fares was based were fully and elaborately set forth in the petition to the Commission. Upon hearing the application, the Commission held that, by reason of certain contracts between the railway company and the cities of Atlanta, Decatur, East Point, and College Park, it had no jurisdiction to grant increased fares, and reached the conclusion that, having found the contracts referred to to be physically existent, their validity was not a question for the Commission, but for the courts, to decide; that when dealing with the rates of a street railroad under the terms of the Act of 1907, embraced in Civil Code, § 2662, they were brought face to face with a contract or an ordinance in existence at the time of the passage of that act, and still subsisting, the Commission could go no further in dealing with the rates until the obstacle should be removed by legal procedure before a court of competent jurisdiction, or until the general assembly should further act. The Commission, having concluded that there were contracts in existence which were an obstacle to their further proceeding, stated as their opinion that the applicant was entitled to an increase in street car fares, and that a 6-cent fare would be reasonable and just "so long as existing abnormal war conditions prevailed," and recommended to the municipal authorities of Atlanta, Decatur, and College Park the justice of granting the increase "by amendment to existing contracts or ordinances." The railway company then brought to the superior court

of Fulton county its petition against the Commission, and prayed that the writ of mandamus issue, requiring the Commission to take jurisdiction in the matter of fixing the rates, it being insisted that the Commission had erred in declining to take jurisdiction in the matter, for the reason that there were no contracts, valid or otherwise, between the city of Atlanta and petitioner, fixing the street railroad fares, or that there was in existence in 1907 an ordinance, valid or otherwise, passed by the city of Atlanta, fixing street railroad fares, and that if there existed at said times any such contracts or ordinances the same were invalid because the city of Atlanta lacked the charter power to make such contracts or ordinances, and because, if the city of Atlanta had charter power to make such contracts and ordinances they would be void because violative of article 4, § 2, ¶ 1, of the Constitution of the state of Georgia, conferring upon the general assembly alone the power of regulating passenger tariffs, preventing unjust discrimination, and fixing reasonable and just rates. Applicant also insisted that the alleged contracts between applicant and the towns of Edgewood, East Point, Decatur, and College Park were invalid because these towns were without charter power to make such contracts, and that if they had such power the contracts would be void because in violation of that section of the Constitution referred to. The further contention was made that, even if there were valid contracts between the petitioner and one or more of the municipalities referred to, the existence of such valid contract would not prevent the Commission from exercising its jurisdiction to fix street railroad fares in cases other than those covered by such valid contracts, and that if there were with the cities whose streets were occupied by petitioner valid existing contracts, the act of the Commission in fixing and approv-

ing just and reasonable rates would not be an impairment of such contracts under the Constitution of this state.

1. We will first consider the question as to whether, if there were contracts in existence on the 23d day of August, 1907, between the municipalities named, or any of them, by the terms of which the street railroad fares were fixed as to that municipality, such a contract would prevent the fixing of the street railroad fares by the Commission. The act to revise and enlarge the powers and duties of the Railroad Commission of Georgia, etc., approved August 23, 1907, contains the statutory provision now embraced in § 2662 of the Civil Code, and, so far as relates to the questions under consideration in this case, reads as follows: "The powers and duties hereinbefore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies, or persons owning, leasing, or operating street railroads in this state: Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance."

Until the passage of the Act of 1907 the Commission was without authority to deal with the subject of fixing fares for street railways. Until the enactment of that statute they did not exercise, as to street railway companies, the power to make the rates of charges for transportation of passengers on the lines of street railways operated by street railway companies, like that of the applicant in this case. But the Act of 1907, as indicated by its caption, extended and enlarged the powers and duties of the Commission, and embraced in these enlarged and ex-

tended powers and duties there was, among other things, the authority to fix fares upon street railroads, and to otherwise exercise control over street railroad corporations or companies operating street railroads, but in § 5, the section of the Act of 1907 extending the powers of the Commission so as to embrace authority to fix fares upon street railroads, the legislature enacted as a part of that section the proviso "that nothing herein [in the statute extending the powers and duties of the Commission] shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company [street railroad company]."

In our opinion the effect of the proviso is to leave the Commission where it was before the enactment of the statute as to its power and authority to determine and fix fares upon street railroads in any municipality which had a valid subsisting contract covering that subject with the street railroad company.

Counsel for the railway company contend in their arguments that it was not competent for the municipality to enter into a contract with the street railroad company upon this subject; that the fixing of fares upon street railroads and other railroads is a matter that falls within the police power of the state, and that under the provisions of the Constitution of the state, especially that part of the Constitution which declares that the exercise of the police power of the state shall never be abridged (Civ. Code, § 6464), the municipality and the railway company could not make a binding contract upon this subject. We cannot agree with this contention in full. We readily assent to the proposition that the regulation of fares—police power. the fixing of fares upon street railroads, as well as upon steam railroads, is a matter falling within the

police power, and that neither the legislature of the state nor the legislative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the state, but we do not think that in all cases and in reference to every subject which might fall within the police power of the state it is incompetent for a municipality or other corporation to make a contract in reference to such subject-matter, where the state has not seen fit to exercise the police power in reference thereto.

Under the Constitution of this state (art. 3, § 7, ¶ 20; Civ. Code, § 6448) the general assembly cannot authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities. Under such provisions the city authorities may withhold their consent for the construction of a street railroad upon any of the streets of the municipality. It would seem that if they can do this they might impose conditions upon which a railroad company might construct its tracks in the streets and enter into a contract with the corporation as to the conditions upon which it should be permitted to construct a railway within the limits of a municipality. In the case of Atlanta R. & Power Co. v. Atlanta Rapid Transit Co. 113 Ga. 481, 39 S. E. 12, it was said: "Our Constitution in ¶ 20, § 7, art. 3, declares that the general assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city without the consent of the corporate authorities. But when a corporation to duly construct such a railway has been created, . . . it is within the power of the corporate authorities of the city, in whose streets it is proposed to be constructed, to refuse it admission al-

Constitutional law—police power—right to abridge.

Contract—affecting police power—validity.

—constitutional power.

together, as well as to confine it to certain streets and routes, and to impose, as a condition precedent to such construction, such reasonable terms as the corporate authorities, looking to the interests of the citizens, may deem best."

Where application is made to the municipal authorities by a street railroad company for the consent of the authorities to the construction of a railway in its streets, it does not seem to be sound to say that the city authorities could only say "Yes" or "No" to such a petition,—that the city is compelled to refuse admission altogether or to admit it without any conditions whatever. In the case of *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L.R.A. 300, 60 S. W. 110, the supreme court of Missouri says: "It would be difficult to conceive of a more positive and unequivocal veto than that conferred upon the cities, towns, and villages of this state by § 20 of article 12 of the Constitution, and § 2543, Mo. Rev. Stat. 1889, to prevent the construction and operation of railroads upon their streets and highways, without their consent. When such power is given to cities and towns it is not limited to a mere 'Yes' or 'No,' but they may impose such conditions upon their consent as they see fit. . . . Judge Elliott, in his work on Railroads (volume 3, § 1081), says: 'When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, the authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railroad in its streets.'"

In the case of *People ex rel. Frontier Electric R. Co. v. North Tonawanda*, 70 Misc. 91, 126 N. Y. Supp. 186, the supreme court of New York says: "A city may refuse to assent to the construction of a railroad in its streets, and may therefore impose any conditions it

thinks proper as conditions precedent to the giving of its assent; and if the city attaches conditions which the company deems unreasonable, the only remedy of the latter is to refuse to accept the assent."

See also *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Quinby v. Public Service Commission*, 223 N. Y. 244, 3 L.R.A. 685, P.U.R.1918D, 30, 119 N. E. 433. In *Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998, it is said that a constitutional provision, giving cities reasonable control of their streets, authorizes them to impose reasonable rates upon a public utility as a condition to the occupancy of the streets, the reasonableness of the rate being reviewable by the courts. In the case of *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, it is said: "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded fixed until another rate was adopted by a like agreement."

See also *Barre v. Barre & M. Power & Traction Co.* 88 Vt. 304, 92 Atl. 237, and *State ex rel. Sedalia v. Public Service Commission*, —, Mo. —, P.U.R.1919C, 507, 204 S. W. 497.

We do not base our opinion that a street railroad company and a municipality may, under certain circumstances, contract with reference to rates of fare, entirely upon that part of the Constitution which provides that the legislature shall not authorize a street railroad company to construct its railways in the limits of a municipality without the consent of the municipal authorities. We think that where the state has not exercised its police

power, and is not seeking to exercise its police power, over the subject of fares upon street railroads, the municipality and the street railway might enter into contracts upon this subject that will be valid; but the right of the municipality to refuse absolutely its consent to the construction of a street railway within its limits, and the constitutional and statutory provisions in regard thereto, strengthen us in the view that it is competent for the municipality and the street railroad company to enter into contracts upon this subject.

Having reached this conclusion, in the further consideration of the issues involved in this case we must inquire whether there was a contract between the city of Atlanta and other municipalities named and the railway company upon the subject of fares.

We take up first the question as to whether or not the city of Atlanta had a contract on August 23, 1907, and prior thereto, with the railway company upon the subject of fares. Whether it had such a contract is to be gathered from the facts, which we state briefly as follows: The Atlanta Street Railroad was Atlanta's original and principal railway. It included the lines upon several of the principal streets of the city. On January 1, 1869, the city granted consent to this street railroad company to occupy the streets of said city, by an ordinance, one of the conditions of which was as follows: "Fourth. The charges for passage on said road shall not exceed 20 cents for any through line, and not exceeding 10 cents for half lines or short distances."

On December 18, 1882, the city of Atlanta granted its consent to the Metropolitan Street Railway Company to occupy certain streets upon condition that "franchises granted subject to the conditions and limitations of ordinances heretofore passed in reference to the Atlanta and Gate City Street Railroad Companies."

On July 4, 1877, a like grant on the same terms was made to Atlanta & Edgewood Street Railway Company. On December 7, 1891, a grant was made to Atlanta Consolidated Street Railway Company to occupy certain streets in the following language: "The rights and franchises consented to and granted to said several street railroad companies (including Atlanta Street Railroad Company) . . . are hereby reconvented and regranted to said Atlanta Consolidated Street Railroad Company on the terms specified in said grants both as to privileges and obligations."

Subsequently, August 23, 1899, the city of Atlanta granted a consent to the Atlanta Rapid Transit Company to occupy with its lines certain named streets. Among the terms of this consent was the following: "This grant is made on the further condition that the charge for fare for a single passenger from any point on the lines of said company to any other point on the lines of said company within the city limits of Atlanta as now or hereafter defined shall not exceed 5 cents, except on cars that may be run after midnight and before 5 o'clock, A. M., for which fares for single passengers as aforesaid shall not exceed 10 cents."

Prior to February 8, 1902, the name of Atlanta Consolidated Street Railroad Company had been changed to that of Atlanta Railway & Power Company, and there was in existence at said time in Atlanta only two street railway companies, the Atlanta Railway & Power Company and Atlanta Rapid Transit Company. These two railroad companies, together with the Georgia Electric Light Company and the Atlanta Steam Company, desired to consolidate, and the consent of the city was sought to permit and authorize such consolidation. This consent of the city was obtained, and was embodied in what is known as the "Consolidation Ordinance" of February 8, 1902. In this ordinance in which the consent was

granted, it was provided: "The said consolidated company shall, for the purpose of giving one continuous ride inside the city of Atlanta from a point on one of its lines to a point on another of its lines grant one transfer ticket on the payment of one full fare."

We have gone carefully through these ordinances conferring certain rights and franchises upon the street railroad companies mentioned, have considered the terms of what might be called the consent contract in the Consolidating Ordinance, and we cannot find that there were the elements of a contract existing, in view of the provisions of the Consolidating Ordinance. The Railroad Commission of the state, in passing upon the question when the application for increase in fares was before it, in rendering their decision set forth at some length the grounds upon which they based the conclusions reached, and in announcing the conclusion and decision used, as a part of their opinion, the following language:

"The physical existence of a contract in 1907 between the town of Decatur and the lessor of applicant, prescribing a 5 cent maximum fare between Decatur and Atlanta, is admitted. A similar contract between College Park and applicant's lessor was in existence.

"The Georgia Railway & Electric Company obtained its Atlanta franchises under an ordinance of the city of Atlanta, approved February 8, 1902, known as the 'Consolidating Ordinance.' This ordinance contained the terms and provisions upon which the consolidation of the street railways therein named could be made. It was accepted by the Georgia Railway & Electric Company. The proposition of the city and its acceptance by the company constituted a contract, which contract was in existence in 1907.

"The 'Consolidating Ordinance' does not, in direct terms, prescribe rates. It, however, contains this provision: 'The said consolidated

company shall for the purpose of giving one continuous ride inside the city of Atlanta from a point on one of its lines to a point on another of its lines, which, however, does not carry the passenger on a parallel line or in the same general direction from which he came, grant one transfer ticket upon the payment of one full fare, provided such transfer is requested at the time of the payment of the fare.'

"At that time the universal fare throughout the city of Atlanta upon each and all of the lines embraced in the ordinance was 5 cents. A 'full fare' must have meant the then prevailing fare. To compel the grant of transfers and at the same time throw no restrictions upon an increase in the primary rate would have been to leave the way open to nullify the free transfer by increasing or doubling the original and customary charge without transfers.

"But whether this be the correct view as to what was a 'full fare' or not, it is immaterial to a proper conclusion as to the grant of the prayer of petitioner for authority to charge 2 cents for a transfer; to grant it would, to that extent, repeal the Consolidating Ordinance under which the petitioner is now operating."

It will be seen that the Commission laid especial stress upon that clause which we have already quoted from the Consolidating Ordinance. Whether, as they say, the uniform prevailing fare at the time of the adoption of the ordinance was 5 cents or not, this Consolidating Ordinance, that is, the clause which we have quoted, does not fix the fare at 5 cents. It deals directly and expressly with the question of transfers, declaring that upon the payment of one "full fare" the consolidated company shall "grant one transfer ticket." That means, it seems to us clearly, that upon payment of one full fare, whatever that may be, whether 4 cents, 5 cents, 6 cents, or more or less, the transfer shall be granted. We find



nothing in the contract tending to bind either the company or the municipality as to the amount of a full fare. No attempt was made to state what was a full fare, and it does not appear to us to have been the intention of the contract and parties to do this. The thing contracted about was transfers, and we cannot assume from the words of the ordinance that one "full fare" was a 5-cent fare. Upon this point we agree with counsel for plaintiff in error that the matter of fares was so important that it would not have been left to inference, but would have been the subject of definite contract if the city intended at that time to fix the amount of fares.

As between the municipality of East Point and the railroad company, the contract was to the effect that "passengers from all other parts of the town of East Point shall be accorded each and every privilege which may be accorded citizens of Atlanta with regard to transportation."

If that is a contract upon the subject of fares at all, the fares would seem to follow, as to amounts, the fares for passenger transportation fixed for Atlanta.

The contracts with the municipalities of College Park and Decatur stand upon a different footing. Those contracts were in existence on the 23d day of August, 1907, and are still subsisting contracts. As we decided in the first part of this opinion, these contracts are not invalid, but are valid and subsisting contracts, and were valid and subsisting contracts on the 23d day of August, 1907, and the Commission properly held that they were without jurisdiction to fix the fares between the two towns just referred to and the city of Atlanta over the lines of the railway company.

Nothing that we have said in regard to the matter of contracts between municipalities and street railway companies upon the subject of fares is to be construed as in any way impairing the police power of the state. We are of the opinion

that at any time that the state may act in regard to this matter and extend the powers of the Railroad Commission so as to cover the matter of fares upon street railways in towns where there are existing contracts, then, regardless of such contracts, the Commission, in the exercise of the branch of the power thus conferred, can act.

Constitutional law—impairment of contract—street car fares.

But we are of the opinion that the effect of the proviso in the section of the Act of August 23, 1907, which we have quoted above, is to leave the Commission without authority to fix rates of fare upon street railroads in towns and cities where there were existing contracts at the time of the passage of the law between such towns and cities and the street railroad companies, and that therefore the Commission did not have the authority to determine and fix rates of fare as between the town of College Park and the city of Atlanta, and upon one line running from Decatur to the city of Atlanta, because these two last lines referred to are expressly covered by contracts which were valid subsisting contracts at the time of the passage of the law. Nevertheless, there was no existing contract which prevented the Commission from taking jurisdiction of the matter of rates of fare in the city of Atlanta and upon lines of the railway company running into the city of Atlanta, except from the two points just mentioned.

This leaves for consideration and determination any valid ordinance upon the subject of fares which would bring the city within the purview of the proviso that the act should not operate as a repeal of any existing municipal ordinance, and we are of opinion that, so far as concerns the question of fares, there was not in Atlanta any municipal ordinance which could prevent the jurisdiction of the Commission over the question of rates of fare from attaching. Under the view we take of the case we do not think it is neces-

sary to determine whether there was or was not among the ordinances of the city one purporting to regulate the matter of fares on the street railroad, for whether there were such ordinances, or whether those ordinances on this subject had been repealed, cannot affect the decision on this branch of the case under the principles of law which we have held to be sound, for we are of opinion that the city of Atlanta was without authority to enact such an ordinance, and an ordinance passed

**Municipal  
corporation—  
validity of  
ordinance.**

without authority cannot have the effect of a law, but is void and without effect. Towns and cities have only such powers as are granted them by the state, either in their charters or in general laws, and in determining the question as to whether cities have the power to pass any ordinances in question we have to examine their charters and the general laws, for in that way are to be found the sources of their powers as municipalities, and in doing this it must be remembered that all grants of power to municipalities are to be strictly construed, and, if not expressly granted or necessarily implied from express grant of other powers, then no such grant of powers exists. "A grant of power to a municipal corporation must be construed strictly, and such a corporation can exercise no powers except such as are expressly given or are necessarily implied from express grants of other powers." *Lofton v. Collins*, 117 Ga. 438, 61 L.R.A. 150, 43 S. E. 710; *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718. In the case of *Lockwood v. Muhlberg*, 124 Ga. 662, 53 S. E. 92, it is said: "And the rule is general that the powers granted to municipal corporations are to be strictly construed; and if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative." 21 Am. & Eng. Enc. Law, 2d ed. 950, and citations. "The intent of the legislature should be sought for in every instance, and carried

out if possible; but the courts have generally favored the common-law rule that municipal, like all grants of power from the state, are to be construed in favor of the state, and against the grantee, whenever a reasonable doubt exists." *Tiedeman, Mun. Corp.* § 110. See also *Dill. Mun. Corp.* § 88; *McQuillin, Mun. Ord.* § 48." *Savannah v. Wilson*, 49 Ga. 476; *Frank v. Atlanta*, 72 Ga. 428.

Applying these principles to the facts of the present case, we do not find that the city of Atlanta, nor the other municipalities whose right to fix fares upon street railroads is involved in this case, have the charter power to pass ordinances <sup>—power to fix fares.</sup> upon this subject.

We do not think that the sections of the charter of the city of Atlanta giving them control over the streets, nor that authorizing the municipality to prescribe "reasonable charges to be collected by hacks, cabs, drays or other licensed vehicles for the transportation of persons," etc., nor that part of the charter authorizing them to pass ordinances generally for a municipal purpose not in conflict with the charter or the Constitution or laws of this state or of the United States, nor similar provisions in the charter, grant to the city the power to fix the rates of fare upon lines of street railroad; that power is not expressly given in any of these provisions of the charter, nor is it to be necessarily inferred from any of the powers actually granted. Many authorities, including textbooks, decisions by the Supreme Court of the United States, and decisions by the courts of other states, might be here quoted and cited to support the ruling which we have made, but we do not deem it necessary, as the doctrine here restated is so generally recognized, and the conclusion which we have reached under the facts in this particular case necessarily follows from an application of that doctrine.

3. In those cities where there

was no valid contract upon this subject, which we have pointed out, the Railroad Commission had power and authority, and it was their duty, to fix the fares upon the lines of railroad of the Georgia Railway & Power Company, for no ordinance passed by any of these municipalities upon the subject would be valid or binding, because where such ordinances were passed, it was without charter authority to do so, and, as we have ruled in the preceding division of this opinion, any attempt to pass an ordinance on this subject was nugatory. Under the provisions of the Act of 1907, except as to the two municipalities which we have indicated, the way is clear for the Railroad Commission of the state to perform the duty and exercise the power of fixing the rates in the municipalities involved in this case other than the two expressly named above.

No question as to the right to have the writ of mandamus issue in the event the Railroad Commission of the state has jurisdiction of the street railroads touching the matter of fares was raised; indeed, it is stated in the bill of exceptions that both sides agreed that "procedure by mandamus was the proper procedure in the cause, and the parties so stated in open court."

It follows, then, from what we have above held, that the court should have granted the writ requiring the Commission to pass upon and determine the rates of fare upon the other lines of street railroad not covered by the contracts between the railway company and the cities of Decatur and College Park, and the judgment of the court below is reversed in so far as it refused to issue the writ of mandamus requiring the Commission to take jurisdiction as indicated. The judgment is affirmed in so far as it refused the writ as to passenger fares covered by the contract between the towns of Decatur and

College Park and the railway company.

Judgment reversed in part and affirmed in part.

All the Justices concur, except Fish, Ch. J., who dissents, and Hill, J., who dissents in part.

Fish, Ch. J., dissenting:

I cannot concur in the entire conclusion reached by the majority of the court. To my mind the state Railroad Commission, in view of the facts of the case and the law applicable thereto, rightly held that it was without jurisdiction to grant the relief sought by the railway company, and that the judge of the superior court correctly refused to grant the writ of mandamus against the Commission. It follows, of course, that in my opinion the judgment under review should be affirmed in its entirety.

Hill, J., dissenting:

I cannot concur in the opinion of the majority of the court in its entirety. I concur in the judgment in so far as it reverses the judgment of the trial court, and dissent from that portion which affirms the judgment in part. The view I take of this case is that the Constitution of the state confers the exclusive power to make passenger rates, etc., upon the legislature. Article 4, ¶ 1, of the Constitution (Civ. Code 1910, § 6463), declares: "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs are hereby conferred upon the general assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this state, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

In pursuance of that authority the legislature provided for the creation of the Railroad Commission of the state, with authority to regulate

and fix freight and passenger rates, etc., over the railroads of this state, street railroads being excepted. Acts 1878-79, p. 125. In 1907 (Acts 1907, p. 72; Civil Code 1910, § 2662) the legislature amended the Act of 1878-79, and enlarged the powers of the Railroad Commission so as to include street railroads within its jurisdiction. Nowhere else is express authority conferred to make just and reasonable passenger fares or rates. Under the Constitution the general assembly must fix the rates, and even that body could not contract as to rates. And if this is so, it could not authorize a municipality to so contract. *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694. Article 3, § 7, ¶ 20, of the Constitution (Civ. Code 1910, § 6448), provides: "The general assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

And § 2600 of the Civil Code of 1910 declares: "All the provisions of the preceding division shall govern in the incorporation, control, and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement: That they must in their petition specify what city, town, or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regula-

tions by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate. . . ."

It is insisted that the last-quoted provision of the Constitution and Code section confer the power upon municipalities to contract rates. To this I cannot agree. Power cannot be granted which is inconsistent with the Constitution or the general law of the state. Civ. Code, §§ 6391, 6392. To grant power to a municipality to make contract rates in this state would be inconsistent with both the Constitution and general law. The Constitution does provide that railways shall not be constructed on streets without the consent of the municipality. Civ. Code, § 6448. But the power to consent to the construction and operation of street railroads over city streets does not include the power to make rates. *Chicago v. O'Connell*, 278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210; *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; *Tampa Waterworks v. Tampa*, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23. Nor does the power to make rules and regulations as to the construction of street railroads in the streets of a city confer the authority to make rates. The city of Atlanta has not, by authority of the Constitution, nor its charter, nor general law of the state, authority to make rate ordinances or rate contracts relatively to the state itself. Rate making is not inherent in municipalities, and no such authority has been conferred in Georgia on them, either by the Constitution or general law of the state. See *Henderson v. Heyward*, 109 Ga. 377, 47

L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590. Even if the rate ordinances and contracts under review are "valid subsisting contracts," they must give way to the demands of the state whenever the state undertakes to exercise its police power in order to make change or revise rates through the Railroad Commission. And this would not have the effect of impairing the obligation of contracts. In *Union Dry Goods Co. v. Georgia Public Service Corp.* 142 Ga. 841, L.R.A.1916E, 358, 83 S. E. 946 (3), it was held by this court: "The Railroad Commission Act of 1907 (Acts 1907, p. 72), giving to the Commission jurisdiction over electrical lighting and power companies, and the order of the Commission fixing maximum rates in the instant case, are not void as in opposition to the clauses in the Federal and state Constitutions prohibiting the passage of any ex post facto law, or law impairing the obligation of contracts, or the taking of property without due process of law, or for a public use without just compensation."

And see *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508; *Railroad Commission v. Louisville & N. R. Co.* 140 Ga. 828, L.R.A.1915E, 902, 80 S. E. 327, Ann. Cas. 1915A, 1018.

**NOTE.**

As the statute involved in the reported case (*GEORGIA R. & POWER CO. v. RAILROAD COMMISSION*, ante, 1), which conferred the power upon the Railroad Commission as to the regulation of street railway rates, contained an express proviso denying the power of the Commission to impair any valid subsisting contract between a municipality and a street railway company, the denial of the jurisdiction of the Commission to regulate rates on lines as to which there were such contracts involved merely the application of the statutory condition rendering it unnecessary to consider the effect of the constitutional provision against impairing the obligation of contracts, which has been frequently invoked against the power of public service commissions, acting under statutes which do not expressly restrict their power in this respect, to alter franchise rates. The general subject of the power of the public service commission with respect to the regulation of street railways is considered in the annotation beginning at page 36, post. The specific question as to the power of a public service service commission to increase franchise rates, including street railway rates, is considered in the annotation in 3 A.L.R. 730.

PUGET SOUND TRACTION, LIGHT, & POWER COMPANY, Appt.,  
v.

CHARLES A. REYNOLDS et al., Constituting the Public Service Commission of the State of Washington, et al.

*United States Supreme Court — June 11, 1917.*

(244 U S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705.)

**Constitutional law — impairing contract obligations — requiring street railway passengers to be carried beyond franchise limits.**

1. An order of the Public Service Commission created by Wash. Laws 1911, chap. 117, requiring street railway passengers to be carried beyond the limits of a particular franchise, does not impair the obligation of any contract contained in municipal ordinances granting street railway franchises which give the street railway companies the right to make rules for

the management and operation of the lines, "provided that such rules and regulations shall not conflict with the laws of the state," and the charter and ordinances of the city, since this, by fair construction, means the laws as they shall from time to time exist, and the act creating the Commission and the orders made by the Commission are within this description.

[See note on this question beginning on page 36.]

— municipal contracts — street railway fares and transfers.

2. The exercise by the state, acting through a Public Service Commission, of its police power over street railway fares and transfers, could not be precluded by ordinances of the cities of Seattle and Ballard, in the state of Washington, contractual in form, granting street railway franchises, where, under Wash. Const. art. 12, § 18, adopted before the franchises were granted, the legislature was required to pass laws establishing reasonable maximum rates for transportation of passengers and freight, and to correct abuses and prevent discrimination in such rates, and was empowered to establish a railroad and transportation commission and define its powers and duties, and by art. 11, § 10, any city containing a population of 20,000 inhabitants or more is permitted to frame a charter for its own government "consistent with and subject to the Constitution and laws of this state."

[See 19 R. C. L. 768.]

(Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice McReynolds dissent.)

— due process of law — rate regulation.

3. Whether an order of a Public Service Commission requiring street railway passengers to be carried beyond the limits of the particular franchises covering those lines, and at a reduced rate, is confiscatory or otherwise arbitrary within the inhibition of U. S. Const. 14th Amend., is not to be determined with reference to earnings and operating expenses of the lines in question, separately considered, where such lines are and have long been operated as parts of a system.

[See 6 R. C. L. 483.]

Carriers — governmental control — street railways — through service — single fare.

4. A street railway company operating a number of lines as parts of a single system may be required to establish through service upon the payment of a single fare.

**APPEAL** by plaintiff from a judgment of the District Court of the United States for the Western District of Washington denying an application for a temporary injunction to restrain the enforcement of an order of the Public Service Commission, requiring street railway passengers to be carried beyond the limits of the particular franchise and at a reduced rate.  
*Affirmed.*

The facts are stated in the opinion of the court.

Messrs. James B. Howe and Hugh A. Tait, for appellant:

The order of the Public Service Commission and the interlocutory decree sustaining it, as to through car service, violate the 14th Amendment to the Constitution of the United States.

Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Interstate Commerce Commission v.

Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The fact that plaintiff had given more than its franchises and the law required of it is no justification for compelling it to continue that service when experience has demonstrated that the lines upon which the service was being given were operated at a loss.

(844 U. S. 674, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705.)

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684-697, 43 L. ed. 858-864, 19 Sup. Ct. Rep. 565; Wilmington City R. Co. v. Taylor, 198 Fed. 159; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417-435, 54 L. ed. 259-271, 30 Sup. Ct. Rep. 118.

The law does not vest the Commission with jurisdiction to substitute for a reasonable regulation another regulation which the Commission thinks should be substituted. The regulation of the carrier must first be found to be unreasonable, and for such regulation the Commission can only substitute one which is reasonable and sufficient.

Union P. R. Co. v. Public Utilities Commission, 95 Kan. 604, P.U.R. 1915D, 377, 148 Pac. 667; Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 385, 137 N. W. 329.

An order substituting for a franchise provision requiring physical transfer of passengers, the requirement of through service at great additional expense, is substituting management by the Commission for the regulation provided by law.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684-691, 43 L. ed. 858-862, 19 Sup. Ct. Rep. 565; Great Northern R. Co. v. Minnesota, 238 U. S. 340-345, 59 L. ed. 1337-1339, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491-501, 59 L. ed. 1423-1431, L.R.A. 1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869.

The order of the Commission interfering with the right of plaintiff to comply, in the management of its property, with its franchises and the law, was not regulation, but arbitrary interference with its right to conduct and manage its own affairs.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 685, 43 L. ed. 859, 19 Sup. Ct. Rep. 565; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R. 1915D, 706, 35 Sup. Ct. Rep. 869; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

The order of the Commission violates § 10, art. 1, of the Constitution of the United States, both in regard to transfers and the right of plaintiff to make rules for the management of its property.

Wood v. Seattle, 23 Wash. 24, 52 L.R.A. 369, 62 Pac. 135; McGilvra v.

Seattle Electric Co. 61 Wash. 46, 111 Pac. 896, Ann. Cas. 1912B, 1020; State ex rel. Seattle v. Seattle Electric Co. 71 Wash. 213, 43 L.R.A.(N.S.) 172, 128 Pac. 220.

Messrs. W. V. Tanner, Attorney General, Scott Z. Henderson, L. L. Thompson, and C. E. Arney, for appellees:

The fixing of the rates to be charged by a public service corporation is a legislative function, subject only to the condition that rates, when fixed, must be reasonable, and not confiscatory.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

While a reasonable contract entered into by a municipal corporation, establishing inviolable rates to be charged by a public service corporation, will be sustained and its obligation protected from impairment, where the municipality is authorized to make it, the power to make such a contract must be given in express language; and, in considering whether such power does exist, this court will give great if not controlling consideration to the decisions of the highest court of the state.

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820.

Under the Constitution and laws of Washington a municipality cannot make an irrevocable contract fixing rates with a public service corporation.

State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Spokane v. Spokane & I. E. R. Co. 75 Wash. 656, 135 Pac. 636.

Immunity from the exercise of governmental power, whether that be taxation or rate-making power, will not be implied, and consequently such immunity, if it exists, does not accompany the property of a utility when transferred to a purchaser, in the ab-

sence of an express provision upon the subject.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520; Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413.

With no rate complaint before it, the Commission was not authorized to determine the rate.

State ex rel. Great Northern R. Co. v. Railroad Commission, 47 Wash. 627, 92 Pac. 457; State ex rel. Northern P. R. Co. v. Railroad Commission, 52 Wash. 440, 100 Pac. 987.

Even without the express declaration of the Commission, which is in evidence, the court will not construe the order of the Commission as requiring service without compensation.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The state, in the exercise of its police power, may compel a carrier to furnish adequate connections for the interchange of traffic and the forwarding of the cars of one line over the lines of another, although such connections involve the expenditure of considerable sums of money.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The railway system of plaintiff must be considered as a whole, and not by the disassociated properties which may be owned by it.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48

L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Mr. Justice Pitney delivered the opinion of the court:

Appellant (plaintiff below) owns and operates a street railway system in the city of Seattle, Washington, aggregating about 200 miles, as assignee of numerous franchises granted to its predecessors in interest by the cities of Seattle, West Seattle, and Ballard, and by King county. It filed its bill in the district court to obtain relief from the operation and effect of an order made by the Public Service Commission of the state on March 24, 1915, bringing in as defendants the members of the Commission and the attorney general of the state. Plaintiff being a corporation of the state of Massachusetts, and defendants citizens of the state of Washington, the jurisdiction was invoked both upon the ground of diversity of citizenship and upon the ground that the order complained of was alleged to impair the obligation of contracts and deprive plaintiff of its property without due process of law, in violation of the Constitution of the United States. The order was made as the result of an investigation of which plaintiff had notice,



and it contains the following provisions:

"(1) That the defendant company [plaintiff] continue the operation of through service on the Ballard beach line.

"(2) That the Alki point and Fauntleroy park lines be operated through the city of Seattle on First or Second avenue as far north, at least, as Virginia street.

"(3) That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki point and Fauntleroy park lines."

The third paragraph was subject to a qualification; but since the district court granted an injunction against this part of the order, and defendants have not appealed, the qualifying clause need not be set forth and we may confine our attention to the requirements of paragraphs 1 and 2. As to these, the district court, three judges sitting, denied an application for a temporary injunction (223 Fed. 371), and plaintiff brings the case here by direct appeal under § 238, Judicial Code.

In order to understand the effect of the first two paragraphs and the grounds upon which they are attacked, it should be stated that the Ballard beach line was constructed and is operated under a franchise ordinance of the city of Ballard, which city afterwards became and now is a part of the city of Seattle. The line extends from Ballard beach to the intersection of West Fifty-ninth street and Twenty-fourth avenue, at which point it connects with lines of plaintiff that were constructed under other franchises. For some time prior to and at the date of the making of the order in question, plaintiff had been and was operating through cars over the Ballard beach line and the connecting lines to and into the business section of Seattle, instead of physically transferring passengers from car to car at West Fifty-ninth street and Twenty-fourth avenue. Because, as is said, of the expense

5 A.L.R.—2.

attached to the operation of through cars, plaintiff had given notice that it would discontinue such operation and require the transfer of passengers at the point mentioned. The effect of the order was to require plaintiff to continue the through service.

The Alki point and the Fauntleroy park lines, each of them 8 or 9 miles in length, were constructed under separate franchises granted to predecessors in interest of plaintiff by the city of Seattle. They have their northern termini at or about Yessler way, but for two or three years prior to the date of the order cars on these lines, instead of stopping on their north-bound trips at that point, continued about a mile farther north along First or Second avenue to Virginia street, in the business district of the city. Shortly before the promulgation of the order, this through service was discontinued, and north and south bound passengers required to transfer at Yessler way. The effect of the order was to compel the reinstatement of the through service.

The ordinances under which these three lines were constructed provide in substance that the company "shall have the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines herein provided for; provided, that such rules and regulations shall not conflict with the laws of the state of Washington and the charter and ordinances of the city." Each franchise provides also that the company shall have the right to charge a passenger fare for one continuous passage not exceeding 5 cents, even though a transfer be necessary, but shall sell commutation tickets entitling the purchaser to twenty-five rides for \$1, such tickets, however, not to be transferable and not to entitle the owner to the transfer privilege.

(1) One ground of complaint respecting the order of the Commission is that, in requiring passengers to be carried beyond the limits of a

particular franchise, it in effect confers the transfer privilege upon holders of commutation or "4-cent" tickets. The order says nothing about rates of fare; but we will assume, as the district court assumed, that it has the effect attributed to it in this respect.

It is urged that the order impairs the obligation of the contracts contained in the franchise ordinances, both in regard to transfers and in regard to plaintiff's right to make rules for the management and operation of its lines. As to the latter point, the proviso that the rules "shall not conflict with the laws of the state," etc., by

**Constitutional law—impairing contract obligations—requiring street railway passengers to be carried beyond franchise limits.**

fair construction, means the laws as they shall from time to time exist. The act establishing the

Public Service Commission (Laws 1911, chap. 117) and orders made by that Commission are within the description; hence, the contract, if it be a contract, was subject to and is not impaired by the order in question.

Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well set-

**—municipal contracts—street railway fares and transfers.**

tled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police

power of the state unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, art. 12, § 18, requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination in rates by railroads and other common carriers, and provides that "a railroad and transportation commission may be established, and its powers and duties fully defined by law." By art. 11, § 10, any city containing a population of 20,000 inhabitants or more is permitted to

frame a charter for its own government, "consistent with and subject to the Constitution and laws of this state." This Constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The supreme court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the state; that the Public Utilities Act superseded any conflicting ordinance or charter provision of any city; and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the state. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, 43-50, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

The present case is very clearly distinguishable from *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 248, 61 L. ed. 268, 273, P.U.R.1917B, 1010, 37 Sup. Ct. Rep. 87, where the state legislature had expressly provided that the municipal corporation might make a binding agreement with a street railway respecting the rates of fare.

(2) It is insisted that neither the Alki nor the Fauntleroy park line is earning sufficient to pay its operating cost, or ever can do so under a fare limited to 5 cents, and that for this reason an order requiring these lines to carry passengers beyond the termini fixed in their franchises upon 4-cent tickets, and to give them the more costly through service by means of a single car, is necessarily a taking of plaintiff's property without compensation, and hence without due process of law within the meaning of the 14th Amendment. A similar point was made in the bill with respect to the Ballard beach line, but is not seriously pressed here. As to the other two lines, there seems to be no question that since they run for a considerable distance over the tide flats, receiving and discharging but few passengers

en route, so that a majority of the passengers are carried distances of 5 or 6 miles, these lines, separately considered, never have paid operating expenses and probably never will.

But we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the 14th Amendment is to be determined with reference alone to the

—due process of  
law—rate  
regulation.

Alki, the Fauntleroy, or the Ballard beach lines. These are and long have been operated by plaintiff as parts of a system comprising 200 miles of tracks. The Commission found that the net earnings of the system for the year ending February 28, 1915, not including depreciation and taxes, were upwards of \$1,600,000; that the company had refused to produce the valuations of its property made by experts, and had failed to show that there was not sufficient return from its property to pay operating expenses, taxes, and depreciation, and leave a balance. And from the evidence introduced the Commission found the fact to be that, allowing for the services required by its order, the company would have net returns over and above operating expenses, taxes, and depreciation. It was not and is not contended that the system earnings are unremunerative.

Plaintiff relies upon *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 604, 59 L. ed. 735, 745, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, where this court held that a statute which segregated a single commodity, and imposed upon it a rate that would compel the carrier to transport it for less than the proper cost of transportation, was in excess of the power of the state. In our opinion, that decision is inapplicable, the present case being controlled rather by *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484, where the

state of Arkansas had prescribed a maximum rate of 3 cents per mile for each passenger, under a penalty payable to the passenger from whom an overcharge was exacted, and in an action to recover such a penalty the company defended on the ground that the portion of its road over which plaintiff was carried was highly expensive to construct and maintain, and that the cost of maintaining it and transporting passengers over it exceeded the maximum rate fixed by law. But this court held "that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; . . . and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."

(3) Plaintiff's brief contains some general attacks upon the effect of the Commission's order in requiring plaintiff to carry passengers over portions of "separate and distinct franchise routes" upon payment of a single fare. This criticism is not well founded. Even were the several portions of its lines separately owned, they being operated practically as a single system, it would be within the bounds of reasonable regulation to establish through service and a joint rate. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 296, 301, 45 L. ed. 194, 199, 201, 21 Sup. Ct. Rep. 115; *Michigan C. R. Co. v. Michigan R. Commission*, 236 U. S.

Carriers—  
governmental  
control—street  
railways—  
through serv-  
ice—single fare.

615, 629, 59 L. ed. 750, 755, P.U.R. 1915C, 263, 35 Sup. Ct. Rep. 422.

The decree of the District Court, so far as appealed from, is affirmed.

The CHIEF JUSTICE and Mr. Justice McKenna dissent because they are of the opinion that this case, as a matter of authority, is controlled by *Detroit United R. Co. v. Michigan*, 242 U. S. 238, P.U.R.1917B, 1010, 61 L. ed. 268, 37 Sup. Ct. Rep. 87, and that, as a matter of original consideration, the assailed legislation has impaired the obligation of a contract, in violation of the Constitution of the United States, and

was repugnant to the Constitution because wanting in due process.

Mr. Justice McReynolds also dissents.

#### NOTE.

The power of a public service commission with respect to the regulation of street railways is the subject of the annotation beginning at page 36, post. The effect of that question on rights under franchise or contract is specifically dealt with in subdivision IV. of that annotation.

### ST. CLAIR BOROUGH, Appt.,

v.

### TAMAQUA & POTTSVILLE ELECTRIC RAILWAY COMPANY et al.

*Pennsylvania Supreme Court — January 7, 1918.*

(259 Pa. 462, P.U.R.1918D, 229, 103 Atl. 287.)

#### Public Service Commission — authority of legislature.

1. The legislature has authority to commit questions relating to the regulation of street railway companies and their rates to public service commissions.

[See note on this question beginning on page 36.]

#### Courts — jurisdiction — power conferred on Public Service Commission.

2. The ultimate power of the courts is not interfered with by a statute requiring the submission to the Public Service Commission, in the first instance, of the question of the reasonableness of a change of rates by a street railway company, if the record of the Commission is subject to review by the courts.

#### Public Service Commission — right of borough to appeal to.

3. A borough claiming that a street car company operating within its limits has increased its rates in violation of the franchise ordinance may apply to the Public Service Commission for relief, and, if relief is denied, it may appeal to the court where it can raise all questions properly involved in which it has an interest.

APPEAL by plaintiff from a decree of the Court of Common Pleas for Schuylkill County dismissing a bill filed to restrain defendants from running cars over a certain designated route, or prohibit them from charging more than a 5-cent fare. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William Wilhelm and J. Milton Boone for appellant.

Messrs. Byron A. Milner, Otto E. Farquhar, M. M. Burke, F. C. Newbourg, Jr., and Joseph De F. Junkin, for appellees:

A preliminary injunction does not

lie to restrain a street railway company after it has been constructed and in operation, unless it is evident that the operation will cause irreparable injury and damage.

Loyalsock Twp. v. Montoursville Pass. R. Co. 7 Pa. Dist. R. 291; Heil-

man v. Lebanon & A. Street R. Co. 175 Pa. 188, 34 Atl. 647.

Assuming the said Ordinance of 1906 is in force, it lacks mutuality, and therefore cannot be enforced.

Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749; Heckman's Estate, 236 Pa. 193, 84 Atl. 689; Pittsburg v. Pittsburg R. Co. 47 Pa. Super. Ct. 476; Easton v. Easton Transit Co. 17 Pa. Dist. R. 711.

The provision as to fares is revocable, and not binding perpetually on the railway company.

Coffin v. Landis, 46 Pa. 426; Philadelphia & R. R. Co. v. River Front R. Co. 168 Pa. 357, 31 Atl. 1098; Cumberland Valley R. Co. v. Gettysburg & H. R. Co. 177 Pa. 519, 35 Atl. 952; Kenderdine Hydro-Carbon Fuel Co. v. Plumb, 182 Pa. 463, 38 Atl. 480; McCullough-Dalzell Crucible Co. v. Philadelphia Co. 223 Pa. 336, 72 Atl. 633; Turtle Creek v. Pennsylvania Water Co. 243 Pa. 415, 90 Atl. 199; Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236.

The regulation of fares and the construction of contracts in relation thereto are exclusively within the jurisdiction of the Public Service Commission of the commonwealth of Pennsylvania.

Bellevue v. Ohio Valley Water Co. supra.

Moschzisker, J., delivered the opinion of the court:

The borough of St. Clair filed a bill in equity against the Tamaqua & Pottsville Electric Railway Company, the Pottsville & St. Clair Electric Railway Company, the Pottsville Union Traction Company, and the Eastern Pennsylvania Railways Company, praying that they either be restrained from running their cars over a certain designated route or prohibited from charging more than a 5-cent fare thereon. September 18, 1917, the court below preliminarily enjoined the operation of the cars; but, on September 25, 1917, the following decree was entered: "The court being of opinion that it has no jurisdiction, and therefore cannot maintain this injunction, under Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236, it is hereby ordered that the injunction be dissolved."

October 6, 1917, an additional de-

cree was filed as follows: "Counsel for the plaintiff . . . having asked the court to dispose of the . . . prayer for the granting of a preliminary injunction relative to the 5-cent fare in which the court is asked to grant an injunction to restrain the defendant company from charging a 6-cent fare . . . we decline to grant any injunction, for the reasons heretofore given, . . . to wit, that we have no jurisdiction in the case, under the decision heretofore cited."

Plaintiff has appealed, and these two decrees are assigned as error.

It appears, *inter alia*, that in 1894 the Tamaqua & Pottsville Company was granted a municipal franchise to lay tracks in the plaintiff borough; that in 1906 another ordinance was approved, conferring the privilege of making certain extensions, wherein it was stipulated that not more than a 5-cent fare should be charged; that later the rights possessed by the first-named corporation passed to the other defendants, and the street railway in question is now operated by the Eastern Pennsylvania Railways Company.

Plaintiff contends that the Ordinance of 1906 is binding upon the defendant companies, and therefore the latter have no legal right to raise their fares from 5 to 6 cents, while the defendants contend that they never built the extensions granted by this ordinance, and for that reason it has no binding effect; further, that they have complied in all respects with the requirements of the Public Service Company Law of July 26, 1913 (P. L. 1374), and are entitled to charge the increased rate; but the court below did not decide any of these contentions, holding as stated in the above-quoted decrees, that it had no jurisdiction, and citing the decision of this court in Bellevue v. Ohio Valley Water Co. supra.

In the Bellevue Case, we decided two points of law: (1) That "hereafter, so long as the Act of 1913 [supra] remains in force, the ques-

tion of the reasonableness of rates established by public service corporations must, in the first instance, be submitted to the Public Service Commission, when challenged" (245 Pa. 116), and we there said: "This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well" (245 Pa. 116). (2) Where contracts fixing a rate "unlimited" in time have heretofore been entered into by public service companies, the state has the right, through the Public Service Commission, notwithstanding the contract, to inquire into and adjust the rate to a reasonable basis; and, in this connection, we said: "We did decide in [Turtle Creek v. Pennsylvania Water Co. 243 Pa. 415, 90 Atl. 199] that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations." See also *Mt. Union v. Mt. Union Water Co.* 256 Pa. 516, 520, P.U.R.1917E, 933, 100 Atl. 968.

As before stated, the court below did not attempt to adjudge as to the binding force of the alleged contract here in question, i. e., the Ordinance of 1906, but evidently based its decision upon our ruling in the *Bellevue Case*, to the effect that questions of rates to be charged by public service corporations must be passed upon in the first instance by the Public Service Commission, before any aspect of the matter involved can be brought before the courts for determination; and in this we see no error.

The Act of 1913, *supra*, does not deprive the courts of any ultimate power theretofore vested in them under the laws of the commonwealth; it requires merely that when a rate is to be or has been increased by a public service corpora-

tion, all complaints concerning the change shall be first submitted to and passed upon by the Public Service Commission. In turn, the decision of the Commission is subject to review, and the courts are vested with the right and fixed with the duty of passing upon the record brought up on appeal (*Mt. Union v. Mt. Union Water Co.* 256 Pa. 516, 518, P.U.R.1917E, 933, 100 Atl. 968), "which record shall include the testimony taken therein, the findings of fact, if any, of the Commission based upon such testimony, a copy of all orders made by the Commission in said proceedings, and a copy of the opinion, if any, filed by the Commission" (art. 6, § 18). In cases where the parties theretofore had a right of trial by jury, it is still preserved to them (art. 6, § 29, as amended by Act June 3, 1915 [P. L. 779, 782]; *New Brighton v. New Brighton Water Co.* 247 Pa. 232, 241, 93 Atl. 327; *West Virginia Pulp & Paper Co. v. Public Service Commission*, 61 Pa. Super. Ct. 555, 569); and in all instances it is made the duty of the reviewing court, if it shall find from the record "that the order appealed from is unreasonable, or based upon incompetent evidence materially affecting the determination or order of the Commission, or is otherwise not in conformity with law," to "enter a final decree reversing the order of the Commission, or, in its discretion, it may remand the record to the Commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law" (art. 6, § 24). The fact that no complaint is made to the Commission, when a change of rate is filed with that body, does not prevent any person affected thereby from subsequently entering one (art. 5, § 4). *Baltimore & O. R. Co. v. Public Service Commission*, 66 Pa. Super. Ct. 403, 406. The Commission is armed with ample facilities for making investigations, and the provisions of the statute afford it full means of enforcing its orders when entered; moreover, in change of rate cases, pending hear-

Courts—  
jurisdiction—  
power conferred  
on Public Service  
Commission.

ing, the Commission is expressly empowered to require the public service company involved to "furnish to its . . . patrons a certificate . . . of payments made by them in excess of the prior established rate" (art. 5, § 4), and subsequently, if an increase is denied, to make an order for reparation (art. 5, § 5).

The plaintiff borough, in the present case, may file its complaint and have it passed upon by the Public Service Commission, whose duty will be, not only to decide as to the reasonableness of the rate, but also to find all material facts in connection with the increase. *Baltimore & O. R. Co. v. Public Service Commission*, 66 Pa. Super. Ct. 413, *supra*. Should the Commission decide that the change of fare is unreasonable, then, so far as the borough is concerned, that will be the end of the matter; but, on the other hand, should that tribunal permit the increase, then, on appeal, the borough can raise all questions properly involved in which it has an interest, and have them passed upon by the courts.

Since the Public Service Company Law has been upon our books, we have consistently adhered to the rule that matters within the jurisdiction of the Commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (*Bethlehem City Water Co. v. Bethlehem*, 253 Pa. 333, 337, 338, 98 Atl. 646; *New Brighton v. New Brighton Water Co.* 247 Pa. 232, 240-242, 93 Atl. 327); and it is plain that orderly procedure requires an adherence to this practice, otherwise different phases of the same case might be

pending before the Commission and the courts at one time, which would cause endless confusion. Under the established system, the Commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well-regulated review by the courts, where and when all questions of law may be raised and determined; and "this is so not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose. The disposition everywhere is to commit questions relating to the regulation and to the rates of public service corporations, to the supervisory powers of special tribunals, and, concededly, matters of this character are within the domain of legislative action." *Belle-vue v. Ohio Valley Water Co.* 245 Pa. 118, 91 Atl. 237, *supra*. See also *York Water Co. v. York*, 250 Pa. 115, 118, 95 Atl. 396.

The assignments of error are overruled, and the orders appealed from are affirmed.

#### NOTE.

The power of Public Service Commission with respect to regulation of street railways is the subject of the annotation beginning at page 36, post, the regulation of rates and fares being specifically treated in subdivision V. f, except so far as it involves the question as to the impairment of the obligation of contracts, which is treated in subdivision IV.

Public Service  
Commission—  
right of borough  
to appeal to.

—authority  
of legislature.

**BOARD OF SURVEY OF THE TOWN OF ARLINGTON**  
v.  
**BAY STATE STREET RAILWAY COMPANY.**

*Massachusetts Supreme Judicial Court—June 21, 1916.*

(224 Mass. 463, 113 N. E. 273.)

**Public Service Commission — power over rates — street railways.**

1. A statute conferring power on a Public Service Commission to determine the just and reasonable rates and fares to be charged by street railway companies, when the rates chargeable by them are insufficient to yield reasonable compensation for the service rendered, includes power to change stipulations as to rates in original grants by municipal authorities of the right to locate rails in the streets of the municipality.

[See note on this question beginning on page 36.]

**Contract — street railway franchise — state or municipal.**

2. In granting locations for street railways within the limits of towns and contracting for rates, the town officials act for the state, and not the town, so that, so far as the town is concerned, the state has the power to change or abrogate the terms of the contract at will.

[See 19 R. C. L. 768.]

**Public policy — legislative determination.**

3. A statute empowering the Public Service Commission to determine the just and reasonable fares to be charged by street railway companies is a legislative determination that it is

unwise and inexpedient to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares, contained in location grants of the public officials of different municipalities.

**Public service corporation — waiver of franchise contract.**

4. The state, by conferring power upon the Public Service Commission to determine just and reasonable rates for street railway companies, waives any limitation of rates which may have been imposed upon the carrier by the local authorities when granting a location to the corporation within a municipality.

[See 19 R. C. L. 768, 1159.]

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**RESERVATION** by the Supreme Judicial Court for Middlesex County for determination by the full court of a suit to enjoin defendant from raising its rate of fare within the limits of certain towns. *Bill dismissed.*

The facts are stated in the opinion of the court.

Stat. 1913, chap. 784, §§ 17, 19–22, 29, referred to in the opinion, are as follows:

“Section 17. All charges made, demanded or received by any common carrier subject to the supervision of the Commission for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common carrier business, or made, demanded or received by any two or more common carriers joining in rendering or performing any service shall be just and reasonable, and every such common carrier and

any two or more such common carriers joining in rendering or performing any service shall be entitled to make, demand and receive just and reasonable charges for any such service, and every unjust or unreasonable charge is hereby prohibited and declared unlawful; but charges heretofore established and set out in any schedule filed as hereinafter provided shall be deemed *prima facie* lawful until changed or modified by the Commission under the powers conferred upon the Commission by the provisions of this act, but this provision shall not give to



such rates any greater weight as evidence of the reasonableness of other rates than they would otherwise have."

"Section 19. Subject to the powers of the Commission to regulate and prescribe rates and charges, a common carrier may make commodity, transit, or other classes of rates. The furnishing by any common carrier of any service at the rates and upon the terms and conditions provided for in any existing contract executed prior to the first day of July, nineteen hundred and thirteen, shall not constitute a discrimination unless the Commission shall so determine. The Commission shall not be prevented from taking such action as it may deem proper by any commitment or agreement of a common carrier entered into by reason of any requirement or recommendation of any board of public officers acting under delegated authority from the general court prior to the enactment hereof. Unless the Commission shall determine otherwise common carriers shall be permitted, whether required to do so by law or not, to issue mileage, workingmen's, excursion, school, or commutation passenger tickets, or reduced rate tickets for the transportation of children under twelve years of age, or of pupils attending schools, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of five hundred miles or more. All season tickets, before issuance, shall be subject to the approval of the Commission as to the form thereof and the conditions named therein.

"Section 20. Every common carrier shall file with the Commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and

regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the Commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the Interstate Commerce Commission. No common carriers shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the Commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified, or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the Commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the Commission shall order, to be given prior to the time, fixed in such notice to the Commission, for the changes to take effect. The Commission for good cause shown may allow changes without requiring the

thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and filed, as the Commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the Commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: Provided, however, that when any such contract or contracts are or become terminable by notice, the Commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

"Section 21. Whenever the Commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and after notice, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. Pending any such investigation and the decision thereon, the Commission shall have power, by any order served upon the common carrier affected, to suspend the taking effect of such change or changes, but not for a longer period than six months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, the Commission may make such order in reference to any new rate, joint rate, fare, telephone

rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, as would be proper in a proceeding initiated after the same has taken effect. At any such hearing involving any proposed increase in any rate, joint rate, fare, telephone rental, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the common carrier. If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the Commission that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the Commission shall have power to determine what will be the just and reasonable rate or rates, fare, or fares, telephone rental or rentals, toll or tolls, charge or charges, to be thereafter observed in such case as the minimum to be charged and to make an order that the common carrier complained of shall not thereafter demand, charge or collect any rate, fare, telephone rental, toll, or charge lower than the minimum so prescribed without first obtaining the consent of the Commission, not to be given without a public hearing.

"Section 22. Whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges of any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable

compensation for the service rendered and are unjust and unreasonable, the Commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The Commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the Commission such authorization is consistent with the public interests, and the Commission may from time to time modify or revoke such authorization."

"Section 29. This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the Commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the Commission are hereby repealed: Provided, that nothing herein contained shall be construed to repeal, directly or by implication, the provisions of chapter five hundred of the acts of the year eighteen hundred and ninety-seven, or to authorize the Commission to make any order or take any action inconsistent with the provisions of said act or with any rights which have been

acquired by any common carrier under any statute prior to the passage of this act."

Mr. Philip A. Hendrick, for petitioner:

Under § 45 of Pub. Stat. chap. 113, neither the company nor the board of railroad commissioners could raise the rate of fare above the rate established by agreement, made as a condition of location or otherwise, between the company or its directors, and the mayor and aldermen of a city, or the selectmen of a town, except by a mutual arrangement with the parties.

Keefe v. Lexington & B. Street R. Co. 185 Mass. 183, 70 N. E. 37.

The condition of an original grant of location is binding upon the company.

Clinton v. Worcester Consol. Street R. Co. 199 Mass. 287, 85 N. E. 507; Westwood v. Dedham & F. Street R. Co. 209 Mass. 213, 95 N. E. 81.

The company, when it accepted and acted upon the grant, could not resist the enforcement of the conditions or restrictions therein, and, having accepted the grant and enjoyed the benefits, could not escape performance of its undertaking.

State ex rel. Rutherford v. Hudson River Traction Co. 73 N. J. L. 227, 63 Atl. 84; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; Detroit v. Detroit Citizens Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

Messrs. James F. Jackson and Sheldon E. Wardwell, for defendant:

Municipal authorities, in granting locations to street railway companies, act in behalf of the public, and not by virtue of proprietary rights, and the legislature has power to abrogate or modify conditions contained in such location grants.

Springfield v. Springfield Street R. Co. 182 Mass. 41, 64 N. E. 577; Worcester v. Worcester Consol. Street R. Co. 182 Mass. 49, 64 N. E. 581; Keefe v. Lexington & B. Street R. Co. 185 Mass. 183, 70 N. E. 37; Wellesley v. Boston & W. Street R. Co. 188 Mass. 251, 74 N. E. 355; Clinton v. Worcester Consol. Street R. Co. 199 Mass. 279, 85 N. E. 507; Westwood v. Dedham & F. Street R. Co. 209 Mass. 213, 95 N. E. 81.

The Commission has power to authorize the raising or lowering of fares in spite of conditions in location franchises.

Milwaukee Electric R. & Light Co.

v. Railroad Commission, 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Duluth Steel R. Co. v. Railroad Commission, 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Kenosha v. Kenosha Home Teleph. Co. 149 Wis. 338, 135 N. W. 848; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; Public Service Electric Co. v. Public Utilities Comrs. 87 N. J. L. 128, P.U.R. 1915C, 229, 93 Atl. 707.

And authority over rates fixed by previous legislative enactment.

State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; People ex rel. Ulster & D. R. Co. v. New York Public Service Commission, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065.

Attempts to regulate rates by ordinance produce injustice and personal and locality discrimination.

Keefe v. Lexington & B. Street R. Co. 185 Mass. 183, 70 N. E. 37; Holmes, Regulation of Railroads and Utilities in Wisconsin, chap. 21.

Rugg, Ch. J., delivered the opinion of the court:

One of the clauses in the original location granted by the selectmen of the town of Arlington in 1897 to the Arlington & Winchester Street Railway Company, to whose rights, privileges, and obligations the defendant has succeeded, was to the effect that "the rate of fare shall not exceed 5 cents from any point in Arlington to any point in Arlington or Winchester, or from any point in Winchester to any point in Arlington, on all lines now or in the future controlled or operated by said company or by any company or system of which said road may in the future form a part." The defendant, under the authority of Stat. 1913, chap. 784, §§ 17, 19-22, 29, proposes to raise the rate of fare above 5 cents, subject to the approval of the Public Service Commission. This suit in equity is brought to enjoin such action by the railway company.

The location here in question having been an original location granted by the selectmen and accepted by

the directors of the street railway company before Stat. 1898, chap. 578, took effect, the regulation of fares by agreement, as a condition in the grant of the location, was within the power conferred by the then-existing statute upon the selectmen, and bound the street railway to the same extent as if inserted in a special charter of incorporation. Clinton v. Worcester Consol. Street R. Co. 199 Mass. 279, 85 N. E. 507; Westwood v. Dedham & F. Street R. Co. 209 Mass. 213, 95 N. E. 81. In granting locations for street railways, boards of selectmen and boards of aldermen are public officers, and not agents of their respective towns and cities. The state exerts its sovereign power through them as its instruments. Flood v. Leahy, 183 Mass. 232, 66 N. E. 787. The legislature has the power, so far as concerns these public officers and the municipalities by whom they were elected, to change or abrogate the terms of such locations. Although phrased in the form of a contract, and securing valuable financial obligations to the cities and towns, the power of the legislature to modify, to their loss, such locations, has been settled after great consideration and vigorous protest from the interested municipalities. Springfield v. Springfield Street R. Co. 182 Mass. 41, 64 N. E. 577; Worcester v. Worcester Consol. Street R. Co. 182 Mass. 49, 64 N. E. 581, s. c. affirmed in 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327. See also Southern Wisconsin R. Co. v. Madison, 240 U. S. 457, 60 L. ed. 739, 36 Sup. Ct. Rep. 400. Regulation of fares in this respect stands on no higher ground than requirements as to paving of streets. The paramount power of the legislature over the subject of fares was recognized expressly in Clinton v. Worcester Consol. Street R. Co. 199 Mass. 279, at page 288, 85 N. E. 507.

The question, therefore, is reduced to one of statutory interpreta-

Contract—  
street railway  
franchise—  
state or  
municipal.

tion. It is whether the general control over fares has been vested in the Public Service Commission by Stat. 1913, chap. 784. That act marked a radical change in the policy of the legislature in the regulation of street railways. It conferred upon the Public Service Commission far greater powers over the operation and accommodations to be provided by such common carriers than had been vested in any board by earlier acts. Summarily stated, it clothed the Commission with full power to require safe, reasonable, and adequate service to the public from all common carriers. The authority of the Commission as to supervision and regulation in other respects is ample. It is manifest that such broad powers justly cannot be exercised, to the extent conferred by the words used, except when joined either with equally full power to regulate charges, rates, and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required. This power expressly is conferred by § 22, which, after subjecting the rates and fares actually charged or demanded to their supervision, enacts that whenever the Commission is of opinion "that the rates, fares or charges, or any of them, chargeable by any such common carrier, are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the Commission shall determine the just and reasonable rates, fares and charges to be charged," and shall fix the same by order binding upon the carrier. That these words were intended to be interpreted according to their full natural scope is obvious from the provision of § 29, to the effect that "this act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the Commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all

acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the Commission are hereby repealed." It is impossible to give the act a narrow or constricted construction as to the subject of fares.

There is no room for the binding force of stipulations as to fares in original grants of locations by local boards, in the face of these sweeping provisions. Such

Public Service  
Commission—  
power over  
rates—street  
railways.

stipulations are extinguished so far as inconsistent with the terms of Stat. 1913, chap. 784. The plain purpose of the legislature, in recognition of the fact that many street railways operate miles of tracks extending through numerous cities and towns, was to prescribe for the regulation of fares throughout the commonwealth by a single public board, which may be expected to act with a broad and unbiased view for the promotion of the common good of all the conflicting interests involved, and not under the influence of purely local considerations. The statute is a legislative determination that it is unwise and inexpedient longer to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares, contained in locations granted by the public officers of different municipalities. This conclusion is confirmed by the provisions of § 19, to the effect that "the Commission shall not be prevented from taking such action as it may deem proper by any commitment or agreement of a common carrier entered into by reason of any requirement or recommendation of any board of public officers acting under delegated authority from the general court prior to the enactment hereof." See *Keefe v. Lexington & B. Street R. Co.* 185 Mass. 183, 70 N. E. 37.

Public policy—  
legislative  
determination.

It is not necessary to determine what would be the effect of a reduction of fares, against the protest of the street railway company, below the rate fixed in the location.

This record simply presents a case where the original act of the state, performed by the selectmen in granting a location to the street railway company, has been modified in respect of fares by the state, speaking through the paramount power of the legislature, and that modification has been accepted by the street railway company. No one else can complain.

No question of estoppel arises on this record. The state, acting through its legislature in enacting the statute, has waived in this respect, in view of the adoption of its present policy as to fares, whatever conditions the state, acting through

**Public service corporation—  
waiver of  
franchise  
contract.**

the selectmen, had imposed in the public interests in the original location.

Hence, cases like *State ex rel. Rutherford v. Hudson River Traction Co.* 73 N. J. L. 227, 63 Atl. 84, and *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349, upon which dependence is placed by the defendant, have no application.

The plaintiff relies strongly on *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410. The irrelevancy of that decision to the facts here presented is demonstrated by

*Worcester v. Worcester Consol. Street R. Co.* 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327.

While the public policy and statutory history of other states may be so different from that of this commonwealth that decisions of other jurisdictions are by no means controlling, the conclusion here reached is in harmony with the reasoning of numerous cases. *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Duluth Street R. Co. v. Railroad Commission*, 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887; *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *Public Service Electric Co. v. Public Utility Comrs.* 87 N. J. L. 128, P.U.R.1915C, 229, 93 Atl. 707.

It follows that the subject of fares (with express and possible exceptions not here material) has been placed under the control of the Public Service Commission. Its power is not restrained on the facts here disclosed, by the condition in the original grant of location.

Bill dismissed.

#### NOTE.

The regulation by Public Service Commission of street railway rates and fares is treated in subdivision V. f, of the annotation beginning at page 36, post.

PUGET SOUND TRACTION, LIGHT, & POWER COMPANY, Appt.,  
v.  
PUBLIC SERVICE COMMISSION of the State of Washington et al.,  
Respts.

*Washington Supreme Court (In Banc)—February 18, 1918.*

(100 Wash. 329, P.U.R.1918C, 662, 170 Pac. 1014.)

**Public service corporation — power to change routing of street cars.**

1. An order of a Public Service Commission requiring a street car company, which is earning a net return of only  $2\frac{1}{4}$  to 4 per cent upon its capi-

tal, to route cars during rush hours from a cross-town line to the center of the city to avoid transfers by residents of an outlying district of the city, is unreasonable and void if it will cost \$7,000 to make the necessary track changes, and impose an additional expense of at least \$5,000 a year upon the corporation, while the congestion caused by such routing will interfere with other lines.

[See note on this question beginning on page 36.]

**Street railway — rates — compensation.**

2. A street car company is entitled to reasonable compensation for its services, subject to the qualification that having devoted its property to public use it must accept all reasonable conditions of such use, and to a certain extent subordinate its interests to those of the public it serves.

[See 4 R. C. L. 608.]

**— rights of public.**

3. The public is entitled to service from a street car company which will, within reasonable limits, meet its needs as distinguished from its mere convenience.

[See 4 R. C. L. 1066, 1067.]

(Ellis, Ch. J., and Holcomb, Main, and Webster, JJ., dissent.)

**APPEAL** by the traction company from a judgment of the Superior Court for Thurston County affirming an award of the Commission, changing the routing of the cars of said company. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James B. Howe and Hugh A. Tait, and Edgar L. Crider, for appellant:

The Commission ordered appellant to give a service which it was not obligated to give, which it had never given, and which it had never professed to give.

Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; McGilvra v. Seattle Electric Co. 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020.

A railway company can, unless prevented by contract, make schedules, create rules, and prescribe transfer points.

Heidegger v. Metropolitan Street R. Co. 142 Mo. App. 335, 126 S. W. 990; Dryden v. St. Louis Transit Co. 120 Mo. App. 424, 96 S. W. 1044; Hampe v. Pittsburg & B. Traction Co. 165 Pa. 463, 30 Atl. 931; Central of Georgia R. Co. v. Ashley, 159 Ala. 145, 48 So. 981; Kelly v. New York City R. Co. 192 N. Y. 97, 84 N. E. 569.

**— loss for convenience of public.**

4. A street car company cannot be required to satisfy the mere convenience of the public at any considerable loss to itself, where the service is adequate to the needs of the public.

**Public Service Commission — reasonableness of order — entailment of loss.**

5. While the mere fact that obedience to an order of the Public Service Commission will entail a pecuniary loss on a street car company is not of itself conclusive proof of the unreasonableness of the order, yet the fact that obedience to the order will cause a loss should be taken into account in determining its reasonableness.

Street railway franchises are contracts and create vested rights.

Wood v. Seattle, 23 Wash. 1, 52 L.R.A. 369, 62 Pac. 135; McGilvra v. Seattle Electric Co. 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020; State ex rel. Tacoma v. Tacoma R. & Power Co. 61 Wash. 507, 32 L.R.A.(N.S.) 720, 112 Pac. 506; State ex rel. Seattle v. Seattle Electric Co. 71 Wash. 213, 43 L.R.A.(N.S.) 172, 128 Pac. 220; Peterson v. Tacoma R. & Power Co. 60 Wash. 406, 140 Am. St. Rep. 936, 111 Pac. 338.

The order not only violates article 1, § 10, of the Constitution of the United States, but also the 14th Amendment.

Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1916A, 706, 35 Sup. Ct. Rep. 869; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35

Sup. Ct. Rep. 753; *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510-528, 56 L. ed. 863-869, 32 Sup. Ct. Rep. 535; *Interstate Commerce Commission v. Union P. R. Co.* 222 U. S. 541-549, 56 L. ed. 308-312, 32 Sup. Ct. Rep. 108; *Wilmington City R. Co. v. Taylor*, 198 Fed. 159; *Union P. R. Co. v. Public Utilities Commission*, 95 Kan. 604, P.U.R.1915D, 377, 148 Pac. 667.

Such order is unreasonable and therefore invalid under the statute.

*Union P. R. Co. v. Public Utilities Commission*, supra; *Railroad Commission v. Houston & T. C. R. Co.* 90 Tex. 340, 38 S. W. 747; *Detroit & M. R. Co. v. Michigan R. Commission*, 171 Mich. 335, 137 N. W. 329; *Louisiana R. & Nav. Co. v. Railroad Commission*, 131 La. 387, 59 So. 820; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

Appellant's voluntary operation of a through car over more than one franchise route is no justification for an order requiring the operation of a through car over several routes.

*Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 697, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 435, 54 L. ed. 259, 271, 30 Sup. Ct. Rep. 118; *Wilmington City R. Co. v. Taylor*, 198 Fed. 159; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 598, 59 L. ed. 735, 742, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

Messrs. W. V. Tanner, Attorney General, Hance H. Cleland, Assistant Attorney General, and Adair Rembert, for respondents:

The police power of the state cannot be bartered away by the municipality, and the order is not an impairment of a contract.

*State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 272, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50; *Portland R. Light & P. Co. v. Portland*, 201 Fed. 119; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L.

ed. 1155, 27 Sup. Ct. Rep. 762; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892; *Spokane v. Spokane & I. E. R. Co.* 75 Wash. 651, 135 Pac. 636; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650-671, 672, 29 L. ed. 516-524, 6 Sup. Ct. Rep. 252; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 114, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

The order is a valid and reasonable exercise of the police power.

*Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661; *Twenty-Second Ward Advancement Asso. v. Milwaukee Electric R. & Light Co. (Wis.)* P.U.R.1915A, 168; *Kelley v. Bangor R. & Electric Co. (Me.)* P.U.R.1915C, 493.

The police power may relate to matters of the public convenience, as well as to its health and morals.

*Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 300, 43 L. ed. 702, 707, 19 Sup. Ct. Rep. 465; *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805.

The order is reasonable in requiring the service, although the change would entail some expense and the earnings would not be increased.

*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Grand Trunk R. Co. v. Michigan R. Commission*, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. ed. 616, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The order does not violate the 14th Amendment.

*Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Morris, J., delivered the opinion of the court:

Appeal from a judgment of the



superior court affirming an order of the Public Service Commission affecting the service on appellant's Twenty-third avenue line, in the city of Seattle. This line is a cross-town line, running north and south between the Lake Washington canal on the north and Jackson street on the south. It crosses or intersects east and west lines of the appellant at Jackson street, Yesler way, East Union street, East Cherry street, and Madison street. North of Madison street, extending south from the canal, is a residential section known as Interlaken.

In November, 1913, a complaint was filed with the Public Service Commission on behalf of the residents of this district, reciting that the service furnished by the Puget Sound Traction, Light, & Power Company was inadequate and insufficient on its Twenty-third avenue line, in that a large portion of the public patronizing this line had no occasion to go south of Madison street save for the purposes of transportation to and from the business section of the city; that the shortest and most convenient route for this traffic for the residents of the Interlaken district is south on the Twenty-third avenue line to Madison street, thence by transfer to the Madison street line, along and over which they would be brought to the business section of the city; that this transfer involves delay and inconvenience which could be eliminated by diverting the Twenty-third avenue cars at Madison street and routing them from that point west along the Madison street line into the city, thus giving a direct service instead of a transfer service. Citation was issued to the traction company, which appeared. A hearing was had, and, on November 11, 1914, the Commission entered its order, finding that the service on the Twenty-third avenue line as then provided by transfer at Madison street was adequate and sufficient, and enabled the complainants to reach the business section of the city without undue de-

lay or material inconvenience, and, so finding, dismissed the complaint. In February, 1915, the Commission vacated the order of November 11, 1914, and granted a rehearing, and on December 27, 1915, the Commission entered the following order: "It is ordered that the respondent company, within sixty days after the date of the service of this order, route the cars on Twenty-third avenue north, between the hours of 7 and 9 in the morning and 5 and 7 in the evening, down Madison street to the business section of the city, said cars to be operated at the same intervals as now operated by the Twenty-third avenue line north of Madison street; that respondent company operate between Madison street and Jackson street, during said period of time, a shuttle service."

This is the order complained of. The finding upon which this order is based recites, as the only inadequacy of service found by the Commission, the wait incidental to the transfer at Madison street. No finding is made that the company did not operate a sufficient number of cars on the Twenty-third avenue line to take care of the traffic, or that the service was inadequate in any respect other than in the transfer at Madison street. The only question we have to determine is the reasonableness of this order.

In opposition to the making of this order, it is shown on behalf of the traction company that it will necessitate an expense of \$7,100 to make the necessary track changes at Madison street. The complainants say this figure is excessive. (This record was made in January, 1914). It is also shown that it will necessitate an additional operating expense of from \$5,000 a year, admitted by the complainants, to \$19,000 a year, claimed by the traction company. It is also shown that the grades on Madison street, over which the rerouted Twenty-third avenue cars would pass in complying with this order are such, between certain streets, that cars

must have a required clearance to insure safety of operation; that this condition would become more aggravated with the increased service on Madison street, as the districts now served by the lines operated upon that street become more densely populated, and that adding an additional service route would be unwise from the standpoint of safety. The effect would also be to disturb and slow up an already congested down-town condition, thus detrimentally affecting service on other lines.

The Twenty-third avenue line is operated at a loss, the cost being 15 cents per car mile and the revenue 11 cents per car mile. The entire street car system of appellants, during the years 1913 and 1914, earned a net return of less than 4 per cent. It is contended by appellants that the showing for the subsequent years is approximately 2½ per cent. Whether or not these are the true figures, it is probably less than the 4 per cent of the prior years.

Viewing these facts, it seems to us that the order complained of is unreasonable. The only reason given is the inconvenience of the patrons of the Twenty-third avenue line north of Madison street. Residents of outlying districts of large cities must anticipate some inconvenience in reaching the business section of the city. Every cross-town line cannot be made a trunk line giving direct and quick service. Residents of such cities are likely to encounter some inconvenience in traveling from one portion of the city to another, and the mere change of cars at some transfer point is not such an inconvenience as will necessitate a change of operative conditions under the circumstances here shown.

A similar case is that of *Heidegger v. Metropolitan Street R. Co.* 142 Mo. App. 335, 126 S. W. 990, where the street car company sought to change its service in a given locality from a continuous one-line service to a service requir-

ing a change of cars. The change was objected to upon the same grounds as here urged. The court sustained the right to make the change, on the ground that the inconvenience to the traveling public was of itself insufficient to defeat the proposed change.

In *McGilvra v. Seattle Electric Co.* 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020, the principle here involved, so far as it affects the right of a street car company to establish transfers, was before the court. It was there held that such rights exist, though it might cause some inconvenience to the traveling public, quoting from the *Heidegger Case* with approval, and citing *People ex rel. Linton v. Brooklyn Heights R. Co.* 69 App. Div. 549, 75 N. Y. Supp. 202. From one aspect of the case it would seem that the *McGilvra Case* and the principle upon which it rests are controlling as against the reasonableness of this order. Considering the case, however, in all its phases, and having regard to the power delegated to the Public Service

Commission, the unreasonableness of the order is apparent. In considering the reasonableness of an order of the Public Service Commission directing an additional service on the part of a public service corporation, consideration must be given both to the carrier and the public. The carrier is entitled to a reasonable compensation for the service; the public is entitled to a service that will, within reasonable limits, meet its needs, subject, on the part of the carrier, to the qualification that, having devoted its property to a public use, it must accept all reasonable conditions of such use, and to a certain extent subordinate its interests to that of the public it serves. *Puget Sound Electric R. Co. v. Railroad Commission*, 65

Public service corporation—power to change routing of street cars.

Street railway—rates—compensation.

—rights of public.

Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763. The rights of the carrier are at all times subject to the power of the state to prescribe rules and regulations, the effect of which will bring a fair remuneration to the carrier for the required service and secure substantial service to the public in like cases.

"But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business, according to the undertaking which the carrier has expressly or impliedly assumed. . . . The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement." Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

There is a broad distinction between a service that is required to meet the needs of the public or of a given community, and requiring a service to satisfy the convenience of a community. In the first instance, the carrier, by reason of its public character and the rights it derives from the public, must subject itself to all reasonable necessities of public service and, for this purpose, must subordinate its interests to the necessities of the public. In the second instance, the carrier cannot be required to satisfy the convenience of the public at any considerable loss to itself; especially when, as here, the service rendered is adequate for the needs

of the situation, but, in some respects, is not as convenient as it might be.

While the mere incurring of a pecuniary loss in carrying out an order to furnish certain facilities in the line of the carrier's duty does not of itself give rise to

Public Service Commission—reasonableness of order—entailment of loss.

the conclusion of unreasonableness, the fact, however, that the furnishing of the required facilities will "occasion an incidental pecuniary loss, is an important criteria to be taken into view in determining the reasonableness of the order. . . .

As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

These observations lead us to the conclusion that the order complained of is, under all the affecting circumstances, unreasonable. The judgment sustaining the same is reversed.

Mount, Parker, Chadwick, and Fullerton, JJ., concur.

Holcomb, J., dissents.

Webster, J., dissenting:

The superior facilities of the Public Service Commission for determining matters of this character should entitle its orders to great weight, and the courts should not overturn them except in clear cases. In my judgment, the evidence does not warrant the conclusion that the order in question is unreasonable; I therefore dissent.

Ellis, Ch. J., and Main, J., concur with Webster, J.

—loss for convenience of public.

## ANNOTATION.

### Power of Public Service Commission with respect to regulation of street railways.

- I. Introductory, 36.
- II. Jurisdiction generally, 36.
- III. Jurisdiction as affected by powers of municipality:
  - a. In general, 37.
  - b. Requirement of municipal consent to construction, 42.
  - c. Municipally owned railway, 43.
- IV. Jurisdiction as affected by rights under franchise or contract, 44.
- V. Jurisdiction in respect to particular matters:
  - a. Original construction, 50.
  - b. Extension, 53.
  - c. Abandonment, 55.

#### *I. Introductory.*

In recent years, the legislatures of many states have enacted laws creating public service commissions, or similar bodies, and have vested them with the general supervision and control of public service corporations. The nature and extent of the powers conferred on such commissions necessarily depend on the terms of the particular statutes. This note is intended to treat the cases dealing with the nature and extent of the powers of commissions or similar bodies over street railways, in regard to location, construction, fiscal management, operation, etc., and the extent of these powers as affected by the rights of local authorities or rights under franchise contracts. Cases dealing with the method of procedure before the commission and the manner of enforcement of its orders are excluded, as these matters are not affected by the nature of the public utility subject to regulation.

#### *II. Jurisdiction generally.*

The creation of public service commissions or like bodies, and their jurisdiction and power over public service corporations, being entirely of statutory origin, the statute must be looked to in order to determine the nature and extent of the power conferred over any particular public utility. In many jurisdictions, street rail-

#### V.—continued.

- d. Crossings, 56.
- e. Operation generally, 58.
- f. Rates and fares, 60.
- g. Equipment of cars, 63.
- h. Tracks or paving, 63.
- i. Bridges, 64.
- j. Motive power, 65.
- k. Fiscal management, 66.
- l. Sale, consolidation, or reorganization, 69.
- VI. Reasonableness of regulation:
  - a. In general, 69.
  - b. Operation and equipment, 70.
  - c. Rates and fares, 73.
- VII. Review, 76.

way corporations are specifically included, by the terms of the statute, among those utilities made subject to the control and supervision of the commission. And it is too well established that a street railway comes within the meaning of the terms, "common carrier," "public service corporation," and "public utility," as used in other statutes, to justify the citation of authorities.

However, where the term "railroads" was used in the statute to describe the public service corporations over which the commission should exercise its control and supervision, it has been held that street railways were excluded from the jurisdiction of the commission unless specifically included by other provisions of the statute. *Railroad Comrs. v. Market Street R. Co.* (1901) 132 Cal. 677, 64 Pac. 1065, wherein it was held that the Board of Railroad Commissioners of California had no authority over street railways under the section of the Constitution (§ 22, art. 12) defining the duties and jurisdiction of the Commissioners. By this section it is provided that the Commissioners should have the power to establish rates of charges for the transportation of passengers and freight by "railroad and other transportation companies." It was insisted that the term, "other transportation companies," was

broad enough to include street railways, but it was held that, unless specifically named, street railways could not be said to be included in either the word "railroad," or the term, "other transportation companies," as used in the Constitution.

And in *Denison & S. R. Co. v. Railroad Commission* (1902) 95 Tex. 671, 69 S. W. 62, it was held that the court had no power to compel the Railroad Commission to take jurisdiction of an application of a street railway for the approval of a proposed bond issue, the decision of the Commission that its authority under the statute did not extend to street railways being final and conclusive on the court.

In Kansas, prior to the Act of 1907 (Laws 1907, chap. 267, § 1) the jurisdiction of the Board of Railroad Commissioners was limited to railroads operated by steam. *Kansas City, O. B. & Electric R. Co. v. Railroad Comrs.* (1906) 73 Kan. 168, 84 Pac. 755. But by that act its jurisdiction was extended to electric lines, except that, where such line was operated exclusively within a county, its power was limited to the regulation and control of crossings over another railroad. *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (1909) 81 Kan. 430, 28 L.R.A. (N.S.) 1082, 105 Pac. 704.

By the statute creating the Kentucky Railroad Commission, street railways were expressly excepted from its jurisdiction. *Louisville & N. R. Co. v. Bowling Green R. Co.* (1901) 110 Ky. 788, 63 S. W. 4.

The authority of the state to control and regulate public service corporations being unquestioned, it may delegate this power to duly constituted bodies, and therefore the legislature violates no constitutional limitations by empowering a Commission to exercise control and supervision over street railway corporations, such a delegation not involving the exercise of the exclusive power of lawmaking, which a legislature cannot part with. *Portland R. Light & P. Co. v. Railroad Commission* (1913) 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820, affirming (1909) 56 Or. 468, 105 Pac. 709, 109 Pac. 273; *Ex parte Birmingham* (1917)

— Ala. —, P.U.R.1917C, 667, 74 So. 51; *Connecticut Co. v. Norwalk* (1915) 89 Conn. 528, P.U.R.1915E, 490, 94 Atl. 992; *State ex rel. St. Joseph R. Light & P. Co. v. Public Service Commission* (1917) 272 Mo. 645, P.U.R.1918B, 767, 199 S. W. 999. As said in *Ex parte Birmingham* (1917) — Ala. —, P.U.R.1917C, 667, 74 So. 51: "Commissions with like powers are no novelty. We follow a well-beaten path when we hold that the legislature had not, by this act, delegated any part of that constitutional and prerogative power which is peculiarly its own; it has not delegated any power strictly and exclusively legislative. It has committed discretion and judgment to the Commission; but such delegations of administrative function and authority which the legislature might itself exercise are common, and necessary to our scheme of government. *McNiell v. Sparkman* (1913) 184 Ala. 96, 63 So. 977. The distinction between the delegable and nondelegable powers of the legislature is thus well stated by the supreme court of Pennsylvania, in *Locke's Appeal* (1873) 72 Pa. 498, 13 Am. Rep. 716: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

### III. Jurisdiction as affected by powers of municipality.

#### a. In general.

As a general rule, the power given by statute to public service commissions or similar bodies, to supervise and control street railway corporations, supersedes the power of municipalities to regulate such corporations, except where specifically preserved to them. *Portland R. Light & P. Co. v. Portland* (1914) 210 Fed. 667; *PUGET SOUND TRACTION, LIGHT, & P. Co. v. REYNOLDS* (reported herewith) ante, 13, affirming (1915) 223 Fed. 371; *State, Phillipsburg, Prosecutor, v. Public Utility Comrs.* (1913) 85 N. J. L. 141, 88 Atl. 1096; *Seattle Electric Co. v. Seattle* (1914) 78 Wash. 203, 138 Pac. 892.

In *Portland R. Light & P. Co. v. Portland* (Fed.) *supra*, the court, holding that a municipality had no power, after the passage of a statute vesting in the Public Utility Commission the control and supervision of rates to be charged by public utilities, to fix by ordinance the rates to be charged by a street railway company, said: "The right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power, without the consent of the state, where there is a general law on the subject emanating from the entire state. It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal, or inconsistent with a general law of the state, constitutionally enacted. . . . The regulation of fares to be charged by public service corporations is not primarily a municipal matter, but is a sovereign right belonging to the state in its sovereign capacity. All authority over the subject must emanate from the state. The effect of the amendment to the charter of the city of Portland is an attempt to ignore the state authority and to assume sovereign rights superior and contrary to the expressed will of the state as manifested in its legislation. If the amendment is valid and takes the public utilities within the city of Portland out of the operation of the Public Utility Act and the jurisdiction of the Commission created by it, then every municipality in the state may amend its charter with like effect, and the Public Utility Act will become a useless and emasculated piece of legislation, the will of the entire people as expressed therein be practically ignored, and the people of

a part of the state become greater than the whole. The Public Utility Act was not passed by the legislature, but approved by a majority of the people on a referendum vote. It is, therefore, the expressed will of the sovereign power of the state, concerning a subject over which it has jurisdiction, and it cannot be amended or abrogated by the people of a particular or given locality. The purpose was to provide a uniform system throughout the entire state for the control and regulation of public utilities, and fixing the rates to be charged by them, and to create a tribunal for that purpose. It is true the Public Utility Act does recognize the authority of municipalities over public service corporations within its boundaries for certain purposes, but not in the matter of regulating or prescribing rates or fares. That power is vested alone in the Public Service Commission."

And in *State, Phillipsburg, Prosecutor, v. Public Utility Comrs.* (1913) 85 N. J. L. 141, 88 Atl. 1096, it was said: "The power thus conferred . . . quite manifestly was that of police regulation, being concerned with the control and regulation of its streets in the interest of the traveling public. The contention, therefore, that such a power, once conceded by the legislature to the municipality, is incapable of modification or revocation, is conspicuously opposed to the fundamental doctrine that the police power of the state cannot be aliened even by express grant."

Similarly, in *Seattle Electric Co. v. Seattle* (1914) 78 Wash. 203, 138 Pac. 892, it was held that by the enactment of the Public Service Commission Law (3 Rem. & Bal. Code, §§ 8626-1 et seq.) the jurisdiction of municipalities over street railways was divested and placed exclusively in the Public Service Commission. Accordingly it was held that the city had no power, after the passage of the statute, to enact an ordinance regulating the number of passengers which a car might carry and the schedule on which the car should be run, as those matters were exclusively within the jurisdiction of the Commission.

In *Troy v. United Traction Co.* (1911) 202 N. Y. 333, 95 N. E. 759, affirming (1910) 137 App. Div. 935, 122 N. Y. Supp. 1124, it was held that, as there was no provision in the charter of a city authorizing it to pass ordinances inconsistent with the provisions of the Public Service Commission Law, it had no authority to pass an ordinance regulating the schedule of a street railway, which was inconsistent with an order relating to the same subject-matter issued by the Commission.

In *Illinois C. R. Co. v. St. Louis & N. E. R. Co.* (1906) 125 Ill. App. 446, it was held that a statute (Rev. Stat. 1903, p. 1479), giving the Board of Railroad and Warehouse Commissioners the power to pass on the sufficiency of a proposed crossing by a street railway over the tracks of another road, was not invalid as invading the powers conferred on municipalities as to their streets. In that case it was said: "True it is that the Commission may, in their discretion, prevent any crossing whatever to be made within the limits of a municipality, and if such interdictive authority can be said to abridge the exclusive jurisdiction of a city over its streets, conferred by the Cities, Villages, and Towns Act, § 209, must be held impliedly to repeal or modify such part of such former act as is inconsistent therewith or repugnant thereto. Furthermore, we think that such section may be upheld as an exercise of the inherent power of the state to enact all police laws necessary and proper to secure and protect the life and property of the general public, including not only those who may be residents of a particular municipality, but all who travel upon or intrust their property to the custody of railroads. To this extent the local police power of municipalities is clearly subordinate to that of the state."

In *State ex rel. United R. Co. v. Public Service Commission* (1917) 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, it was held that, while under the Constitution (§ 16, art. 9) cities were empowered to frame and adopt a charter for their government, this did not confer the right to assume all powers the state

might exercise within its limits, but only those incident to it as a municipality, or which concerned matters of purely local government, and that therefore those provisions of the charter of the city of St. Louis providing that the city should have full control over all public utilities, including regulation of rates, condition of service, etc., were void, as such powers were not incidental to municipal government, but belonged more properly to the state. On this point the court said: "The power of the freeholders of the city of St. Louis in framing and adopting the present charter must be held, when properly exercised, to have been limited as in the rule stated. The control and management of public utilities had then been provided for by the Public Service Commission Act; and such control was not a matter of purely local or municipal concern, but one subject to the state legislative will. The power having been thus classified and defined, the attempt of the framers of the charter to also provide for such control constituted an unwarranted invasion of a province clearly within the purview of the state. In so far, therefore, as clause 13 of § 1 of article 1, and § 2 of article 19, of the present charter of the city of St. Louis, attempt to provide for the regulation of public utilities, for the management and control of which express provision has been made in the Public Service Act, such clause and sections of said charter are declared to be inoperative and of no effect."

But where municipalities are invested by the Constitution with legislative discretion to prescribe rules, regulations, and rates of fare to be observed by street railway companies operating wholly within the city, and have exercised this power by valid ordinance accepted by the company, a Commission empowered generally with the control and supervision of public utilities has no jurisdiction in the case. *Com. ex rel. Dowden v. Richmond & R. River R. Co.* (1914) 115 Va. 756, 80 S. E. 796.

In Oklahoma, the general supervision, regulation, and control of street railways is given by the Constitution

(§ 19, art. 9) to the Corporation Commission, except where a city, town, or county may be empowered by statute to regulate street railways operated wholly within their respective limits. Construing this section of the Constitution, and the statute (Comp. Laws 1909, § 1409) empowering cities and towns to regulate street railways, but omitting counties, it has been held that it is beyond the power of a county board of commissioners to grant a franchise to a street railway, and therein make terms relieving it from the control and supervision conferred on the Corporation Commission by the Constitution. *Tulsa Street R. Co. v. State* (1910) 26 Okla. 559, 110 Pac. 373. But it has been held that the ordinary power given a municipality over its streets and highways for the promotion of the health, safety, morals, and general welfare of its inhabitants was not contemplated by the proviso in the Constitution (§ 18, art. 9), limiting the power of the Corporation Commission where cities, towns, or counties are given specific control by statute over public service corporations operated within their limits. *Oklahoma R. Co. v. Powell* (1912) 33 Okla. 739, 127 Pac. 1080; *Oklahoma R. Co. v. State* (1912) 33 Okla. 752, 127 Pac. 1085.

In some instances, the control and regulation of street railways is primarily given to the municipalities in which they are located, subject to the jurisdiction of the Commission on appeal. Thus by statute (Rev. Laws 1902, chap. 217), in Connecticut, the control belonging to municipalities in regard to the use of the highways by street railways was made subject to the ultimate and supreme authority of the Board of Railroad Commissioners. Under this chapter, the municipal authorities might act as the agent of the state in the exercise of that control, but jointly with the commissioners, who in some particulars might exercise the control through original and exclusive action, and might exercise it in all particulars, either through original or appellate and final action. *New York, N. H. & H. R. Co.'s Appeal* (1908) 80 Conn. 623, 70 Atl. 26. And

it is further provided that, on appeal to the Board of Railroad Commissioners from an order of a municipality relating to the regulation of a street railway, the Board hears the case de novo, having fully as much power as the municipality in the original proceeding, and it may affirm, disaffirm, or modify the order, or issue any other order that it may deem advisable. *Central P. & Electric Co.'s Appeal* (1896) 67 Conn. 197, 35 Atl. 32; *Hartford v. Hartford Street R. Co.* (1903) 75 Conn. 471, 53 Atl. 1010; *Waterbury's Appeal* (1905) 78 Conn. 222, 61 Atl. 547; *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 40, 78 Atl. 593. In *Waterbury's Appeal* (1905) 78 Conn. 222, 61 Atl. 547, it appeared that, on appeal to the Railroad Commission from an order of a municipality requiring a street railway company to alter certain bridges, etc., as a condition precedent to the construction of its line, the Commission refused to make any order respecting the particular mode of construction as fixed by the municipality, on the ground that it was without power to do so. Holding that the power of the Commission, on appeal to it, was fully as great as that of the municipality originally, and that it erred in not passing on all matters before it, the court said: "In the present action, they had before them a written application of a street railway company desiring to construct its railway on a highway under the charge of a municipality, to which that municipality had been made a party and on which it had been fully heard. It would be doing violence to the spirit if not to the letter of the statute to hold that their powers were lessened by the fact that the application came to them not in the first instance, but by way of appeal, and that its original purpose was simply to secure the approval of a location. When, to its approval of that, the municipality attached conditions as to the mode of construction, these became an incident of the proceeding, and it was fully within the powers of the Commissioners, after hearing all parties in interest, to affirm, disaffirm, or modify the order appealed from by the



trolley company, as they might deem equitable. Their order shows upon its face that they did not think they possessed this power. In view of this misconception of their functions, it was proper for the superior court to annul their order."

Under the Kansas Public Utilities Act, the Public Utilities Commission is given exclusive control of railways which are not principally confined in their operation to a given municipality, and those so principally confined are subject primarily to the control and regulation of the local authorities, with the right of appeal to the Commission, which may proceed in court in the name of the state, to have set aside any ordinance which it has declared to be unreasonable. *Re Wright* (1918) 102 Kan. 329, 170 Pac. 28, wherein it was said: "The seemingly practical arrangement has been made by the legislature, in accordance with the doctrine of home rule, that local affairs shall be under the control of local officers, but that utilities which are not principally confined in their operations to a given municipality shall be under the supervision of the state Commission, and, as indicated, in certain cases of local friction the state Commission acts first in a sort of appellate capacity, and then next, if necessary, as advocate for the complainants by a proceeding in court." In that case, it appeared that the reasonableness of a city ordinance requiring the local cars of an interurban railway operated exclusively in the city, to run to a given point on the main or through track line at certain intervals, was in question. It was insisted that the ordinance related solely to the operation of the local cars, the control of which, under the Kansas Public Utilities Act, was vested primarily in the city. But the court, holding that as the cars were operated on the through tracks the power to make the requirement in question was exclusively with the Public Utilities Commission, said: "The property here directly involved is, in a physical sense, purely an interurban road. It is physically impossible to separate or divide the track itself into one for local and

another for through purposes. There is no question that for all through purposes the property and its operation come within the exclusive jurisdiction of the state board. It is equally clear that these local cars must be operated so as not to impair, impede, or destroy the through service."

In New Hampshire, by Laws 1901, chap. 76, original jurisdiction over the location of the tracks, turnouts, and poles of a street railway was given to the mayor and board of aldermen, with the right of appeal by any party aggrieved to the Board of Railroad Commissioners, whose decision as to questions of fact was made final. *Boston & M. R. Co. v. Portsmouth* (1901) 71 N. H. 21, 51 Atl. 664.

It has been held that the Public Service Commission did not have the authority to order a street railway company to make certain yearly extensions to its underground conduits, where the city had the power to compel the company to place its wires underground, and the road had partially complied with an ordinance to that effect, as the right to make such an order rested with the city, and it might desire that wires of other companies be carried in the same conduit so as to avoid the necessity of tearing up the streets more than once. *People ex rel. United Traction Co. v. Public Service Commission* (1915) 167 App. Div. 498, 153 N. Y. Supp. 542.

In *Ex parte Birmingham* (1917) — Ala. —, P.U.R.1917C, 667, 74 So. 51, it was held that the provision in the act creating the Public Service Commission (Acts 1915, p. 268), to the effect that the question as to whether a proposed sale, conveyance, or lease of the property and franchises of a street railway company was consistent with the public interest should be determined by the governing body of the municipality as well as by the Commission, in certain cases, did not affect the duties and powers of the Commission, but that under the act the Commission and the municipality each acted independently and without reference to each other.

In *Central R. & Electric Co.'s Appeal* (1896) 67 Conn. 197, 35 Atl. 32, it was

held that by the Act of 1895 sole and exclusive jurisdiction was given the Railroad Commissioners with respect to ordering fenders to be put on street cars, and therefore that an order of a municipal council requiring a street railway to equip its cars with such fenders as the street committee might approve was null and void. The reason given for the enactment of the statute was as follows: "Should the street committee of the common council require one style of fender, and the selectmen of Plainville or of Berlin, into each of which towns the company's railways extend, require another, it would be necessary either to change cars or to stop and shift the fenders on every trip, upon crossing the city line. It was to prevent the possibility of such conflicts of obligation that the jurisdiction of the Railroad Commissioners over this subject was made sole and exclusive. Any existing provisions of charters or by-laws to the contrary were repealed; any future municipal legislation to the contrary was forbidden."

*b. Requirement of municipal consent to construction.*

It is generally provided, either by statutory or constitutional enactment, that the consent of the municipality must be obtained before a street railway company can be authorized to construct its roads in the streets and highways of such city or town. See *Chicago v. O'Connell* (1917) 278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210; *Cambridge v. Railroad Comrs.* (1908) 197 Mass. 574, 83 N. E. 869; *State ex rel. United R. Co. v. Public Service Commission* (1917) 270 Mo. 429, 192 S. W. 958, 198 S. W. 872; *Re Public Service Commission* (1913) 154 App. Div. 587, 139 N. Y. Supp. 982; *Wilson Twp. v. Eastern Transit Co.* (1917) 258 Pa. 266, 101 Atl. 983; *Montreal Street R. Co. v. Montreal Terminal R. Co.* (1905) 36 Can. S. C. 369. And see the statutes of the various jurisdictions. However, these provisions are generally construed as giving to municipalities the privilege of veto as to original construction only, and do not confer on them the right to participate in the supervision and con-

trol of the railway by a Public Service Commission. Thus, by the Constitution of Illinois (§ 4, art. 2) the legislature is prohibited from granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the streets or highways proposed to be occupied by such street railroad. In *Chicago v. O'Connell* (Ill.) supra. It was insisted that under this provision the Public Utilities Commission was without power to issue an order fixing a certain standard of service for the street railways of the city of Chicago, and requiring them to provide the necessary equipment, trailers, etc., to carry out the provisions of the order; but the court held that the power conferred on municipalities by this provision was limited to the right to say whether or not a street railway should be constructed in the streets, and if so, in what streets.

And in *State ex rel. United R. Co. v. Public Service Commission* (1917) 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, 198 S. W. 872, the requirement as to the consent of a municipality to the construction of a street railway in its streets was held to be limited to consent to the original construction, and therefore, under the statute (Public Service Commission Act, Laws 1913 § 49) creating the Public Service Commission and conferring on it the power to manage and control public utilities, it was held that an order of the Commission relating to the manner in which the company was to operate, manage, and conduct its cars was well within the power of the Commission, and did not require the consent of the city to validate it.

Construing the provision of the Missouri Constitution (§ 20, art. 72), requiring the consent of municipalities to the construction and operation of street railways in the streets, it has been held that the legislature could not delegate to the Public Service Commission the power to require a street railway company to apply to the municipal authorities within a given time for authority to make an ex-

tension ordered by the Commission, such extension being into new territory, and not merely incidental, such as sidings, switches, etc. It was held that this was, in effect, an attempt by the Commission indirectly to compel the city authorities to give their consent, which was contrary to the spirit of the Constitution. *State ex rel. United R. Co. v. Public Service Commission (Mo.) supra.* And this rule was held to apply to a street over which the company had been empowered to construct its railway, which right, however, it had lost by nonuser, the court holding that, as the railway company had lost its right to use the street, the Commission had no power to order it to do so without the consent of the city.

By the Massachusetts statute (Stat. 1906, chap. 520), authorizing the construction of a subway in the city of Cambridge, it was provided that the plans of the company, showing the proposed route or location and the general form and method of construction, with the location of the proposed tracks and stations and approaches, should be submitted to the Board of Railroad Commissioners for approval, before the work of construction could be begun. By § 13 of the same act it was provided that the plans, as approved by the Commission, should be submitted to the mayor of the city, for his approval of the location of stations, and their exits and approaches. *Cambridge v. Railroad Comrs. (1908) 197 Mass. 574, 83 N. E. 869.* It appeared in this case that the plans approved by the Commissioners provided for two stations, and it was insisted that the power to fix the number of stations was given by the statute to the mayor, who maintained that there should be four or five stations. The court, construing the statute, held that the power given the mayor was limited to the exact location and manner of construction of the stations which had been approved by the Commissioners, and did not extend to the question of the number of stations, and it was pointed out that even this power was made subject to review by the Com-

missioners, by another section of the same act.

It has been held that a recommendation of a Public Service Commission that a subway be built on one level, instead of two, was not such a change in plans as to require a resubmission to municipal authorities. *Re Public Service Commission (1913) 154 App. Div. 587, 13 N. Y. Supp. 982.*

In *Wilson Twp. v. Easton Transit Co. (1917) 258 Pa. 266, 101 Atl. 983,* it was held that where the municipal authorities appeared at a hearing before the Public Service Commission, wherein a certificate of public convenience was entered which empowered a street railway to change an overhead crossing to a subway crossing, its appearance without objecting to the order was a waiver of the municipality's right to prohibit such change without its consent, and in effect amounted to an assent to the change, and therefore the municipality was estopped from bringing an action later to enjoin such change.

In Canada, it is provided by statute (Railway Act 1903, § 184) that the Board of Railway Commissioners shall not have authority to issue or enforce an order respecting the construction and operation of a street railway until the company has first obtained consent therefor, by a by-law, of the municipal authorities. Accordingly it has been held that a by-law adopted by a town council, but not submitted to the ratepayers or the lieutenant governor in council as provided by law, being invalid, the Commissioners had no jurisdiction. *Montreal Street R. Co. v. Montreal Terminal R. Co. (1905) 36 Can. S. C. 369.*

#### *c. Municipally owned railway.*

By the Illinois Public Utilities Act (§ 10), public utilities owned or operated by a municipality are excepted from the operation of the act, but it has been held that the mere fact that a city held an option on the street railways and exercised a voice in their management did not amount to such ownership within the meaning of the act, as to exempt the railways from regulation by the Public Utilities Commission. *Chicago v. O'Connell (1917)*

278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210.

But, in Canada, it has been held that, under the authority conferred on the Ontario Railway and Municipal Board by statute (Ont. Railway Act 1906), the Board could require a board of commissioners who had been operating a municipally owned street railway, a part of which had been sold to another municipality under an agreement that the whole should be operated by a board of commissioners constituted according to the terms of the agreement, to turn over to such commissioners the control of the road; and that the fact that the railway was owned by a municipality was immaterial, as under the act the Board was given authority over all street railways. *Re Port Arthur Electric Street R. Co.* (1909) 18 Ont. L. Rep. 376, 13 Ont. Week. Rep. 811.

*IV. Jurisdiction as affected by rights under franchise or contract.*

As to power of Public Service Commission to increase rates fixed by franchise, see note to *Salt Lake City v. Utah Light & T. Co.* 3 A.L.R. 730.

As a general rule, the municipal ordinance granting a franchise to a street railway company, which fixes and determines the terms and conditions on which the road may be constructed and operated, does not operate as a contractual bar to the power of public service commissioners to alter or change the terms and conditions fixed in the municipal franchise, unless it clearly appears that the municipality was empowered to make such an irrevocable contract.

*United States.*—*Milwaukee Electric R. & Light Co. v. Railroad Commission* (1915) 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming (1912) 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911.

*Illinois.* — *Chicago v. O'Connell* (1917) 278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210.

*Kansas.*—*State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (1909) 81 Kan. 430, 28 L.R.A.(N.S.) 1082, 105 Pac. 704.

*Massachusetts.*—*BOARD OF SURVEY v.*

*BAY STATE STREET R. Co.* (reported herewith) ante, 24; *Fall River v. Public Service Comrs.* (1917) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915.

*Michigan.* — *Jackson & Suburban Traction Co. v. Railroad Comrs.* (1901) 128 Mich. 164, 87 N. W. 133.

*Oregon.*—*Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R. 1919A, 127, 173 Pac. 1178.

*Utah.*—*Salt Lake City v. Utah Light & Traction Co.* (1918) — *Utah*, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556.

*Wisconsin.*—*Manitowoc v. Manitowoc & N. Traction Co.* (1911) 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Duluth Street R. Co. v. Railroad Commission* (1915) 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887.

In *Milwaukee Electric R. & Light Co. v. Railroad Commission* (U. S.) supra, the court, upholding the right of the state through its Railroad Commission, to change the rate of fare as fixed in the grant of franchise by a municipality, said: "The fixing of rates which may be charged by public service corporations of the character here involved is a legislative function of the state, and while the right to make contracts which shall prevent the state, during a given period, from exercising this important power, has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

In *Robertson v. Wilmington & P. Traction Co.* (1918) — *Del.* —, P.U.R. 1919B, 129, 104 Atl. 839, it was held that a statute fixing street car fares at 5 cents did not preclude the Public Service Commission from ordering an increase, the court saying that, as a state agency, the powers of the Commission in that respect were the same as those of the legislature.

In *Chicago v. O'Connell* (Ill.) supra, wherein it appeared that the Illinois Public Utilities Commission had issued an order requiring the Chicago street

railways to maintain a certain standard of service on some of their lines, it was insisted that because of certain contracts with the city of Chicago the Commission was without power to issue the order. Answering this contention, the court said: "Appellees' contention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort, or convenience. Thus, the grant of the right to the railway companies to construct and operate street railways in the city, the agreement to divide the net receipts between the railway companies and the city, and the option given to the city to purchase the railway properties at a certain price, are all matters which do not affect the public safety, welfare, comfort, or convenience, because it is immaterial to the public what person or corporation operates the street railways, or what disposition is made of the profits, and over those matters neither the state nor the state Public Utilities Commission has any control by virtue of the police power. Nor has the Commission, by the order here complained of, assumed to exercise control over any such matters. The order requires only such things to be done by the railway companies as will, in the judgment of the Commission, improve the service furnished the public, and in so far as the order conflicts with the ordinances concerning such matters the order of the Commission supersedes and sets aside the provisions of the ordinances, but does not, within the meaning of the constitutional prohibition, impair the obligation of any contract, because the city had no power to contract away any of the police powers delegated to it by the legislature."

Similarly, in *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (Kan.) *supra*, it was held that, although a franchise granted by the city to a street car company only authorized it to lay its tracks at grade, the legislature, as the permanent authority, could enlarge its power in this regard, either by direct legislation or through some other body, such as, in this case, a Board of Railroad Com-

missioners, which authorized and commanded that a crossing of certain railroad tracks in the streets should be by subway.

In *Salt Lake City v. Utah Light & Traction Co.* (1918) — Utah, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556, it was held that the provision of the Constitution (art. 12, § 8), prohibiting the granting of a right to construct and operate a street railroad within any incorporated city or town without the consent of the local authorities, did not give the city the exclusive right to fix rates, and while an ordinance granting a street railway company a franchise, and fixing the rates to be charged, was binding on the city and the company, the city had no power to contract so as to bind itself or the other party as against the exercise of the police power by the state through its duly qualified agents. It was accordingly held that the Public Utilities Commission was not estopped by the terms of an ordinance requiring the company to sell commutation tickets on certain of its lines, from issuing an order relieving the company from this requirement. The court stated the rule as follows: "It is now settled law that, so long as the state does not interfere, the rates agreed upon between the cities and the street railway companies in the franchise ordinances are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them. Either party may, however, make application to the Utilities Commission, if one is created by legislative enactment, for the purpose of being relieved from the rates fixed in the franchise ordinance, and if it be made to appear that the rates under existing conditions have become unfair or unreasonable, in that they are either too high or too low, the Commission may establish a rate which will again respond to the existing conditions, and may so adjust it as to make it fair, just, and reasonable both to the railway company and to the public. In doing that, the constitutional rights of the parties are neither invaded nor disregarded, for the simple reason that

when the original rate was fixed by agreement it was still subject to modification at any time by the sovereign power of the state, providing the fare as fixed is found to be unfair and unreasonable. Every contract fixing rates entered into between the cities of this state and the street railway companies, both under the Constitution and the state, is always subject to change by the paramount power of the state, and the right of the state to so change the rates continues unless and until the legislature has, in express terms, surrendered the power or delegated it to some other arm of the state."

In *BOARD OF SURVEY v. BAY STATE STREET R. CO.* (reported herewith) ante, 24, it was insisted by a municipality that the legislature had no power to delegate to the Public Service Commission the authority to allow a street railway company to raise its fares above the limit prescribed in the grant of location and franchise made to the company by the municipality. It was held that in granting locations for street railways the authorities of a municipality acted as public officers, and not as agents of their respective towns and cities, and that the state exerted its sovereign power through them as its instruments; that, although framed in the form of a contract and securing valuable financial obligations to the cities and towns, it was well settled that the legislature had the power to change or abrogate the terms of such grants; and that, by the enactment of the statute (Stat. 1913, chap. 784) giving the Public Service Commission supervision and control over street railways, the state had waived whatever conditions it had imposed when acting through the selectmen in granting the original decision.

Likewise, in *Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R.1919A, 127, 173 Pac. 1178, it was held that rates of fare fixed in a franchise were fixed by the city as agent of the state, and the state might recall the power given and invest it in another body. Accordingly it has been held that an order of the Public Serv-

ice Commission allowing a street railway company to increase its fares was not invalid as violating the obligation of the franchise contract, nor because it deprived the city of its property without due process of law.

In *St. Louis v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 10, 207 S. W. 799, it was held that a municipal ordinance granting a street railway franchise and fixing rates was subject to the regulatory power of the Public Service Commission. See, to the same effect, *Kansas City v. Public Service Commission* (1919) — Mo. —, P.U.R.1919D, 422, 210 S. W. 381.

Where a contract embodied in an ordinance granting a street railway franchise fixed a rate unlimited in time, it has been held that the state had the right, through the Public Service Commission, notwithstanding the contract, to inquire into and adjust the rate to a reasonable basis. *ST. CLAIR v. TAMAQUA & P. ELECTRIC R. CO.* (reported herewith) ante, 20, wherein it was said: "A contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by the public service corporations."

In *State, Phillipsburg, Prosecutor, v. Public Utility Comrs.* (1918) 85 N. J. L. 141, 88 Atl. 1096, it appeared that the municipality, and not the railroad company, was objecting to an order of the Commissioners directing a railway company to change its gauge to standard. It was insisted by the municipality that an ordinance fixing the gauge of a street railway, passed under the power delegated to a municipality to regulate a railway on its streets, was in the nature of a contract, the obligation of which the legislature could not impair. Holding that the town could not set up such a contract as a barrier to the exercise of the police power by the state, it was said: "It will be observed in this inquiry that the contractual relationship sought to be sustained is pleaded, not by the com-

pany, which is not before us as a complaining party, but by a municipal corporation, an arm of the state government, to which the power *pro bono publico* was delegated by the legislature. It is not perceived how the question of the constitutionality of the acts of the Public Utility Commissioners can enter, as between the state and its creature, the town, upon a mere proposal, not to divest the municipality of any property right, but to transfer from the local municipal body to a general state board the legislative police power of street regulation in the operation of street car companies, a power inherent in the state, and of which it has not even *pro tanto* divested itself by prior temporary delegation to the municipality, to subserve what, at the time of the delegation, may be conceded to have been a local public interest."

In Indiana, the Public Service Commission is authorized by statute (Acts 1913, chap. 76, § 122) to suspend temporarily or change the rates of fare charged by public utilities, when in case of an emergency the Commission deems such relief necessary in order to prevent injury to the interest of the people or to any public utility. Accordingly it has been held that it was within the power of the Commission to permit a street railway to increase its fares in order to meet the increased cost of operation due to the emergency of war, and that this power was not affected by the terms of the franchise contract. *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis* (1918) — Ind. —, P.U.R.1918F, 111, 120 N. E. 129.

But where the legislature has by clear and specific terms delegated the authority to make contracts as to the conditions under which a street railway should be operated, it has been held that the state could not empower a Public Service Commission to change or alter them during the period for which the contract was to run. Thus, in *Barre v. Barre & M. Power & Traction Co.* (1914) 88 Vt. 304, 92 Atl. 237, it was held that the Public Service Commission had no jurisdiction to relieve a street railway from the obliga-

tions it undertook in obtaining its franchise, since these obligations were entered into under special statutory authority delegated to the municipality, and, as such, excepted from the operation of the act giving the Public Service Commission jurisdiction over tools and rates. That, being under the control of the municipality, the validity of such agreements as it might make with a railway company was subject to the jurisdiction of the courts, and not the Commission.

In Washington, it has been held that the Public Service Commission had no power to change or abrogate franchise conditions which had been previously imposed on a street railway company by the city when granting the franchises, under the express authorization of the legislature. *State ex rel. Tacoma R. & Power Co. v. Public Service Commission* (1918) 101 Wash. 601, P.U.R.1918E, 277, 172 Pac. 890; *Seattle v. Puget Sound Traction Light & P. Co.* (1918) 103 Wash. 41, 174 Pac. 464. It appeared in these cases that, by statute (Rem. Code, § 7507), cities were empowered to authorize or prohibit the location of street railways in the streets and to "prescribe the terms and conditions upon which any street railroad shall be located or constructed." And this statute was construed to be a plain and specific grant by the state to the city, of power to impose terms and conditions on which any of its streets may be used by a street railroad, and not to be affected by the Public Service Commissions Law, conferring on the Commission the power to deal with the questions of safety, efficiency, rates, and quality of service. In construing the latter statute, the court in *State ex rel. Tacoma R. & Power Co. v. Public Service Commission* (Wash.) *supra*, said: "There is there conferred upon the Commission the power to deal with the questions of safety, efficiency, rates, and quality of service. In other words, speaking generally, the statute confers upon the Commission power to deal with the subject of rates and service. There is nothing in this section which either expressly or by necessary implication confers power upon the Public Service

Commission to deal with the question of franchises or to modify any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the Commission. The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. The franchises in question having been granted under the clear and express authority of a statute enacted long prior to the Public Service Commission Law, it seems plain that it was not the intent of the latter law to grant power to the Commission to abrogate franchise provisions." The court added, however, that the question as to whether the legislature had the power to confer on the Commission the right to abrogate the conditions in franchises to street railway companies, granted prior to the passage of the Public Service Commissions Law, was not before it for decision, and no opinion was expressed thereon. But see *PUGET SOUND TRACTION, LIGHT, & P. CO. v. REYNOLDS* (reported herewith) ante, 13, affirming (1915) 223 Fed. 371, wherein it was held that the Public Service Commission, under the Washington statute, was not barred by the conditions in ordinances granting a street railway franchise, fixing the fares to be charged, from modifying such fares. On this point the court said: "Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power." However, the statute (Rem. Code, § 7507), held in the two Washington cases set out above to have been a plain and specific grant of power to impose terms and conditions on which the streets could be used, was not mentioned in the opinion, it apparently not having been brought to the attention of the court. It was further held by

the court in this case that where, by the terms of the ordinance, the street railway company was empowered to make reasonable rules and regulations for the management and operation of the railroad, subject to the proviso that the rules should not conflict with the laws of the state, there was no question as to the power of the Commission to order the railway to restate through service on some of its lines.

In *Interurban R. & Terminal Co. v. Public Utilities Commission* (1918) 98 Ohio St. 287, 3 A.L.R. 696, P.U.R. 1919B, 212, 120 N. E. 831, it was held that a Public Service Commission had no power to disturb street railway rates fixed by a franchise, the franchise constituting a contract between the municipality and the company.

In *Milwaukee Electric R. & Light Co. v. Railroad Commission* (1915) 238 U. S. 174, 59 L. ed. 1254, P.U.R. 1915D, 591, 35 Sup. Ct. Rep. 820, affirming (1912) 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911, wherein it was insisted that the state had, by the enactment of a statute (§§ 1862, 1863, Wis. Stat.) empowering municipalities to grant franchises to street railway companies on such terms and conditions, and subject to such rules and regulations, as the proper authorities should determine, delegated to the municipalities the power to enter into an irrevocable contract with the railway company, the court, adopting the construction given the statute by the Wisconsin court, held that it authorized the grant of the use of the streets on such terms as the proper authorities should determine, and not on such terms as the parties in interest should agree to, and quoted with approval the following statement by that court: "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a



valid subsisting obligation. It would be unreasonable to hold that by enacting § 1862, Stat. 1898, or § 1863, Stat. Supp. 1906, Laws of 1901, chap. 425, the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

In *Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433, it was held that the statute (Public Service Commissions Law, § 49; McKinney, Consol. Laws, bk. 47, p. 53) empowering the Commission to fix rates of street railways limited the jurisdiction of the Commission to rates fixed by statute, and, in the absence of express authority over rates fixed by agreement between a municipality and a street railway company, the Commission had no power to regulate such rates. The court, by way of dictum, said that a franchise granted a street railway pursuant to the constitutional provision (Const. art. 3, § 18) requiring the consent of the local authorities to the construction and operation of street railways, was not a mere privilege or gratuity, but, once accepted, became a contract which neither the state nor its agencies could impair. However, in a subsequent case involving the power of the Commission over gas rates, the court took occasion to say that in *Quinby v. Public Service Commission*, supra, the question of the power of the state to deal with street railway rates despite the franchise agreement was not passed on, but that the opinion clearly intimated that such power did exist. *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777. And in *International R. Co. v. Rann* (1918) 224 N. Y. 83, 120 N. E. 153, affirming (1918) — App. Div. —, 171 N. Y. Supp. 1088, affirming (1918) 104 Misc. 46, 171 N. Y. Supp. 193, the court, citing *Quinby v. Public Service Commission* (N. Y.) supra, as authority, held that, while the Commission could change the rate fixed by statute, it was without jurisdiction to change or increase a rate fixed by a franchise or contract with a city, except on the

5 A.L.R.—4.

consent or request of the municipal authorities, evidenced as provided by law. But see *People ex rel. New York & N. S. Traction Co. v. Public Service Commission* (1916) 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405, wherein it was held that a municipality was prohibited by the Constitution (§§ 1, 18, art. 3) from imposing conditions, in granting a franchise to a street railway corporation, which assume to regulate the rate of fare, and therefore the Public Service Commission had the power under the Railroad Law (§ 181; McKinney, Consol. Laws, bk. 48, p. 203) to authorize an increase of the fare above that fixed by a municipality in the ordinance granting the franchise.

In *Westinghouse Electric & Mfg. Co. v. Binghamton R. Co.* (1919) P.U.R. 1919C, 780, 255 Fed. 378, the court, applying the law of New York, as established in *Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433, said that a contract between a municipality and a street railway company precluded the Public Service Commission from changing rates, but held that a municipal consent to electrification of the road had in the instant case abrogated the contract.

In *International R. Co. v. Public Service Commission* (1919) 106 Misc. 293, P.U.R.1919C, 390, 174 N. Y. Supp. 403, the court upheld the power of the Public Service Commission to entertain a proceeding to increase rates by a street railway company in Buffalo, the rates having been fixed by the "Milburn Agreement," ratified by Laws 1892, chapter 151, portions of which were incorporated in franchises and consents, there being an express provision in such agreement that nothing contained therein should prevent the legislature from regulating fares. The court relied upon the decision in *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777, observing that the maximum rates were fixed and made operative by the legislative act in ratifying the Milburn Agreement, without which approval

that agreement would have had no effective force.

The jurisdiction of the New York Commission over the rates of inter-urban railways constructed on private rights of way, but across streets of municipalities, notwithstanding maximum rate provisions in the consents accepted by the company, was upheld in *Koehn v. Public Service Commission* (1919) 107 Misc. 151, P.U.R.1919D, 953, 176 N. Y. Supp. 147. The provision of article 3, § 18, of the New York Constitution relating to municipal consents for the construction and operation of "a street railway," was held, however, not to apply to such a road. The court said in effect that the decision in *People ex rel. South Glens Falls v. Public Service Commission* (N. Y.) *supra*, would constitute a reversal of the law of the *Quinby Case*, unless the latter could be distinguished and limited by virtue of the special features of that case, referring, in this connection, to the constitutional provision just mentioned; to the fact that the contract had been recognized by the legislature by § 173 of the Railroad Law of 1910; that § 181 of the same law had prohibited more than a 5-cent fare within any incorporated city or village; and that by special statutory enactment in 1915, subsequent to the Railroad and Public Service Commission Law of 1910, there was an express legislative fixing of fare for the city of Rochester.

The decision in *GEORGIA R. & POWER CO. v. RAILROAD COMMISSION* (reported herewith) ante, 1, denying the jurisdiction of the Railroad Commission to regulate fares or the matter of transfers upon certain lines, with reference to which there were valid subsisting contracts between the municipality and the street railway, fixing the rates, was referable to the express proviso in the statute which conferred the power upon the Commission to regulate such rates, to the effect that nothing in the statute should be construed to impair any valid subsisting contract now in existence between any municipality and any street railway company. It was not necessary, therefore, in this case, to invoke the consti-

titutional provision against impairing the obligation of contracts, as in the New York cases, or to construe statutory provisions not explicit in the terms as to the powers of the Commission in regard to franchise rates.

In *People ex rel. Bridge Operating Co. v. Public Service Commission* (1912) 153 App. Div. 129, 138 N. Y. Supp. 484, wherein it was held that a license contract made between a bridge commissioner and a street railway operating cars over a bridge, fixing the fares to be charged, did not operate as such a contract as would bar the legislature from reducing through the Public Service Commission, the rate of fare so fixed. The court in this case based its decision on the ground that the statute creating the office of bridge commissioner, while it gave him power to fix the rate of fare, did not give him power to do so for any specified time, and that therefore, although the fare had been fixed by the agreement for a period of ten years, the Commission was not barred from decreasing it. In *Troy v. United Traction Co.* (1909) 134 App. Div. 756, 119 N. Y. Supp. 474, it was held that, where the Public Service Commission had issued an order requiring a street railway company to run its cars on a fifteen-minute schedule, a city had no power to require the company to operate on a ten-minute schedule, although the ordinance granting the franchise provided that the cars should be run as often as the public wants and convenience might require, and under such reasonable directions as the common council might from time to time prescribe.

In *Kansas City v. Public Utilities Commission* (1918) 103 Kan. 473, 176 Pac. 324, it was held that a hearing as to street car rates before a Public Service Commission would not be enjoined on the ground that rates were fixed by contract, the remedy, if any, being by action after the Commission had rendered its decision.

#### *V. Jurisdiction in respect to particular matters.*

##### *a. Original construction.*

It is generally required by statute

creating public service commissions or similar bodies, and investing them with the supervision and control of street railways, that before a street railway company can construct its road it must obtain from the Commission a certificate or order of convenience and necessity for the construction of the road, and its approval of the proposed plans. *Seccomb v. Wurster* (1897) 83 Fed. 856; *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 40, 78 Atl. 593; *Stevens v. Connecticut Co.* (1912) 86 Conn. 36, 84 Atl. 361, Ann. Cas. 1913D, 597; *Re Portland R. Extension Co.* (1901) 94 Me. 565, 48 Atl. 119; *Re Millbridge & C. Electric R. Co.* (1902) 96 Me. 110, 51 Atl. 818; *Woodall v. Boston Elev. R. Co.* (1906) 192 Mass. 308, 78 N. E. 446; *Re New York, W. & B. R. Co.* (1908) 193 N. Y. 72, 85 N. E. 1014, reversing (1908) 126 App. Div. 909, 110 N. Y. Supp. 1139; *People ex rel. South Shore Traction Co. v. Willcox* (1909) 196 N. Y. 212, 89 N. E. 59, affirming (1909) 133 App. Div. 556, 118 N. Y. Supp. 248; *Re Empire City Traction Co.* (1896) 4 App. Div. 103, 38 N. Y. Supp. 983; *McWilliams v. Jewett* (1895) 14 Misc. 491, 36 N. Y. Supp. 620; *People ex rel. West Shore Traction Co. v. Bauer* (1907) 54 Misc. 28, 103 N. Y. Supp. 1081; *Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co.* (1912) 78 Misc. 220, 139 N. Y. Supp. 216; *Baker v. New York Municipal R. Corp.* (1917) 181 App. Div. 939, 168 N. Y. Supp. 509.

In *Re Empire City Traction Co.* (1896) 4 App. Div. 103, 38 N. Y. Supp. 983, the purpose of § 9 of the Railroad Law (McKinney, Consol. Laws, bk. 48, p. 28), requiring a certificate of convenience and necessity from the Railroad Commissioners, was said to be "to prevent the paralleling of routes and the filing of certificates of incorporation by divers associations for the same routes, and the holding of franchises by the filing of such certificates, thereby preventing others willing so to do from proceeding with the improvement without making terms with the corporation first filing its certificate."

Under the Maine Statute of 1899 (chap. 119, Public Laws 1899) it was

essential that the Board of Railroad Commissioners should find that public convenience required the construction of a street railroad, before they indorsed their approval on the articles of association, and before the company could transact any business. *Re Portland R. Extension Co.* (1901) 94 Me. 565, 48 Atl. 119; *Re Millbridge & C. Electric R. Co.* (1902) 96 Me. 110, 51 Atl. 818.

By the act incorporating the Boston Elevated Railway Company, and the act amendatory thereof (Stat. 1894, chap. 548, § 18, Stat. 1897, chap. 500, §§ 2, 6), the Board of Railroad Commissioners were required to approve the plans of the company before the railway could be constructed, and after its completion the company was required to obtain from the Commissioners a certificate that the railway appeared to be in a safe condition for operation before it could be operated. In examining the plans the Commissioners were required to consider the strength and safety of the structure, the rolling stock, motive power and method of proposed operation, and the comfort and convenience of the public, and their judgment in respect to these matters, so far as they entered into the approval of the plans, could not be impeached or controlled. *Woodall v. Boston Elev. R. Co.* (1906) 192 Mass. 308, 78 N. E. 446.

In *Re New York, W. & B. R. Co.* (1908) 193 N. Y. 72, 85 N. E. 1014, reversing (1908) 126 App. Div. 909, 110 N. Y. Supp. 1139, it was held that a street railway company which had only a de facto existence because of defects in its original incorporation, and whose original roadbed and property had been sold by a receiver, would be deemed a new corporation as of the date of its legal organization, and as such was required to obtain a certificate of convenience and public necessity from the Railroad Commissioners, as required by the Railroad Law (McKinney, Consol. Laws, bk. 48, p. 28). Nor did the fact of its compliance with the statute validating its organization as of the date of its original incorporation relieve it of the

necessity of obtaining the certificate from the Commissioners.

And in *Baker v. New York Municipal R. Corp.* (1917) 181 App. Div. 939, 168 N. Y. Supp. 509, it was held that where, by the terms of the certificate of the Public Service Commission, the time within which the consent of abutting property owners to the construction of an elevated street railway must be obtained was not limited, but the Commission reserved the right to revoke the certificate unless such consent was secured within a year, the Commission could revoke the certificate only by affirmative action after due hearing, and, even in case of revocation, the consents which had been obtained were not thereby invalidated.

In *People ex rel. South Shore Traction Co. v. Willcox* (1909) 196 N. Y. 212, 89 N. E. 459, affirming (1909) 133 App. Div. 556, 118 N. Y. Supp. 248, it was held that, where the Public Service Commission had in fact determined that the construction and operation of a proposed street railway were both necessary and convenient for the public service, it was without authority to refuse its permission and approval to the construction of the railroad and the exercise of the franchise on the ground that the conditions imposed by a municipality in granting its consent were improper.

Notwithstanding the original laying out of a route for a subway by the Public Service Commission, and its approval by the board of estimate and the mayor, it has been held that a railway company, applying to the appellate division of the supreme court to have the decision of the Commission confirmed, must, where there is objection on the part of the adjoining property owners, affirmatively show a requisite public necessity in order to override such protests. *Re Utica Ave. Route* (1913) 169 App. Div. 306, 144 N. Y. Supp. 228.

In that case, an order of the Public Service Commission approving the plans for the construction of a subway was reversed on the ground that a sufficient public necessity for its construction had not been shown. It appeared from the evidence that the

proposed subway would be built in part through a purely residential street shaded by large trees, which would be destroyed if the subway were built, that a stringent condition as to the residential character of the property appeared in the conveyances, forbidding the erection of buildings of any character except a dwelling house arranged for the use of one family only, and that the actual building of the subway was planned in the remote future, when other transportation facilities might prove inadequate. Conceding the fact that public necessity would override private rights, and that the temporary character of a neighborhood should not determine whether or not it should be devoted to public needs, the court, in denying the existence of such a public necessity under the circumstances as would justify the granting of the right sought, said: "There is no present design to build this road, at least, through Stuyvesant avenue. Its legalization will be all for perhaps a score of years, depending on the capacity of other transit systems and the financial resources of the city. Such a route, when authorized, will be an immediate cloud on the values of these property owners, however it may stimulate sales in the vacant property on Utica avenue. Upon consideration of the testimony, we think the facts shown fall short of proof of that public need which alone could warrant this invasion of a residential street, with jeopardy of private rights."

In the case of *Re Empire City Traction Co.* (1896) 4 App. Div. 103, 38 N. Y. Supp. 983, it was held that the fact that a corporation, seeking to construct a street railroad, had been refused a certificate of convenience and necessity by the Railroad Commissioners, did not prevent it from bidding for a franchise when offered by a city.

In the case of *Re Wood* (1905) 181 N. Y. 93, 73 N. E. 561, affirming (1904) 99 App. Div. 334, 91 N. Y. Supp. 225, it was held that under the Railroad Law of 1892 (§ 59) the appellate division was given the power to compel

the Board of Railroad Commissioners to grant to a street railway company seeking to construct a street railway, a certificate of convenience and necessity.

In *McWilliams v. Jewett* (1895) 14 Misc. 491, 36 N. Y. Supp. 620, it was held that it was not necessary that a street railway should first obtain the certificate of necessity from the Board of Railroad Commissioners, required by statute, before the municipality could grant a public hearing on the company's application for its consent to the construction of the road.

Nor was it necessary that the railway company should obtain the certificate before securing a franchise from a municipality. *Seccomb v. Wurster* (1897) 83 Fed. 856; *People ex rel. West Shore Traction Co. v. Bauer* (1907) 54 Misc. 28, 103 N. Y. Supp. 1081.

Under the Connecticut statute (Public Acts 1905, chap. 244, § 1), requiring a street railway company to cause a plan of its location showing streets, grades, etc., to be made before it could begin construction, it has been held that it must appear that the plan of location had been adopted by a vote of the directors, and, until such vote, all action by the Railroad Commissioners, on appeal from local authorities, was unauthorized in law. *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 24, 78 Atl. 593; *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 40, 78 Atl. 587. And where a street railway has been given by statute the right to acquire a right of way over private lands by condemnation, it has been held that the Commissioners had no power to entertain and approve a plan of location until the company had, by agreement, or condemnation proceedings, secured the right to locate over such private lands. *Norton v. Shore Line Electric R. Co.* (Conn.) *supra*. But where the application is for the approval of a proposed widening of a layout of a completed railway, it has been held that it was not necessary for the company to have first attempted to secure the additional land by agreement or condemnation proceedings, before the

Commissioners could lawfully entertain and approve such plan. However, it was necessary that the directors should have acted on the plan to take the land. *Stevens v. Connecticut Co.* (1912) 86 Conn. 36, 84 Atl. 361, Ann. Cas. 1913D, 597.

#### *b. Extension.*

As to power of Public Service Commission to require railroad or street railway to extend its line, or build new line to new territory, see annotation to *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 2 A.L.R. 975.

Like the right to construct originally, the right to build extensions to a street railway system is generally placed under the supervision and control of Public Service Commissions. *Daniels v. Commonwealth Ave. St. R. Co.* (1900) 175 Mass. 518, 56 N. E. 716; *Re Traction Co.* (1907) 119 App. Div. 806, 104 N. Y. Supp. 377; *Syracuse, L. S. & N. R. Co. v. Carrier* (1912) 149 App. Div. 411, 134 N. Y. Supp. 791; *People ex rel. New York & Q. C. R. Co. v. Public Service Commission* (1916) 173 App. Div. 826, 160 N. Y. Supp. 91; *Public Service Commission v. New York R. Co.* (1912) 77 Misc. 487, 136 N. Y. Supp. 720; *Mitchell v. Sandwich, W. & A. R. Co.* (1914) 32 Ont. L. Rep. 594, 8 Ont. W. N. 508.

In determining as to the public convenience and necessity of a proposed extension of the lines of a street railway company, the Railroad Commissioners should take into consideration all the circumstances, the probable growth in the population, the convenience of the people, and the fact that there was territory lying beyond, which at an early date must be accommodated. *Re Traction Co.* (1907) 119 App. Div. 806, 104 N. Y. Supp. 377.

In *Mitchell v. Sandwich, W. & A. R. Co.* (1914) 32 Ont. L. Rep. 594, 7 Ont. Week. N. 508, it was held that, notwithstanding permission had been granted by a municipal corporation to a street railway to extend its lines on certain streets, the company acquired no right until the proposed extension had received the approval of the Railway and Municipal Board, as provided for by the Ontario Railway Act (§ 250, subsec. 2).

The Commission may force a railway company to extend its lines in accordance with the terms of its franchise. *Public Service Commission v. New York R. Co.* (1912) 77 Misc. 487, 136 N. Y. Supp. 720.

In *People ex rel. New York & Q. C. R. Co. v. Public Service Commission* (1916) 173 App. Div. 826, 160 N. Y. Supp. 91, the court, without setting out the evidence, which was in conflict, held that the Commission was justified in issuing an order prohibiting the abandonment by a street railway of its franchise rights on certain streets, on which it had failed to construct its lines.

But where a street railway company had forfeited the right to construct a part of its road, by failure to exercise the privilege for more than twenty years, it was held that the Public Service Commission could not compel its successor to construct the additional lines called for in the original franchise. *Public Service Commission v. Richmond, L. & R. Co.* (1917) 163 N. Y. Supp. 64.

In *State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co.* (1919) — Wis. —, 172 N. W. 230, an order of a Public Service Commission, compelling an extension of double-track railway by an interurban street railway company, was sustained under a grant of power to require an extension by a street railway operating "within" a municipality.

Under the statute in force in New York prior to 1902 (Railroad Law, § 90), it was not necessary for a street railway company to obtain the approval of the Railroad Commissioners to an extension of its lines, but this requirement was added to the law in 1902 (§ 59a, now Railroad Law, § 10, McKinney, Consol. Laws, bk. 48, p. 34). *Delaware, L. & B. R. Co. v. Syracuse, L. & B. R. Co.* (1899) 28 Misc. 456, 59 N. Y. Supp. 1035, affirmed in (1899) 43 App. Div. 621, 60 N. Y. Supp. 386; *New York C. & H. R. R. Co. v. Auburn Interurban Electric R. Co.* (1904) 178 N. Y. 75, 70 N. E. 117, affirming (1903) 79 App. Div. 645, 80 N. Y. Supp. 1144. Accordingly it was held in the case last cited that a street

railway company, filing in 1901 a statement as to a proposed extension, as required by the statute, did not have to secure the permission of the Board of Railroad Commissioners.

While under the New York Railroad Law of 1890 a street railway company was not required to obtain from the Railroad Commissioners a certificate of convenience and necessity when desiring to extend its lines, a railroad company could not, under the guise of extending its lines, build an entirely new road which would constitute the greater part of its system, without obtaining the certificate. *New York C. & H. R. R. Co. v. Buffalo & W. Electric Co.* (1904) 96 App. Div. 471, 89 N. Y. Supp. 418. Accordingly it was held in this case that a street railway consisting of 5 miles of track could not build a so-called extension of 70 miles without obtaining the approval of the Commissioners. But in *Roberts v. Huntington R. Co.* (1907) 56 Misc. 62, 105 N. Y. Supp. 1031, it was held that, though a street railway only 3 miles in length proposed to extend its system an additional 15 miles, such an extension did not amount to the construction of a new road, and, under the Railroad Law of 1890, did not require the approval of the Public Service Commission.

It has been held that where a street railway company was under no obligation, either contractual or by the terms of its charter, to extend its lines, the Public Service Commission had no power to order an extension which, in the honest opinion of the directors of the road, would prove unprofitable. *Towers v. United R. & Electric Co.* (1915) 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170. In this case it appeared that the Commission had ordered a street railway to extend its lines by a single track for 3 miles into the country, and to operate on the extension a single car, with such headway as the company might determine. It was insisted by the company that such an extension, equipped and operated as ordered by the Commission, was unwise from an engineering standpoint, and could only be operated at a loss to the company. Holding that the leg-

islature never intended by the creation of the Commission to deprive the directors of railway companies of their discretionary power in such matter, the court said: "It is apparent from an examination of the record that the construction and equipment of this extension in the way the directors of the company, in the exercise of their honest judgment, considered that it should be constructed, or equipped and operated, would result in an annual loss to the company. That such would be the case cannot be doubted, and is not denied by the appellant. What the Commission has done, and what it intended to do, is to order the construction of a 'jerk-water' line, equipped with one car only, from Overlea to the point indicated in the order. This they did against the judgment of the directors of the appellee company. If the conclusion of the Commission as to questions of fact be accepted as sound, this was the only possible construction and equipment that could have been ordered that would have shown any profit at all. In the judgment of the company, this kind of a road is highly undesirable from a business, engineering, and operating standpoint, and the construction of such a road is disapproved of by its directors. The manner of construction, equipment, and operation of such an extension are, in our opinion, matters to be determined by the directors of the company. As to such matters, the legislature did not intend that the judgment and discretion of the directors of the company, when honestly exercised, should be controlled or ignored either by the Public Service Commission or the courts. The company submitted to the court abundant evidence to show why they regard this 'jerk-water' line as an unprofitable and unbusiness-like undertaking. In overruling their judgment and requiring this extension to be made upon the terms specified in the order, the Public Service Commission substituted its judgment for that of the directors of the appellee company. This . . . it had no power to do."

An approval by the Railroad Com-

missioners of an extension of a street railway was upheld in *Daniels v. Commonwealth Ave. Street R. Co.* (1900) 175 Mass. 518, 56 N. E. 715, over the objection that the extension was partly over the tracks of another company, intervening between the old and new tracks of the company making the extension, and in the same case it was held that the fact that the extension approved was temporary, being only a detour made to avoid a grade crossing then under process of being changed, was no objection to its validity.

In Ohio, 'it is provided by statute (§ 614-51, Gen. Code) that the requirements and orders of a city council, respecting additions and extensions by public utilities, shall be subject to review by the Public Utilities Commission. Construing this statute, it was held in *Cincinnati v. Public Utilities Commission* (1915) 91 Ohio St. 331, P.U.R.1916A, 1057, 110 N. E. 461, Ann. Cas. 1916E, 1081, that, on appeal to the Commission, it was authorized only to pass on conditions presented by the evidence, and to determine whether or not the ordinance in question was, in its requirements, just and reasonable, and whether it should be enforced against the railway company, and that it could exercise no further power in the matter.

#### c. Abandonment.

In Nebraska, by constitutional provision (art. 5, § 19a), and by statute enacted pursuant thereto (Rev. Stat. 1913, § 6107), the state Railway Commission is authorized and required to regulate the rates and services of, and to exercise a general control over, all railroads and all other common carriers. Construing these provisions, it was held in *H. Herpolsheimer Co. v. Lincoln Traction Co.* (1914) 96 Neb. 154, 147 N. W. 206, 1114, rehearing denied in (1914) 97 Neb. 113, 149 N. W. 326, that a street railway company could not abandon a part of its lines, or withdraw the service theretofore given on such lines, without first having obtained the approval of the Commission, and that an injunction would be granted to prevent it from so doing.

*d. Crossings.*

In many states, the public service commissions or similar public bodies are specifically given by statute authority to determine the necessity for and the mode of making a crossing by a street railway over the tracks of another road.

**United States.**—*Malott v. Collinsville, C. & E. St. L. Electric R. Co.* (1901) 47 C. C. A. 345, 108 Fed. 313.

**Illinois.**—*Chicago, P. & St. L. R. Co. v. Jacksonville R. & Light Co.* (1910) 245 Ill. 155, 91 N. E. 1024; *Illinois C. R. Co. v. St. Louis & N. E. R. Co.* (1906) 125 Ill. App. 446.

**Kansas.**—*State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (1909) 81 Kan. 430, 28 L.R.A.(N.S.) 1082, 105 Pac. 704.

**Maine.**—*Maine C. R. Co. v. Waterville & F. R. & Light Co.* (1896) 89 Me. 328.

**Michigan.**—*Jackson & Suburban Traction Co. v. Railroad Comrs.* (1901) 128 Mich. 164, 87 N. W. 133.

**Missouri.**—*State ex rel. St. Joseph R. Light & P. Co. v. Public Service Commission* (1917) 272 Mo. 645, 199 S. W. 999.

**New York.**—*Olean Street R. Co. v. Pennsylvania R. Co.* (1902) 75 App. Div. 412, 78 N. Y. Supp. 113, affirmed without opinion in (1903) 175 N. Y. 468, 67 N. E. 1086; *Lake Shore & M. S. R. Co. v. Chautauqua Traction Co.* (1907) 54 Misc. 275, 104 N. Y. Supp. 550; *New Paltz, H. & P. Traction Co. v. Central New England R. Co.* (1914) 84 Misc. 528, 147 N. Y. Supp. 624.

**Pennsylvania.**—*Pittsburgh R. Co. v. Pittsburgh* (1918) 260 Pa. 424, P.U.R. 1918F, 301, 103 Atl. 959.

**Canada.**—*Ottawa Electric R. Co. v. Ottawa* (1906) 37 Can. S. C. 354; *British Columbia Electric R. Co. v. Vancouver, V. & Eastern R. Nav. Co.* (1913) 48 Can. S. C. 98.

Under the Illinois statute (Rev. Stat. 1903, p. 1479), providing that, when one railroad desired to cross another and objection was made as to the place or manner of crossing, the matter should be submitted to the Board of Railroad and Warehouse Commissioners, it has been held that a traction company organized under

the Railroad Act could not construct a crossing over another railroad, where objection was made, until the matter had been submitted to the Commission. It was further held that the power of the Commission under the act was in the nature of a veto power, it having the power to prevent a crossing being made at any place or in such manner as would unnecessarily impede or endanger travel, but not the power to indicate a particular place, and no other, at which the crossing should be made. *Illinois C. R. Co. v. St. Louis & N. E. R. Co.* (1906) 125 Ill. App. 446.

By the Illinois Act of 1907, relating to the crossing of one railroad by another, it was specifically provided that any railroad desiring to cross the tracks of another should first obtain permission from the Railroad and Warehouse Commission, prescribing the place where and the manner in which such crossing should be made, and by another provision of the act it was provided that street railroads should be considered to be railroads within the meaning of the act. This latter provision was not incorporated in the statute prior to its amendment in 1907. By this act, the permission of the Commission was required to be obtained, regardless as to whether or not any objection to the place or mode of crossing had been made, while under the law prior to 1907 permission was not required except where there were objections. *Chicago, P. & St. L. R. Co. v. Jacksonville, R. & Light Co.* (1910) 245 Ill. 155, 91 N. E. 1024.

In Pennsylvania, by the Public Service Company Law (Act 1913, P. L. 1374) the Public Service Commission was given primary jurisdiction over street railway crossings, and accordingly it has been held that the courts had no jurisdiction to grant an injunction restraining the construction of a crossing, except on appeal from an order of the Commission, granting a certificate of public convenience. *Pittsburgh R. Co. v. Pittsburgh* (1918) 260 Pa. 424, P.U.R.1918F, 301, 103 Atl. 959.

In *Malott v. Collinsville, C. & E. St. L. Electric R. Co.* (1901) 47 C. C. A. 345, 108 Fed. 313, it was held that a



corporation organized under the general Railroad Law was subject to all the statutory provisions relating to railroads, and the fact that it operated street cars for purely local purposes, in cities through which it passed, did not alter its character. It was, therefore, held that an interurban electric railway company was subject to the provisions of the Illinois Act of 1889 (§ 209, chap. 114), giving the Board of Railroad and Warehouse Commissioners the power to determine the fitness of a proposed railroad crossing where objection to the plan was made.

Under the Kansas statutes (Laws 1907, chap. 267, § 1, Gen. Stat. 1901, § 5974), giving the Board of Railroad Commissioners power to determine the necessity, place, and manner of the crossing by a street railway company of the lines of another railroad, it has been held that where a street railway company was operating a continuous line across a city, except for a break caused by a number of railroad tracks, over which its passengers were transferred, the Commissioners might require it to construct a crossing below grade. *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (1909) 81 Kan. 430, 105 Pac. 704, wherein it was said: "By the terms of the statute the Board of Railroad Commissioners had power to determine that the crossing should be made at the place indicated, by means of a subway beneath the railroad tracks. But in addition to this it also had power to determine the 'manner' of crossing, and we think this fairly implies the right to make any reasonable requirements having relation to the safe operation of both roads, that being a matter committed to its control. . . . For instance, the kind of support to be provided for the surface railroad, and the grade and consequent length of the approaches to the subway, are details clearly subject to regulation by the Board. Consequently, a proper function of the Board is to decide upon a plan of the work, as has been done in this case." It was further objected that an order of the Board of Railway Commissioners, requiring a street railway to construct a crossing over

certain railroad tracks, was invalid in that the plan involved the exclusive use by the railway company, not only of the subway itself, but of that portion of the street taken up by the approaches, which was a violation of the prohibition against the grant to street railways of exclusive privileges in streets, contained in Laws 1903, chap. 122, § 58. Answering this contention, the court said: "The most suitable arrangement to be made in this regard is a fair matter for the determination of the Railroad Board. The statute (Laws 1903, chap. 122, § 58) giving the mayor and councilmen of cities of the first class authority to regulate public grounds contains a prohibition of any exclusive privilege for a railway in a street, but the restriction applies only to acts of the city officials, as it is a limitation of the power granted to them."

In *Jackson & Suburban Traction Co. v. Railroad Comrs.* (1901) 128 Mich. 164, 87 N. W. 133, it was held that under the power given the Railroad Commissioners by statute (2 Comp. Laws, §§ 6349 et seq.), to regulate and prescribe the manner of a crossing by a street railway over another road, the Commissioners had the power to order an overhead crossing to be made notwithstanding the contention of the railway that in order to comply with the order it must exercise the power of eminent domain, which it did not possess, and that therefore the order, in effect, amounted to an order forbidding the construction of that part of its road.

And in *New Paltz, H. & P. Traction Co. v. Central New England R. Co.* (1914) 84 Misc. 528, 147 N. Y. Supp. 624, affirmed without opinion in (1914) 164 App. Div. 919, 149 N. Y. Supp. 1099, it was held that an order of the Public Service Commission, requiring a trolley company's tracks to be run over a bridge to be constructed by a railroad in order to abolish a grade crossing, was not open to objection on the part of the trolley company on the ground that the order required it to move its tracks from its own right of way onto the property of the railroad company, as the fact that the tracks were car-

ried on a bridge above the soil did not affect its ownership therein.

In *Owosso v. Michigan United R. Co.* (1918) — Mich. —, 167 N. W. 919, it was held that, while control of crossings of street railways over a railroad was vested in the Railroad Commission by statute (Comp. Laws 1915, § 8365), a resolution of a city requiring the tracks of a street railway to be removed from the side to the center of a street, although it necessitated changing a crossing, was not invalid because of the fact that the Commission had not approved the change in the crossing, it appearing that no application had been made to the Commission for its approval.

It has been held that the power given the Public Service Commission to regulate the manner in which railroad crossings should be made, and to apportion the cost thereof, included the power to apportion to a street railway a portion of the cost of eliminating a grade crossing over a steam railroad. *State ex rel. St. Joseph R. Light & P. Co. v. Public Service Commission* (1917) 272 Mo. 645, 199 S. W. 999.

In *Ottawa Electric R. Co. v. Ottawa* (1906) 37 Can. S. C. 354, it was held that the Board of Railway Commissioners was not prevented from apportioning the cost of the change in a railway crossing on one of the streets of a city, between the railroad company, the city, and the street railway company, by reason of an agreement between the city and the railway company, empowering the company to operate cars on the city streets; such agreement could not be interpreted to mean that the city was bound to furnish the company with a street over which to run its cars, without additional cost to the company.

And in *British Columbia Electric R. Co. v. Vancouver, V. & E. R. Nav. Co.* (1913) 48 Can. S. C. 98, it was held that the Board of Railway Commissioners of Canada had the authority to apportion the cost of the change in a railroad crossing between a Dominion railroad, a street railway operating under provincial authority, and the city, under the Railway Act (Rev.

Stat. (Can.) 1906, chap. 37) conferring jurisdiction on the Commission to determine who were "interested parties," who should contribute to the cost of crossing works.

Under the laws of New York (Railroad Law, §§ 91, 92, 94; McKinney, Consol. Laws, bk. 48, pp. 135, 138, 141), the Public Service Commission is empowered to determine who shall bear the expense of a street railway crossing, as well as the mode and manner in which the crossing shall be made. *New Paltz, H. & P. Traction Co. v. Central New England R. Co.* (1914) 84 Misc. 528, 147 N. Y. Supp. 624. But under the Railroad Law of 1890 (§ 12), the Board of Railroad Commissioners was given the exclusive power to determine only the manner and method of crossing a steam railroad by a street railway, and the supreme court was invested with the power to determine the point of crossing and the compensation to be paid. *Olean Street R. Co. v. Pennsylvania R. Co.* (1902) 75 App. Div. 412, 78 N. Y. Supp. 113, affirmed in (1903) 175 N. Y. 468, 67 N. E. 1086; *Lake Shore & M. S. R. Co. v. Chautauqua Traction Co.* (1907) 54 Misc. 275, 104 N. Y. Supp. 550. But in the case last cited it was held that under the Laws of 1893, chap. 239, the supreme court was given jurisdiction to allow a temporary crossing pending the decision of the Commission as to the permanent crossing, and the decision of the court commissioners as to compensation.

In *Louisville & N. R. Co. v. Bowling Green R. Co.* (1901) 110 Ky. 788, 63 S. W. 4, it was held that since the statute creating the Railroad Commission expressly excepted street railways from its jurisdiction, the Commission had no power to determine whether a proposed crossing by a street railway over the tracks of a commercial railroad was reasonable and feasible, nor did the fact that the Commission was given jurisdiction over the steam railroad give it supervision over the proposed crossing.

#### *e. Operation generally.*

Under the New York Railroad Law of 1890 (§ 161, re-enacted in substance in Public Service Commission

Law, § 49, McKinney, Consol. Laws, bk. 47, p. 53, whereby a like power was given to the Public Service Commission), the Board of Railroad Commissioners was empowered to hear complaints as to the operation of street railways, and to determine whether the mode of operating the road and conducting its business was reasonable and expedient, in order to promote the security, convenience, and accommodation of the public, and the right to review such determination was given to the courts. Accordingly it was held in *People ex rel. Linton v. Brooklyn Heights R. Co.* (1902) 172 N. Y. 90, 64 N. E. 788, affirming (1902) 69 App. Div. 549, 75 N. Y. Supp. 202, that mandamus would not lie in the first instance to compel an elevated railway company to restore continuous train service to a specified station.

In *Chicago v. O'Connell* (1917) 278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210, it was insisted that an order of the Public Utilities Commission requiring the street railways of Chicago to maintain a certain standard of service, and the Public Utilities Act, in so far as it purports to confer on the Commission power to make the order, deprived the railway company and the city, which held an option on the railways, of property without due process of law, and took and damaged the private property of the railway and city without just compensation. Holding that the order was issued in the lawful exercise of the police power of the state, and as such was not subject to the constitutional objections urged against it, the court said: "The regulation of public utilities is one phase of the exercise of the police power of the state. The police power may be exercised by the legislature directly, or it may be exercised indirectly by conferring the power upon agencies created by the legislature. The power is an attribute of sovereignty, and is primarily vested in the legislature, which has the right to recall it at any time from the agency to which it has been delegated, and, after being recalled, to retain it or confer it upon some other agency of government. In the exercise of this power

the state may interfere whenever the public interests demand such interference, and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . A rightful exercise of the police power is not a violation of any of the provisions of the Constitution upon which appellees rely; . . . and statutes affecting the owners of public utilities by lessening their privileges, regulating their charges, and increasing their burdens, within reasonable bounds, are uniformly held valid."

Where the Public Service Commission issued an order requiring a railroad to maintain a waiting room or car at the intersection of two streets, during certain months of the year, it has been held that the company would not be relieved from its duties under the order because of the refusal of the city to allow a car to be placed at the point indicated, or of the difficulty in renting a room in the locality, but that under the circumstances the company might appeal to the Commission for relief. *Public Service Commission v. New York & Q. C. R. Co.* (1915) 170 App. Div. 580, 156 N. Y. Supp. 323.

And in *Brady v. South Shore Traction Co.* (1912) 197 Fed. 669, it was held that a street railway which had obtained a license from a city to operate its cars over a bridge, on the condition that it would not charge more than 5 cents, and would furnish transfers at the termini, would be enjoined at the instance of another company operating cars over the bridge, from operating a purely shuttle service over the bridge at a fare of 3 cents, it appearing that it had failed to secure the approval of the Public Service Commission covering such service.

It has been held that the Public Service Commission should grant a rehearing on an order for additional cars issued before the beginning of the war, where it was claimed that because of conditions due to the war it was difficult, if not impossible, for the railway company to raise the money to purchase them. However, it was held

that the part of the order which related only to six cars should not be suspended pending the rehearing, their cost not being sufficient to justify it, but that that part of the order which required the purchase of forty-two new cars should be stayed until the rehearing could be had. *People ex rel. United Traction Co. v. Public Service Commission* (1915) 167 App. Div. 498, 153 N. Y. Supp. 542.

*f. Rates and fares.*

With respect to the regulation of rates of fare of a street railway company by a public service commission, the decision in a majority of the cases has turned on the question whether the ordinance granting the franchise and fixing the rate of fare to be charged constituted such a contract, the impairment of which is forbidden by the Constitution. These cases have been fully set out *supra*, under subdivision IV. of this note, or in the note in 3 A.L.R. 730 on the power to increase rates fixed by franchise. Aside from this it seems to be conceded that the regulation and fixing of rates of public service corporations, being a legislative function, may be lodged in public service commissions or similar agencies of the state, created by the legislature and invested with supervision and control of street railways.

**United States.**—*Portland R. Light & P. Co. v. Railroad Commission* (1913) 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820, affirming (1909) 56 Or. 468, 105 Pac. 709, 109 Pac. 273; *Milwaukee Electric R. & Light Co. v. Railroad Commission* (1915) 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming (1912) 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; *Wilmington City R. Co. v. Taylor* (1912) 198 Fed. 159; *Trenton & M. County Traction Corp. v. Trenton* (1915) 227 Fed. 502, affirmed in (1915) P.U.R.1916C, 599, 143 C. C. A. 416, 229 Fed. 140.

**Georgia.**—*GEORGIA R. & POWER Co. v. RAILROAD COMMISSION* (reported herewith) ante, 1.

**Massachusetts.**—*BOARD OF SURVEY v. BAY STATE STREET R. Co.* (reported herewith) ante, 24; *Fall River v. Public Service Comrs.* (1917) 228

Mass. 575, P.U.R.1918B, 141, 117 N. E. 915; *Donham v. Public Service Commission* (1919) — Mass. —, P.U.R. 1919C, 880, 122 N. E. 397; *Fall River v. Public Service Commission* (1919) — Mass. —, P.U.R.1919C, 992, 122 N. E. 406.

**New Jersey.**—*Public Service R. Co. v. Public Utility Comrs.* (1911) 81 N. J. L. 363, 80 Atl. 27.

**New York.**—*Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 3 A.L.R. 685, P.U.R.1918D, 30, 119 N. E. 433; *Willcox v. Richmond Light & R. Co.* (1910) 142 App. Div. 44, 128 N. Y. Supp. 266, affirmed in (1911) 202 N. Y. 515, 95 N. E. 1141; *People ex rel. Bridge Operating Co. v. Public Service Commission* (1912) 153 App. Div. 129, 138 N. Y. Supp. 434; *Metzger v. New York State R. Co.* (1915) 168 App. Div. 187, P.U.R.1915F, 727, 154 N. Y. Supp. 789; *People ex rel. New York & M. S. Traction Co. v. Public Service Commission* (1916) 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405.

**Ohio.**—*State ex rel. Krichbaum v. Northern Ohio Traction & Light Co.* (1913) 2 Ohio App. 113, 34 Ohio C. C. 262.

**Oregon.**—*Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R. 1919A, 127, 173 Pac. 1178.

**Pennsylvania.**—*ST. CLAIR v. TAMAGUA & P. ELECTRIC R. Co.* (reported herewith) ante, 20.

**Utah.**—*Salt Lake City v. Utah Light & Traction Co.* (1918) — Utah, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556.

In *GEORGIA R. & POWER Co. v. RAILROAD COMMISSION* (reported herewith) ante, 1, the court having determined that as to certain lines there was no contract between the municipality and the street railway, fixing rates, the jurisdiction of the Railroad Commission to fix the rates on those lines was upheld under the express terms of the statute conferring such power. As previously shown (subdivision IV.), the denial of the jurisdiction as to other lines was due to the existence of valid contracts on the subject between the municipality and the street railway company, which brought them within the provision

of the statute to the effect that the powers of the Commission did not extend to the impairment of such contracts.

"The fixing of rates which may be charged by public service corporations of the character here involved [street railway] is a legislative function of the state." *Milwaukee Electric R. & Light Co. v. Railroad Commission* (1915) 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming (1912) 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911.

The purpose of the statute empowering a Commission to regulate street car fares was stated in *BOARD OF SURVEY v. BAY STATE STREET R. Co.* (reported herewith) ante, 24, as follows: "The plain purpose of the legislature, in recognition of the fact that many street railways operate miles of tracks extending through numerous cities and towns, was to prescribe for the regulation of fares throughout the commonwealth by a single public board, which may be expected to act with a broad and unbiased view for the promotion of the common good of all the conflicting interests involved, and not under the influence of purely local considerations. The statute is a legislative determination that it is unwise and inexpedient longer to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares, contained in locations granted by the public officers of different municipalities."

And in *Portland R. Light & P. Co. v. Railroad Commission* (U. S.) supra, it was held that, under the unquestioned authority of the states to control the rates of fare to be charged by street railway companies, the state could delegate to the Railroad Commission the power to regulate rates. It was accordingly held that the Commission had the power to require a railway company to reduce its rate between two points to correspond with that charged between other points on its lines, the conditions being practically the same.

Likewise, in *Fall River v. Public*

*Service Comrs.* (1917) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915, it was held that, under the statute (Stat. 1913, chap. 784), the Public Service Commission had plenary power over the establishment and regulation of fares on street railways, and accordingly it was within the power of the Commission to allow the railway to discontinue the sale of six-for-a-quarter tickets, provided for in the original grant.

In *O'Brien v. Public Utility Comrs.* (1918) — N. J. L. —, P.U.R.1919B, 865, 105 Atl. 132, it was held that a Public Service Commission had the power to sanction a reasonable increase of rates to meet increased cost of operation, and an increase from 6 to 7 cents was sustained. See, to the same effect, *Trenton v. Trenton & M. County Traction Corp.* (1918) — N. J. L. —, P.U.R.1919B, 873, 105 Atl. 136; *Robertson v. Wilmington & P. Traction Co.* (1918) — Del. —, P.U.R.1919B, 129, 104 Atl. 839.

Where a street railway company promulgates a regulation as to rates, and files the same with the Public Service Commission as required by law, the courts have no jurisdiction to pass on its reasonableness until the Commission has acted, the primary jurisdiction over rates being in the Commission. *Metzger v. New York State R. Co.* (1915) 168 App. Div. 187, P.U.R. 1915F, 727, 154 N. Y. Supp. 789.

In *State ex rel. Krichbaum v. Northern Ohio Traction Light Co.* (1913) 2 Ohio App. 113, 34 Ohio C. C. 262, which was a proceeding by quo warranto brought to revoke the grant of a franchise to an interurban street railway on the ground that the fares charged were excessive, it was held that where the only question involved was the reasonableness of the fares charged, the courts had no jurisdiction, as that was a matter exclusively within the jurisdiction of the state Railroad Commission, as provided by statute (102 L. O. L. 553, 556, 557).

Similarly, in *ST. CLAIR v. TAMAQUA & P. ELECTRIC R. Co.* (reported herewith) ante, 20, it was held that the courts had no jurisdiction as to rates until the Public Service Commission had passed on them.

In Virginia, the jurisdiction of the Corporation Commission over the rates charged by street railway companies is limited by the Constitution (§ 156b) to those companies operating wholly without, or partly without and partly within, a city, the power to fix rates of companies operating wholly within cities being reserved to the cities. *Com. ex rel. Dowden v. Richmond & R. River R. Co.* (1914) 115 Va. 756, 80 S. E. 796.

Under the Oregon statute (Laws 1911, p. 483), creating the Public Service Commission, it is empowered to act on its own motion, or on petition of the public utility itself, or on complaint of any mercantile, agricultural, or manufacturing society, or by any body politic or municipal organization, or by any three persons, firms, corporations, or associations. Accordingly it has been held that the fact that the state did not institute proceedings in regard to raising the rate of fare charged by a street railway company did not affect the jurisdiction of the Commission. *Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R.1919A, 127, 173 Pac. 1178.

And it has been held that a Board of Public Utility Commissioners had the power to suspend an increase in the fares of a street railway company, pending a hearing and determination of the reasonableness of the change, without giving notice and an opportunity to be heard as to the order of suspension, thus preserving the status quo until a hearing on the merits could be had. *Trenton & M County Traction Corp. v. Trenton* (1915) 227 Fed. 502, affirmed in (1915) P.U.R.1916C, 599, 143 C. C. A. 416, 229 Fed. 140.

But where the statute creating a Public Service Commission specifically provides that street railway fares shall not be over 5 cents, the Commission has no power to authorize an increase above that amount. *State ex rel. Tacoma R. & Power Co. v. Public Service Commission* (1918) 101 Wash. 601, P.U.R.1918E, 277, 172 Pac. 890.

In *Wilmington City R. Co. v. Taylor* (1912) 198 Fed. 159, it was held that where, by its method of procedure, a Public Utility Board had deprived a

traction company of a fair opportunity to be heard, an order requiring the restoration of the sale of "six-for-a-quarter" tickets amounted to depriving the company of its property without due process of law.

In *Willcox v. Richmond Light & R. Co.* (1910) 142 App. Div. 44, 128 N. Y. Supp. 266, affirmed in (1911) 202 N. Y. 515, 95 N. E. 1141, it was held that on the refusal of street railway companies to issue transfers, as provided by their franchise and by agreement with a municipality, the Public Service Commission had jurisdiction to institute summary proceedings to compel a compliance with the terms of the franchise and agreement.

In *Re Niagara Falls Bd. of Trade* (1909) 20 Ont. L. Rep. 197, 15 Ont. Week. Rep. 119, it was held that by the Ontario Railway Act (subsec. 5 of § 171), providing that the provisions of the act giving the Railway and Municipal Board jurisdiction over street railway fares should not apply to a company whose tariff was subject to the approval of any commissioners in whom was vested any park or lands owned by the Crown for public use, the Board had no jurisdiction over the fares of a street railway operated in Queen Victoria Niagara Falls park. But it was further held that, by the act approving an agreement between the company and the park commissioners, a part of the Ontario Railway Act was included, and therefore any change in the fares of the company was subject to the approval of both the park commissioners and the Board.

It has been held that the power conferred on the Board of Railway Commissioners of Canada by statute (Railway Act (Can.) Rev. Stat. 1906, chap. 37) did not include the power to order a street railway organized and operating under authority conferred by a provincial legislature, to make through traffic agreements with a railway company subject to the authority of the Dominion Parliament. *Montreal Street R. Co. v. Montreal* (1909) 43 Can. S. C. 197.

In *Montreal Park & I. R. Co. v. Montreal* (1909) 43 Can. S. C. 256, 18 Ann. Cas. 143, it was held that the Board

of Railway Commissioners of Canada had no power over a railway company organized and operating under authority of a provincial legislature.

*g. Equipment of cars.*

The power conferred on the Public Service Commission by statute, in New York (Public Service Commission Law, § 50; McKinney, Consol. Laws, bk. 47, p. 63) to order repairs and changes in the equipment of street railways, has been held to be sufficiently broad to justify an order of the Commission, requiring a street railway to equip its cars with both power and geared hand brakes. *People ex rel. Brooklyn Heights R. Co. v. Public Service Commission* (1913) 157 App. Div. 698, 142 N. Y. Supp. 942.

In *Henderson v. Durham Traction Co.* (1903) 132 N. C. 779, 44 S. E. 598, it was held that the power given the Corporation Commission to exempt street railway companies from the provision of an act requiring them to equip their cars with fenders, when, in the judgment of the Commission, the enforcement of the statute was unnecessary, did not give the Commission the power to exempt all the street railway companies in the state from the operation of the statute. On this point the court said: "The power conferred upon the Commission is one of exemption, and not of suspension. The order made by the Commission exempts all street railway companies from the provisions of the act, as to the fenders, until otherwise ordered by the Commission, thus applying to all street railways in the state, and of course operating, if within the power of the Corporation Commission, to suspend the statute. This, we think, exceeds the power conferred by the statute, and is therefore invalid, thus leaving the act in force, and the duty of the street railway companies to provide fenders as prescribed by the act."

*h. Tracks or paving.*

By § 110 of the Indiana statute creating the Public Service Commission (Acts 1913, p. 167), the Commission is given control over all matters of service in the operation of street railways. Accordingly it has been held

that the right of a street railway to replace a double-track line with a single track, being a matter of reasonable service, should first be submitted to the Commission for determination, and the action by the city to enjoin the company from replacing its double track with a single track was improperly brought. *Vincennes v. Vincennes Traction Co.* (1918) — Ind. —, 120 N. E. 27.

Under the Connecticut Statute of 1901 (Rev. Stat. 1902, § 3882), it was provided that a street railway company might appeal to the Public Utilities Commission from any decision of municipal authorities with respect to any matter relating to street railways, and it was held that on such an appeal the Commissioners tried the matters before them *de novo*, and might issue any order they saw fit regarding the regulation of the company. In this case it appeared that the municipal authorities had refused to allow the company to replace certain asphalt paving with a creosote-resinate wood pavement, and, on appeal, the Commissioners "permitted and directed" the railway company "to lay a creosote-resinate wood pavement between its rails and 2 feet outside of" same, between two described points, "in order that its practicability and efficiency might be thoroughly tested," which order, on appeal to the supreme court of errors, was held to be within the power of the Commissioners. *Hartford v. Hartford Street R. Co.* (1903) 75 Conn. 471, 53 Atl. 1010. In *Connecticut Co. v. Norwalk* (1915) 89 Conn. 528, P.U.R. 1915E, 490, 94 Atl. 992, it was insisted that a special act authorizing the Public Utilities Commission to determine the number of tracks, not exceeding two, to be laid by any street railway on a bridge to be constructed under the provisions of said act, was unconstitutional in that it pretended to confer jurisdiction on the Commission to determine the number of tracks to be laid across the bridge, arbitrarily, and without regard to public convenience or safety. Construing the act to imply a determination reached in the usual way provided by the Public Utilities Act, the court said: "The

Public Utilities Commission succeeded the railroad commissioners, and all the rights, powers, and duties heretofore vested in the railroad commissioners, and not inconsistent with the Public Utilities Act, were transferred to and continued in the Commission, and new and enlarged powers were by the act vested in the Commission. Chapter 74 of the Public Acts of 1853 created the railroad commissioners, and provided that they might make orders in reference to the management and operation of railroads which, in their opinion, were necessary for the public safety. Throughout the many statutes relating to the powers of the railroad commissioners over railroads and railways, we find that public necessity, convenience, or safety is made the condition of the right of the commissioners to act. This basic fact is either found by the general assembly or delegated by it to the commissioners to find. The Public Utilities Act was passed upon the public demand for greater public protection through larger control of and supervision over public service corporations. The act is broad in its sweep, extensive in the jurisdiction conferred, and far-reaching in the supervision of public service corporations and the control over public and private interests. It is essentially a remedial statute, and as such, like the Workmen's Compensation Act, is to receive a liberal construction, designed to effectuate its cardinal purpose. It would be a singular legislative condition, if it were so, that within two years of the enactment of this highly important piece of constructive legislation the legislature were found to have passed an act intentionally disregarding the foundation upon which all the powers of the railroad commissioners over railroads and railways rested, and committed to their successors in this single matter of operation the power of acting at their will and without regard to the necessity, convenience, or safety of the public. And that, too, while leaving all other administrative matters contingent upon this vital principle of public welfare. Doubly singular would this be when the legislature,

twice in 1911, the year of enactment of the Public Utilities Act, and twice in 1913, the year of the passage of the special act in controversy, made the public convenience, or necessity, or safety, the basis of the administrative orders authorized by the new Commission."

Under the New Jersey Public Utility Act 1911, p. 378, the Board of Public Utility Commissioners was given general supervision, jurisdiction, and control over all public utilities, and by a specific provision power was conferred on it to permit a street railway company to change the gauge of its tracks to the standard steam railway gauge. Accordingly it was held in *State, Phillipsburg, Prosecutor, v. Public Utility Comrs.* (1913) 85 N. J. L. 141, 88 Atl. 1096, that an order directing a horse-car railroad company to change its gauge to the standard was within the jurisdiction of the Commissioners.

In *Re West Toronto & T. R. Co.* (1911) 25 Ont. L. Rep. 9, 20 Ont. Week. Rep. 271, it was held that the Ontario Railway and Municipal Board had the power, under the Act of 1906 (§§ 63, 64), to order a street railway company to reconstruct or repair its tracks in accordance with an agreement between the railway company and the city, requiring the company to keep in repair its tracks, etc.

In *State ex rel. Tacoma R. & Power Co. v. Public Service Commission* (1918) 101 Wash. 601, P.U.R.1918E, 277, 172 Pac. 890, it was held that the statute creating the Public Service Commission did not empower it to abrogate the terms and conditions contained in franchises granted by municipalities, and therefore the Commission could not relieve a street railway from the duty of paving between its tracks, although it might appear that its income was not sufficient to allow of the expenditure and at the same time permit it to give an adequate service to the public.

#### 4. Bridges.

By statute in Maine (Rev. Stat. chap. 51, § 75), it was provided that bridges erected by a municipality, over which a street railroad passed,



should be constructed and maintained in such manner as the Board of Railroad Commissioners might determine. That after notice of a hearing the Commissioners should determine all questions of repair, renewal, or, if necessary, rebuilding, and should apportion the cost between the railroad company and the city or town. It has been held that under this statute the Railroad Commissioners were invested with the power to require the repair of an old wooden bridge, and to apportion the cost between the railroad company and the town as it might deem fair and just. *Orono v. Bangor R. & Electric Co.* (1909) 105 Me. 428, 74 Atl. 1022. And in a later case it was held that the Commissioners, under this statute, were empowered to order the construction of a new steel bridge in place of the weakened wooden one. (1912) 109 Me. 292, 84 Atl. 385.

In *Norwalk v. Connecticut Co.* (1914) 88 Conn. 471, 91 Atl. 442, it was insisted that under chap. 207 of the Public Acts of Connecticut of 1911, the Public Utilities Commission had no power to apportion the cost of a new bridge, built to replace an old one over which the tracks of a street railway ran, between the municipality and the railway company, its power being limited by the statute to cases of "repair, strengthening, or reconstruction." Holding that the act was broad enough to cover a case of a new bridge built to replace an old one, the court said: "This point is too fine for practical use in the construction of the statute. The word 'reconstruction,' as distinguished from repair and strengthening, means rebuilding. It cannot be limited to an exact reproduction of the original bridge. Some latitude must be allowed for present and prospective changes in highway and waterway traffic, and for the expression of architectural design. . . . The word 'reconstruction,' as used in the latter part of the act, is evidently large enough to include a reconstruction adapted to changed conditions, though the result is, in one sense, a new bridge, provided it is in fact a substitute, in point of highway traffic, 5 A.L.R.—5.

for the old." In that case, it was further held that, under chap. 207 of the Public Acts of Connecticut of 1911, the jurisdiction of the Public Utilities Commission as to the necessity for and character of a new bridge built to replace an old one, and to apportion the cost between a street railway running over the bridge and a municipality, attached as soon as the parties disagreed either as to the necessity and character of the bridge or the apportionment of the cost.

But in *Augusta v. Lewiston, G. & W. Street R. Co.* (1915) 114 Me. 24, P.U.R. 1915F, 260, 95 Atl. 267, it was held that where a municipality and a street railroad had agreed as to the nature of the repairs to be made to a bridge, and to apportion the cost between themselves, and the repair had actually been made in pursuance of such agreement, the Public Utilities Commission, which had succeeded to the powers of the Railroad Commission, had no power under the statute (Rev. Stat. § 75, chap. 51) to apportion the costs for such repairs.

#### *j. Motive power.*

Under the New York Railroad Law of 1890 (chap. 565, § 100, re-enacted in substance as Railroad Law, § 180, McKinney, Consol. Laws, bk. 48, p. 201, requiring the consent of the Public Service Commission), the consent of the Board of Railroad Commissioners was required before a street railway company could change its motive power. *St. Michael's P. E. Church v. Forty-Second Street, M. & St. N. Ave. R. Co.* (1899) 26 Misc. 601, 57 N. Y. Supp. 881; *People ex rel. Babylon R. Co. v. Railroad Comrs.* (1898) 32 App. Div. 179, 52 N. Y. Supp. 908, affirmed in (1899) 153 N. Y. 711, 53 N. E. 1129; *Re Kingsbridge R. Co.* (1901) 66 App. Div. 497, 73 N. Y. Supp. 440; *People ex rel. Luckings v. Railroad Comrs.* (1898) 156 N. Y. 693, 51 N. E. 1093, affirming (1898) 30 App. Div. 69, 51 N. Y. Supp. 781.

Under that act, the Board of Railroad Commissioners was authorized to grant permission to street railways to operate their cars by any power other than locomotive steam power. Construing this statute, it was held in

*People ex rel. Babylon R. Co. v. Railroad Comrs.* (1898) 32 App. Div. 179, 52 N. Y. Supp. 908, affirmed in (1899) 158 N. Y. 711, 53 N. E. 1129, that the Commissioners erred in not taking jurisdiction of an application of a street railway company to change its motive power from horse power to kinetic stored steam power, such power not being within the meaning of "locomotive steam power," as used in the statute.

But it has been held that where the Board of Railroad Commissioners, under the authority vested in them by the statute heretofore mentioned, had granted a street railway permission to change its motive power from horse power to underground electric power, the Board could not subsequently reconsider its ruling, as the privilege granted by it was in the nature of a franchise, and in the absence of statutory authority the Commissioners could not alter it. *People ex rel. Luckings v. Railroad Comrs.* (N. Y.) *supra*.

#### *k. Fiscal management.*

Statutes creating public service commissions or like bodies, and conferring on them power to supervise and control the construction and operation of street railways, generally provide that the commission shall have control over the issuance of bonds and other securities. *Augusta Trust Co. v. Federal Trust Co.* (1907) 82 C. C. A. 309, 153 Fed. 157; *Guaranty Trust Co. v. Metropolitan Street R. Co.* (1910) 180 Fed. 637; *Federal Trust Co. v. Bristol County Street R. Co.* (1915) 222 Mass. 35, 109 N. E. 880; *Kansas City R. Co. v. Public Service Commission* (1917) 273 Mo. 173, P.U.R.1918D, 12, 201 S. W. 74; *People ex rel. Third Ave. R. Co. v. Public Service Commission* (1911) 203 N. Y. 299, 96 N. E. 1011, affirming (1911) 145 App. Div. 318, 130 N. Y. Supp. 97; *People ex rel. Westchester Street R. Co. v. Public Service Commission* (1914) 210 N. Y. 456, 104 N. E. 952, modifying (1913) 158 App. Div. 251, 143 N. Y. Supp. 148; *People ex rel. Dry Dock, E. B. & B. R. Co. v. Public Service Commission* (1915) 167 App. Div. 286, 153 N. Y. Supp. 344.

In the case of *Re Lincoln Traction Co.* (1919) — Neb. —, P.U.R.1919C, 927, 171 N. W. 192, orders of a Public Service Commission with respect to the issue of stock and bonds by a street railway company were passed on, but without specific discussion of the power of the Commission.

The Massachusetts statute respecting the supervision of the issuing of bonds of street railways by the Board of Railroad Commissioners requires not a perfunctory or merely formal approval, but a thoroughgoing investigation, designed for the protection of the public, the stockholders, and the secured and unsecured creditors, which results from an intelligent approval manifested by an adjudication. *Federal Trust Co. v. Bristol County Street R. Co.* (1915) 222 Mass. 35, 109 N. E. 880.

In *Augusta Trust Co. v. Federal Trust Co.* (1907) 82 C. C. A. 309, 153 Fed. 157, the court, refusing relief to the holder of a note issued by a street railway corporation, on the ground that the note had been issued without the approval of the Board of Railroad Commissioners as required by the Massachusetts statute, said: "The statute . . . requires that no bonds be issued except, of course, by a vote of a majority in interest of the stockholders of the corporation, which condition, perhaps, is sufficiently covered in this record. Nor can they be issued until the Board of Railroad Commissioners is satisfied that the value of the property of the corporation, 'excluding the value of the franchise, . . . taken at a fair value for railway purposes, . . . equals or exceeds the amount of the capital stock outstanding and the debt;' nor until the Board, 'after an examination of the assets and liabilities of the company, and such further investigation as it considers expedient, shall by vote approve their issue.' Proceedings under the line of statutes to which the section quoted relates have never been merely formal, but, according to the practice, they are not completed until after due notice, public hearing, and a solemn adjudication. Indeed, this section requires a formal vote by the

Board, to be passed 'after an examination of the assets and liabilities of the company, and such further investigation as it,' that is, the Board, 'considers expedient.' All this emphasizes the fact that this legislation is in line with a deep-seated public policy, which, inasmuch as the corporation involved is purely local, we could not in any way disregard with reference to either a formal or an equitable mortgage, or to any attempt to authorize the complainant to share with the holders of the bonds already issued, or even to protect it by a lien on the property in excess of their claims. Any attempt in either direction would be equally violative of the local statutes appertaining hereto."

The section of the Stock Corporation Law (§ 55; McKinney, Consol. Laws, bk. 58, p. 250) which permits stock to be issued for the value of the property purchased was not repealed by the Public Service Commission Law (§ 55; McKinney, Consol. Laws, bk. 47, p. 70), providing that before stock can be issued for property purchased, there must be an order of the Commission authorizing the issue, stating the amount and the purposes to which it is to be applied; but the two sections should be read together, and the latter section is intended to prevent the issue of watered or fictitious stock. *People ex rel. Third Ave. R. Co. v. Public Service Commission* (N. Y.) supra; *People ex rel. Westchester Street R. Co. v. Public Service Commission* (1914) 210 N. Y. 456, 104 N. E. 952, modifying (1913) 158 App. Div. 251, 143 N. Y. Supp. 148. Accordingly it has been held that, while not conclusive, the price paid for a street railway system at a foreclosure sale is entitled to great weight in fixing the amount of stock to be issued by the purchasing company. *People ex rel. Westchester Street R. Co. v. Public Service Commission* (N. Y.) supra. In this case it appeared that the Commission refused to allow stock to be issued for the cost of the purchase, and limited the issue to approximately one half of the cost price, basing its ruling on the ground that the property was not worth the price paid for

it, and that, being bound by a 5-cent-fare franchise, it could not be operated at a profit. In modifying the decision of the appellate division, and directing the proceeding to be remitted to the Public Service Commission, where additional evidence could be had of the value of the property, the court said: "We are unable to hold, as is held in substance by the appellate division, that the Westchester Street Railroad Company is entitled, as a matter of law, to the approval by the Public Service Commission of an issue of its stock to an amount at least equal to the bid made in its behalf for parts of the property and franchises of the Tarrytown, White Plains, & Mamaroneck Railway Company. The purchase price of property in the open market is generally entitled to great weight in determining the value of such property, but such purchase price is not conclusive evidence of value, and a determination of such amount does not prevent the consideration of other evidence bearing upon the value of the property purchased. The finding of the Public Service Commission as to value having been disapproved, and its order annulled and set aside, the proceeding should be remitted to it for its further action in view of the findings of the appellate division, and either party to the proceeding should, if desired, be allowed to present further testimony to the Commission relating to the question of value."

In *People ex rel. Third Ave. R. Co. v. Public Service Commission* (1911) 203 N. Y. 299, 96 N. E. 1011, affirming (1911) 145 App. Div. 318, 130 N. Y. Supp. 97, it was held that the Commission was not justified in refusing permission to a street railway company to issue securities under a plan of reorganization after foreclosure, because the value of the mortgaged property and the amount of new capital to be invested were less than the amount of securities sought to be issued. This case was decided, however, prior to the enactment of § 55a of the Public Service Commissions Laws, extending the power of the Commission over reorganized street railway companies,

and providing that the amount of securities issued by a reorganized street railway company should not exceed the fair value of the property involved.

In *People ex rel. Dry Dock, E. B. & B. R. Co. v. Public Service Commission* (1915) 167 App. Div. 286, 153 N. Y. Supp. 344, it was held that the Commission erred in applying the test of the actual value of a street railway company's property and its earning capacity as a criterion for its approval of the issue of bonds for the purpose of refunding existing debts and obligations, but that it was right in refusing to approve their issue until it had been proved that the securities sought to be refunded represented actual investments for the company's capital account. In summing up its decision, the court said: "In a refunding case the inquiry of the Commission is properly directed to the following considerations, the evidence requisite to reach a determination whereupon should be furnished by the petitioner: (1) Whether the proposed issue is reasonably required for the refunding purpose. (2) Whether the expenditure to be refunded is a capital, as distinct from an operating or income, charge. (3) If the expenditure to be refunded is an operating or income charge, whether such refunding should, nevertheless, be permitted under the exception clause of the statute which reads: 'Except as otherwise permitted in the order in the case of bonds.'" And it was further held that the decision of a Federal court that the obligations sought to be refunded represented investments on account of the company's capital was not binding on the Commission, when it was not a party to the action. And it was further held that § 55a, relating to the issue of securities by street railway companies, was limited to the reorganization of railroads, and did not apply to the refunding of obligations of a company where it was not proposed to reorganize it. *Ibid.*

The fact that obligations which a street railway company sought to have refunded were incurred before the enactment of the Public Service Commissions Laws did not relieve the com-

pany from the necessity of securing the approval of the Commission to the issuance of the refunding bonds. *Ibid.*

By the Public Service Commissions Act (§ 46; McKinney, Consol. Laws, bk. 47, p. 50) it is made the duty of the Commission to prescribe the form of the annual reports required under the statute to be made by street railway companies, and it has been held that this section is applicable to a street railway which is in the hands of a Federal receiver. *People ex rel. Public Service Commission v. Joline* (1909) 65 Misc. 394, 121 N. Y. Supp. 857.

But it has been held that the Public Service Commission did not have the power, under the statute (Public Service Commissions Law, § 52; McKinney, Consol. Laws, bk. 47, p. 65) authorizing the Commission to require railway corporations to keep their accounts according to a system prescribed by the Commission, to order a street railway company to reserve a certain percentage of its gross revenue for maintenance and depreciation, and for the creation of the amortization-of-capital account, the court saying that the statute was not intended to regulate the management of street railway finances, but to show what the management was. *People ex rel. New York R. Co. v. Public Service Commission* (1918) 223 N. Y. 373, P.U.R. 1918F, 125, 119 N. E. 848, reversing (1918) 181 App. Div. 338, P.U.R. 1918B, 707, 168 N. Y. Supp. 760.

In *Waterloo v. Berlin* (1912) 28 Ont. L. Rep. 206, 4 Ont. Week. N. 256, 23 Ont. Week. Rep. 337, it was held that, under the Ontario Railway and Municipal Board Act (1906), the Board had exclusive jurisdiction to enforce its orders, and accordingly it was held that, where the Board had ordered one municipality owning a street railway line to pay a certain proportion of the net earnings of the railway to an adjoining municipality, the courts had no jurisdiction to entertain an action for an accounting between the two municipalities.

In the case of *Re Lincoln Traction Co.* (1919) — Neb. —, P.U.R.1919C,

927, 171 N. W. 192, the court incidentally declared that it was the duty of a street railway company to keep its accounts in the manner required by the Public Service Commission.

*1. Sale, consolidation, or reorganization.*

In Missouri, by § 62 of the Public Service Commission Act (Laws 1910), the reorganization of street railroad corporations is made subject to the control of the Public Service Commission. *Kansas City R. Co. v. Public Service Commission* (1917) 273 Mo. 173, P.U.R.1918D, 12, 201 S. W. 74.

Prior to the enactment of § 55a of the New York Public Service Commissions Law (McKinney, Consol. Laws, bk. 47, p. 72), giving the Commission supervision over reorganizations of street railroad corporations, it was held that a company organized under the provisions of the Stock Corporation Law, pursuant to a plan of reorganization entered into to take over the property and franchises of a street railway system sold in foreclosure proceedings, was not required to obtain the approval of the Commission before it might exercise and enjoy the rights and privileges which belonged to the company last owning the property. *People ex rel. Third Ave. R. Co. v. Public Service Commission* (1911) 203 N. Y. 299, 96 N. E. 1011, affirming (1911) 145 App. Div. 318, 130 N. Y. Supp. 97.

In *Schenck v. International R. Co.* (1914) 146 N. Y. Supp. 365, it was held that a street railway might contract for use of another road's track, subject to permission and approval of Commission.

In *Ex parte Birmingham* (1917) — Ala. —, P.U.R.1917C, 667, 74 So. 51, it was held that the Alabama statute (Acts 1915, p. 268), empowering the Public Service Commission to determine whether a proposed sale and conveyance or lease of a public utility is consistent with the interests of the public, was not subject to the objection that it delegated legislative power to the Commission, the court declaring that while the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things

on which the law makes, or intends to make, its own action depend. Nor was the statute objectionable as authorizing the Commission to create a monopoly by allowing two parallel street car lines to consolidate, the court holding that such a grant of rights was not exclusive so long as the power to grant other similar franchises was reserved.

In *Philadelphia Trust Co. v. Northumberland County Traction Co.* (1917) 258 Pa. 152, 101 Atl. 970, it was held that the Pennsylvania Public Service Company Law, which requires the consent of the Public Service Commission before a street railway can sell, lease, consolidate, or merge its property or franchises, did not extend to a foreclosure sale under a mortgage.

*VI. Reasonableness of regulation.*

*a. In general.*

Ordinarily, the decisions of Public Service Commissions with respect to the management and control of street railways are regarded as *prima facie* just, reasonable, and correct. *Phoenix R. Co. v. Geary* (1914) 209 Fed. 694, s. c. on appeal (1915) 239 U. S. 277, 60 L. ed. 287, 36 Sup. Ct. Rep. 43; *Cincinnati v. Public Utilities Commission* (1915) 91 Ohio St. 331, P.U.R.1916A, 1057, 110 N. E. 461, Ann. Cas. 1916E, 1081; *Oklahoma R. Co. v. Powell* (1911) 33 Okla. 737, 127 Pac. 1080; *Newport News & O. P. R. & Electric Co. v. Hampton Roads R. & Electric Co.* (1904) 102 Va. 847, 47 S. E. 858.

As was said in *Duluth Street R. Co. v. Railroad Commission* (1915) 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887; "Where the matter of reasonableness ends and where unreasonableness begins is somewhat difficult of ascertainment. It is a question of fact, which the Commission primarily should decide, and when it makes a decision, and that decision is approved by the trial court, it cannot be disturbed by this court unless it appears that the decision is clearly wrong."

Nor will the order of a Public Service Commission regulating the conduct and operation of a street car company be declared to be unreasonable and confiscatory, solely because it is is-

sued in a spirit of retaliation for the curtailment of the facilities formerly furnished by the company. *Puget Sound Traction, Light & P. Co. v. Reynolds* (1915) 223 Fed. 371, affirmed on other grounds in the reported case (1917) 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705, wherein, with respect to an order of the Commission that a street railway company should resume the operation of certain of its lines beyond their franchise limits, it was said: "The complaint charges that there has been no physical valuation of the properties of the company, and that the order was made by the Commission in a spirit of retaliation, because of the refusal of the company to renew some traffic agreement with the port of Seattle; but these facts, if true, do not show, or tend to show, that the order is either confiscatory or unreasonable. The court is concerned with results rather than with motives or methods, and on the record presented we are of opinion that the enforcement of the order should not be interfered with, in so far as it relates merely to the running of cars on the Ballard beach, Alki point, and Fauntleroy park lines, beyond the franchise limits of these lines."

In *State ex rel. St. Joseph R. Light & P. Co. v. Public Service Commission* (1917) 272 Mo. 645, P.U.R.1918B, 767, 199 S. W. 999, an order of the Public Service Commission allotting to a street railway company about one seventh of the cost of eliminating a grade crossing over a steam railroad was held to be reasonable. It was insisted by the railway company that its portion of the cost should be limited to the estimated cost of the work to be done within the street railway company's track zone, but the Commission, in arriving at the amount, followed what was known as the "trackage basis," and also took into consideration the benefits to be derived by both companies, as well as any additional cost in operation, and this was held to be proper.

It has been held that an order of the Board of Railroad Commissioners, placing the entire cost of repairing a

crossing of a street railway over the tracks of a steam railroad, on the street railway company, was not unjust or unreasonable, it appearing that the steam road was first constructed, and that the crossing was put in for the sole convenience and accommodation of the street railway. *Maine C. R. Co. v. Waterville & F. R. & Light Co.* (1896) 89 Me. 328, 36 Atl. 453.

In *Public Service R. Co. v. Public Utility Comrs.* (1914) 86 N. J. L. 105, 91 Atl. 313, affirmed in (1915) 87 N. J. L. 250, P.U.R.1918C, 224, 93 Atl. 585, it was held that an order requiring a street railway company to pay \$2,644.46 annually toward the upkeep of a bridge over which its tracks ran, based on the fact that the additional weight on the bridge tended to shorten the life of the structure, the cost to the counties of extra construction made necessary by the use of the bridge by the railway, depreciation due to the shortened life of the bridge, and the extra cost of maintenance due to such use, was reasonable.

Under the power given the Board of Railroad Commissioners by statute, in Maine (Rev. Stat. chap. 51, § 75) to apportion the cost of repairing or rebuilding a bridge between a municipality and a street railroad crossing over the bridge, it was held in *Bangor R. & Electric Co. v. Orono* (1912) 109 Me. 292, 84 Atl. 385, that an order requiring an old wooden bridge originally built by the town, and subsequently used by a street railroad, which use greatly weakened it, to be replaced by a new steel bridge, and apportioning the cost between the town and the railroad company, in the ratio of 40 and 60 per cent, respectively, was not unjust or unreasonable.

#### *b. Operation and equipment.*

An order requiring a street railway operating in a large city to replace its old cars, which were shown to be small, inconvenient, and uncomfortable, with new cars of modern design, was held in *People v. Public Service Commission* (1915) 167 App. Div. 498, 153 N. Y. Supp. 542, not to be unreasonable. In this case it was said: "It is strongly contended that the cars in

present use are sufficient for the purposes of the road, and are convenient and economical, and that the Commission was not justified in ordering this large expense for the purpose, as is claimed by the relator, of putting on cars 'in keeping with the dignity of a city such as Albany.' This, however, was a question of fact. It is probably true that the Commission would not be justified in ordering larger cars simply for the purpose of conforming to the style of an aristocratic city, if the smaller cars were convenient and adequate for the purposes for which they were being used. It is sworn, however, that these smaller cars are not convenient or comfortable, and are not adapted to the large traffic of a large city. These were all questions of fact upon which the Public Service Commission is deemed to have passed, with full knowledge of the existing situation. Their conclusion, we think, is founded upon sufficient evidence."

In *Cincinnati v. Public Utilities Commission* (1915) 91 Ohio St. 331, P.U.R.1916A, 1057, 110 N. E. 461, Ann. Cas. 1916E, 1081, the court upheld an order of the Public Utilities Commission, relieving a street railway from the operation of a city ordinance requiring the company to extend its lines, on the ground that the proposed extension was required to be made over a street which was unstable and unsafe, due to the sliding character of the ground and the extreme grade, and that the construction as proposed involved unusual operating difficulties with respect to grades, curves, and otherwise, and that operation thereon would jeopardize the lives of passengers.

An order of a Public Service Commission requiring a street railway company to furnish adequate facilities to the public may be valid, even though the company suffers some incidental loss in complying therewith, as a public service corporation may always be required to perform its duties to the public. *Puget Sound Traction, Light & P. Co. v. Reynolds* (1915) 223 Fed. 371, affirmed in the reported case (1917) 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705. In this case

it appeared that the order required the company to furnish sufficient cars to provide seats for substantially all persons using certain lines of a street railway system, covering about 16 miles out of a total mileage of 200 operated by the company, and that, because of the length of the haul and the sparsely settled district through which the lines ran, they were operated at a loss, though the total system was operated at a profit.

In *Phoenix R. Co. v. Geary* (1913) 209 Fed. 694, affirmed in (1915) 239 U. S. 277, 60 L. ed. 287, 36 Sup. Ct. Rep. 45, it was held that, under its power to regulate public service corporations, the Corporation Commission of Arizona had the right to compel a street railway company to double track a portion of its railroad extending between the business center of the city of Phoenix and the state capitol and office buildings where a large number of people were employed, and in which vicinity there was a population of from twelve to fifteen hundred people, such an order not being unreasonable under the circumstances.

And an order of the Public Utilities Commission requiring a street railway company to lay double tracks across a new concrete bridge, built to replace an old wooden bridge on which the company had one track, has been held not to be an unreasonable order in view of the character of the new bridge and the natural expectation of increased traffic from the rapid increase of the population in the community. *Norwalk v. Connecticut Co.* (1915) 89 Conn. 537, P.U.R.1915E, 294, 94 Atl. 988.

Under a statute (Vt. Acts 1908, No. 116, § 9) giving the Public Service Commission jurisdiction in all matters respecting the manner of operating and conducting any business subject to its supervision under the act so as to be reasonable and expedient and promote the safety, convenience, and accommodation of the public, it has been held that the Commission had the authority to order a traction company to move its high tension line from a dangerous proximity to the wires of a telegraph company, and the require-

ment that the wires be placed no nearer than 30 feet to the telegraph wires was reasonable. *Western U. Teleg. Co. v. Burlington Traction Co.* (1917) 90 Vt. 506, P.U.R.1917C, 320, 99 Atl. 4, Ann. Cas. 1918B, 841. In this case it was said: "The high tension line, when considered without reference to proximity or parallelism with any other line, might be regarded as fairly well constructed for the purpose for which it is used. But the proximity which exists between sections 1 and 18, inclusive, of said line, and the petitioner's line west of the railroad track, which is parallel, creates danger which is in no wise justifiable from the standpoint of public safety. The wooden poles of the high tension line, under abnormal stress of weather, and particularly in the spring when the ground is thawing, are likely to blow over, which would almost inevitably bring about a contact between the wires of the two lines. Porcelain insulators, the type used in the high tension line, will puncture occasionally under stress of electrical service, and a breakage of the insulators often results therefrom. This is sometimes followed by a break and recoil of the wire, which, being under considerable tension, may be whipped laterally to a considerable distance, probably resulting, the present conditions existing, in a contact between the high tension and the telegraph wires. The pins holding the insulators of the high tension line are of wood, and a punctured insulator would probably result in the destruction of the pin and a liberation of the wire, with a resultant contact between the lines. At points where the two lines are closest, the line clearance in some instances is not over 25 inches, and if a wire in either line becomes there disconnected, an ordinary swing of the disconnected wire would result in contact between the two lines. At these last-mentioned points, it is extremely hazardous for linemen to work on the ends of the petitioner's cross arms nearest the high tension line. All the hazards mentioned are intensified by the use of wooden pins in the high tension line. Such pins

tend gradually to disintegrate when used in connection with voltage of an intensity as high as 22,000. The lack of storm and head guying and of sufficient side guying, and the use of solid instead of stranded wire in the electric line, also go to intensify the danger created by the proximity of the two lines. Contact between wires of the two lines would produce an instantaneous electrification by a current of at least 16,000 volts of the petitioner's wire, and every instrument and piece of apparatus connected therewith at every point on the wire, with the attendant probability of injury or death to persons using said instruments or apparatus. The findings in conclusion are that the maintenance and operation of the aforesaid eighteen sections of the petitionee's high tension line, with a voltage of 22,000 at the proximity which exists between the same and the petitioner's telegraph line adjacent thereto, constitutes an ever-present public danger, which should be eliminated; and that a separation of the line of poles carrying the first eighteen sections of the high tension line, and the petitioner's line of poles parallel thereto and west of the railroad track, to a minimum distance of 30 feet, would eliminate the danger above described in the most reasonable and feasible manner, if both lines are to be continued in operation."

An order requiring a street railway company to equip its heavy double-truck cars with both power and geared hand brakes was held to be unreasonable, in *People ex rel. Brooklyn Heights R. Co. v. Public Service Commission* (1913) 157 App. Div. 698, 142 N. Y. Supp. 942.

While a Public Service Commission may require a street car company to furnish additional facilities to accommodate passengers during the rush hours of a day, such an order must be definite and specific so that the company can reasonably obey it. *Puget Sound Traction, Light & P. Co. v. Reynolds* (Fed.) *supra*, wherein it appeared that the order required the company to furnish a sufficient number of cars to provide seats for sub-



stantially all persons using certain lines, except in cases of emergency or on extraordinary and unusual occasions. Holding that such an order was unreasonable, the court said: "The crowds which pass over these two lines mornings and evenings, and the thousands that flock to the parks and beaches on Sundays and summer afternoons, are neither emergency crowds, nor are the occasions extraordinary or unusual, and to require the company to furnish cars and seats for all who present themselves for transportation over these single-track railways, 8 miles in length, is to require the impossible. We do not underestimate the difficulties which confront the Commission in its efforts to compel the company to furnish adequate facilities, nor do we overstate the difficulties which confront the company in its efforts to furnish these facilities. The furnishing of seats for passengers on street railways is an unsolved problem, and perhaps will remain so as long as a considerable part of the population is habitually attracted in the same direction at the same time in pursuit of business or pleasure. The matter is not wholly beyond regulation and control, however. If, as appears in this case, one third of the passengers are without seats during certain hours of the day, an increase in facilities to that extent during these hours will, in a large measure, relieve the congestion. Such an order or regulation can be made definite and specific, and the company can reasonably comply therewith; but to compel it to furnish cars and seats at all times and on all ordinary occasions for all who may present themselves for transportation, as already stated, is an unreasonable requirement, and one to which no transportation company can conform. This conclusion finds ample support in the record, and is supported by facts and conditions within the common knowledge of all, of which a court may well take judicial notice."

In *Callahan Estate v. Manhattan R. Co.* (1915) 168 App. Div. 81, 153 N. Y. Supp. 770, it was held that where an order of the Public Service Commis-

sion required an elevated street railway, in relocating its structure, to place the supporting columns a certain distance from the curb line, would be construed to be operative only where such construction was physically possible, and not to apply to localities where the streets were so narrow that to comply with the order would render the construction impossible.

In *People ex rel. United Traction Co. v. Public Service Commission* (1915) 167 App. Div. 498, 153 N. Y. Supp. 542, it was held that an order requiring a street railway company to install a private telephone system exclusively for its own use would be modified so as to allow the railway to connect its wires with the telephone company, and to use the poles of that company for stringing its wires.

In *PUGET SOUND TRACTION, LIGHT & P. CO. v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 80, it is held that an order of the Commission requiring the rerouting of one of the lines of a street railway company at an estimated expenditure of \$7,000, and an additional operating expense of \$5,000 per year, was not justified, where the reason for the order was merely to relieve persons living in the vicinity served by that line from the necessity of transferring.

#### *c. Rates and fares.*

Whether an increase in the fares charged by a street railway company is necessary in order to obtain a reasonable compensation for the service rendered is primarily a question of fact. It is not limited to any particular part of the system, which, if operated by itself, might be found to be more than self-sustaining. As said in *Fall River v. Public Service Comrs.* (1917) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915: "The question whether the company should be permitted to withdraw the commutation tickets called for the exercise of the sound discretion and judgment of the Commission, based on the evidence of the company's financial condition and ability to serve efficiently the public, dependent upon the maintenance of its entire system of intercommunication and transportation."

And, as was said in *Puget Sound Traction, Light & P. Co. v. Reynolds* (1915) 223 Fed. 371: "It may be conceded that the order is invalid if it amounts to a confiscation of the plaintiff's property, or denies to it a reasonable return on its invested capital; but the order was made within the acknowledged jurisdiction of the Commission, and the rates established are presumed to be reasonable and just, under all the authorities, state and Federal, until the contrary is made to appear."

The rule generally adopted in passing on the reasonableness of rates is that consideration must be had of the earning capacity of the entire system, and not of segregated or individual portions of the lines. Accordingly it has been held that, in fixing the rate to be charged by a street railway company, the fact that cars run as through cars over a bridge were operated at a loss could not be taken into consideration. *People ex rel. Bridge Operating Co. v. Public Service Commission* (1912) 153 App. Div. 129, 138 N. Y. Supp. 434.

Although an order of a Public Service Commission fixing the rate of fare to be charged on a portion of a street railway system compels the company to operate such portion of its system at a loss, yet, if the entire system may be operated at a profit, there is no confiscation of property or deprivation of property rights, and the order cannot be declared to be unreasonable solely on this ground. *Puget Sound Traction, Light & P. Co. v. Reynolds* (1915) 223 Fed. 371, affirmed in the reported case (1917) 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705, wherein it appeared that, by an order of the Public Service Commission compelling a street railway company to operate its cars on certain lines to points beyond the franchise limits of these lines, as fixed by the franchises granted to the predecessors in interest of the then owner, the company was required to grant transfers on commutation tickets, the effect of which was to lower its rates over a portion of its system admittedly already operated at a loss.

Holding that the fact that a part of the railway system was operated at a loss did not render the order confiscatory, where it appeared that the entire system was operated at a profit, the court said: "The passenger who travels five blocks ordinarily pays the same fare as the passenger who travels 5 miles. The one pays more than the service is worth, while the other pays less; but the long haul and the short haul are supposed to equalize each other in the end. And any attempt to fix street car fares so that each car or each line will bring a reasonable return to the owner would destroy all uniformity in rates and practically abrogate the power of regulation."

In *Duluth Street R. Co. v. Railroad Commission* (1915) 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887, it was held that an order of the Railroad Commission, fixing the rate to be charged by a street railway company so as to yield substantially 7½ per cent on the reasonable value of the property, was not unreasonable. On this point it was said: "The plaintiff insists that a rate of 7½ per cent, considering the character of the business and the risks which follow it, is not reasonable compensation for the investment. It is not claimed that a rate which will yield such a return is confiscatory, and it is obvious that it is not. It is said, truthfully enough we think, that there is a difference between a rate that is not quite low enough to be condemned as confiscatory and one which is in fact reasonable, and it is a reasonable rate which the Commission is called upon to fix. This may all be conceded. But there is a good deal of difference between a rate which affords the investor the substantial return of 7½ per cent, and one so low that it can be said that it practically deprives the owner of the beneficial use of his property, and would substantially confiscate it in whole or in part if permitted to stand. Allusion has already been made to the substantial character of the investment in this case, and to its probable continuity. What is a reasonable return is a question of fact, the solution

of which calls for the exercise of sound judgment and common sense. Undoubtedly there are some risks attendant on such an investment that are not found in the case of a well-placed loan on real estate. But the Commission has taken this into account by allowing a higher rate of return than the ordinary real-estate loan yields. It is also true that there are some speculative ventures that promise to yield a larger rate of return, and in fact do if they are successful. But while the rewards may be greater in case of success, the chances of failure are also greater, and the Commission seems to have adopted an intermediate figure between these two classes of investments, and its judgment in this regard, confirmed by the trial courts, should not be disturbed."

In *Puget Sound Electric R. Co. v. Railroad Commission* (1911) 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1918B, 763, it was held that a rate which allowed a net return of 7 per cent was reasonable.

In *Donham v. Public Service Commission* (1919) — Mass. —, P.U.R. 1919C, 880, 122 N. E. 397, an order establishing a 7-cent street car fare in case of the purchase of five or more tickets, and a 10-cent fare in the absence of such a purchase, was held to be reasonable.

In *People ex rel. Bridge Operating Co. v. Public Service Commission* (1912) 153 App. Div. 129, 138 N. Y. Supp. 434, it was held that, where it appeared that the rate fixed by the Commission for the operation of cars over a bridge would produce a much larger profit on the investment than was realized by the ordinary investor, it could not be declared to be unreasonable. The exact percentage, however, was not stated.

In *Public Service R. Co. v. Public Utility Comrs.* (1911) 81 N. J. L. 363, 80 Atl. 27, an order of the Board of Public Utility Commissioners, requiring a street railway to restore a 3-cent fare formerly charged school children, was upheld as reasonable, the court saying: "The act of the railway company in this instance must, therefore, be considered as the increase of a rate of fare which was in existence when

the statute became effective. Section 17 of the act, subdivision (h), confers upon the Commission power 'to hear and determine whether the said increased charge of alteration is just and reasonable.' Such is the purpose of the order under review, and, the legislature having conferred the power of regulation and administration upon the Commission, this court will not interfere in the discharge of that duty, except, in the language of the 38th section of the act, 'where it clearly appears that there was no evidence before the board to support reasonably such order, or that the same was without jurisdiction of the board.' Neither of these conditions existing in this case, the order of the Board of Public Utilities Commissioners now under review will be affirmed."

In *People ex rel. Cohoes R. Co. v. Public Service Commission* (1911) 143 App. Div. 769, 128 N. Y. Supp. 384, affirmed in (1911) 202 N. Y. 547, 95 N. E. 1137, the court upheld an order of the Public Service Commission requiring a street railway company to reduce its fare from 6 to 5 cents for passengers carried across a bridge, over the objection that the extra 1 cent was collected as toll for the bridge company, the court holding that the money paid the bridge company was a part of the expense of operating the road, and could not be added to the fare.

In *People ex rel. New York State R. Co. v. Public Service Commission* (1915) 167 App. Div. 279, 153 N. Y. Supp. 18, affirmed without opinion in (1916) 219 N. Y. 565, 114 N. E. 1078, it appeared that two parallel lines of a street railway were practically 1,360 feet apart for the greater length of the lines, when one turned at right angles and crossed the other. The order of the Commission in question required the company to issue transfers from one line to the other at the point of intersection. This was objected to by the company on the ground that it allowed a passenger to ride back in the same general direction from which he had come, which, in effect, gave for a single fare, a round-trip ticket from the point of embarkation back prac-

tically to the same point, a result not contemplated by the statute (§ 181, Railroad Law; McKinney, Consol. Laws, bk. 48, p. 203) prohibiting a street railway from charging more than 5 cents for one continuous trip. In holding the order to be valid and reasonable the court said: "If there were any impassable barrier between the two streets, and a person residing on Blandina street were denied a continuous ride for 5 cents to any point on South street, the spirit of the law, which is the convenience of the public, would be defeated. To the lame, aged, and infirm, a distance of 1,360 feet is, frequently, as much of a barrier as a deep gulf or impassable river. The mere fact that a person rides back on another line in the same direction from whence he came has no particular significance. The convenience of the public under the circumstances at hand is a consideration of great importance, which we must observe. If this railroad is not to be burdened by strict adherence to the literal language of the statute, neither is the public to be defrauded and inconvenienced by strict adherence to the arbitrary rule that a passenger cannot, for one fare, ride back towards the starting point,—a rule of the court in derogation of the statute. Street car roads in cities are calculated for short-distance rides, and it may not be possible for a person desiring to proceed from one point to another point to go directly in one direction, or even in one general direction, as he might in the case of a steam railroad; nevertheless, under the statute, unless the courts are to warp the statute out of shape, the railroad is not permitted to charge more than one 5-cent fare for a continuous ride from one point to any other point in the city, no matter what the direction is. It is possible for a person living midway between these two lines, in the case at bar, to walk to one line, ride to the point of transfer, enter a second car and ride on the other line to a point opposite his residence for one fare—substantially a round trip. But this would be unlikely to happen, except in rare instances, for what would be the object?

Picking out an improbable possibility like this in no manner militates against the wisdom and soundness of the law."

In *Com. ex rel. Dowden v. Richmond & R. River R. Co.* (1914) 115 Va. 756, 80 S. E. 796, it was held that, under a constitutional provision (Va. Const. § 156b) vesting in cities legislative discretion when prescribing rates to be charged by street railways operated wholly within their limits, where a city by ordinance relieved a street railway company of the duty to furnish transfers to and accept them from a railway operating wholly without the city, the Corporation Commission had no authority to order the privilege restored in so far as the railway operated wholly within the city was concerned, and under the circumstances it would be unreasonable to require the company operating wholly without the city to restore the privilege.

In *Oklahoma R. Co. v. Powell* (1911) 33 Okla. 737, 127 Pac. 1080, an order of the Corporation Commission was held to be reasonable, which required a street railway company to issue transfers during certain hours, and to stop passing cars on parallel tracks for the transfer of passengers.

#### VII. Review.

Ordinarily, the decision of a Public Service Commission with respect to the regulation of a street railway in purely administrative matters of fact is final and conclusive, but if an administrative order be so unreasonable as to justify interference, it will be set aside by the courts.

**Connecticut.**—*New York, N. H. & H. R. Co.'s Appeal* (1908) 80 Conn. 623, 70 Atl. 26; *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 40, 78 Atl. 587; *Stevens v. Connecticut Co.* (1912) 86 Conn. 36, 84 Atl. 361, Ann. Cas. 1913D, 597; *Norwalk v. Connecticut Co.* (1915) 89 Conn. 537, P.U.R.1915E, 294, 94 Atl. 988.

**Kansas.**—*State ex rel. Dawson v. Parsons Street R. Electrical Co.* (1909) 81 Kan. 430, 28 L.R.A. (N.S.) 1082, 105 Pac. 704.

**Maine.**—*Maine C. R. Co. v. Waterville & F. R. & Light Co.* (1896) 89 Me. 328, 36 Atl. 453; *Parsons v. Water-*

ville & O. Street R. Co. (1906) 101 Me. 173, 63 Atl. 728.

**Massachusetts.**—*Paine v. Newton Street R. Co.* (1906) 192 Mass. 90, 77 N. E. 1026; *Fall River v. Public Service Comrs.* (1917) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915.

**Michigan.**—*Jackson & Suburban Traction Co. v. Railroad Comrs.* (1901) 128 Mich. 164, 87 N. W. 133.

**New Hampshire.**—*Boston & M. R. Co. v. Portsmouth* (1901) 71 N. H. 21, 51 Atl. 664.

**New York.**—*People ex rel. Brooklyn Heights R. Co. v. Public Service Commission* (1913) 157 App. Div. 698, 142 N. Y. Supp. 942; *Re New York* (1914) 163 App. Div. 10, 147 N. Y. Supp. 1057; *People ex rel. New York & A. C. R. Co. v. Public Service Commission* (1916) 173 App. Div. 826, 160 N. Y. Supp. 91.

**Utah.**—*Salt Lake City v. Utah Light & Traction Co.* (1918) — Utah, —, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556.

**Canada.**—*Re Port Arthur Electric Street R. Co.* (1909) 18 Ont. L. Rep. 376, 13 Ont. Week. Rep. 811.

As was said in *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (Kan.) supra: "Its decision, in the absence of exceptional circumstances, must be final. Of course, if its action had been arbitrary or capricious, the courts could afford relief."

And in *Fall River v. Public Service Comrs.* (Mass.) supra, the court said: "It is only where 'any rulings or orders of the Commission . . . are unlawful' that this court, in equity, can 'annul, modify, or amend' them, 'to the extent only of such unlawfulness.'"

In the case of *Re Lincoln Traction Co.* (1919) — Neb. —, P.U.R.1919C, 927, 171 N. W. 192, it was held that the findings of the Commission on an application to increase rates cannot be reviewed by a court, except for error of law or entire failure of the facts to support the conclusion reached.

In *Public Service Commission v. Brooklyn Heights R. Co.* (1918) 105 Misc. 254, P.U.R.1919B, 258, 172 N. Y. Supp. 790, in sustaining an order of the Public Service Commission that 250 additional cars should be put into

service, as against a contention that prevailing high prices made the order inequitable, the court referred to the poor service previously given, and said: "In view of these just public claims, which outweigh all others, the court should give little heed to nice considerations of equity, which might be applicable were this a litigation between private parties, involving only private rights and interests."

In *Salt Lake City v. Utah Light & Traction Co.* (Utah) supra, it was said that on appeal from an order of the Public Utilities Commission, fixing street railway rates, the court was limited in its review to the questions as to whether the Commission had exercised its authority according to law, whether there was any evidence to sustain its findings, and whether any constitutional rights of the complaining party had been invaded or disregarded, but that it could not pass on the sufficiency of the evidence as to the reasonableness of the findings. That it was only when a rate established by the Commission was clearly oppressive on the one hand, or confiscatory on the other, that it became a judicial question, and so within the power of the court on review; otherwise, it was an administrative question, and the decision of the Commission was conclusive on the court.

Similarly, in *Paine v. Newton Street R. Co.* (Mass.) supra, it was held that the power to review the rulings of the Board of Railroad Commissioners made in relation to the laws which govern street railway companies, given the supreme judicial court or the superior court by statute (Rev. Laws, chap. 112, § 100), was limited to rulings of law, and did not apply to decisions of facts.

And in *Jackson & Suburban Traction Co. v. Railroad Comrs.* (1901) 128 Mich. 164, 87 N. W. 133, it was held that the court would not review the discretion of the Railroad Commissioners on the facts, as to the necessity of an overhead crossing, unless there was a clear abuse of discretion, which must appear from the facts brought before the court, and, in the absence of such facts, the ruling of the

Commissioners must be taken as proper.

It is provided by statute in New Hampshire (Laws 1901, chap. 76) that the decisions of the Board of Railroad Commissioners on appeal from the mayor and board of aldermen, on questions of fact, shall be final. Construing the statute, the court in *Boston & M. R. Co. v. Portsmouth* (1901) 71 N. H. 21, 51 Atl. 664, held that an order of the Board of Railroad Commissioners, setting aside that part of an order of the mayor and board of aldermen, limiting the time within which a street railway must be completed and providing that the work should be done on certain streets before commencing work on other streets, on the ground that it was not required by public interest, being a determination of a question of fact, was not reviewable by the courts.

In *Parsons v. Waterville & O. Street R. Co.* (1906) 101 Me. 173, 63 Atl. 723, it was held that, under a statute (Rev. Stat. chap. 53, § 16), the decision of the Railroad Commissioners on the question of a change of location of the tracks of a street railroad was final.

In *Norwalk v. Connecticut Co.* (1915) 89 Conn. 537, P.U.R.1915E, 294, 94 Atl. 988, it was held that the number of tracks to be laid over a new concrete bridge, and the character of the rails and overhead equipment, was a purely administrative matter, and that, therefore, the decision of the Commission in regard thereto was final and conclusive.

In *Re New York* (1914) 163 App. Div. 10, 147 N. Y. Supp. 1057, it was held that the Commissioners' determination of whether the fee or only an easement in land required for a subway should be taken was a legislative question, and was, therefore, final and binding on the courts.

While the action of the Board of Railroad Commissioners of a purely administrative character is not subject to review by the courts, when an order of the Commissioners regulating a street railway is in any respect unauthorized in law, irregular or informal, or based upon a misconception of the law, or of their power or duty, or it

will materially damage an appellant, or it appears that it has invaded or threatened the legal rights of an appellant, or that it is so unreasonable as to justify judicial interference, it is within the judicial power of the court, on an appeal in proper form, to set such order aside. *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 40, 78 Atl. 587.

And where the decision of the Commission is judicial or quasi judicial, it will be reviewed by the courts. Thus, in *Norton v. Shore Line Electric R. Co.* (1911) 84 Conn. 24, 78 Atl. 593, it was held that whether the Commissioners have exercised their powers of regulation in such a way as to do no greater injury to the owners on the highway than the performance of their duties requires, or whether the construction approved of may do such owners special injury, are essentially judicial questions, and as such reviewable by the courts.

And it has been held that the question of the apportionment of the cost of a bridge between a municipality and a street railway company was judicial in its nature, and, on appeal from the order of the Commission to the supreme court, the court should hear the matter *de novo*, and enter such order as it saw fit. *Norwalk v. Connecticut Co.* (1915) 89 Conn. 537, P.U.R.1915E, 294, 94 Atl. 988.

In *People ex rel. Joline v. Willcox* (1910) 198 N. Y. 433, 91 N. E. 1102, reversing (1909) 134 App. Div. 563, 119 N. Y. Supp. 641, it was held that an order of the Public Service Commission, establishing through routes and fixing the rates of a street railway company, was quasi judicial, and as such reviewable by certiorari.

Where a court is given the power, on appeal from the Board of Utilities Commissioners, to review the facts and to set aside the order only on concluding that the evidence on which the order rested is not such as will reasonably support it, if there is evidence that will reasonably support the order, the courts will not disturb it. *Public Service R. Co. v. Public Utility Comrs.* (1914) 86 N. J. L. 105, 91 Atl. 313,

affirmed in (1915) 87 N. J. L. 250, P.U.R.1915C, 224, 93 Atl. 585.

By statute in Ohio (Gen. Code, § 544), it is provided that, on appeal from an order of the Public Utilities Commission, the supreme court may reverse, vacate, or modify the order, if on consideration of the record the court is of the opinion that such order is unlawful and unreasonable. But by § 542 of the Code it is further provided that an order of the Public Utilities Commission must be regarded as *prima facie* reasonable. *Cincinnati v. Public Utilities Commission* (1915) 91 Ohio St. 381, P.U.R.1916A, 1057, 110 N. E. 461, Ann. Cas. 1916E, 1081.

In *State ex rel. St. Joseph R. Light & P. Co. v. Public Service Commission* (1917) 272 Mo. 645, P.U.R.1918B,

767, 199 S. W. 999, it was held that the reasonableness of an order apportioning the cost of eliminating a grade crossing between a steam railroad and a street railway was subject to review by the supreme court on all the evidence, as in the trial of suits in equity.

Under the Maine Statute of 1899 (Public Laws 1899, chap. 119), it was provided that the determination of the Board of Railroad Commissioners, as to the public convenience requiring the construction of a street railway, should be subject to review on appeal to the supreme judicial court. See *Re Portland R. Extension Co.* (1900) 94 Me. 565, 48 Atl. 119; *Re Milbridge & C. Electric R. Co.* (1902) 96 Me. 110, 51 Atl. 818. M. B.

E. M. FUNK et al., Appts.,

v.

TOWNE YOUNG, Trustee, etc.

*Arkansas Supreme Court—March 3, 1919.*

(— Ark. —, 210 S. W. 143.)

### Set-off — by trustee.

1. That the deposit account of the maker of a note to an insolvent bank stands in his name as trustee does not prevent his setting it off upon the note in the hands of the receiver's assignee if he is personally answerable for the amount of the deposit.

[See note on this question beginning on page 83.]

### — against insolvent bank — depositor's account.

2. If a bank becomes insolvent, a depositor who is also indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee of the bank on the indebtedness due to the bank.

[See 3 R. C. L. 529, 647.]

### Receiver — purchaser for value.

3. A receiver of an insolvent corporation is not an assignee for a valuable consideration in the ordinary sense of that term, and the assets of the corporation pass to him in precisely the same condition and subject to the same equities as the corporation held them.

[See 23 R. C. L. 56.]

### — rights of assignee.

4. The assignee of a receiver of an insolvent corporation has no greater rights than were possessed by the receiver.

### Pleading — ambiguous answer — remedy.

5. Where the averments of an answer are incomplete, ambiguous, or defective, the remedy is a motion to make them more definite and certain.

[See 21 R. C. L. 518, 526, 600.]

### — when demurrable.

6. An answer is not demurrable if the facts stated, with every reasonable inference to be drawn therefrom, constitute a good defense.

[See 21 R. C. L. 517, 518.]

**Set-off — of deposit on note.**

7. In an action by an assignee of a note held by an insolvent bank which is in the hands of a receiver, to collect

the note from a depositor in the bank, the latter may set off the amount of his deposit account.

[See 3 R. C. L. 529, 647.]

**APPEAL** by defendants from a judgment of the Circuit Court for Benton County (Maples, J.) in favor of plaintiff in a suit brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Hart, J.:

Towne Young, trustee, brought suit against Funk & Son, E. M. Funk, and Erwin C. Funk, to recover the sum of \$149.40 and the accrued interest alleged to be due him on a promissory note. The note is dated April 27, 1914, at Rogers, Arkansas, and is signed by Funk & Son, E. M. Funk, and Erwin C. Funk. The face of the note was for \$200, and was due and payable to the order of the Bank of Rogers sixty days after date, with interest at the rate of 10 per cent per annum from maturity until paid. The note had the following indorsements on the back of it:

Bank of Rogers, by W. E. Talley, Pres.

Paid Dec. 18-16, \$100. J. R. D.

"For value received I hereby assign and transfer the within note to Towne Young, trustee.

"John M. Davis,  
"Bank Commissioner."

The defendants filed an answer to the complaint as follows:

"They deny that they are indebted to the plaintiff in the sum of \$149.40, or in any other sum.

"Second. Defendants, further answering, admit that on April 27, 1914, they executed their promissory note to the Bank of Rogers for the sum of \$200, bearing 10 per cent interest from date, and admit that there was indorsed as paid thereon \$100, December 18, 1916.

"Third. That on the — day of July, 1914, the said Bank of Rogers, being insolvent, closed its doors, and was with all its assets taken over by John M. Davis, state bank commissioner, and the affairs of said bank are now in process of settlement in the Benton chancery court; that at the time the said bank failed

defendant Erwin C. Funk had on deposit in said bank, subject to check, the sum of \$25.06; that the firm of Funk & Son had on deposit in said bank, subject to check, the sum of \$8.37; that there is due and owing the defendants E. M. Funk and Erwin C. Funk, members of the firm of Funk & Son, \$ 33.43, and interest, which they are entitled to have set off against the said note in suit.

"Fourth. Defendant E. M. Funk, further answering for himself, says that on the — day of the —, 19—, he, as trustee for S. C. Walters, deposited in said bank, for which he was personally responsible to S. C. Walters, on time deposit, the sum of \$300; that at the time the aforesaid bank failed there was due and owing him as such trustee from said bank the sum of \$300; that about July, 1914, a short time before the said bank closed its doors, he received from said bank a bank draft for \$4.20, being for the interest due on the aforesaid time deposit; that the bank failed before the draft could be presented for payment, and defendant avers that he is entitled to have the same applied towards the payment of said note.

"Fifth. That the said several sums above mentioned as owing from the Bank of Rogers to defendants, Funk & Son, E. M. Funk, and Erwin Funk, have been filed with the bank commissioner, and have been allowed as subsisting claims against the bankrupt estate of the said Bank of Rogers; that 27 per cent of said claims have been paid, leaving due and owing these defendants jointly 73 per cent thereof.

"Defendants pray that the amount of the several sums unpaid and found due and owing these defendants as above set forth and men-



tioned, or so much thereof as may be necessary, be allowed as set-off against the amount that may be found due and owing plaintiff on the note in suit, that the plaintiff take nothing from defendants, for their costs, and for all proper relief."

Subsequently they filed an amendment to the answer, which is as follows: "Wherein they say that on the 22d day of January, 1916, subsequent to the maturity of the note sued on, plaintiff purchased from John M. Davis, state bank commissioner, all of the assets of the said Bank of Rogers, including the note in controversy, and defendants aver that plaintiff purchased the said note subject to the equities of the defendant."

The answer was duly verified by E. M. Funk. The defendants also filed a motion to transfer the case to equity. The plaintiff filed a demurrer, which was sustained by the court. The judgment recites that the defendants refused to plead further, but elected to stand upon their answer and cross complaint, and that the court found that the defendants are indebted to the plaintiff in the sum of \$174.50 as principal and interest on the note.

Judgment was rendered against the defendants in favor of the plaintiff for that amount, and the defendants have appealed.

Mr. W. N. Ivie for appellee.

Hart, J., delivered the opinion of the court:

The court erred in sustaining the plaintiff's demurrer to the defendants' answer and cross complaint, and in rendering judgment in favor of the plaintiff against the defendants for the amount sued for.

In *Steelman v. Atchley*, 98 Ark. 294, 32 L.R.A.(N.S.) 1060, 135 S. W. 902, the court held that, the relation between a bank and a general depositor being that of debtor and creditor, if a bank becomes insolvent, a depositor who is also indebted to the bank may set off the amount of his deposit in an action by the receiver

Set-off—against insolvent bank—depositor's account.

or assignee of the bank to recover on the indebtedness due the bank. The trend of all modern decisions is toward liberality in the allowance of set-offs in the case of insolvency of the party against whom the set-off is claimed, to the end that only the true balance may be required to be paid to the representative of the estate of the insolvent. In such cases a receiver is not an assignee for a valuable consideration in the ordinary sense of that term, and by operation of law the rights and property of the bank pass to him precisely in the same condition and subject to the same equities as the corporation held them. So it is the well-established rule that a receiver takes the claims in favor of the bank subject to all the equities between the bank and its depositors. See notes in Ann. Cas. 1917C, at page 1188, and Ann. Cas. 1916D, at page 599. Under our statutes the bank commissioner takes the place of a receiver of an insolvent bank. Section 51 of Act 113 of the Acts of Arkansas 1913, p. 462.

It is also deducible from the authorities cited above that the assignee of the receiver is entitled to no greater rights than were possessed by the receiver. The reason is that he only purchases the rights of the bank, and a note or demand held by an insolvent bank against a third person is an asset of the bank only so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. Our statute (Kirby's Dig. § 6098) provides that the defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off, whether legal or equitable, as he shall have. Sections 6099 and 6101 of Kirby's Digest, defining respectively counterclaims and set-offs, have been amended by Act No. 267 of the Acts 1917, p. 1441. As amended, the counterclaim may be a cause of ac-

Receiver—purchaser for value.

—rights of assignee.

tion in favor of the defendants or some of them against the plaintiffs or some of them. A set-off may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort. So the court has held that in a suit on a promissory note the parties may settle all matters in dispute between them, whether the respective causes of action grew out of the same or different contracts, or whether they arise upon contract or arise out of some tort. *Coats v. Milner*, 134 Ark. 311, 203 S. W. 701.

In the application of this statute to the facts of the present case, it is readily apparent that Erwin C. Funk had the right to set off against the claim of the plaintiff the sum of \$25.06, which he had on deposit in the bank at the time of its failure, and that the firm of Funk & Son had a right to set off the sum of \$8.37, which the firm had on deposit in the bank at the time it became insolvent.

It therefore follows from the principles of law above announced that the court erred in sustaining the demurrer to the answer and cross complaint of the defendants and in not allowing the set-offs above referred to as claimed by the defendants. For this reason alone the judgment must be reversed, and the cause remanded for a new trial.

In the fourth paragraph of the answer the defendant E. M. Funk, further answering for himself, avers that at the time the bank became insolvent there was due and owing him as trustee from the bank the sum of \$300; that he had deposited this sum in the bank as trustee for S. C. Walters; and that he was personally responsible to Walters for said sum.

In *Dickerson v. Hamby*, 96 Ark. 163, 131 S. W. 674, the court held that, where the averments of an answer are incomplete, ambiguous, or defective, the remedy is a motion to make them more definite and cer-

tain. The court further held that, in determining the sufficiency of any pleading, every fair and reasonable intendment must be indulged in to support such pleading, <sup>—when demurrable.</sup> and an answer is not demurrable if the facts stated, with every reasonable inference to be drawn therefrom, constitute a good defense. See also *Jonesboro, L. C. & E. R. Co. v. St. Francis Levee Dist.* 80 Ark. 316, 97 S. W. 281.

Tested by this rule, we think that the demands of the plaintiff and of the defendants were mutual demands, and that, the assignee of the insolvent bank having sued the defendant for the collection of the debt due to the insolvent estate, the defendants may set off the debt due to them or either of

them from the insolvent estate and <sup>set-off—of deposit on note.</sup>

account for the balance only. In other words, we think it fairly inferable that the language of the paragraph of the answer just referred to was merely descriptive of the person of the defendant Funk, and did not alter the right of the depositor to have mutual claims that are due <sup>—by trustee.</sup>

the bank and himself set off against each other. This view is strengthened by the averment that the defendant is personally liable for the amount so deposited by him. 2 *Michie, Banks & Bkg.* p. 1060, § 135 (1b), and cases cited; *Laubach v. Leibert*, 87 Pa. 55; and *Miller v. Franklin Bank*, 1 Paige, 444.

In the last-mentioned case it was held that the public administrator of the city of New York is entitled to offset against a debt due from him to the bank a demand for deposits in the bank, whether made in his own name or as public administrator. The court said that as between him and the bank he stood in the same situation that an attorney would who had deposited in the bank for safe-keeping the moneys collected for different clients, in one general account in his name as attorney, to be drawn out on his own check

Pleading—  
ambiguous  
answer—  
remedy.

when called for. The court further said that in neither case could the bank object to pay the money to the depositor, or to allow it to be offset against a demand in favor of the bank, unless they had notice from the persons having an equitable claim thereon not to pay it. We think this principle was recognized in the *Bank of Hartford v. McDonald*, 107 Ark. 232, 154 S. W. 512, where the court held that a trustee

with full control over the trust funds in a bank may draw them out at his will, and the bank incurs no liability in permitting this to be done so long as it does not participate in any breach of trust resulting in any misapplication of the funds.

It follows that the judgment must be reversed, and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

### ANNOTATION.

#### **Right of one indebted to insolvent bank to set off deposits which he has made as trustee.**

The conclusion reached in the reported case. (*FUNK v. YOUNG*, ante, 79) to the effect that one who has deposited trust funds in a bank in his own name as trustee for a named beneficiary may, upon the insolvency of the bank, set off such deposit against his individual note to the bank, where he is personally liable to the beneficiary for such deposit, and the statutes permit both legal and equitable set-offs in any action in contract for the recovery of money, and that the words used in connection with his name as depositor were merely descriptive of his person, and did not alter the rights of the depositor,—is directly supported by *Miller v. Franklin Bank* (1829) 1 Paige (N. Y.) 444, where, in reaching a similar conclusion (set out in *FUNK v. YOUNG*), the court said: "If a suit was brought for this deposit, in his name of public administrator, the addition would only be descriptive of the person, but would not alter the right of either party to the suit. There was no law directing or authorizing the public administrator to deposit moneys in the bank. As between him and the bank, he stands in the same situation that an attorney or solicitor would who had deposited in the bank for safe-keeping the moneys collected for different clients in one general account in his name as attorney or solicitor, to be drawn out on his own check when called for. In neither case could the bank object to pay the money to the

depositor, or to allow it to be offset against a demand in favor of the bank, unless they had notice from the persons having an equitable claim thereon not to pay it. Neither would the right of offset depend upon the question whether the depositor was personally liable in case of loss by the failure of the bank. It is the duty of the petitioner, whether he is personally liable for the loss or not, to do everything in his power to protect the rights of those who may be interested in different portions of the moneys deposited; and if he had a legal right of offset against the debt due from him to the institution, he must stand in the same situation here as he did before the appointment of the receiver [for the bank]. The equities of all creditors of the institution being equal, the legal right must prevail."

So, in *Rubey v. Watson* (1886) 22 Mo. App. 428, in discussing the rights of a surety on the bond of a public official as against an insolvent bank in which such official had public funds deposited, it was said that the deposit was a credit in such official's hands "which he could have successfully used as a set-off in a contest between him and the bank, on any demand it might have held against him;" and that "the fact that the deposit was in his official capacity does not alter the rule," he having been responsible for it individually.

Support for the conclusion reached

in the *FUNK CASE* is also afforded by *Laubach v. Leibert* (1878) 87 Pa. 55, wherein it was held that trust funds deposited in a bank by an "assignee" could, upon the insolvency of the bank, be appropriated by the latter in payment of his individual notes to the bank. The court said: "On what principle can the bank, with the money in its own hands and a direction to apply it to payment, maintain suit on the notes, and recover the cash, having the money in its hands already appropriated to go to payment of its other debts? Clearly this would be grossly inequitable."

Another case which touches upon the question under annotation and likewise supports the views of the preceding cases is *Comfort v. Patterson* (1878) 2 Lea (Tenn.) 670. In that case the deposit was kept in the name of "M. L. Patterson, C. & M.," he being clerk and master of the chancery court, and consisted of both personal and court funds. The court assumed that there was sufficient of the depositor's individual money banked to satisfy his indebtedness to the bank, and remarked that it was "hardly worth while to determine authoritatively whether the defendant might not also set off, if necessary, against his note, enough of the deposit derived

from official collections." However, it did express its opinion to the effect that such trust funds could be used if necessary, basing its conclusion on the fact that the deposit was so far in the depositor personally that the addition of his official title to his name was a mere *descriptio personæ* which did not alter the rights of the parties, especially where, as in this case, the official funds were blended with his own funds.

However, a contrary conclusion was reached in the case of *People v. German Bank* (1906) 116 App. Div. 687, 101 N. Y. Supp. 917, affirmed without opinion in (1908) 192 N. Y. 533, 84 N. E. 1117, it having been held that a trust fund on deposit in the names of three trustees could not, on the insolvency of the bank, be set off against the individual note of one of the trustees, even with the assent of his associate trustees. The court distinguished *Miller v. Franklin Bank* (1829) 1 Paige (N. Y.) 444, *supra*, on the ground that the trustee in that case had a personal interest in the deposit in question, since it consisted partly of his individual funds, and that the title added to the name under which the deposit was held was merely descriptive, whereas such was not the present case. G. J. C.

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H. J. GREEN et al., Constituting the Arkansas State Board of Dental Examiners, Appts.,

v.

DR. F. A. BLANCHARD.

*Arkansas Supreme Court—March 24. 1919.*

(— Ark. —, 211 S. W. 375.)

**Dentist — power to provide for revocation of license.**

1. The legislature may declare for what acts or conduct the license to practice dentistry may be revoked, and vest in state boards the authority to investigate and try the charges which may be made under the statute.

[See note on this question beginning on page 94.]

— advertising to deceive public.

2. A statute permitting the revocation of a license to practise dentistry for advertising with a view to deceiv-

ing or defrauding the public is too indefinite to be capable of enforcement.

[See 21 R. C. L. 364.]

## — painless dentistry.

3. Violation of a statute against advertising to practise dentistry without causing pain is not effected by stating that one has absolutely minimized pain from dental work.

[See 21 R. C. L. 363, 364.]

## — advertising on receipts.

4. The words "painless dentist" on receipts given for payment for work done do not violate a statute against advertising painless dentistry, since to advertise means to give public notice.

(McCulloch, Ch. J., and Smith, J., dissent.)

APPEAL by the Board of Dental Examiners from a judgment of the Circuit Court for Pulaski County (Hendricks, J.) setting aside its order revoking petitioner's certificate authorizing him to practise dentistry, in a proceeding to set aside such order. *Affirmed.*

## Statement by Hart, J.:

This is a proceeding by certiorari in the circuit court to set aside an order of the board of dental examiners of this state revoking the certificate of Dr. F. A. Blanchard, authorizing him to practise dentistry.

The proceeding brings into question an act of the legislature passed in 1915, regulating the practice of dentistry and dental surgery in this state. Acts of 1915, p. 178. The power to grant licenses to applicants to practise dentistry in this state and various other powers are conferred upon the state board by the act. Among others, the power to revoke the certificate is conferred by § 7 of the act.

On the 27th day of February, 1918, the Arkansas state board of dental examiners issued a citation to Dr. F. A. Blanchard to appear before it on the 9th day of April, 1918, at the senate chamber in the state capitol in the city of Little Rock, and there to show cause, if any there be, why the license heretofore issued to him by said board should not be revoked under the provisions of §§ 7 and 8 of the act.

After hearing the testimony introduced, the board found Dr. Blanchard guilty of violation of the provisions of the act above referred to, and entered an order revoking his license. At the request of Dr. Blanchard, the findings of the board were stated by its president as follows: "The painless dentist; sixteen years' written guaranties were not given—the experts—wholesale

cost did not enter into the transaction."

The facts are as follows: In February, 1918, and for several months prior thereto, Dr. F. A. Blanchard was practising dentistry in the city of Little Rock and employed several assistants in his office. He advertised his business in the daily papers, and an advertisement in his name, dated March 10, 1918, contained the following:

"Blanchard's Dentists are Specialists. Each Thoroughly Efficient in His Own Line. Dental work is divided into parts at Blanchard's. If a tooth is to be pulled you are attended by an expert extractor who understands this thoroughly. If a crown is to be made an expert laboratory man does this, and so on. You are thus assured of the work as good as the best."

Another advertisement contained the following:

"Dental specialists, who attend you here, each a specialist in his line, thus giving you the greatest dental skill.

"Dr. F. A. Blanchard, sixteen years' continuous practical experience.

"Dr. C. N. Cantrell, thoroughly efficient in all dental work.

"Dr. M. E. Ludwick, expert crown and bridge workman.

"Dr. W. D. Flack, expert extractor and bridge workman.

"Dr. F. L. Merck, chief of laboratory.

"Sixteen years' written guaranty given to every patient.

"These dentists are past masters

in their respective lines, busily at work practising the latest science of dentistry in office without a superior in all America, as far as modern equipment is concerned. Offices fitted with all modern mechanical and other devices, perfected to add to the pleasure and comfort of all patients."

Still another is as follows: "Highest efficiency. The gentlemen operators and mechanical dentists in my office are time-tried and proven men of highest efficiency, otherwise they would have no place in my office. The work they do for you will be done thoroughly and conscientiously and will be backed by my guaranty, which I do not fail to make good. It is my honest opinion that we give more and better work for the money than any dental parlor or parlors in the United States. Our supplies of all kinds are purchased in great quantities at lowest wholesale cost, a fact that redounds to the advantage of our patients and makes possible our present scale of low prices."

There was also evidence on the part of the board tending to show that neither Dr. Blanchard nor his assistants were experts or specialists in dentistry.

A young man seventeen years old testified for the board that he worked for Dr. Blanchard from the 4th to the 9th day of March, 1918. He worked in the laboratory on plates for false teeth, and stated that he was the only laboratory man Dr. Blanchard had that week. On cross-examination, he admitted that he did not make any crowns, or attempt to make any. His only work was working on plates for false teeth, polishing them, etc. He also admitted that there were two operators who did the most difficult part of the laboratory work. He testified that there were three assistants in the office who did the crown work while he was there.

Several of the advertisements of Dr. Blanchard contained the following: "I have absolutely minimized pain from dental work."

It was also shown that Dr. Blanchard issued receipts to his patients upon which were the printed words, "painless dentist." These receipts also had printed on them the words, "United Dental Company." The printed words were marked out with a stamp.

According to the testimony of Dr. Blanchard, these were some old receipts which he had when he was practising in New Orleans, Louisiana. He was delayed in getting receipts which he had ordered for his office here, and only used these receipts until he could get others. He plainly marked out with a stamp the words, "painless dentist," and, "United Dental Company." The receipts were not used to advertise his business at all. On the back of the receipts used by Dr. Blanchard here are the following words:

We do good work cheap and for cash. If any work is defective, kindly call our attention to it, and we will gladly make it good without extra charge. All complaints must be made to Dr. Blanchard, and if fault is found in the work, will gladly repair same for you without argument.

Dr. F. A. Blanchard,  
By Flack.

It is also shown that the assistants employed by Dr. Blanchard were experts and specialists as advertised by him. One witness testified that Dr. Blanchard repaired a plate for her, and that she had three teeth extracted at his office absolutely without pain; that she did not know what anesthetic was applied; that she had had work done by other dentists and that they hurt her much more; that the work that was done for her in Dr. Blanchard's office was very satisfactory.

Upon the hearing of the writ of certiorari in the circuit court, judgment was rendered setting aside the order of the board revoking the license of Dr. Blanchard.

From the judgment rendered, the board has duly appealed to this court.

Messrs. House, Rector, & House, for appellants:

There was ample evidence of a substantial character to justify the findings of the board.

Hall v. Bledsoe, 126 Ark. 125, 189 S. W. 1041; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; Munk v. Frink, 81 Neb. 631, 17 L.R.A.(N.S.) 439, 116 N. W. 525; Richardson v. Simpson, 88 Kan. 684, 43 L.R.A.(N.S.) 911, 129 Pac. 1128.

Dr. Blanchard was guilty of advertising to practise dentistry without pain.

Carter v. State, 81 Ark. 37, 98 S. W. 704.

The board was justified in revoking Dr. Blanchard's license.

Macomber v. State Bd. of Health, 28 R. I. 3, 8 L.R.A.(N.S.) 585, 65 Atl. 263; State ex rel. Spriggs v. Robinson, 253 Mo. 271, 161 S. W. 1169; Chenoweth v. State Medical Examiners, 57 Colo. 74, 51 L.R.A.(N.S.) 958, 141 Pac. 132, Ann. Cas. 1915D, 1188; Forman v. State Bd. of Health, 157 Ky. 123, 162 S. W. 796; Munk v. Frink, 81 Neb. 631, 17 L.R.A.(N.S.) 439, 116 N. W. 525; Walker v. McMahon, 81 Neb. 640, 116 N. W. 528; Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17; Berry v. State, — Tex. Civ. App. —, 135 S. W. 631; Richardson v. Simpson, 88 Kan. 684, 43 L.R.A.(N.S.) 911, 129 Pac. 1128; State ex rel. Conway v. Hiller, 266 Mo. 242, 180 S. W. 538; Freeman v. State Medical Examiners, 54 Okla. 531, L.R.A. 1916D, 436, 154 Pac. 56; State Medical Examiners v. Jordon, 92 Wash. 234, 158 Pac. 982; Lassen v. Dental Examiners, 24 Cal. App. 767, 142 Pac. 505.

Messrs. Mehaffey, Reid, Donham, & Mehaffey, and J. A. Tellier, for appellee:

The board exceeded its jurisdiction and proceeded illegally, basing its finding upon charges which were never made and upon indefinite and uncertain charges which it refused to make more specific and definite.

Rapp v. Parker, 128 Ark. 239, 193 S. W. 535; Forman v. State Bd. of Health, 157 Ky. 129, 162 S. W. 796.

The evidence before the board furnished no legally substantial basis for its action in revoking appellee's license to practise dentistry.

St. Louis, I. M. & S. R. Co. v. Coleman, 97 Ark. 442, 135 S. W. 338; Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 468, 38 Am. St. Rep. 254, 21 S. W. 1062.

Dr. Blanchard's advertisement in regard to experts and specialists did not violate the statute.

Nelson v. Sun Mut. Ins. Co. 71 N. Y. 453; Ellis v. Thomas, 84 App. Div. 628, 82 N. Y. Supp. 1064; Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221; State v. Simonis, 39 Or. 111, 65 Pac. 595; Scott v. Astoria & C. River R. Co. 43 Or. 26, 62 L.R.A. 543, 99 Am. St. Rep. 710, 72 Pac. 594; Turner v. Haar, 114 Mo. 335, 21 S. W. 737; Farmer v. Stillwater Co. 86 Minn. 59, 90 N. W. 10; Buffum v. Harris, 5 R. I. 243; Pendleton v. Saunders, 19 Or. 9, 24 Pac. 506; State v. Davis, 55 S. C. 339, 33 S. E. 449.

The severity of the penalty—the revocation of appellee's right to practise dentistry—requires more evidence to constitute legally sufficient evidence than an ordinary case.

Hall v. Bledsoe, 126 Ark. 125, 189 S. W. 1041; Chenoweth v. State Medical Examiners, 57 Colo. 74, 51 L.R.A.(N.S.) 965, 141 Pac. 132, Ann. Cas. 1915D, 1188.

Hart, J., delivered the opinion of the court:

The constitutionality of statutes creating state medical and dental boards and empowering them to license and revoke licenses of physicians and dentists has generally been upheld. This court upheld such a statute in the case of State Medical Bd. v. McCrary, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631. The appeal, however, does involve the construction of that part of the act regulating the practice of dentistry relating to the revoking of licenses by the board. See Acts of 1915, p. 178. The sections referred to are §§ 7 and 13. They read as follows: "Sec. 7. The state board of dental examiners may refuse license or suspend or revoke the same for any of the following causes: . . .

"Second. The publication or the circulation of any fraudulent or misleading statement as to the skill or method of any person or operator.

"Third. The commission of a criminal operation, or conviction of felony, or chronic or persistent inebriety, drunkenness or confirmed drug habit, or in any way advertis-

ing to practise dentistry or dental surgery without causing pain or advertising in any other manner with the view of deceiving or defrauding the public or in any way that would tend to deceive the public, or using or advertising as using any drug, nostrum, patent or proprietary medicine of any unknown formula, or any dangerous or unknown anesthetic which is not generally used by the dental profession, or using or advertising as using any drugs, material, medicine, formula, system or anesthetic which is either falsely advertised, misnamed, or not in reality used. . . ."

"Sec. 13. It shall be unlawful for any person or persons to practise or offer to practise dentistry or dental surgery under any name except his or her own name, or to use the name of company, association, corporation or business name, or to operate, manage or be employed in any room or rooms or office where dental work is done, or contracted for under the name of any company, association, tradename or corporation. Any person or persons practising or offering to practise dentistry or dental surgery shall practise under and use his or her name only."

Section 17 provides that any person who shall practise or attempt to practise dentistry or dental surgery during the period of revocation of his license shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$50 nor more than \$200, or shall be imprisoned in the county jail not less than one month nor more than one year; or shall be punished by both such fine and imprisonment.

The board relied upon the power given it by that part of § 7 contained in subdivision 2 and the following in subdivision 3, "or advertising in any other manner with the view of deceiving or defrauding the public, or in any way that would tend to deceive the public," in making the order revoking the license of appellee.

On the part of appellant board, it

is contended that subdivision 2 and the words, "deceiving or defrauding the public," include the acts proved by the board to have been done by appellee as set out in our statement of facts. Counsel say that it was impossible for the legislature to enumerate all the acts which these words embraced, and that they include all the acts proved by the board in this case, and that their meaning would be so considered by the common judgment of mankind. Cases are cited by them to sustain their contention.

On the other hand, the judgment of the circuit court annulling the order of the board revoking appellee's license is sought to be upheld on the ground that subdivision 2 and that part of subdivision 3 of § 7 just referred to are so vague and indefinite as to make the statute inoperative and invalid for that reason. Cases are cited by them to sustain their contention. This court has never been called upon to construe these words or words of similar import in a statute of this sort. In the case of *State Medical Board v. McCrary*, supra, the court was called on to construe our statute empowering state medical boards to revoke the license of one who publicly advertises "special ability to treat or cure chronic and incurable diseases." The contention was there made that the statute was too vague and indefinite to be enforced. The court said that the question gave it the gravest concern, but upheld the statute on the ground that "chronic and incurable diseases" are specifically named and discussed in standard medical works, and so are known to all physicians who are qualified to practise their profession. Cases on both sides of the question are cited in the opinion. Additional cases are cited in *State ex rel. Spriggs v. Robinson*, 253 Mo. 271, 161 S. W. 1169, a case decided by the supreme court of Missouri. Here the language of the statute is essentially different from that construed in the *McCrary* Case. It does not advise the dentist in ad-



vance of what act or acts may be in violation of its provisions. Subdivision 2 and the words, "deceiving or defrauding the public," have no common-law definition. They are not defined in the statute and have no generally well-defined meaning in the decision of courts. Under the statute, a dentist might do an act neither violating moral law nor involving moral turpitude, and which he regarded as strictly proper, and still his acts might, in the opinion of the board, be such as were calculated to deceive or defraud the public. Different standards might be established by different boards. It is well known that the different schools of medicine and even of dentistry have widely divergent views as to the treatment of certain diseases. It must be remembered that the statute does not prohibit advertising, however unprofessional and unethical we might consider that to be. It only prohibits advertising with the view of "deceiving or defrauding the public or in any way that would tend to deceive the public." So the members of one school of medicine or dentistry might advocate a certain treatment and in good faith advertise it to the public, which might be condemned by members of another school as calculated to deceive and defraud the public. The members of the profession are usually men of intelligence and good citizens. We do not believe that they would be guilty of such a multiplicity of wrongful acts that their conduct could not be safely regulated by a specific legislative enactment.

It is competent for the legislature to declare for what acts or conduct

Dentist—power to provide for revocation of license.

a license may be revoked, and to vest in state boards the authority to investigate and try the charges which may be made under such a statute; but the statute should specifically name or designate the offenses or wrongful acts which shall constitute a cause for revoking his li-

cense, so that the dentist may know in advance whether he has violated the terms of the statute. We think this construction is in accord with the principles of law heretofore laid down by this court.

In *Ex parte Jackson*, 45 Ark. 158, the court annulled a statute which made it a misdemeanor to "commit any act injurious to the public health, or public morals, or to the perversion or obstruction of public justice, or the due administration of the law." In construing the statute the court said: "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The Constitution, which forbids ex post facto laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

So, too, in discussing the principle in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, the court held the statute too vague and indefinite for enforcement, and in discussing the question said: "Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Continuing, the court said: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be

rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

But it is insisted that, because this is not a case of prosecution for crime, the doctrine of those cases has no application. This very question came before the court in *Czarra v. Medical Supers.* 25 App. D. C. 443, in which the court held that the doctrine was applicable, and cited with approval the cases just referred to. Shepard, Ch. J., speaking for the court, said: "The police power of every state warrants the requirement of the possession of all reasonable qualifications by those who seek to engage in the public practice of medicine, and, incidentally, the extension of a wide discretion to those agencies charged with the duty of inquiry and determination. But we do not agree that the exercise of the same wide discretion can be extended to a case where, when one has been regularly admitted, the deprivation or forfeiture of his license is sought under another or an independent provision of the same statute. The right to practise the profession, once regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection of property lawfully acquired. And these are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense."

As said in that case, while the proceeding to revoke the license is not itself a criminal proceeding, it is a preliminary step thereto. The statute provides a severe penalty for practising dentistry after the revocation of the license, and in the prosecution therefor the order of revocation must necessarily be held to be conclusive evidence of the fact of the revocation of the license. It is a fact worthy of note that the case of *Ex parte Jackson*, supra, has

been cited in all cases of this character where the statute was held too indefinite and uncertain for enforcement.

It is also a fact worthy of note that, in most of the cases which have upheld statutes as general as the one under consideration, the question now under discussion was not raised, discussed, or decided. The question discussed in each case was the constitutionality of such statutes, and that is noticeably so in the cases cited by this court in *State Medical Bd. v. McCrary*, 95 Ark. 511, 30 L.R.A. (N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631. The principle under discussion is well stated in the case of *Czarra v. Medical Supers.* supra. There the question was whether "unprofessional or dishonorable conduct," as declared in the act, were sufficiently specific and certain as to warrant the exercise of the power of revocation of the license by the board of medical supervisors. The court held "that unprofessional or dishonorable conduct" was not defined by the common law, and that the words have no common or generally accepted signification, and that what conduct may be of either kind is a matter of opinion only. Chief Justice Shepard, speaking for the court, in discussing this phase of the case, says: "Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply, not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement

of the law the exercise of an arbitrary power of discriminating between the several classes of acts."

The principle was also recognized by the Supreme Court of the United States in *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

It follows that subdivision 2 of § 7 and that part of subdivision 3 as follows, "or advertising in any other

-advertising  
to deceive  
public.

manner with the view of deceiving or defrauding the public

or in any way that would tend to deceive the public," are too uncertain and indefinite for enforcement.

The remaining part of the section, however, is valid and capable of enforcement. This brings us to a consideration of whether or not appellee violated that part of subdivision 3 of § 7 as follows: "Or in any way advertising to practise dentistry or dental surgery without causing pain." Appellee advertised in the daily papers as follows: "I have absolutely minimized pain from dental work." Does this bring the case within the rule laid down in *Hall v. Bledsoe*, 126 Ark. 125, 189 S. W. 1041? We do not think this language in its common acceptation

-painless  
dentistry.

means that appellee would practise dentistry or dental

surgery without causing pain. The word "minimize," as defined by the *Century Dictionary*, means: "To reduce to a minimum or the lowest terms or proportions; to make as little or slight as possible."

So the word does not indicate that appellee would practise dentistry without causing pain, but that he had reduced it so as to make the pain as little or slight as it was possible to do in the practice of dentistry. The word "absolutely" means positively, and was only a word of emphasis. There is nothing in the record to show that the words were used in any other signification.

It is contended on the part of the board that the use of the receipts

with the words "painless dentist" on them indicated that appellee was intending to evade the statute. These receipts were given to customers who had paid him for work after it had been done. They

-advertising  
on receipts.

were not in any sense used to advertise the business. To "advertise" means to give public notice.

It follows that the judgment of the Circuit Court must be affirmed.

McCulloch, Ch. J., and Smith, J., dissent.

McCulloch, Ch. J., dissenting (April 7, 1919):

It is conceded that the law applicable to this case, as far as concerns the scope and extent of appellee's remedy on certiorari, is settled by the decision of this court in the case of *Hall v. Bledsoe*, 126 Ark. 125, 189 S. W. 1041, which involved a review of the proceedings of the board of control in the removal of the superintendent of one of the state charitable institutions. In that case we said: "We are not called on to decide primarily whether or not the decision of the board was correct. The lawmakers have placed that authority in the board of control, and it would be clearly an encroachment by the courts upon the authority of another department of government to undertake to substitute the judgment of the judges for that of the members of the tribunal vested with authority to manage the institutions of the state and to appoint and remove those who are placed there in charge. When all the testimony in the case is considered and viewed in the strongest light to which it is susceptible in support of the board's findings, it cannot be said that there is an entire absence of evidence of a substantial nature tending to establish the charge of inattention and neglect of duty on the part of the superintendent. This being true, it becomes the duty of the courts, upon well-settled principles of law, to leave undisturbed the action of the tribunal especially creat-

ed by the lawmakers to pass upon those questions. Any other view would make the board of control a mere conduit through which a decision on the removal of an unfaithful or inefficient superintendent would be passed up to the courts instead of leaving the matter where the lawmakers have placed it, in the hands of the board."

I think the position of the majority in condemning certain parts of the statute is untenable and against the great weight of judicial authority. The doctrine of the *McCrary Case* (95 Ark. 511, 30 L.R.A. (N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631), ought to control the present case. The provision of the statute considered in that case was different from the one in the instant case, but not to the extent that they escape control by the same principles. In the *McCrary Case* the statute which we upheld made "advertising special ability to treat or cure chronic and incurable diseases" grounds for revoking the license of a physician, and we said that the terms of the statute were not too vague, for the reason that it is easily ascertainable from standard medical books what diseases are considered by the profession as "chronic and incurable." Medicine is not an exact science; it is progressive; and a disease considered incurable to-day may be definitely known to-morrow as being curable. The standard books of to-day may repudiate accepted theories of yesterday. Yet we declared, rightly, I think, that the statute thus dealt with was not so vague as to render it invalid. Now, under the same principles, we ought to declare the same result concerning the statute under present consideration which authorizes the revocation of the license of a dentist who advertises himself by the publication of "any fraudulent or misleading statement as to the skill or method of any person or operator." Fraud is many-sided and manifests itself in various forms, yet, when brought to light, it is

recognizable under whatever form it may assume. Fraud is a fact,—not a principle of law,—and it does not constitute a delegation of legislative power to authorize the state board of dental examiners to determine whether or not, in a given instance, a fraudulent or misleading statement has been published. In other words, this delegation of power to the board is not to act in a legislative capacity in declaring what the law on the subject is, but the legislature itself has declared the law in the statute, and the delegation to the board is merely one to determine the question of fact whether or not the publication in a given instance constituted a fraudulent or misleading one within the meaning of the language of the statute.

No case has come to our attention which deals with a statute containing the precise provision found in the statute now under consideration, but in the *McCrary Case* we expressly recognized the fact that the weight of authority preponderated in favor of the validity of statutes which authorize the revocation of physicians' licenses for "unprofessional or dishonorable conduct." Among the few cases holding to the contrary, the case of *Czarra v. Medical Supers.* 25 App. D. C. 443, was referred to as being with the minority, and, strangely enough, that case seems to have controlling influence on this court in the decision of the present case.

The cases constituting the majority are very numerous, and the following are especially in point: *Forman v. State Bd. of Health*, 157 Ky. 123, 162 S. W. 796; *Richardson v. Simpson*, 88 Kan. 684, 43 L.R.A. (N.S.) 911, 129 Pac. 1128; *Berry v. State*, — Tex. Civ. App. —, 135 S. W. 631; *State Medical Examiners v. Jordan*, 92 Wash. 234, 158 Pac. 982; *Lassen v. Dental Examiners*, 24 Cal. App. 767, 142 Pac. 505; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928; *State ex rel. Powell v. State Medical*

Examining Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.

The case of *Matthews v. Murphy*, 23 Ky. L. Rep. 750, 63 S. W. 785, 54 L.R.A. 415, is one of the three cases constituting the minority, but in the later case cited above the court ranged itself with the majority by holding to be valid a statute authorizing the revocation of a physician's license for unprofessional and dishonorable conduct which is fraudulent or involves moral turpitude. The court said that such a provision is not vague, as it "erects a definite standard by which the board is to be governed, to which every member of a learned and honorable profession should conform; and he may know in advance that he should conform to this standard." [157 Ky. 123.] The Texas case cited above dealt with a statute which authorized revocation for "grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," and the court decided that the grounds stated were not so indefinite as to render the statute void. This decision was by one of the courts of civil appeals of that state, but a writ of error to the supreme court was denied.

A statute of the state of Washington (Rem. & Bal. Code, § 8397½) contains the following as grounds for revoking the license of a physician: "All advertising of medical business which is intended or has a tendency to deceive the public, or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

The supreme court of that state, in the case cited above, upheld the statute, and in the opinion it was said that it was as definite as it could reasonably be made because such an advertisement "as to the limitless variations of language, symbols, and verbal or pictorial allurements, no human ingenuity could possibly anticipate and forestall them."

The language of our statute is obviously much more definite than

that of many others which declare that the license of a physician may be revoked for "unprofessional or dishonorable conduct;" yet, by the great weight of authority, the latter is sufficiently definite to sustain the validity of such a regulation.

I am of the opinion, therefore, that the statute is valid, and that the board of dental examiners had before it substantial evidence that appellee violated the statute with respect to the character of advertisement made grounds for revocation. The evidence tended to show that the advertisement was false on each point set forth in it, and that appellee made the false claims for the purpose of deceiving the public. It is unnecessary for us to determine where the preponderance of the testimony adduced before the board was; for, if there was any evidence at all to sustain the finding of the board, we have no authority under the law to disturb it. *Hall v. Bledsoe*, 126 Ark. 125, 189 S. W. 1041.

I am clearly of the opinion, too, that the decision of the board holding that appellee, in advertising that he had "absolutely minimized pain from dental work," violated the terms of the statute. The language of the advertisement is not precisely that used in the statute, but the effect upon the public mind is the same, and was evidently so intended. The statement was very artfully framed so as to escape the exact language of the statute, and yet convey the same meaning, at least to unthinking or credulous persons. The most emphatic words were used in the advertisement. In the first place, though it did not say that pain was eliminated, it said that it was "absolutely minimized . . . from dental work." Even a close analysis of these words leads to the interpretation that it was meant to convey the idea that pain was eliminated, for to "absolutely minimize pain from dental work" is to reduce it to a practical exclusion. But that is certainly true in

a popular sense. The words are calculated to carry the same meaning as those used in the statute, and, since the board has so decided, we ought not to disturb the findings

of that tribunal, which was expressly clothed with power to pass on such questions.

I dissent.

Smith, J., concurs in the dissent.

## ANNOTATION.

### Validity of statute providing for revocation of license of physician, surgeon, or dentist.

- I. Majority rule, 94.
- II. Minority rule, 99.
- III. Rule in California, 100.
- IV. Rule in Kentucky, 101.
- V. Rule in Ohio, 102.

#### *I. Majority rule.*

The rule obtaining in the majority of the jurisdictions which have passed on the question is that a statute providing that the license of a physician, surgeon, or dentist may be revoked by the officers or board by which such licenses are granted, is not rendered uncertain or otherwise invalid because the grounds for revocation are therein stated in general terms.

**Arizona.**—*Aiton v. Medical Examiners* (1911) 13 *Ariz.* 354, *L.R.A.* 1915A, 691, 114 *Pac.* 962.

**Illinois.**—*People v. Apfelbaum* (1911) 251 *Ill.* 18, 95 *N. E.* 995.

**Indiana.**—*Spurgeon v. Rhodes* (1906) 167 *Ind.* 1, 78 *N. E.* 228.

**Iowa.**—*Smith v. State Medical Examiners* (1908) 140 *Iowa*, 66, 117 *N. W.* 1116.

**Kansas.**—*Meffert v. State Bd. of Medical Registration* (*Meffert v. Pack-er*) (1903) 66 *Kan.* 710, 1 *L.R.A.* (N.S.) 811, 72 *Pac.* 247; *Richardson v. Simpson* (1913) 88 *Kan.* 684, 43 *L.R.A.* (N.S.) 911, 129 *Pac.* 1128.

**Michigan.**—*Kennedy v. State Bd. of Registration* (1906) 145 *Mich.* 241, 108 *N. W.* 730, 9 *Ann. Cas.* 125.

**Minnesota.**—*State ex rel. Chapman v. State Medical Examiners* (1885) 34 *Minn.* 387, 26 *N. W.* 123; *Wolf v. State Medical Examiners* (1909) 109 *Minn.* 360, 123 *N. W.* 1074.

**Missouri.**—*State ex rel. Williams v. Purl* (1910) 228 *Mo.* 1, 128 *S. W.* 196.

**Nebraska.**—*Mathews v. Hedlund* (1908) 82 *Neb.* 825, 119 *N. W.* 17.

**New York.**—*Re Smith* (1833) 10 *Wend.* 449.

**Rhode Island.**—*State Bd. of Health v. Roy* (1901) 22 *R. I.* 538, 48 *Atl.* 802.

**Texas.**—*Berry v. State* (1911) — *Tex. Civ. App.* —, 135 *S. W.* 631.

**Washington.**—*State Medical Examiners v. Jordan* (1916) 92 *Wash.* 234, 158 *Pac.* 982; *State Medical Examiners v. Harrison* (1916) 92 *Wash.* 577, 159 *Pac.* 769; *State Medical Examiners v. Macy* (1916) 92 *Wash.* 614, 159 *Pac.* 801.

**Wisconsin.**—*State v. Schaeffer* (1906) 129 *Wis.* 459, 109 *N. W.* 522.

"It has never held that the granting, or refusing to grant, such a license as this, was the exercise of judicial power, and in fact this is not claimed in this case; and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is, in each case, identical; viz., to exclude an incompetent or unworthy person from this employment." *State ex rel. Chapman v. State Medical Examiners* (1885) 34 *Minn.* 387, 26 *N. W.* 123.

In *Aiton v. Medical Examiners* (1911) 13 *Ariz.* 354, *L.R.A.* 1915A, 691, 114 *Pac.* 962, it was held that a statute providing that a physician's license might be revoked for "grossly immoral or unprofessional conduct" was not void for uncertainty, since the words "unprofessional conduct" must be understood to mean such conduct as would be generally understood to be unprofessional because grossly immoral or dishonorable, and therefore the license could not be revoked for some trivial reason, or for what might be regarded as a mere breach of professional ethics.

In *People v. Apfelbaum* (1911) 251

Ill. 18, 95 N. E. 995, it appeared that the license of the defendant to practise medicine had been revoked for advertising under a name other than his own, and for other unprofessional and dishonorable conduct, the revocation being by virtue of a section of the Medical Practice Act. The defendant contended that this act was void for uncertainty, was unconstitutional because it conferred judicial power on the board of health, and because it violated the 14th Amendment of the Federal Constitution, in that it took property without due process of law. It was held, denying all these contentions of the defendant, that the statute was not void for uncertainty in not specifying what constituted unprofessional or dishonorable conduct, as it would scarcely be possible to set out every act that would warrant the revocation of a license on this ground, and in any event the defendant's license had been revoked for advertising under a name not his own, and as to this charge the statute was not uncertain. It was also held that the defendant had had due process of law, which did not necessarily mean a trial in court, the court saying: "Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformably to the fundamental rules of right and affecting all persons alike, is due process." It was also held that the board did not exercise judicial power as that term was used in reference to the distribution of the powers of government, but merely exercised a discretion in the performance of an administrative or ministerial function.

In *Spudgeon v. Rhodes* (1906) 167 Ind. 1, 78 N. E. 228, it was held that a statute regulating the practice of medicine and providing for the revocation of the license of a physician found "guilty of a felony, or gross immoral-

ity, or addicted to the use of liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery," was a legitimate exercise of the police power. It was held that the charge made against the plaintiff did not constitute a public offense or crime, but was a civil case, and therefore did not come within that provision of the Constitution guaranteeing the right of persons charged with capital or other infamous crimes to be held to answer only on a presentment or indictment by a grand jury, or within the guaranty of trial by jury. It was also held that the granting or refusing to grant a license to practise medicine, or the revocation thereof, was not the exercise of judicial power.

In *Smith v. State Medical Examiners* (1908) 140 Iowa, 66, 117 N. W. 1116, it was held that a statute providing for the revocation of the license of a physician for incompetency was constitutional and valid. The court held that, although the right to practise was a valuable right, entitled to constitutional protection, yet, as the plaintiff had received notice of the meeting at which the charges were to be heard, and had had an ample opportunity to defend, it could not be said he had not received due process of law, even though no express provision was made for notice and a hearing in the statute. The court said that it would presume that the legislature intended to provide for notice and a hearing as a part of the rule that statutes should be construed to uphold their constitutionality whenever possible. "Every requirement of the law is met if the party be given a fair and reasonable opportunity to be heard."

In *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) (1903) 66 Kan. 710, 1 L.R.A. (N.S.) 811, 72 Pac. 427, it appeared that the license of a physician to practise his profession was revoked for "gross immorality," pursuant to a statute regulating the practice of medicine and surgery, which was as follows: "All persons engaged in the practice of medicine on the date of the passage of this act shall, within four months from the date of such passage, apply to the

board of registration and examination for a license to practise. . . . The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause." Laws 1901, chap. 254, § 2, Gen. Stat. 1901, § 6670. It was held that the physician had not been deprived of property without due process of law because the right to practise medicine was subject to the police power of the state to regulate pursuits or callings which affect the public health, safety, or morals, this power having been reserved to the state by the Federal Constitution. It was further held that the board was not bound by the technical rules of evidence, as it was the intention of the legislature to provide a summary method by which physicians unfit to practise might be removed. The petitioner had received notice of the charges to be made against him, and had had an opportunity to be heard and to cross-examine witnesses. The contention of the petitioner that the law was *ex post facto* as to him because the offenses for which his license had been revoked were committed prior to the passage of the act was held to be without foundation, as the revocation was not a punishment of the offender, but a means of protecting the public from physicians not conforming to the required standard of morals.

In *Richardson v. Simpson* (1918) 88 Kan. 684, 43 L.R.A.(N.S.) 911, 129 Pac. 1128, it appeared that a statute provided for the revocation of dentists' licenses to practise, "who have by false or fraudulent representations obtained or sought to obtain money or any other thing of value or have practised under names other than their own, or for any other dishonorable conduct." Gen. Stat. 1909, § 7991. It was held that the words "other dishonorable conduct" did not render the statute void for uncertainty, as they should be interpreted to mean conduct

of the same general character as that already specified.

In *Kennedy v. State Bd. of Registration* (1906) 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125, it was held that a statute providing for the revocation of a physician's license for inserting in a newspaper an advertisement relative to venereal disease, and containing matter of an obscene and offensive nature derogatory to good morals, was a valid exercise of the police power and was constitutional. It was also held that the revocation of a license to practise medicine was not the exercise of a judicial power, and that the term "due process of law" did not necessarily imply judicial proceedings, as the petitioner would not be deprived of any constitutional right by an observance of the terms of the statute, an appeal to the courts would not be necessary, and no provision therefor need be made therein.

In *State ex rel. Chapman v. State Medical Examiners* (1885) 34 Minn. 387, 26 N. W. 123, there was involved a statute providing for the revocation of the license of a physician to practise, who should be guilty of "unprofessional or dishonorable conduct." It was contended that this statute was void because it took property—the right of a physician to practise his profession—without due process of law, and it conferred judicial power upon executive officers, members of the board of health, contrary to the Constitution. It was held that the statute was a valid exercise of the police power, and that the granting and revoking of licenses were not judicial powers. It was also held that due process of law did not necessarily mean that judicial proceedings must be resorted to, the ordinary procedure in such cases being that the board or body of officers who issued the license had also the power to revoke it when it appeared that the reasons given by statute for so doing existed.

In *Wolf v. State Medical Examiners* (1909) 109 Minn. 360, 123 N. W. 1074, it was held that a statute providing for the revocation of physicians' licenses for unprofessional conduct was constitutional, as it gave the right



of appeal to the district court of the proper county on questions of law and fact, and hence fully protected the rights of persons coming before the board, and secured them due process of law.

In *State ex rel. Williams v. Purl* (1910) 228 Mo. 1, 128 S. W. 196, the court sustained a statute of Missouri providing for the revocation of the license of a dentist for "fraud, deceit or misrepresentation in the practice of dentistry, or for gross violations of professional duties." Section 8528, Revised Statutes 1899, as amended in 1905, Laws 1905, p. 215. It was held that this statute was constitutional and valid, as the words used had a definite and well-understood meaning, and therefore the statute could not be held void for uncertainty. It was held that although the words "gross violation of professional duties," standing alone, would have no well-defined meaning, they must be read in connection with the other words in the section, from which it clearly appeared that the legislature intended that these general words should be limited by the preceding special or particular words, in accordance with a familiar rule of construction, and as so limited their meaning was certain and well defined.

In *Mathews v. Hedlund* (1908) 82 Neb. 825, 119 N. W. 17, it was held that a statute regulating the practice of medicine, and providing for the revocation of a physician's license upon proof of his having performed a criminal operation, was a valid and constitutional law, and did not deprive the defendant of property without due process of law, as it provided due notice and opportunity to be heard and to cross-examine witnesses.

In *Re Smith* (1833) 10 Wend. (N. Y.) 449, it was held that a statute providing for the revocation of the license of a physician to practise, where it appeared that he was guilty of immoral conduct or habits, was a valid and constitutional law. It was claimed that this law deprived the plaintiff of the right of trial by jury and attempted to establish a new court whose procedure differed from

that of the common law. It was held that the right of trial by jury in the Federal Constitution referred to the Federal courts only, and the state Constitution secured the right (of trial by jury) in all cases in which it had heretofore been used. It was held that this proceeding was not a trial for an offense with a view to punishment, but a mere summary inquiry to ascertain facts for a collateral purpose. It was further held that the law in question did not violate that provision of the Bill of Rights and the Constitution which declared that no person should be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, the court saying: "When the Constitution speaks of a person not being *held to answer* for a capital or otherwise infamous crime, unless on presentment or indictment, . . . it means to answer in a course of criminal proceedings,—to answer *criminaliter*, with a view to punishment under the criminal law, and has no reference whatever to those collateral or incidental proceedings which are disciplinary in their character, or have exclusive regard to some special character or relation which belongs to the individual."

In *State Bd. of Health v. Roy* (1901) 22 R. L. 538, 48 Atl. 802, it was held that a statute providing for the revocation of a physician's license upon proof that the holder thereof had been guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public was a valid exercise of the police power and constitutional. It appeared that the defendant had obtained his license to practise by presenting a diploma which had been issued to another person of the same name, and which he falsely represented had been issued to himself. The court said: "That such conduct would be grossly unprofessional seems to us too plain to require argument." It was further held that the defendant was not deprived of his constitutional right to a jury trial in this case, because jury trials in civil cases under the Constitution were declared to be secured only in cases wherein

that mode of trial had been in use. And it was also held that the defendant had received due process of law, as he had notice, an opportunity to be heard, and a right of appeal to the highest court of the state.

In *Berry v. State* (1911) — Tex. Civ. App. —, 135 S. W. 631, there was involved a statute regulating the practice of medicine, including the admission of physicians to practise and the revocation of licenses, which provided as one of the grounds for revocation, "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public." It was held that the statute was not void for uncertainty, as the words "unprofessional" and "dishonorable" were limited and explained by the words which followed,—"of a character likely to deceive or defraud the public." As thus limited, their meaning was that any conduct, to come within the prohibition of the statute, must be fraudulent as well as unprofessional or dishonorable, and therefore it could not be said that the words used were indefinite and uncertain, as such conduct would be closely akin to crime; in particular, the crime of getting money by false pretenses, although all the elements of the latter offense would not have to be proved.

In *State Medical Examiners v. Harrison* (1916) 92 Wash. 577, 159 Pac. 769, it appeared that the defendant had been convicted of aiding and abetting the commission of a criminal abortion, and her license to practise as an osteopath had thereupon been revoked, as provided by a statute (Rem. & Bal. Code, §§ 8397 and 8397½). Section 8397 provided as follows: "Whenever any holder of a certificate herein provided for is guilty of unprofessional conduct, as the same is defined in this chapter, and said unprofessional conduct has been brought to the attention of the board granting said certificates, in the manner hereinafter pointed out . . . it shall be their duty to, and they must, revoke the same at once, and the holder of said certificate shall not be permitted to practise medicine and surgery, or osteopathy . . . in this state."

Section 8397½ provided as follows: "The words 'unprofessional conduct,' as used in this chapter, are hereby declared to mean: First. The procuring, or aiding or abetting in procuring a criminal abortion. . . . Fifth. Conviction of any offense involving moral turpitude, in which case the record of such conviction shall be conclusive evidence. . . ." It was held that the legislature had power to pass this law, and that it was not void because it made the record of conviction conclusive evidence. It was also held that the use of the words "moral turpitude" did not make the statute so vague and uncertain as to render it void, as those words were capable of accurate definition and were well understood.

In *State Medical Examiners v. Macy* (1916) 92 Wash. 614, 159 Pac. 801, a statute regulating the practice of medicine, which provided for the revocation of the license of a physician guilty of unprofessional conduct, was held not to be void for uncertainty. The statute defined what should constitute unprofessional conduct in seven subdivisions of § 8397½ of the act (Rem. & Bal. Code). The third of these subdivisions was as follows: "Third. All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety." It was also held that there was no constitutional right to a jury trial in such a case, as physicians were not required to have licenses until after the adoption of the Constitution, and hence the provision that "the right of trial by jury in all cases wherein it has heretofore been had shall remain inviolate" manifestly could not apply.

In *State Medical Examiners v. Jordan* (1916) 92 Wash. 234, 158 Pac. 982, there was involved the same section which was construed in the case last cited. It was held that this section was not void for uncertainty, and could not well be made more specific. It does not, the court said, prohibit all advertising by a physician, but only such as has a tendency to deceive the

public or impose on credulous or ignorant persons; it makes wrongful, and not merely unethical, conduct a ground for revocation.

In *State v. Schaeffer* (1906) 129 Wis. 459, 109 N. W. 522, it appeared that the defendant had procured a license to practise medicine by fraudulently representing himself to be a graduate of certain medical colleges, and that he was therefore possessed of the requisite knowledge, skill, and ability to practise medicine and surgery. The defendant had practised for five years by virtue of the certificate so secured, when a law was passed which provided that the license of a physician "which has been *heretofore* or which may be *hereafter* issued to any person to practise medicine, . . . who is guilty of immoral, dishonorable, or unprofessional conduct, after the passage of this act, or who has procured such license or certificate of registration by fraud or perjury, or where the same was obtained through error," shall be revoked. It was held that this act applied to certificates issued prior to the time the act went into effect, as that was the meaning of the word "*heretofore*" as used therein, and such construction and operation of the statute were not repugnant to the constitutional provision prohibiting the passing of "*ex post facto*" laws, since that term applied only to criminal laws.

## II. *Minority rule.*

In a few jurisdictions the rule is that statutes regulating the medical profession and providing for the revocation of the licenses of physicians must describe the grounds with particularity, so as to make it clear just what is meant. Statutes using general terms such as "manifestly incurable disease" or "unprofessional or dishonorable conduct" are held to be too vague and uncertain to be enforced, since they do not inform in advance those practising the profession for what acts their licenses may be revoked. *Graeb v. State Medical Examiners* (1913) 55 Colo. 523, 47 L.R.A. (N.S.) 1063, 139 Pac. 1099; *Czarra v. Medical Supers.* (1905) 25 App. D. C.

443. And see the reported case (*GREEN v. BLANCHARD*) ante, 84.

In *Graeb v. State Medical Examiners* (Colo.) supra, a statute providing for the revocation of the licenses of physicians for certain specified acts and conduct was before the court for construction. One of the acts specified was "obtaining a fee on the representation that a manifestly incurable disease can be permanently cured." It was held that, as it appeared from the only evidence submitted in the case that there was no disease which was manifestly incurable, the statute, in that respect, was void because of insufficiency and uncertainty.

In *Czarra v. Medical Supers.* (D. C.) supra, it was held that a statute which provided for the revocation of the license of a physician for "unprofessional or dishonorable conduct," besides other causes specifically mentioned, was invalid. The statute in no way defined what should be considered "unprofessional or dishonorable conduct," and the court held that the statute was too uncertain to be enforced, and ordered the complaint dismissed, saying: "Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts." It was also held that there was a broad distinction between the power of the state to issue licenses to those properly qualified and the power to revoke a license once lawfully acquired, saying, in that connec-

tion: "The right to practise the profession, once regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection of property lawfully acquired. And these are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense."

### *III. Rule in California.*

Although there is an apparent conflict in the holdings of the California cases on this subject, it is due to the existence of a distinction between the statutes involved.

In *Hewitt v. State Medical Examiners* (1906) 148 Cal. 590, 3 L.R.A. (N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750, it was held that a statute which provided that the license of a physician might be revoked for publishing an advertisement containing "grossly improbable statements" was void, as it was unreasonable, uncertain, and indefinite. The court said: "Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the certificate of a physician (the only matter we are concerned with), is sustained upon the ground that the legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices, and character render them unfit to remain in it. As the duty of determining whether such professional or moral unfitness exists must necessarily be vested in somebody other than the legislature, it is usually committed by appropriate legislation to boards composed of men learned in their profession. Such power, however, to revoke the license of a practitioner, when conferred upon a board, must be under provisions of law which are reasonable, must apply to matters of conduct upon the part of the practitioner

which affect the health, morals, or safety of the community; and the acts or conduct which shall render him liable to the penalty of forfeiture of his right to practise his profession must be declared with such certainty and definiteness in the act that he may know exactly what they are. The right to practise medicine is, like the right to practise any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured."

In *Lassen v. Dental Examiners* (1914) 24 Cal. App. 767, 142 Pac. 505, it was held that a statute which gave the board of dental examiners authority to revoke the license of a dentist who aided and abetted an unlicensed person to practise was a valid law, there being no uncertainty as to the meaning of the words "aid and abet." In overruling the contention of the petitioner that the statute was void for uncertainty, the court said: "Equally untenable is the appellant's second contention that the Dental Act is void for the reason, as claimed, that it leaves the decision as to what constitutes aiding and abetting to the board, or to the individual making the accusation. We are cited to the case of *Hewitt v. State Medical Examiners*, supra, as supporting appellant's claim. The case is not parallel. It was decided under the Medical Act, which provides that one who advertised the cure of diseases by printing 'grossly improbable' statements is liable to a revocation of his license; and it was held that the provisions of the statute that all advertising of medical business in which 'grossly improbable' statements are made shall constitute unprofessional conduct, for which the board may revoke the certificate, without defining what statements shall be deemed 'grossly improbable,' and which leaves it to the whim or caprice of the medical examiners, without any standard for their guidance, is too indefinite and uncertain to be enforced. No such situation is here presented. In the case at bar the charges are direct and positive to the effect that appellant actually aided and abetted

said Keck in the commission of his offense by supplying him with the tools necessary therefor; that he was employed by appellant, and was supplied with dental paraphernalia for the purpose of practising dentistry, as defined by § 15 of the Dental Act. Said section clearly declares what is meant by the practice of dentistry; and the appellant is charged in the accusation with aiding and abetting an unlicensed person, known to him to be such, to so practise dentistry unlawfully, and of receiving the reward of such unlawful practice. Certainly the act of employing a person, providing him with an office and dental instruments for the purpose of practising dentistry, and receiving the reward of his illegal practice, is aiding and abetting such person to commit the offense of practising dentistry without a license. There is no doubt or uncertainty as to what is meant by the words 'aiding and abetting' one to practise unlawfully, as used in the Dental Act, as claimed by respondent. This is a pure question of fact, which is subject to proof in the ordinary manner that proof is taken of such offenses in criminal courts. The expression 'to aid and abet,' as used in criminal law, means being present either actually or constructively at the time and place of the offense, and doing some act which renders aid to the perpetrator."

#### IV. *Rule in Kentucky.*

In *Matthews v. Murphy* (1901) 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785, a statute of Kentucky (Ky. Stat. § 2615) regulating the practice of medicine was held void for uncertainty, as to the provision therein that the license of a physician might be revoked for "unprofessional conduct likely to deceive or defraud the public," the court saying: "The statute does not prescribe the manner by which a physician may regulate his conduct; it does not advise him in advance what act or acts may be in violation of its provisions; he is not told what is lawful or unlawful. He might do an act which he regarded as entirely proper, which neither violated moral law nor involved turpitude; still such acts might, in the opinion of

the state board of health, amount to unprofessional conduct, and which, in its opinion, did or was calculated to deceive or defraud the public. . . . If the legislature desires to declare for what acts or conduct a physician's license to practise medicine shall be revoked, it is competent to do so, and to vest in some tribunal the authority to investigate and try the charge which may be made under such a statute." After the decision in the above case, the act to which it relates was amended so as to read as follows (Ky. Stat. § 2615): "The state board of health may refuse to issue the certificate provided for in this act, for any of the following causes: 1. The presentation to the board of any license, certificate, or diploma which was illegally or fraudulently obtained, or the practice of frauds or deception in passing examination. 2. The commission of a criminal abortion, or conviction of a felony involving moral turpitude. 3. Chronic or persistent inebriety or addiction to a drug habit to an extent which disqualifies the applicant to practise with safety to the people. 4. Or other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public. The board may suspend or revoke a certificate for any of the causes for which it may refuse to grant a license under the provisions of this act."

But in *Forman v. State Bd. of Health* (1914) 157 Ky. 123, 162 S. W. 796, a subsequent statute on the same subject was held to be valid, the court saying: "Is the act now before us subject to the same objection [as the former statute in *Matthews v. Murphy* supra]? It will be observed that it prescribes three specific grounds on which a physician's license may be revoked. These are, briefly: Fraud in obtaining the certificate, the commission of a criminal abortion or the conviction of a felony involving moral turpitude, and chronic inebriety. The fourth clause is to be read in connection with the preceding three. Some force must be given the word 'other' and the word 'dishonorable,' which were not in the former

statute. Evidently the word 'dishonorable' was added to qualify the word 'unprofessional,' the two words meaning 'unprofessional conduct which is dishonorable,' and these words are qualified by the word 'other,' which must mean that the unprofessional dishonorable conduct referred to is other than that above specified. The well-settled rule in the construction of statutes is that where certain things are specified and then a general expression is used, referring to other things, the other things must be of like character with those named. Two of the things above named being fraud in obtaining the certificate and the conviction of a felony involving moral turpitude, the grossly unprofessional and dishonorable conduct referred to in clause 4 must be of like character; that is, the conduct must be fraudulent and must involve moral turpitude; for unless the statute is so construed, proper effect will not be given the word 'other,' and when it is so construed it erects a definite standard by which the board is to be governed, to

which every member of a learned and honorable profession should conform; and he may know in advance that he should conform to this standard."

*V. Rule in Ohio.*

In Ohio there is apparently only one case on the subject, *Jewell v. McCann* (1916) 95 Ohio St. 191, 116 N. E. 42. It was therein held, in construing a statute regulating the practice of medicine, and providing for the revocation of the licenses of physicians for certain specified causes, that merely to provide for the revocation of a license "on notice and hearing" was not sufficient to protect the interests of physicians whose licenses were to be revoked. It was held that this statute was unconstitutional, as depriving a person of property without due process of law, as it did not provide a method of procedure whereby the members of the board of health could compel the attendance of witnesses and the production of books and documents, nor invest the board with any of the powers essential to the conduct of the trial or hearing. B. F. D.

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**LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,**

**v.**

**J. A. CARR et al., Doing Business under the Firm Name and Style of Liberty Naval Stores Company.**

*Florida Supreme Court—April 21, 1919.*

(— Fla. —, 81 So. 779.)

**Carrier — car furnished by shipper — loss — liability.**

1. A common carrier of merchandise is not relieved of liability for loss of the goods merely because the shipper furnished the car in which the goods were loaded, where the car was leased from a third person, and for the use of such car upon the road the carrier pays to the owner a certain amount per mile, and the loss of the goods in transportation is due to a defect in the particular car.

[See note on this question beginning on page 108.]

**Appeal — ruling on pleadings.**

2. It is not per se error to overrule a demurrer to a plea which amounts to the general issue, or to a replication which amounts merely to a joinder of issue upon a plea.

**Pleading — demurrer — sufficiency.**

3. A demurrer to a pleading upon the ground that it is vague, indefinite, uncertain, and insufficient presents nothing for consideration, unless upon a bare inspection of the pleading it ap-

pears to be so faulty as to constitute no defense or reply.

[See 21 R. C. L. 522, 526.]

**Carrier — contract against negligence.**

4. A common carrier is not permitted to contract against its own negligence.

[See 4 R. C. L. 767.]

**Appeal — permitting pleadings to remain in case.**

5. Allowing replications which amount merely to a joinder in issue to

remain in the record is not reversible error, if they did not confuse the issues or embarrass the defendant in the preparation of his defense.

**Carrier — cars for special commodities.**

6. A common carrier must furnish suitable cars for the transportation of commodities which it undertakes to carry, and with respect to which it holds itself out as a carrier.

[See 4 R. C. L. 682.]

**ERROR** to the Circuit Court for Gadsden County (Love, J.) to review a judgment in favor of plaintiffs in an action brought to recover damages for loss of certain turpentine while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Paul Carter for plaintiff in error.

Messrs. Myers & Myers, for defendants in error:

The liability of a common carrier intrusted with goods for transportation is that of an insurer of the goods.

Gulf Coast Transp. Co. v. Howell, 70 Fla. 544, L.R.A.1916D, 974, 70 So. 567; Clyde S. S. Co. v. Burrows, 36 Fla. 121, 18 So. 349; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 85 Am. Rep. 107.

The common-law principle as to liability of carriers is recognized by the Supreme Court of the United States and other Federal courts.

Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827; Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co. 33 C. C. A. 611, 62 U. S. App. 281, 90 Fed. 467.

The Carmack Amendment has not changed the common-law doctrine of liability of a common carrier for loss occurring on its own line.

Cincinnati & T. P. R. Co. v. Rankin, 241 U. S. 319, 326, 60 L. ed. 1022, 1025, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; Adams Exp. Co. v. Croninger, 226 U. S. 491, 507, 57 L. ed. 314, 320, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. ed. 690, 698, 38 Sup. Ct. Rep. 397; Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co. 209 Fed. 895; Collins v. Denver & R. G. R. Co. 181 Mo. App. 213, 167 S. W. 1178; Elliott v. Chicago, M. & St. P. R. Co. 35 S. D. 57, 150 N. W. 777; Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266; Cleveland, C. C. & St. L. R. Co. v. Louis-

ville Tin & Stove Co. 33 Ky. L. Rep. 924, 17 L.R.A.(N.S.) 1034, 111 S. W. 358; Wallingford v. Columbia & G. R. Co. 26 S. C. 258, 2 S. E. 19.

When damage is done by a defective car, a railway carrier cannot shield itself on the ground that such car belonged to and was used by another carrier.

St. Louis, I. M. & S. R. Co. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553; Shea v. Chicago, R. I. & P. R. Co. 66 Minn. 102, 68 N. W. 608; St. Louis, I. M. & S. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826; Higgins v. Chicago, B. & Q. R. Co. L.R.A.1917C, 507, note.

Ellis, J., delivered the opinion of the court:

The defendants in error, herein-after referred to as the plaintiffs, brought an action in the circuit court for Gadsden county against the Louisville & Nashville Railroad Company to recover for the value of 5,152 gallons of spirits of turpentine alleged to have been shipped by the plaintiffs from Sumatra, Florida, a station on the line of railroad of the Appalachian Northern Railroad Company, to Cincinnati, Ohio, to be delivered to the order of the plaintiffs, with directions to notify the Moore Oil Company at Cincinnati. The declaration alleges in the first count that the turpentine was

delivered to the Appalachian Northern Railroad on November 18, 1915; that the turpentine was contained in a tank car, and was to be transported by that railroad company and its connecting carriers, by rail to Cincinnati, and there delivered as above stated; that the Appalachian Northern Railroad issued its bill of lading for the car of turpentine, and acknowledged that the same was in apparently good order; that the railroad delivered the car of turpentine to the defendant, a connecting carrier, at River Junction, in good order, and the defendant undertook to transport the car and its contents to the point of destination, but the defendant failed to deliver the same to the plaintiffs or their order at Cincinnati, or elsewhere; that the plaintiffs within four months after a reasonable time for delivery made claim in writing at the point of origin of the shipment for their loss, but the defendant refused to pay the same.

The second count alleged that the defendant received at River Junction the car of turpentine belonging to the plaintiffs, for transportation to Cincinnati and to be delivered to the plaintiffs or their order, but the defendant failed to deliver the same to the plaintiffs or their order, or to anyone for them at said destination, or elsewhere, and the plaintiffs made claim in writing for the loss, but the defendant refused to pay the same.

The defendant pleaded never promised as alleged; for a fifth plea that the bill of lading issued by the initial carrier contained a provision that the carrier, defendant, should not be liable for any loss resulting from the "act or default of the shipper or owner;" that the loss was occasioned solely by the default of the shipper, because the tank car in which the turpentine was shipped was furnished by the Appalachian Northern Railroad Company, and that the car was old, worn, and defective "by reason of the threads on the drainpipe and cap on same being worn," which fact the plaintiffs

knew, but nevertheless loaded the turpentine in the car and delivered it to the Appalachian Northern Railroad; that the turpentine was lost in transit by "reason of said cap coming off, and said threads being old, worn, and defective," and the turpentine running out through the drainpipe. A sixth plea averred that the bill of lading provided that the carrier should not be liable for any loss occasioned by the act or default of the shipper; that the loss of the turpentine was occasioned solely by the default of the shipper, in that the tank car was constructed for shipping oil, turpentine, and like goods in bulk; that it was equipped for loading by means of an opening at the top, and for unloading by means of a "drainpipe or hole in the bottom," all of which the plaintiff knew; that the car was a private car of the plaintiffs under a lease to them, and, when furnished by them to the Appalachian Northern Railroad, was old, worn, and defective, in that the threads on the said drainpipe were worn, and the "drainpipe came off" while the car was being transported, and the contents of the car ran out; that the plaintiffs, at the time of loading the turpentine in the car and delivering it to the railroad for transportation, knew of the worn and defective condition of the drainpipe.

The plaintiffs demurred to the fifth plea, which demurrer was sustained, and interposed five replications to the sixth plea. These replications set up: First, that the car was the property of the German-American Car Company, and was being used by the plaintiffs under an agreement whereby the plaintiffs were to pay the car company for such use \$30 per month; that the defendant paid to the car company three fourths of a cent per mile for the use of the car on its lines, which amount so paid was credited on the plaintiffs' account with the car company; that the car company agreed to maintain the car according to certain requirements of railroad companies and existing "M. C. B.



rules;" that it was the custom of the railroad company to inspect the car in transit, make necessary repairs, and charge the same to the car company; that the car had made three consecutive trips to Cincinnati over the defendant's railroad before the trip on which the turpentine was lost, and on its last return was loaded promptly by the plaintiffs; second, that the car was not worn and defective in the particulars averred in the plea; third, that the loss of the turpentine was not due to the worn conditions of the threads on the drainpipe and cap; fourth, that, if the defects existed in the car as averred, they were latent and could not be discovered by the plaintiff by the exercise of ordinary care; and, fifth, that it was not true that the loss of the turpentine was due solely to the default of the plaintiffs.

The defendant demurred to these replications: First, upon the ground that they are vague, indefinite, uncertain, and insufficient; second, that the first replication was bad, because the fact that the defendant paid the car company for the use of the tank car did not relieve the plaintiffs of the duty to keep the car in repair; third, the first replication is bad, because the agreement of the plaintiffs with the car company to keep the car in repair was not binding on the defendants; fourth, it is not averred in the first replication that the defect in the car which caused the loss was not a latent defect, or was one discoverable by the defendant on inspection, or that an inspection by the defendant would have discovered the defect and avoided the loss; that the second, third, and fifth replications amounted to the general issue; and that the fourth replication was bad because, if the defect in the car was latent, that fact would not make the defendant liable for a loss caused by the defect while it was transporting the plaintiffs' car. This demurrer was overruled, and such order constitutes the basis of the second, third, fourth, fifth, sixth, and sev-

enth assignments of error, which are discussed together in plaintiffs' brief.

The rule obtains that it is not per se error to overrule a demurrer to a plea which amounts to the general issue. We apply this rule to a replication which amounts

**Appeal—ruling on pleadings.**

merely to a joinder of issue upon a plea. Therefore there was no error on the part of the court in overruling the demurrer to the second, third, and fifth replications, assuming that they amounted merely to a joinder of issue upon the sixth plea. If they were amenable to that criticism, a motion to strike was the proper remedy, and as the replications do not appear to have confused the issues or embarrassed the defendant in the preparation of his defense, allowing them

**—permitting pleadings to remain in case.**

to remain in the record was not reversible error. See *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, text 428, 43 So. 318; *Bell v. Niles*, 61 Fla. 114, 55 So. 392; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922. See also *National Surety Co. v. Williams*, 74 Fla. 446, 77 So. 212.

The first ground of the demurrer presents nothing for consideration, unless, upon a bare inspection of the replications, they appear to be so faulty as to constitute no reply to the pleas. See *Hartford*

**Pleading—demurrer—sufficiency.**

*F. Ins. Co. v. Hollis*, 53 Fla. 268, 50 So. 985.

This leaves for consideration the second, third, and fourth grounds of the demurrer to the first replication, and the demurrer to the fourth replication.

The question presented by the first replication and demurrer thereto is whether a common carrier of goods or merchandise is in any measure relieved of its liability for loss of the goods because of the fact that the shipper furnished the car in which the goods were loaded, which car he held by lease from a third person, and for the use of such

car upon the road the carrier paid to the owner a certain amount per mile, when the loss of the goods in transportation is due to a defect in the particular car.

This was an interstate shipment, and the liability of the carrier is to be determined according to the rules prescribed by Congress as to the duties of common carriers with respect to the transportation of goods from one state into another. The measure of this liability was fixed by the amendment of June 29, 1906, to the original Interstate Commerce Act of February 4, 1887, and commonly referred to as the Carmack Amendment. The liability imposed upon the carrier was defined by Mr. Justice Lurton in the case of *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, in the following language: "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier."

See also *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555.

Now, it is the common-law duty of a common carrier to furnish suitable and safe cars for the carriage

of the particular kind of commodity undertaken to be conveyed. See 4 R. C. L. p. 682.

"In every case where a carrier has been accustomed or has contracted to carry, or has held itself out as carrying, any particular class of goods, it must provide cars which are suitable for the carriage of such goods. This imports that a common carrier must provide a vehicle in all respects adapted to the purposes of carriage, which implies not only that it must be of a type so constructed as to be able to encounter the ordinary risks of transportation, but also that it must be perfect in all its parts." 4 R. C. L. p. 682.

See also 4 Elliott, Railroads, 1475; *Beard v. Illinois, C. R. Co.* 79 Iowa, 518, 7 L.R.A. 280, 18 Am. St. Rep. 381, 44 N. W. 800; *Forrester v. Southern R. Co.* 147 N. C. 553, 18 L.R.A. (N.S.) 508, 61 S. E. 524, 15 Ann. Cas. 143; *Empire Transp. Co. v. Wamsutta Oil Ref. & Min. Co.* 63 Pa. 14, 3 Am. Rep. 515; *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266; *New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 49 L.R.A. 462, 81 Am. St. Rep. 722, 35 S. E. 444, 7 Am. Neg. Rep. 508. A failure on the part of the defendant carrier to provide a suitable and safe car for the transportation of the turpentine, having undertaken to carry it and holding itself out as a carrier of such commodity, would be a breach of its com-

Carrier—cars  
for special  
commodities.

mon-law duty, and any loss of the turpentine attributable to the unsuitableness, unfitness, or defective condition of the car would be, within the meaning of the act of Congress, a loss or damage caused by the carrier, or an act of negligence on its part.

What effect upon the carrier's liability would have been produced by a contract between the shipper and the carrier, whereby the former agreed to and did furnish the car, or inspected it and accepted it as suitable for the purpose as furnished by the railroad, or the car,

having been supplied by a third person, was used by the railroad and rented by the shipper as suitable and fit for the transportation of the turpentine? The carrier will not be permitted to contract against its

—contract  
against  
negligence.

own negligence. Its duty is to supply

suitable cars, as much so as it is to supply a safe track and suitable engines and competent employees. If a common carrier would be permitted by contract to relieve itself of the duty of supplying a suitable car, there is no reason why it should not, by contract, protect itself from the omission of duty to supply a suitable engine, or safe roadbed or track, or competent employees. It is universally conceded that the carrier cannot, by contract, protect itself from the consequences of its own negligence. Therefore, no arrangement, understanding, agreement, or scheme between the shipper and carrier will be given the effect of relieving the carrier from the consequences of its own negligence. What the carrier cannot directly accomplish by contract it cannot by indirection accomplish. See *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266; *Forrester v. Southern R. Co.* 147 N. C. 553, 18 L.R.A.(N.S.) 508, 61 S. E. 524, 15 Ann. Cas. 143; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; *Santa Fé, P. & P. R. Co. v. Grant Bros. Constr. Co.* 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474; *Adams Exp. Co. v. Croninger*, *supra*. See numerous authorities cited in 10 C. J. 154, 155; 4 R. C. L. 767; *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; *Summerlin v. Seaboard Air Line R. Co.* 56 Fla. 687, 19 L.R.A.(N.S.) 191, 131 Am. St. Rep. 164, 47 So. 557.

The pleadings and the evidence in this case differentiate it from those few cases referred to in the brief of counsel for defendant whereby, under a distinct agreement by the ship-

per to assume the risk of the sufficiency of a car furnished by him for a particular shipment, the carrier was held to be not liable for loss of goods due to defects in the car. See *Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & Stove Co.* 33 Ky. L. Rep. 924, 17 L.R.A.(N.S.) 1034, 111 S. W. 358, and cases cited in the note. In this case the car was selected by what appears to have been a kind of general understanding between the railroad, the car company, and the shipper, that it was suitable for the purpose of transporting kerosene oil, turpentine, and such material therein, in bulk. We think that the common-law duty of the carrier to provide such a car free from defects, one in all respects adapted to the purpose, one able to encounter all the risks of transportation and perfect in all its parts, was not taken

from it by the ar- —car furnished  
by shipper—  
loss—liability.  
rangement between

the shipper, the car company, and the defendant, set out in the pleas and replication, and shifted to the shoulders of the shipper; that the liability of the defendant for loss resulting from any defect in the car was not affected by the arrangement, and it became responsible for the loss of the turpentine under the state of facts set out in the pleadings and shown to exist by the evidence.

The refusal of the court to permit the defendant to file a rejoinder to the first replication of the plaintiff was not error, because the facts therein set out, in view of what has been written in this opinion, in no wise constituted a defense or reply to the plaintiff's replication.

The remaining assignments of error attack the propriety of instructions given to the jury and the court's action in refusing others requested by the defendant; also the sufficiency of the evidence to support the verdict. The instructions given by the court were in line with the views expressed in this opinion concerning the defendant's liability. They might even be said to have

avored the defendant in apparently placing some slight duty upon the plaintiff to have inspected the car for defects. The instructions refused were not in harmony with the views herein expressed, and the evidence was amply sufficient to show negligence in the defendant in the matter of furnishing a car unfit, unsuitable, to encounter the ordinary

risk of transportation, and, because of some defect in the car or careless handling of it, the contents were lost.

We have discovered no error in the record, so the judgment is affirmed.

Browne, Ch. J., and Taylor, Whitfield, and West, JJ., concur.

## ANNOTATION.

### Carrier's liability where shipper furnishes or selects car.

It is not intended to include in this note cases where the shipper or consignor contracted with the carrier to select and inspect the car in which he shipped his merchandise, and to assume the risk of defects therein, where the carrier in fact actually selected and furnished the car.

When merchandise of a certain character is tendered to a carrier for transportation, it is the common-law duty of the carrier to furnish a vehicle free from defects which might endanger the safety of the goods, and which is also suitable for the purpose of transporting merchandise of the character to which the contract of shipment relates. It cannot ordinarily avoid this liability by casting upon the shipper the burden of selecting the car in which the goods are to be shipped.

United States.—Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co. 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467; Ogdensburg & L. C. R. Co. v. Pratt (1874) 22 Wall. 123, 22 L. ed. 827.

Alabama.—Central of Georgia R. Co. v. Chicago Varnish Co. (1910) 169 Ala. 287, 53 So. 832.

Arkansas.—Fordyce v. McFlynn (1892) 56 Ark. 424, 19 S. W. 961.

Colo.—Carr v. Schafer (1890) 15 Colo. 48, 24 Pac. 873.

Florida.—LOUISVILLE & N. R. Co. v. CARR (reported herewith) ante, 102.

New York.—Harris v. Northern Indiana R. Co. (1859) 20 N. Y. 232.

Tennessee.—Louisville & N. R. Co. v. Dies (1891) 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266.

In Cincinnati, N. O. & T. P. R. Co. v.

N. K. Fairbanks & Co. (1898) 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467, in denying the contention that the carrier was relieved from the rigid rule of the common law which makes it an insurer against any loss not due to an act of God or the public enemy, by reason of the fact that the loss was due to a defective axle in the car which was selected by the shipper, the court said: "Precisely what is implied by the term 'selected' is not clear. Certain it is that there is no evidence that these tank cars were ever inspected or approved by the shipper. Nor is it to be conceded that the carrier could avoid responsibility as a carrier by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods are to be shipped. The duty of the carrier is to furnish fit and suitable cars for the carriage of goods. . . . But this question is not raised by the evidence in this record. These tank cars did not belong to the shipper. They were owned by a company called the 'American Cottonseed Oil Company.' Neither were they hired by the shipper, or in any sense furnished by it. The evidence is meager upon this question. It is only shown that these and other like cars were owned by the American Cottonseed Oil Company, and that that company furnished them to railroad companies, charging the usual mileage rate allowed for foreign cars. It is shown that these cars were 'delivered to' the plaintiff in error, at Cincinnati, April 15, 1889, and that that company 'delivered' them to the East Tennessee, Virginia, & Georgia

Railway Company, at Chattanooga, April 21, 1889, and that the latter company 'returned' the cars to the plaintiff in error, 'loaded,' at Chattanooga, May 5, 1889, and that the plaintiff in error paid the owner of the cars three fourths of a cent per mile 'for the use of three cars running over its road, transporting this oil.' This is all the proof discoverable which bears upon this claim that the shipper 'selected' these cars. We see nothing in the facts which distinguishes this case from the ordinary use by one company of the cars of another. The responsibility of the carrier is the same, whether the goods be carried in its own cars or those of another."

In *LOUISVILLE & N. R. Co. v. CARR* (reported herewith) ante, 102, the court pointed out that the car was selected under a general understanding between the railroad, the car company, and the shipper that it was suitable for the purpose of transporting oil, turpentine, and such material, in bulk. The court said that this arrangement did not relieve the carrier from the common-law duty of providing a car free from defects, and one able to encounter all the risks of transportation.

In *Louisville & N. R. Co. v. Dies* (1891) 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266, the consignor procured the agent of the carrier to secure for his use in shipping horses, a parlor horse car owned and rented by an independent company, the shipper paying for its use. Notwithstanding this fact, the carrier was held responsible for injury to the horses shipped in the car, due to its defective condition. The court said: "The carrier cannot escape responsibility by carrying its freight in cars furnished by or owned by another company. It was a common carrier with respect to this shipment, and it was a matter of no importance who owned or furnished or paid for the particular car into which this stock had been loaded. This has been thoroughly well settled with respect to its liability to passengers."

But in *Carr v. Schafer* (1890) 15 Colo. 48, 24 Pac. 873, involving a contract for the carriage of goods by

wagons, the freighter was unacquainted with the country through which the goods were to be transported, while the shipper was familiar therewith; the latter examined the freighter's wagons, and picked out for use those which he regarded as suitable. It was held that under these circumstances the shipper was responsible for the character of the wagons used, and was estopped from complaining that they were not suitable.

Where the shipper or consignor freely and voluntarily undertakes to select the car in which to make shipment of his merchandise, relying in the matter of selection on his own judgment and inspection of the car, he cannot hold the carrier liable for injury to his goods due to obvious defects in the car or to its unsuitability for the transportation of the merchandise of the character he transports therein.

**United States.**—*Alabama & V. R. Co. v. American Cotton Oil Co.* (1918) 161 C. C. A. 316, 249 Fed. 308; *Alabama G. S. R. Co. v. Morris & Co.* (1918) 161 C. C. A. 320, 249 Fed. 312.

**Alabama.**—*Central of Georgia R. Co. v. Chicago Varnish Co.* (1910) 169 Ala. 287, 53 So. 832.

**Arkansas.**—*Fordyce v. McFlynn* (1892) 56 Ark. 424, 19 S. W. 961.

**Illinois.**—*Illinois C. R. Co. v. Hall* (1871) 53 Ill. 409.

**Kentucky.**—*Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & Stove Co.* (1908) 33 Ky. L. Rep. 924, 17 L.R.A. (N.S.) 1034, 111 S. W. 358.

**Michigan.**—*Frohlich v. Pennsylvania Co.* (1904) 138 Mich. 116, 110 Am. St. Rep. 310, 101 N. W. 223, 4 Ann. Cas. 1140.

**Missouri.**—*Huston Bros. v. Wabash R. Co.* (1895) 63 Mo. App. 671; *Nicholson v. St. Louis & S. F. R. Co.* (1909) 141 Mo. App. 199, 124 S. W. 573; *Ottrich v. St. Louis, I. M. & S. R. Co.* (1910) 154 Mo. App. 420, 134 S. W. 665.

**New York.**—*Harris v. Northern Indiana R. Co.* (1859) 20 N. Y. 232.

**South Dakota.**—*Berry v. Chicago, M. & St. P. R. Co.* (1910) 24 S. D. 611, 124 N. W. 859.

In *Nicholson v. St. Louis & S. F. R.*

Co. (1909) 141 Mo. App. 199, 124 S. W. 573, the rule is stated that when the shipper is afforded the opportunity to select the car in which to transport his merchandise or other articles, and he makes such selection with knowledge of defects therein, he cannot hold the carrier liable for injury to the property shipped, due to such defects.

In *Berry v. Chicago, M. & St. P. R. Co.* (1910) 24 S. D. 611, 124 N. W. 859, the court states the rule that if the shipper freely and voluntarily assumes, for a valuable consideration, to select the car in which to make shipments of his merchandise, he cannot hold the carrier responsible for injuries to the article shipped, due to patent defects in the car.

In *Harris v. Northern Indiana R. Co.* (1859) 20 N. Y. 232, it is held that, conceding that where the owner of property makes his own selection of the car in which to ship the same, with full knowledge of its condition, the carrier is not responsible for the consequences, yet this rule does not apply where there are defects in the car of which the shipper had no knowledge, although he might have discovered the same by inspection of the interior of the car. The court said that railroads are not bound at all events, "and at all times, to have on hand at every point upon the road, suitable, safe, and convenient vehicles sufficient to carry all the property which may be offered for transportation. Such a requirement would be in a high degree unreasonable. Amid the varying exigencies attending the business of a railroad company, it must sometimes happen, notwithstanding the utmost vigilance and care, that their engines, cars, and other vehicles will be somewhat unequally and irregularly distributed. They are bound, no doubt, to make reasonable effort to fulfil the just expectations of the public, but precisely how far their obligations in this respect extend, it is unnecessary in this case to decide, and I forbear, therefore, to discuss the question. Conceding that where the owner of the property makes his own selection of vehicles, with full knowledge of their condition, the company

is not responsible for the consequences, yet the latter should take care that the owner has that knowledge. The company has greatly the advantage in such a transaction, inasmuch as its agents are, or must be presumed to be, familiar with the condition, capacity, and quality of their vehicles; while a stranger, called upon to make a selection without any previous knowledge, would be very liable to overlook many defects. I do not intend to say that it is incumbent upon the company to point out such defects as are palpable, and which could not well be overlooked without some degree of negligence; but I do hold that, if the vehicles selected have defects which are not pointed out, it is incumbent upon the company to prove affirmatively that they were open, visible, and apparent. In the present case the defects were twofold: First, the low cross pieces; and, second, the projecting staples. In regard to the cross pieces, it is easy to see that the defect must have been so palpable to an experienced man, as we may, perhaps, presume the plaintiff . . . to have been, that he could hardly fail, with ordinary vigilance, to discover it. Not so, however, with respect to the staples. They were upon the interior of the cars or racks. It does not appear that [plaintiff] . . . entered them. He was not bound to do so. He had a right to presume that the company would not offer him cars which had projecting spikes, or irons of any kind, which would tear or bruise the flesh of the cattle. He may, it is true, have known all about these staples; but it rested with the company to show this, or at least such circumstances as would justly charge him with such knowledge; and they offered no proof on the subject. That it was an improper mode of constructing the cars is virtually conceded by the company, by their subsequently removing the staples in question." It may be observed at this point that the note is not concerned with the duty of the shipper to inspect cars, except as it arises in connection with a car furnished or selected by him.

In *Frohlich v. Pennsylvania Co.*

(1904) 138 Mich. 116, 110 Am. St. Rep. 310, 101 N. W. 223, 4 Ann. Cas. 1140, it appeared that the consignor, with the consent of the carrier, was in the habit of selecting cars in which to ship its merchandise, from cars which came to it loaded. Under these circumstances it was held to have assumed the risk as to the fitness and suitability of the car. The court said that there was nothing in the agreement that the consignor should select in this manner cars in which to ship its merchandise, which was contrary to public policy. That he "knew the character and weight of the products it shipped, knew what kind of cars were suitable for that purpose, and agreed to assume the risk of selecting. Every freight car is not suitable for the transportation of all kinds of products. A car suitable for the shipment of sand is not necessarily suitable for the shipment of cases filled with glass, and very heavy. An old coal car, suitable for shipping coal or like material, is not necessarily suitable for the shipment of glassware. There was no guaranty on the part of defendant that all its cars were suitable, in form or structure, for the shipment of glass. Under the agreement, the mirror company undertook to select such cars only as were suitable for its purpose. The plaintiff and consignee, under this record and the authorities above cited, were bound, under this agreement, by the acts of their consignor. . . . If it selected a car unsuitable for the transportation of the goods sold, the only remedy for the consignee is against the consignor. If this car had been furnished at the express request of the consignor, and the defendant, knowing the purpose for which it was to be used, had furnished the car in response to such express request, the defendant would have assumed all liability for defects, and would not be permitted to say that the defects were open to the knowledge of the shipper, who therefore assumed the risk. The rule applicable in the case before us is thus stated by the text-writers: Where the shipper exercises his own judgment, is not deceived or misled by the carrier, and chooses a car for

the transportation of his property, the carrier is not answerable for the sufficiency of the car, for in such a case he does not trust to the carrier, nor rely upon the duty of the carrier, but, on the contrary, freely exercises his right of choice, and relies entirely upon his own judgment, so that there is no reason for affirming that the carrier was guilty of any wrong."

In *Alabama & V. R. Co. v. American Cotton Oil Co.* (1918) 161 C. C. A. 316, 249 Fed. 308, supra, and *Alabama G. S. R. Co. v. Morris & Co.* (1918) 161 C. C. A. 320, 249 Fed. 312, supra, substantially similar tank cars for the transportation of cotton-seed oil were furnished by the shipper under an arrangement by which the carrier allowed a certain amount per mile for the use of the car; and also made a reduction in the rate charged the shipper; the bill of lading provided that the carrier should not be liable for any loss of the property caused by any act or fault of the shipper or owner; the oil shipped was lost in transportation, from leakage due to defects in the tank; in the first case, the proximate cause of the loss was the failure of the shipper to close an inner valve; an inspection of the car after it was filled would not have disclosed this defect; the defect in the car was a defective cap screwed upon a discharge pipe through which oil was intended to be drawn off, the threads having been worn on the pipe to the extent that the cap loosened and fell off; in the second case, the defect was due to the tank having been worn through at a point where it rested on a separate bracket, and improperly patched; the defendant claimed that the shipper was negligent in selecting and furnishing a car with a defective tank, and that the defect was not discoverable by a reasonable inspection, and that it made such inspection. These matters were held to be properly questions for the jury under the facts submitted, the court holding that the matters set up by the carrier, if true, constituted a complete defense to plaintiff's cause of action, citing *Alabama & V. R. Co. v. American Cotton Oil Co.* (Fed.) supra.

In *Illinois C. R. Co. v. Hall* (1871) 58 Ill. 409, it appeared that the bill of lading provided that the carrier should not be liable for the loss of live stock caused by their jumping from the cars, except in certain instances; the shipper refused to accept the car tendered him by the carrier of stock, and himself selected a car belonging to another carrier. Under these circumstances it was held that he took the risks as to the condition and safety of the car.

In *Huston Bros. v. Wabash R. Co.* (1895) 63 Mo. App. 671, the shipper had its choice to ship its live stock either in a stock car or a box car, and he chose the latter. He was held to have assumed the risk of injury to the stock due to the character of the car. And see, in this connection, *Densmore Commission Co. v. Duluth, S. S. & A. R. Co.* (1899) 101 Wis. 563, 77 N. W. 904, which holds that where a shipper used a refrigerator car in which to ship fruit, and it was not practicable to ventilate the car, and the object of using such a car was to protect the fruit from frost during transportation, and the shipper expressly contracted that the carrier should not be liable for loss or damage by heat, etc., the carrier was not liable for damage to fruit, due to heating. It did not appear in this case, however, that the shipper selected the car.

In *Nicholson v. St. Louis & S. F. R. Co.* (1909) 141 Mo. App. 199, 124 S. W. 573, it appeared that the shipper received a carload of corn in a stock car; his attention was called to the character of the car by an agent of the carrier, who offered to secure for him a closed car in which to continue the shipment, if he cared to reload; the shipper, however, sacked the corn and left it in the stock car. Under these circumstances he was held to have assumed the risk of injury to the corn, due to the open character of the car.

In *Central of Georgia R. Co. v. Chicago Varnish Co.* (1910) 169 Ala. 287, 53 So. 832, the action was brought to recover for the loss of turpentine shipped in a tank car; the defense was made that the car belonged to and was furnished by the consignor and

delivered to the carrier for use in transporting its turpentine, and that the loss complained of occurred by reason of a defect in the tank at the time the car was delivered to the carrier filled with turpentine, and that the carrier was without negligence; the plaintiff, by replication, replied that, at and prior to the date of the shipment, the defendant took a lease of the car from the consignor under an agreement by which the consignor was to furnish defendant with cars for the shipment of the latter's turpentine, the carrier paying rent for the same and keeping them in repair at the consignor's cost. In holding that the demurrer of the carrier to this replication was properly overruled, the court said: "It is the duty of the carrier to provide safe and suitable vehicles for the carriage of goods. He cannot avoid this responsibility by using the cars of another—this upon the theory that in such case the person furnishing the cars becomes the agent of the carrier. But where the consignor undertakes to furnish cars, it cannot in reason be that the carrier is responsible for a loss which arises out of the condition of the cars alone."

In *Otrich v. St. Louis, I. M. & S. R. Co.* (1910) 154 Mo. App. 420, 134 S. W. 665, the facts were that an agent of the carrier called the shipper's attention to defects in the car in which he shipped his live stock, and he was advised to delay the shipment until a more suitable car could be procured; he, however, determined to repair the car, which he did, and made use of it. Under these circumstances he was held to have assumed the risk of injury to the stock, due to defects in the car pointed out to him. The court said: "By accepting the car furnished rather than wait until a better one could be secured, he waived all right to complain of the injuries resulting from the kind of car which was furnished. He will certainly not be allowed to complain that he was not furnished a better car, when another car was offered by defendant's agent and plaintiff would not permit such agent to procure another car for him. He



chose the car in which the stock was shipped, repaired it, bedded it, and loaded his stock into it, and if the car was insufficient it was his own act, and he cannot hold the defendant responsible for the defects."

In *Fordyce v. McFlynn* (1892) 56 Ark. 424, 19 S. W. 961, it appeared that the shipper was to furnish and load the cars for the carriage of his animals, and he was held to have assumed the risk as to the character of the car and the manner of loading.

While not strictly within the scope of this note, attention is called to *Pratt v. Ogdensburg & L. C. R. Co.* (1869)

102 Mass. 557, which held that where the shipper knew that the car in which he was making a shipment was defective and unsafe, and nevertheless accepted and used it, he expressly agreed to assume the risk of the defects therein. He cannot recover from the carrier for the loss of his goods, due to such defects. The court, however, said that in the absence of an express agreement to assume the risk rather than to wait the receipt of a better car, the shipper would have been entitled to hold the carrier for the loss of the goods, due to a defect in the car. A. G. S.

H. J. ROWE, Plff. in Err.,

v.

HAROLD T. TUCK et al.

*Georgia Supreme Court—April 18, 1919.*

(— Ga. —, 99 S. E. 303.)

#### Office — resignation — effect.

1. Where the statute creating a municipal office provides, "Nor shall any person acting as recorder of said court be eligible to any other office in the city of Athens during the term of his office as recorder," such officer is ineligible to any other office in such city during the term for which he has been chosen; and his resignation cannot affect such ineligibility. The court did not err in rendering a judgment accordingly.

[See note on this question beginning on page 117.]

#### — failure to take oath — effect.

2. Where one is elected to a municipal office by the mayor and council for a term ending on a specified date, and is thereafter re-elected for another term, and continues, after the date of expiration of the first term, to perform the duties of the office, his omission to take the oath of office for the new term is a mere irregularity, unless there is a refusal of such character as will constitute a declination of the new term.

[See 22 R. C. L. 452.]

#### — performance of duties.

3. After the beginning of such new term, under the facts of this case, the performance of the duties of the office as above stated will be construed as falling within the new term.

#### — statute creating ineligibility — subsequently created office.

4. A statute creating an office and making the incumbent ineligible to any other office during his term includes not only offices in existence at the time of its passage, but those subsequently created.

#### Statutes — construction — what considered.

5. The courts, in the construction of statutes, must determine the legislative mind from the context and contemporaneous and antecedent history.

#### Office — right to resign.

6. An officer may resign his office at any time unless restrained by constitutional or statutory provisions.

[See 22 R. C. L. 556.]

— meaning of “his office.”

7. The use of the pronoun “his” in a statute creating the office of recorder of a municipality, and providing that the incumbent shall not be eligible to any other office during the term of “his

office as recorder,” does not make the office subject to the control of the incumbent so that he may relinquish it by resignation before the term ends, and make himself eligible to another office.

ERROR to the Superior Court for Clarke County (Cobb, J.) to review a judgment of ouster in a quo warranto proceeding requiring respondent to show cause why he should not be ousted from the office of civil service commissioner, and the office declared vacant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Blanton Fortson, Thomas J. Shackelford, and F. C. Shackelford, for plaintiff in error:

If for any cause plaintiff in error had been removed from this office, his term of office would have expired, and he could then have held any other office in the city government to which he might have been elected.

Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; 29 Cyc. 1396; Thomas v. Owens, 4 Md. 189.

Mr. Wolver M. Smith, for defendants in error:

Plaintiff in error was disqualified from holding any other office in the city of Athens for the term for which he was elected recorder (one year from his election, July 10, 1918).

29 Cyc. 1395F; Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; McWilliams v. Neal, 130 Ga. 735, 61 S. E. 721, 14 Ann. Cas. 626.

An officer may become possessed of an office “although he has failed to take the official oath, or to give the official bond. In such a case his acts show his acceptance. And acceptance of an office may always be shown by proof of the acts of the person chosen to fill it.

Throop, Pub. Off. § 164; Gunn v. Tackett, 67 Ga. 725; Stephens v. State, 106 Ga. 116, 32 S. E. 13; Ledbetter v. State, 2 Ga. App. 631, 58 S. E. 1106.

Gilbert, J., delivered the opinion of the court:

Tuck et al., citizens and taxpayers of the city of Athens, instituted quo warranto proceedings, alleging that H. J. Rowe, who was elected by the mayor and council of said city on August 7, 1918, a member of the civil service commission of said city for a term of six years, was disqualified to hold that office, because at the time of his election thereto he was the duly elected recorder of the

city for a term expiring July 1, 1919, and that the act creating the office of recorder provided that the person holding that office should be ineligible to hold any other municipal office. The prayer is that Rowe be required to show cause why he should not be ousted from the office of civil service commissioner, and that the same be declared vacant. The respondent shows by his answer that he was first elected recorder on December 5, 1917; that while he was again elected to this office on July 10, 1918, he continued to act under his first election, and had failed to qualify and take the oath as required by law, or to accept the office under the election of July 19, 1918; that prior to August 7, 1918, he had tendered to the mayor and council his written resignation of the office of recorder, which had been accepted; and that his term of office as recorder had expired. A judgment of ouster was rendered.

The distinguished trial judge filed with his judgment an opinion correctly stating the principles which this court believes to be controlling as to the issues. The following portion of the opinion of Judge Cobb is adopted as our own:

“The controlling issue in this case is: Was the respondent eligible to election as civil service commissioner during the period from July 10, 1918, to July 10, 1919, the undisputed fact being that he was elected such civil service commissioner on August 7, 1918, during the period named, but after he had resigned the office of recorder?

"It has been the established policy of the law since the foundation of this government that legislators in office should not be elected to offices created, or offices of which the emoluments have been increased during the time that such legislators were in office. This policy finds expression in the Constitution of the United States, in this language: 'No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time.' Hopkins's Code, § 6640. The policy of the law as expressed in our own state Constitution is broader in prescribing ineligibility to office than that in the Federal Constitution. The language of our own Constitution is: 'Nor shall any senator or representative, after his qualification as such, be elected by the general assembly, or appointed by the governor, either with or without the advice and consent of the senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected.' Hopkins's Code, § 6420. The evil that was intended to be remedied by the provisions in the two Constitutions above quoted was to prevent a legislator in office from using the environment, influence, and prestige of the office which he held to create for his benefit another office, or to increase for his benefit the emoluments of an existing office. A similar policy is found in our statute in reference to municipal officers, and the statute extends the policy of the law broader than the constitutional provisions. The statutes of this state provide that 'councilmen and aldermen of the towns and cities of this state shall be incompetent to hold, except in towns of less than two thousand inhabitants, any other municipal office in the said towns and cities during the term of office for which they were chosen; provided, nothing herein shall render them

ineligible to be elected during said term, to serve in a term immediately succeeding said term; but nothing in this section shall apply to any municipal office which is filled by appointment of the mayor.' Hopkins's Code, § 886.

"The provision, in the Act of 1913 creating the office of recorder (Acts 1913, p. 499, § 5), that the recorder should not 'be eligible to any other office in the city of Athens during the term of his office as recorder,' is in line with the established policy referred to in the constitutional and statutory provisions above referred to. The statute in reference to councilmen and aldermen, above referred to, was under construction in the case of *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891, and it was there held that a charter of a municipal corporation providing that 'the mayor and aldermen shall hold their offices for two years, or until their successors are elected and qualified,' fixes the terms of such officers at two years. The term of one of such officers is not reduced or changed by his resignation of the office and the election of his successor before the expiration of two years from the beginning of such term. It seems that this decision is controlling in principle in the present case. The term of office of the recorder is one Office—  
resignation—  
effect. year; therefore the term of office of the

respondent as recorder was from July 10, 1918, to July 10, 1919, and his term could not be reduced by his voluntary resignation, effective either August 7, 1918, or September 1, 1918. It is contended, however, that the act creating the office of civil service commissioner was not in existence at the time of the passage of the act creating the office of recorder, and therefore that the office of civil service commissioner was not in the legislative mind as an office which the recorder was ineligible to hold during the term of his office. The language of the act creating the office of recorder is that the recorder shall not be 'eligible to

any other office in the city of Athens during the term of his office as recorder.' This language is broad

—statute creating ineligibility  
—subsequently created office.

enough to include not only offices which were then in existence, but municipal offices that might be there-

after created. The purpose of the ineligibility provision in the recorder's act was not to prevent a person from holding two offices at the same time, but its purpose was to prevent one in office with a fixed term from holding another municipal office during that term. It is also contended that the language of the ineligibility clause of the act creating the office of recorder uses the expression, 'his office as recorder,'—the contention being that the use of the personal pronoun 'his' makes the office subject to the control of the incumbent, and that when he relinquishes his office by resignation his term ends. It may be that resignation ends the tenure, but it does not end the term. The term is fixed by statute. The tenure of the office, using this expression as indicating the actual holding of the office, may be terminated at the will of the incumbent. But I think that this construction places too much emphasis on the use of the personal pronoun preceding the word office. It may be that the use of the personal pronoun, which is common in legislation in such matters, is unhappy. Much legislation is crude in expression, but the courts must de-

Statutes—  
construction—  
what considered.

termine the legislative mind from the context and contemporaneous and antecedent history.

The use of the personal pronoun in legislation, as it appears in the act under consideration and in similar acts, must be treated as impersonal, if there can be such a thing as the impersonal use of a personal pronoun. Of course, the particular individual who might hold the legislative office is never in the legislative mind. If the ineligibility clause is construed to mean that the recorder may at any time resign his office as

recorder and accept another office then the general assembly has done a vain thing; for no legislation was necessary on this subject. Any officer may resign his office at any time, unless restrained by

Office—right  
to resign.

constitutional or statutory provisions; and for the legislature simply to declare that the recorder could at any time resign his office was a work of supererogation, for this right existed independent of the act in question. It is to be presumed that the legislature intended something when they placed this provision in the act, and that something can reasonably be construed to be only that the recorder of the city of Athens shall not be elected to any other municipal office during the time fixed as the term of office of the recorder. This crudity in legislative expression should not lead the courts into an error of interpretation which will entirely defeat the legislative will.

—meaning of  
"his office."

"It is further contended, as the respondent did not take the oath of office upon his election to the full term, that he was, on the date of his resignation, simply holding over until his successor was elected and qualified. The oath of the office recorder had been duly administered to the respondent when he was elected to the unexpired term, and the failure to administer the oath upon his election to the full term was a mere irregularity and did not interfere with his serving under his new term, especially when it appears that he continuously discharged the duties of recorder and received the compensation fixed

—failure to take  
oath—effect.

—performance  
of duties.

by law for the services required by him as a public officer. It does not now lie in his mouth to say he has never accepted the office for the reason that, through oversight or inadvertence, the mayor failed to administer the oath of office to him. He was a de jure officer, it is true, holding over. Even if he had not

been re-elected, he was certainly a de facto officer as to the full term, and all of his official acts were valid, even though he had taken no oath of office at the beginning of the new term. It certainly cannot be that the mere failure of a public officer to take the oath of office at the beginning of a term which he is actually entitled de jure to serve, and for which he receives compensation, will have the effect to destroy the provisions of an act providing that during such term he shall not be elected to another office. If such is

the law, the entire purpose of the general assembly may be defeated at any time, by an incumbent, who is re-elected, merely failing to discharge a duty which the law imposes upon him, to take an oath upon the beginning of his new term. This would permit an officer to entirely defeat the legislative will and take advantage of his own failure of official duty."

Judgment affirmed.

All the Justices concur.

Petition for rehearing denied.

### ANNOTATION.

#### **Resignation of one office as affecting eligibility to another office during term of former office.**

- I. Under statute or constitution declaring officer "ineligible" to another office:
  - a. General rule, 117.
  - b. Rule in Indiana, 118.
- II. Under statute or constitution forbidding officer to "hold or exercise" another office, 119.
- III. Under statute or constitution declaring officer ineligible "during term for which elected" to another office, 120.
- I. Under statute or constitution declaring officer "ineligible" to another office.
  - a. General rule.

Under a statute or constitutional provision declaring that a person holding a certain office shall not be "eligible" to either of certain other offices, or any other office, it is generally held by the courts that eligibility will be determined as of the time of election or appointment, so that a person who at that time has resigned the first office is eligible to the second, but a person who does not resign the first office before election or appointment to the second is not. *Searcy v. Grow* (1860) 15 Cal. 118; *State ex rel. Nourse v. Clarke* (1868) 3 Nev. 566; *People v. Purdy* (1897) 154 N. Y. 439, 61 Am. St. Rep. 624, 48 N. E. 821; *Re Corliss* (1876) 11 R. I. 638, 23 Am. Rep. 538; *Rex ex rel. O'Donnell v. Broomfield*

(1903) 5 Ont. L. Rep. 596, 2 Ont. Week. Rep. 295.

In *Searcy v. Grow* (Cal.) supra, there was involved a provision that "no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this state." The appellant was elected to the office of sheriff while holding the office of postmaster under the United States, but had resigned the latter office at the time of his qualification for the former. The court held the appellant to be ineligible on the ground that the disqualification had not been removed at the time of the election.

In *State ex rel. Nourse v. Clarke* (1868) 3 Nev. 566, the controlling provision of the Constitution was to the effect that "no person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state." Prior to the defendant's election to the office of attorney general of the state of Nevada he had been United States district attorney for the state. The day before the election the defendant mailed his resignation of the latter office to the President of the United States. The court held that the mailing of the resignation constituted a

legal resignation from the Federal office, and the defendant was therefore eligible for election to the state office.

In *People v. Purdy* (1897) 154 N. Y. 439, 61 Am. St. Rep. 624, 48 N. E. 821, the court applied a provision of the town law (now Town Law, § 81, McKinney, Consol. Laws, bk. 61, p. 59), "No trustee of a school district shall be eligible to the office of supervisor of any town or ward in this town." A trustee of one of the school districts who had been elected supervisor resigned his office of trustee, and qualified as supervisor, and entered on the duties of that office. The court held that eligibility was to be determined at the time of election, and, as defendant had not at that time resigned the office of trustee, he was not entitled to the office of supervisor. Attention is called, in this connection, to a recent opinion of the attorney general of New York, which is apparently in conflict with the foregoing decision. (1916) Ops. Atty. Gen. 179, 7 N. Y. Off. Dept. R. 502.

The language of the provision involved in the case of *Re Corliss* (1876) 11 R. I. 638, 23 Am. Rep. 538, was that no person "holding an office of trust or profit under the United States shall be appointed an elector." In that case it appeared that a commissioner of the United States centennial commission was chosen an elector. On a question by the governor of the state addressed to the judges of the supreme court, as to whether the disqualification of the commissioner for the office of elector was removed by the resignation of the said office of commissioner, the judges replied: "We think the disqualification is not removed by the resignation of the office of trust, unless the office is resigned before the election."

In *Rex ex rel. O'Donnell v. Broomfield* (1903) 5 Ont. L. Rep. 596, the statute under consideration provided that "no member of a school board for which rates are levied . . . shall be qualified to be a member of the council of any municipal corporation." The respondent, a member of a school board for which rates were levied, was elected member of a municipal coun-

cil. He then resigned his office on the school board, and later qualified as a member of the municipal council during the term for which he had been elected a member of the school board. The court held the respondent ineligible for the office of member of the municipal council on the ground that the resignation as member of the school board, removing the ineligibility, had not been effected at the time of election, saying: "At the time of the election . . . the respondent was a member of a school board for which rates were levied; and his resigning from that position subsequent to his election as a county council or will not relieve him from disqualification, if he were, at the time of nomination, actually disqualified."

In *Com. ex rel. Cribbs v. Moore* (1917) 255 Pa. 402, 100 Atl. 260, it appeared that the defendant, who had held the office of state senator, resigned that office and was subsequently duly elected to the office of comptroller within a year from his resignation of the office of state senator, but during the term of that office. It was held that a statute providing that "no person holding office under . . . this state . . . shall be eligible to the office of county comptroller during his continuance in office as aforesaid nor until one year thereafter," had been repealed by a subsequent act, and defendant was therefore eligible to the office of county comptroller.

*b. Rule in Indiana.*

In *Hoy v. State* (1907) 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944, there was involved a statute providing that "no officer, employee, agent, or servant of any corporation . . . having any contract with such city shall be eligible to any office in such city." It was held that a director and vice president of a corporation having a contract with a city, who had been elected councilman of the said city, though ineligible at the time of election, might remove the disability by resigning his office in the corporation before the commencement of the term of office of councilman. The court said: "It is, however, true that if Daily continued to be an officer in the trust com-

pany in question on the day upon which his official term began, he would under the facts, in view of the statute, be ineligible or disqualified, and could not legally be inducted into or hold the office, and, as there was no predecessor filling it, a vacancy therein would have necessarily occurred, to be filled as provided by law. But certainly it was within his power, and was his unquestioned right, at any time between the day of his election in November, and the beginning of his term, to resign or surrender his office in the trust company, and thereby remove or free himself of the disability in question before the commencement of the term of the office to which he had been elected. That this would have been the result of his resignation or surrender of the office which he held in the trust company is fully sustained by the authorities."

**II. Under statute or constitution forbidding officer to "hold or exercise" another office.**

Under a statute or constitutional provision prohibiting the holding of two offices at the same time, or forbidding a person holding a certain office to hold or exercise or enjoy either of certain other offices, or any other office, the prohibition is directed against the "holding" of the second office, so that a person becomes eligible by resigning the first office before entering on the duties of the second. *United States v. Harsha* (1899) 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 294; *Shepherd v. Sartain* (1913) 185 Ala. 439, 64 So. 57; *State ex rel. Oakley v. Fowler* (1895) 66 Conn. 294, 32 Atl. 162, 33 Atl. 1005; *People ex rel. Miller v. Mynderse* (1910) 140 App. Div. 789, 126 N. Y. Supp. 198, affirmed without opinion in (1911) 201 N. Y. 524, 94 N. E. 1098; *Com. v. Pyle* (1852) 18 Pa. 519; *De Turk v. Com.* (1889) 129 Pa. 151, 5 L.R.A. 853, 15 Am. St. Rep. 705, 18 Atl. 757.

In *Shepherd v. Sartain* (1913) 185 Ala. 439, 64 So. 57, there was involved the following provision: "The persons who are ineligible to and disqualified for holding office under the authority of this state are: . . .

(7) No person holding an office of

profit under the United States shall, during his continuance in such office, hold any office of profit under this state." The contestant at the time of his election to the office of probate judge was holding the office of postmaster under the United States. The court held that this subsequent resignation of the office of postmaster before entering on the duties of the office of probate judge sufficed to qualify him for the latter office.

In *State ex rel. Oakley v. Fowler* (1895) 66 Conn. 294, 32 Atl. 162, the statute under consideration prescribed that "no selectman shall hold the office of town clerk, town treasurer, or collector of town taxes of the same town during the same official year." The defendant, a member of the board of selectmen, was elected to the office of collector of town taxes. He resigned the office of selectman, and accepted and qualified for the office of collector of town taxes during the year for which he had been elected selectman. The defendant was held to be eligible to the office of collector of town taxes, the court saying: "The prohibition in this statute seems directed against the holding by a selectman, at the same time that he is a selectman, either of the other named offices. It forbids the holding of incompatible offices at the same time, rather than creates a disability for a certain period. So far as the terms of this statute extend, if one who had been elected a selectman should resign that office, he might afterwards enter upon the duties of either of the other offices, although the year for which he had been elected selectman had not ended. When the disability concerns the holding of the office merely, it is not a disability to be elected; it is sufficient if the disability be removed before the holding begins."

In *People ex rel. Miller v. Mynderse* (1910) 140 App. Div. 789, 126 N. Y. Supp. 198, affirmed without opinion in (1911) 201 N. Y. 524, 94 N. E. 1098, under the village law (*Village Law*, §§ 42, 63, *McKinney, Consol. Laws*, p. 29) providing that "a person shall not hold two village offices at the same time, except the office of collector and

police constable, etc.," the court held that a trustee of the village who had been elected president of the village was eligible to hold the latter office during the term of the former office, on his duly resigning the office of trustee before taking up the duties of the office of president.

In *Com. v. Pyle* (1852) 18 Pa. 519, it was provided by the statute under consideration that "no person (being a stockholder . . . in any bank . . . shall at the same time hold, exercise, or enjoy the office of notary public." The defendant had held shares in a bank in his own right, but, on the same day as the date of his commission, had transferred them to another person for a valuable consideration. As far as these shares were concerned, the court held defendant to be eligible for the office of notary public, saying: "A man may hold one office after he has been chosen to another which is incompatible with it, without thereby forfeiting either of them, provided he resigns the first before he enters upon the duties of the last." The court, however, held him ineligible for the office of notary public, on the ground that as executor and legatee of his deceased father he had come into control of the latter's shares in the bank.

In *De Turk v. Com.* (1889) 129 Pa. 151, 5 L.R.A. 853, 15 Am. St. Rep. 705, 18 Atl. 757, there was involved a provision of the Constitution that no "person holding or exercising any office of trust or profit under the United States shall at the same time hold or exercise any office in this state to which a salary, fees or perquisites shall be attached." The plaintiff in error, while holding the office of postmaster under Federal appointment, was elected county commissioner, an office of the state to which a salary was attached, and qualified and entered on the duties of that office. He continued to exercise the duties of postmaster until a writ of quo warranto was ordered, testing his right to the office of commissioner under the constitutional provision. Before an answer to the writ was filed and issue joined, the plaintiff in error resigned

the office of postmaster. The court held that "his formal resignation and complete surrender of the office of postmaster before issue was joined on the writ placed him in accord with the Constitution, and perfected his title to the office of county commissioner."

But see *Bunting v. Willis* (1876) 27 Gratt. (Va.) 144, 21 Am. Rep. 338, wherein, under a similar statute, it was held that resignation of the Federal office after the term of the state office had commenced did not suffice to perfect title to the latter office, and appellant was therefore incapable of holding it.

In *United States v. Harsha* (1899) 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 294, there was involved an act of Congress (8 Fed. Stat. Anno. 2d ed. p. 951) which provided that "no person who holds an office, the salary or annual compensation attached to which amounts to the sum of \$2,500, shall be appointed to or hold any other office to which compensation is attached." At the time this provision was enacted the defendant held the office of clerk of the circuit court of appeals of the United States, paid by a salary of \$3,000 and the office of clerk of the circuit court of the United States, paid by fees. The defendant offered his resignation of the former office before the passage of the act, but it did not take effect until after the passage of the act. The court held that the act of Congress did not, *ex proprio vigore*, create a vacancy in the office of the clerk of the circuit court by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals, and that defendant, by resigning from the latter office, was eligible to retain the former office.

### *III. Under statute or constitution declaring officer ineligible "during term for which elected" to another office.*

In cases where the Constitution or a statute provides in specific terms that a person holding a certain office shall not be eligible, during the term for which he was elected or appointed to said office, to certain other offices, or any other office, the courts invaria-



bly hold that such ineligibility exists during the entire period for which the person was elected or appointed, and is not affected by resignation of the first office.

**California.**—*Chenoweth v. Chambers* (1917) 33 Cal. App. 104, 164 Pac. 428.

**Georgia.**—*Crovatt v. Mason* (1897) 101 Ga. 246, 28 S. E. 891. And see the reported case (*ROWE v. TUCK*, ante, 113).

**Indiana.**—*Waldo v. Wallace* (1859) 12 Ind. 569; *Gulick v. New* (1859) 14 Ind. 93, 77 Am. Dec. 49.

**Maryland.**—*Wachter v. McEvoy* (1915) 125 Md. 399, 93 Atl. 987.

**Michigan.**—*Ellis v. Lennon* (1891) 86 Mich. 468, 49 N. W. 308.

**Minnesota.**—*State ex rel. Childs v. Sutton* (1895) 63 Minn. 147, 30 L.R.A. 630, 56 Am. St. Rep. 459, 65 N. W. 262.

**New Jersey.**—*Westcott v. Scull* (1915) 87 N. J. L. 410, 96 Atl. 407.

**New York.**—*Forman v. Bostwick* (1910) 139 App. Div. 333, 123 N. Y. Supp. 184.

**Washington.**—*State ex rel. Chealander v. Carroll* (1910) 57 Wash. 202, 106 Pac. 748; *State ex rel. Reynolds v. Howell* (1912) 70 Wash. 467, 126 Pac. 954.

In *Chenoweth v. Chambers* (1917) 33 Cal. App. 104, 164 Pac. 428, the court applied a constitutional amendment which provided that "no senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state: Provided, that this provision shall not apply to any office filled by election by the people." It appeared that the petitioner was elected a member of the assembly for a term of two years, and entered upon the duties of that office. While holding that office he was appointed auditor of the state board of prison directors. Later, and just before the constitutional amendment referred to took effect, the petitioner resigned the office of assemblyman. On these facts, the court held that petitioner was not eligible to the office of auditor of the state board of prison directors after the taking effect of the constitutional amendment and during

the term for which he was elected to the office of assemblyman, saying: "If the section applies to a senator or assemblyman whose term of office had not expired on December 21, 1916 [date of constitutional amendment], we do not think that petitioner succeeded in evading its force by his resignation prior to December 21st; for the section deals with a fixed period of time, to wit, the 'term' of the officer, and not to the period of his incumbency."

In *Crovatt v. Mason* (1897) 101 Ga. 246, 28 S. E. 891, the statute under consideration provided that "the councilmen and aldermen of the towns and cities of this state shall be incompetent to hold, except in towns of less than two thousand inhabitants, any other municipal office in said towns and cities of this state during the time for which they were chosen." The defendant was elected alderman of a city of two thousand or more inhabitants for a term of two years, and qualified, and was filling said term as alderman, when he was elected to the office of mayor of the city. The defendant then resigned the said office of alderman, and qualified, and assumed the duties of the office of mayor during the two years for which he had been elected to the office of alderman. On the foregoing facts, the court held defendant ineligible to the office of mayor, saying: "The plain meaning of the Act of 1895 is that councilmen and aldermen of all cities and towns in this state having two thousand inhabitants shall be incompetent to hold any other municipal office in such town or city during the time for which they were chosen such councilmen or aldermen."

In *Waldo v. Wallace* (1859) 12 Ind. 569, the case was governed by a provision of the Constitution of Indiana that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to an office of trust or profit under the state, other than a judicial office." The appellee was elected mayor, a judicial office within the foregoing provision. During the term for which he was elected mayor, he resigned that office, and was elected to the office of county

sheriff, an office of trust or profit under the state, and not a judicial office. The court held that the appellee was ineligible to the office of sheriff during the term for which he was elected mayor.

In *Gulick v. New* (1859) 14 Ind. 93, 77 Am. Dec. 49, the court, on the same facts as set forth in *Waldo v. Wallace* (Ind.) supra, referred to the decision in that case with approval, saying: "The facts set forth bring this case within that of *Waldo v. Wallace* (Ind.) supra; and that case, therefore, determines the first question that arises in this, namely, that Wallace, the person shown by the record to have been the competitor of Gulick, was ineligible to the office of sheriff at the date of election."

In *Wachter v. McEvoy* (1915) 125 Md. 399, 93 Atl. 987, there was involved an act of the legislature which, after fixing the duration of the term of police commissioners of Baltimore city at two years and until their respective successors are appointed and qualified, declared: "None of said commissioners shall be eligible to an elective or appointed office during the term for which he was appointed." The petitioner was appointed and qualified for a full term as one of the police commissioners of Baltimore city. During the term for which he was appointed he resigned the said office and tendered his certificate of candidacy for the Republican nomination for the office of mayor to the city board of supervisors of elections. The board returned the certificate to the petitioner on the ground that he was ineligible under the aforesaid act of the legislature, to the office of mayor. On a petition for the writ of mandamus to compel the board to accept the certificate and print petitioner's name on the ballot to be used at the election, the court upheld the decision of the board, saying: "The term for which Mr. McEvoy was appointed was for two years. That term was not ended by his resignation. The admitted facts bring him within the disqualifying terms of the statute. The office of mayor is an elective office, and the petitioner is asking to become a can-

didate for the office of mayor 'during the term for which he was appointed' police commissioner. He is, therefore, ineligible for that office by the plain and unambiguous terms of the act. It is earnestly insisted that the disqualification is limited to the term of actual service, but the statute does not so limit it. That construction would be a narrow one, and would fail to give any effect to the phrase, 'during the term for which he was appointed.' If the legislature had intended to limit the disqualification to the time of actual service or to the period of actual incumbency, it would have so stated, and not have used the language which extended the disqualifications to the entire period of the petitioner's appointment as police commissioner."

In *Ellis v. Lennon* (1891) 86 Mich. 468, 49 N. W. 308, there was involved a city charter providing that "no alderman shall be elected or appointed to any office in the city during the term for which he was elected alderman," and further providing that "no member of the common council shall, during the period for which he was elected, be appointed to or be competent to hold any office of which the emoluments are paid from the city treasury." The respondent had been elected alderman of the city for a term of two years, and was ex officio a member of the city council for that term. During the term for which he had been elected, he resigned his office of alderman, and was appointed by the common council chief of police of the city. The court held the respondent to be ineligible to the office of chief of police, saying: "Statutes should be so construed as to give every word and phrase used its common and approved meaning. If it was the intention of the legislature to limit the prohibition to the term of actual service, or simply to make members of the council or aldermen ineligible to other city offices during the term of actual service, the phrases, 'during the term for which he was elected,' and 'during the period for which he was elected,' are entirely superfluous. The term for which respondent was elected is clearly defined by the charter, and the lan-

guage, 'the term for which he was elected,' has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility, and excludes a construction which would have attached in the absence of that language."

In *State ex rel. Childs v. Sutton* (1895) 63 Minn. 147, 30 L.R.A. 630, 56 Am. St. Rep. 459, 65 N. W. 262, the court applied a provision of the Constitution of the state of Minnesota that "no senator or representative shall, during the term for which he is elected, hold any office under the authority of the United States, or the state of Minnesota, except that of postmaster." The respondent was elected to the office of representative. During the term for which he had been elected he resigned his office of representative, and was appointed to, and entered on the duties of, the office of inspector of boilers, an office held under the authority of the state. The court, ordering a judgment of ouster against the respondent, said: "The respondent could not nullify the constitutional prohibitory clause, 'during the time for which he is elected,' by his resignation of the office of representative. The time for which he was elected was the entire constitutional term of two years, and whether he resigned during that time or not, he was not permitted to hold any other office under the authority of this state during such entire term." In so holding, the court overruled *Barnum v. Gilman* (1881) 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375, arising under the same provision.

*Forman v. Bostwick* (1910) 139 App. Div. 333, 123 N. Y. Supp. 1048, arose under a statute providing that "no member of the common council of any city shall, during the period for which he was elected, be capable of holding under the appointment or election of the common council any office the emoluments of which are paid from the city treasury, or paid by fees or compensation directed to be paid by any act or ordinance of the common council." The respondent was elected alderman of a city for a term of two

years, and as alderman was ex officio a member of the common council. During the term for which he was elected alderman, the respondent resigned the said office, and was appointed by the common council to be city judge of the city, and assumed the duties of that office,—an office the emoluments of which are paid from the city treasury. On the foregoing facts, the court held the respondent to be ineligible for the office of city judge, and his appointment thereto to be illegal.

In *Westcott v. Scull* (1915) 87 N. J. L. 410, 96 Atl. 407, there was applied a statute providing that no member of any board of aldermen, or common council, "during the term for which he shall have been elected said member, shall be eligible for election or appointment to any office that is now or hereafter may be by law required to be filled by any such board, council, committee, or body of which he is a member." It appeared that a member of the common council resigned his office, and was at once elected to fill an unexpired term in the council which ran longer than his own. The court held him to be ineligible under the statute, and the election to be void.

In *State ex rel. Chealander v. Carroll* (1910) 57 Wash. 202, 106 Pac. 748, the court construed the charter of the city of Seattle, providing that "no person elected or appointed to" the office of civil service commissioner of the city, "and who has accepted the said office and entered upon the duties thereof, shall . . . be eligible to any other office in the city during the term for which he was so elected or appointed." The relator was appointed to the office of civil service commissioner, and accepted and entered on the duties of that office. He then resigned the office of civil service commissioner, and filed in the city comptroller's office a written declaration of candidacy for the nomination to the office of member of the city council. The court held the relator to be ineligible to the office of member of the city council during the term for which he had been elected civil service com-

In *State ex rel. Reynolds v. Howell* (1912) 70 Wash. 467, 126 Pac. 954, there was involved a constitutional provision that "the term of office of all superior judges in this state shall be four years and until their successors are elected and qualified;" and further provided that "the judges of the supreme court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected." It appeared that a superior court judge received a nomination for governor of the state. It was held that, although the four-year period of the term of superior court judge would expire before the term of governor commenced, he was ineligible to the office of governor during his entire term of superior court judge for four years and until his successor is elected and qualified. The court said: "It was conceded at the

bar, and it cannot be doubted, that a judge cannot qualify himself to hold an office other than a judicial one during his elective term, by resignation or any other act on his part."

In *Com. ex rel. Martin v. Corcoran* (1899) 9 Kulp (Pa.) 507, it appeared that a member of a council of a third-class city resigned his office and was at once elected by the council to fill a vacancy in the office of mayor of the city. The court held that the act of the legislature prohibiting "any member of a council of any city to be eligible to any office, employment, or agency directly chosen by councils, during the term for which he shall have been elected," was not applicable to cities of the third class, and that the defendant was therefore eligible to the office of mayor during the term for which he had been elected city councilman. B. R.

W. R. SULLIVAN et al., Receivers of the Georgia & Florida Railway,  
v.

H. B. CURLING, Doing Business under the Name and Style of Curling Tie  
Company.

*Georgia Supreme Court—May 14, 1919.*

(— Ga. —, 99 S. E. 533.)

**Assignment — of cause of action for tort.**

1. A chose in action arising from a tort is assignable where it involves, directly or indirectly, a right of property.

(a) Where a partnership is dissolved and one partner assigns to the other all of his right, title, and interest in and to the assets of the partnership, the assignee may institute and maintain an action against such tort-feasor for the entire damage sustained by the partnership. The assignor is not a proper party plaintiff to the suit, nor is it proper that the suit be brought in the names of both partners for the use of the assignee.

(b) The petition was not subject to a general demurrer. Whether the petition is good as against "appropriate special demurrer" is not decided; the grounds of demurrer not being stated.

[See note on this question beginning on page 130.]

**Pleading — allegation of assignment.**

2. An allegation in a petition by one member of a partnership that the other member thereof sold out to the plaintiff "all of his right, title, and interest in

and to the assets of said partnership, plaintiff having operated the business since the date of said sale under a tradename, and being the sole and exclusive owner of all of the assets of

the firm," is a sufficient allegation of assignment of a chose in action, in the absence of an appropriate special demurrer and as against a general demurrer that "plaintiff's petition sets

forth no cause of action which would authorize a judgment against defendant."

[See 21 R. C. L. 520.]

(Fish, Ch. J., and Beck, P. J., dissent.)

**CERTIFICATION** by the Court of Appeals for a determination by the Supreme Court of questions arising upon writ of error to review a judgment of the City Court of Hazlehurst in plaintiff's favor in an action brought to recover damages for the alleged negligent burning and destruction of a quantity of wood. *Affirmative answers returned.*

The questions certified by the court of appeals were as follows:

"(1) Is a chose in action, founded upon a tort which involves the damage of personal property, assignable?

"(a) Where the petition of H. B. Curling shows that a partnership, composed of himself and J. H. McLean, had a right of action sounding in tort against a railroad company, for the alleged negligent burning and destruction of a quantity of wood belonging to the partnership, and stacked upon the right of way of the railroad company, and thereafter McLean sold to Curling 'all of his right, title, and interest in and to the assets' of the partnership, and the business was thereafter carried on by Curling in the name of the 'Curling Tie Company' (the partnership name), as a tradename for H. B. Curling, he being the sole and exclusive owner of all of the assets of the concern, can Curling institute and maintain an action against the railroad company for the entire damage sustained by the partnership in the loss of the wood, or is McLean a necessary party plaintiff in the suit, or should suit have been brought in the names of both Curling and McLean for the use of Curling?

"(b) Was the petition in this respect good as against general demurrer, or was it subject to appropriate special demurrer?

"(2) If the right of action was assignable, did the petition (in the absence of an appropriate special demurrer, and as against a general demurrer that 'plaintiff's petition

sets forth no cause of action which would authorize a judgment against defendants') show such an assignment to the plaintiff by the following allegation: 'On the 1st day of July, 1916, the said J. H. McLean sold out to H. B. Curling all of his right, title, and interest in and to the assets of said partnership; said Curling Tie Company having been operated since said date as a tradename for the said H. B. Curling, and he being the sole and exclusive owner of all of the assets of said firm?'"

Messrs. J. W. Quincey, L. E. Heath, J. Mark Wilcox, and S. D. Dell, for defendants:

Plaintiff's petition, in order to be good as against the general demurrer, must allege that the chose in action was assigned in writing.

*Foster v. Sutlive*, 110 Ga. 297, 34 S. E. 1037; *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575.

A right of action arising ex delicto cannot be assigned at all, but must be instituted and maintained in the name of the party or parties in whom the title of the property destroyed was vested at the time of its destruction.

*Lowden v. Merchants & Mariners Transp. Co.* 20 Ga. App. 283, 93 S. E. 45; *Gamble v. Central R. & Bkg. Co.* 80 Ga. 599, 12 Am. St. Rep. 276, 7 S. E. 315; *Marshall v. Means*, 12 Ga. 67, 56 Am. Dec. 444; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 387, 13 S. E. 520; *Allen v. Macon, D. & S. R. Co.* 107 Ga. 845, 33 S. E. 696; *Turk v. Cook*, 63 Ga. 681; *Daniels v. Tarver*, 70 Ga. 206.

Plaintiff's right of recovery is confined to the allegations of negligence upon which recovery is sought.

*Atlantic Coast Line R. Co. v. Barton*, 14 Ga. App. 160, 80 S. E. 530, 4 N. C.

C. A. 998; *Atlantic Coast Line R. Co. v. McElmurray Bros.* 14 Ga. App. 196, 80 S. E. 680; *Central of Georgia R. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956; *Georgia Brewing Asso. v. Henderson*, 117 Ga. 480, 43 S. E. 698; *Hudgins v. Coca Cola Bottling Co.* 122 Ga. 695, 50 S. E. 974; *Western & A. R. Co. v. Bran-an*, 123 Ga. 692, 51 S. E. 650; *Augusta R. & Electric Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444.

Simply showing that the fire was discovered shortly after the passing of the locomotive does not raise the presumption that it set out the fire, but the fact that it set out the fire must be proved by the plaintiff's testimony, and then, and not until then, does the law presume that the railroad company was negligent.

*Gainesville, J. & S. R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213; *Southern R. Co. v. Myers*, 108 Ga. 165, 33 S. E. 917; *Smith v. Southern R. Co.* 20 Ga. App. 609, 93 S. E. 166; *Atlantic Coast Line R. Co. v. McElmurray Bros.* 12 Ga. App. 233, 77 S. E. 2; *Savannah, F. & W. R. Co. v. Flaherty*, 110 Ga. 335, 35 S. E. 677, 7 Am. Neg. Rep. 525; *Atlantic & B. R. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456; *Atlanta R. & Power Co. v. Johnson*, 120 Ga. 908, 48 S. E. 389; *Inman v. Elberton Air Line R. Co.* 90 Ga. 665, 35 Am. St. Rep. 232, 16 S. E. 958.

*Messrs. Newton Gaskins and McDonald & Willingham*, for plaintiff:

The petition filed in this case with the amendments thereto fully set out a cause of action against the defendants, and entitled plaintiff in the lower court to a recovery.

*Atkinson v. Dismuke*, 11 Ga. App. 521, 75 S. E. 835; *Central R. & Bkg. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Singleton v. Southwestern R. Co.* 70 Ga. 464, 48 Am. Rep. 574; *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 21 Am. St. Rep. 169, 11 S. E. 853.

The evidence was sufficient to support the verdict.

*Munroe v. Baldwin*, 145 Ga. 215, 88 S. E. 947; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Chance v. Summerford*, 25 Ga. 662; *Greene v. Central of Georgia R. Co.* 130 Ga. 375, 60 S. E. 861; *Tallulah Falls R. Co. v. Stribling*, 20 Ga. App. 353, 93 S. E. 161; *Southern R. Co. v. Smith*, 21 Ga. App. 814, 95 S. E. 328.

The charge of the court properly submitted the contentions of the parties.

*Macon, D. & S. R. Co. v. Joyner*, 129

Ga. 683, 59 S. E. 902; *Atlanta Consol. Street R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191; *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430; *Millen & S. W. R. Co. v. Allen*, 130 Ga. 656, 61 S. E. 541; *Cooley v. Bergstrom*, 3 Ga. App. 496, 60 S. E. 220; *Savannah Electric Co. v. Jackson*, 132 Ga. 559, 64 S. E. 680; *Woodward v. Fuller*, 145 Ga. 252, 88 S. E. 974.

**Gilbert, J.**, delivered the opinion of the court:

The history of the subject of assignments of rights of action begins with the legal theory that rights of action cannot be assigned at all, on the ground that one who claims as the mere assignee of a right of action must fail in the attempt to enforce the right, because he is not in privity with the person against whom the obligation exists. In the course of ages evolution has wrought changes, and the changes have wrought some confusion. Mr. Street, in his admirable work on *Foundation of Legal Liability* (vol. 3, p. 86), after an elaborate and learned discussion of the subject and its history, including a study of the writings of such ancient authorities as Fleta and Bracton, as well as later writers, including Fitzherbert, Blackstone, and Joshua Williams, arrives at the conclusion that the following demands, claims, and rights of action are assignable: "Causes of action arising from the breach of contract of any kind (except the breach of a promise to marry); causes of action arising from torts which affect the estate rather than the person of the individual who is injured. Under the latter head are claims arising from the carrying away or conversion of personal property; from the fraudulent misapplication of funds by the officer of a bank; from negligent or intentional injury done to personal property or upon real estate." 29 *Harvard L. Rev.* 816; 30 *Harvard L. Rev.* 449.

There are two sections of the Code of Georgia dealing with the assignability of choses in action, and these must be considered in connection with the common law on the

subject. Section 3653 of the Civil Code provides in part: "All choses in action arising upon contract may be assigned so as to vest title in the assignee."

Obviously the codifiers who prepared this Code had in mind the ancient rule that no chose in action was assignable, and their purpose was to except choses in action arising *ex contractu*. Authority was delegated to them to prepare a Code "which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the Constitution, the statutes of the state, the decisions of the supreme court, or the statutes of England of force in this state." Since in this section no provision was made for assigning choses in action arising from torts, the law in that regard was unaltered, under the principle, "*Expressio unius, exclusio alterius*." *Gamble v. Central R. & Bkg. Co.* 80 Ga. 595, 599, 600, 12 Am. St. Rep. 276, 7 S. E. 315. Thus the law remained until the adoption of the Code of 1895. The rule at common law was that "choses in action, except negotiable securities, could not be assigned so as to carry the legal title; and in a court of law any rights in them acquired by other persons than the owner could be enforced only in his name." *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 342, 35 Am. St. Rep. 210, 16 S. E. 943; *East Tennessee, G. & G. R. Co. v. Henderson*, 1 Lea, 1, 3; *Butler v. New York & E. R. Co.* 22 Barb. 110.

This rule of the common law was based upon principles of public policy which forbade the use of the machinery of the courts for any action which savored of champerty and maintenance. In the Code of 1895, § 3079, it is provided that "a right of action is not assignable if it does not involve, directly or indirectly, a right of property; hence a right of action for personal torts or for injuries arising from fraud to the assignor cannot be assigned."

This Code was, as a whole, enact-

ed into law by the general assembly, and the section appears in the Code of 1910 as § 3655. This section was derived from the decision in the case of *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 388, 13 S. E. 520, and works a modification of the common law as it stood in this state previously to that time. It is to be assumed that none of the words in this section were employed without a meaning. It had been the law from the earliest times that a chose in action arising out of tort was not assignable, and it was not necessary to enact this section of the Code in order to establish that principle. We think, therefore, that when the legislature said that "a right of action is not assignable if it does not involve, directly or indirectly, a right of property," the converse necessarily follows; that is, a right of action is assignable if it does involve, directly or indirectly, a right of property. This is in harmony with the rule as laid down by Mr. Street, as stated above, and with the trend of modern authority. *Louisville & N. R. Co. v. Morse*, 143 Ga. 110, 84 S. E. 428; 2 R. C. L. 613, 614; 5 C. J. 889, § 55; 38 Cyc. 463; 15 Enc. Pl. & Pr. 487 et seq.; *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 758; *Comegys v. Vasse*, 1 Pet. 193, 212, 7 L. ed. 108, 116.

In the case of *Allen v. Macon, D. & S. R. Co.* 107 Ga. 838, 845, 33 S. E. 696, it was said that "a claim for damages sustained by reason of a trespass necessarily is one arising *ex delicto*, and therefore is not legally assignable in this state."

Without explanation, it would appear that this case is in conflict with the conclusion which we have reached above. We find, however, from examination of the original record in the case, that the petition was filed in the trial court in the year 1893, and therefore falls in the same class with *Gamble v. Central R. & Bkg. Co.* and *Central R. &*

*Bkg. Co. v. Brunswick & W. R. Co.* supra; all of them having reference to cases instituted prior to the adoption of the Code of 1895. We therefore answer the first question propounded by the court of appeals in

the affirmative; that is, such a chose in action is assignable.

(a) The assignee may institute and maintain an action against the defendant tort-feasor for the entire damage sustained by the partnership. The assignor, retiring partner, is not a proper party plaintiff to the suit; and it was not proper that the suit should have been brought in the names of both partners for the use of the assignee. Civil Code 1910, § 5517, provides: "An action for a tort must, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed, and against the party committing the injury, either by himself, his servant, or agent in his employment."

We have already established that rights of action arising in tort, which involve directly or indirectly the right of property, are assignable. The Code section which we have just quoted was also cited in the case of *Willis v. Burch*, 116 Ga. 374, 375, 42 S. E. 718, which was a trover suit; and the conclusion was drawn therefrom that, if the legal right or title to the property was, at the time of its conversion, in the plaintiffs, action should have been brought in their names alone, and the striking of them as plaintiffs from the petition as brought would leave no cause of action in the usee.

We have, then, to deal with this situation: The chose in action is assignable. It has been assigned. Suit cannot be brought in the name of the nominal plaintiff for the benefit of a named usee. It cannot be brought in the name of a nominal plaintiff, because he has parted with his right, title, and interest in the subject-matter. This brings us face to face with the proposition that the plain-

tiff has the right, title, and interest in an assignable chose in action, which is intangible property. 1 Words & Phrases 2d Series, 684; *Wayne v. Hartridge*, 147 Ga. 127, 131, 92 S. E. 937; 22 R. C. L. 66. And under our Code, wherever there is a right there is a remedy. To solve the difficulty we must "look diligently for the intention of the general assembly, keeping in view at all times the old law, the evil, and the remedy." Civ. Code, § 4, subpar. 9. We will therefore consider the Code, §§ 3653, 3655, and 5517, together with the history of the assignability of choses in action. Out of the apparent conflict certain principles are obvious. Originally it was essential that the person having title at the time of injury to the property should bring the suit, for the reason that it was not assignable. As choses in action became assignable by piecemeal, the rule disappeared as to those which became assignable. Under the provisions of our first Code, choses in action arising ex contractu were made assignable, and shortly thereafter this court, in the case of *Fountaine v. Urquhart*, 33 Ga. Supp. 184, decided that the assignee could maintain his action without making the assignor a party; and again to the same effect in *Mordecai v. Stewart*, 37 Ga. 379. See also *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 787, 21 S. E. 1006 (1); *Chicago Cheese Co. v. Smith*, 94 Ga. 663, 20 S. E. 106; 15 Enc. Pl. & Pr. 859, and note 2.

As we have shown, until 1895 no choses in action arising ex delicto were assignable, and by virtue of the principles which had always obtained such a suit could not be maintained by a usee or by a nominal plaintiff for the benefit of a named usee. Section 5517 of the Code of 1910 appeared in the first Code (of 1863), and has been brought forward in each succeeding Code. It was therefore enacted at a time when choses in action arising ex delicto were not assignable. It was merely the enactment of the common law as stated by Chitty. 1



Chitty, Pl. 90. When the provisions of § 3655 were introduced into the Code, § 5517 necessarily became modified; otherwise the later enactment would be inoperative for lack of remedy. After § 3655 became law, however, there were still some actions arising *ex delicto* which were not assignable, to wit, all such as did not involve directly or indirectly a right of property.

The conclusion is irresistible, when we consider the words "in general," found in § 5517, that the logical and proper construction, consistent with the history and with all of the Code sections bearing upon the subject, is that in all actions arising *ex delicto*, not involving a right of property, and therefore not assignable, the suit must be brought by the party who suffered the injury or tort, and that in such a case there could be no use. Where, however, the right of action does involve directly or indirectly a right of property, it is assignable, and the assignee must bring the suit in his own name without joining the assignor, which is the same rule that obtains in regard to choses in action arising *ex contractu*. 1 Chitty, Pl. 99. In other words, as soon as the general assembly made a certain class of choses in action assignable, it took this class out of the general rule mentioned in Code, § 5517, and the rule became the same as already existed in the case of choses in action arising *ex contractu*. In both cases the assignability determined the mode of procedure. The general rule, as it was at common law, is that the right of action at law is vested solely in the person having the strict legal title and interest. Civ. Code, § 5517; *Haug v. Riley*, 101 Ga. 375, 40 L.R.A. 244, 29 S. E. 44, 15 Enc. Pl. & Pr. 484. Title is determined by assignability. *Reed v. Janes*, 84 Ga. 380, 390, 11 S. E. 401; *Mitchell v. Georgia & A. R. Co.* 111 Ga. 760, 771, 51 L.R.A. 622, 36 S. E. 971.

The case of *Willis v. Burch*, 116 Ga. 374, 42 S. E. 718, is not in ac-  
5 A.L.R.—9.

cord with the conclusion as above stated. It will be observed, however, that this case was a decision by five justices, and is not binding, especially in view of the fact that it is not in harmony with the new legislation introduced into the Code of 1895.

Nothing ruled in the case of *McElmurray v. Harris*, 117 Ga. 919, 43 S. E. 987, necessarily conflicts with the rule which we have herein adopted, as it developed on the trial of that case that the plaintiff had parted with his title to the property sued for by selling it to a third party. The plaintiff could not, therefore, recover in his own name. The verdict in his favor for the use of his vendee was allowed to stand, because there was no appropriate objection made on the trial.

In the case of *McEachern v. Edmondson*, 122 Ga. 80, 49 S. E. 798, the statement that "the rule in actions *ex contractu* by which the name of the original plaintiff may be stricken, and the cause allowed to proceed in the name of the usee, if the latter has a legal right to maintain the suit, . . . does not apply to actions *ex delicto*," was not necessary to a proper decision of that case, and therefore is not binding. In that case a contract conveying certain timber rights had been made; the grantee sold his rights to a third party, after which the original vendor breached the contract by refusing to allow the transferee to cut the timber; and the last named sued the original vendor for damages. This was not a case involving the assignability of choses in action. The cause of action arose after the assignment of the contract in regard to timber. The expression in the case of *Southern R. Co. v. Barrett, D. & L. Co.* 141 Ga. 584, 81 S. E. 863, which apparently conflicts with the conclusion at which we have arrived, is not really a ruling of the court. It expresses a doubt as to the assignability of a chose in action *ex delicto*, but that question was not involved in the case.

At page 588 of 141 Ga., the opinion stated that "it was not even distinctly alleged that there was an attempted assignment. It was not an instance of assignment of title to property with the incidental right to sue for it, or for the deprivation of it."

(b) The petition was good as against a general demurrer; whether it is good as against "appropriate special demurrer" is not decided,

the grounds of demurrer not being set out in the certified question.

2. The second question is answered in the affirmative. Pleading—allegation of assignment.

All the Justices concur except Fish, Ch. J., and Beck, P. J., who dissent.

Petition for rehearing denied, June 14, 1919.

### ANNOTATION.

#### Assignability of right of action ex delicto for injury to property, as affected by statute.

It was a principle of the early common law that a right of action for a tort is not assignable. This principle rested largely upon the theory that such a chose in action was not survivable. An exception was at an early day ingrafted upon this common-law rule by the Statute of 4 Edw. III. chap. 7, which permitted the survivorship of certain actions ex delicto for injuries to personal property; and survivorship was, by a later statute (3 & 4 Wm. IV. chap. 42), prescribed for actions ex delicto for injuries to real property. *Zabriskie v. Smith* (1855) 13 N. Y. 322, 64 Am. Dec. 551. This exception that was thus ingrafted upon the common-law doctrine of non-assignability, making actions ex delicto for injuries to property assignable, became so well settled that it has been stated to be the general rule that actions ex delicto for injuries to property, as distinguished from actions ex delicto for injuries to the person, are assignable (2 R. C. L. p. 613, § 20; 5 C. J. 889, § 55), and this undoubtedly is supported by the great weight of authority; but the assignability has been denied. *McCormack v. Toronto R. Co.* (1907) 13 Ont. L. Rep. 656, 7 Ann. Cas. 500. See *Stapp v. Madera Canal & Irrig. Co.* (1917) 34 Cal. App. 41, 166 Pac. 823, *infra*, and *SULLIVAN v. CURLING* (reported herewith) *ante*, 124.

It is a general principle, according to the weight of authority, that statutes making actions ex delicto survivable make them assignable. This prin-

ciple relating to actions ex delicto generally governs actions ex delicto for injuries to property, and where such an action is survivable, either by virtue of a statute relating to actions ex delicto generally, or a statute relating to actions ex delicto for injuries to property, it is assignable. *Dunshee v. Standard Oil Co.* (1914) 165 Iowa, 625, 146 N. W. 830; *Final v. Backus* (1869) 18 Mich. 218 (followed in *Brady v. Whitney* (1871) 24 Mich. 154, and *Grant v. Smith* (1872) 26 Mich. 201) as interpreted in *Dayton v. Fargo* (1881) 45 Mich. 153, 7 N. W. 758; *Hansen Mercantile Co. v. Wyman, P. & Co.* (1908) 105 Minn. 491, 21 L.R.A. (N.S.) 727, 117 N. W. 926; *Babcock v. Canadian Northern R. Co.* (1912) 117 Minn. 434, 136 N. W. 275, Ann. Cas. 1913D, 924; *Bultman v. Atlantic Coast Line R. Co.* (1915) 103 S. C. 512, 88 S. E. 279.

Some statutes make claims assignable generally. *Birch v. Metropolitan Elev. R. Co.* (1890) 15 Daly, 453, 8 N. Y. Supp. 325, seems to have been decided under such a statute.

Claims against a railroad company for damage by fire were made assignable by statute, referred to in *Southern R. Co. v. Stonewall Ins. Co.* (1912) 177 Ala. 327, 58 So. 313, Ann. Cas. 1915A, 987.

The contemporary statute should be consulted on the assignability of actions ex delicto for injuries to property; this note deals with statutes only

so far as they have been the subject of judicial notice.

The exception relating to actions ex delicto for injuries to property that has generally been held to exist to the common-law rule of nonassignability of choses in action has not been recognized in all cases, but the action has been held assignable by virtue of a statute expressly making an action ex delicto for violation of a right in property assignable. *Stapp v. Madera Canal & Irrig. Co.* (1917) 34 Cal. App. 41, 166 Pac. 823, holding a claim for damages caused by flooding land assignable, without assigning or transferring title to or possession of the property damaged, under a statute providing that "a thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner."

See *SULLIVAN v. CURLING* (reported herewith) ante, 124.

It is the theory of some cases that at common law no mere right of action was assignable so as to pass the legal right to the assignee, but that when it affected the estate of the assignor, though the legal right still remained in the assignor, so that the action must be prosecuted in his name, the court, exercising its equity powers, would protect the rights of the assignee. A Code provision that every action must be prosecuted in the name of the real party in interest makes no change in the assignability of choses in action, but does authorize the action to be brought in the name of assignees in the case of a chose in action properly assignable. *Hodgman v. Western R. Corp.* (1852) 7 How. Pr. (N. Y.) 492. Nor does a statutory provision that nothing in the foregoing provision shall be deemed to authorize the assignment of a thing in action not arising out of contract, in connection with the foregoing one that an action shall be brought in the name of the real party in interest, affect the assignability of actions ex delicto. *Zabriskie v. Smith* (1855) 13 N. Y. 322, 64 Am. Dec. 551; *Thurman v. Wells* (1854) 18 Barb. (N. Y.) 500; *Butler v. New York & E. R. Co.* (1856) 22 Barb. (N. Y.) 110; *McArthur v. Green*

*Bay & M. Canal Co.* (1874) 34 Wis. 152. Under this theory, where the action is survivable by virtue of a statute, it is assignable, and this assignability is not affected by a statute such as the above, providing that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract." *Snyder v. Wabash, St. L. & P. R. Co.* (1885) 86 Mo. 613, followed in *Doering v. Kenamore* (1885) 86 Mo. 538, overruling *Wallen v. St. Louis, I. M. & S. R. Co.* (1881) 74 Mo. 521; *Snyder v. Wabash, St. L. & P. R. Co.* (Mo.) supra, is followed in *Chouteau v. Boughton* (1890) 100 Mo. 406, 13 S. W. 877; *Remmers v. Remmers* (1908) 217 Mo. 541, 117 S. W. 1117, and *Brown v. Quincy, O. & K. C. R. Co.* (1917) 198 Mo. App. 71, 199 S. W. 707.

A statute making an absolute assignment of a chose in action effectual in law to pass and transfer the legal right to such chose in action from the date of notice given to the debtor, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor, does not enlarge the class of things lawfully assignable, but has to do only with procedure. *McCormack v. Toronto R. Co.* (1907) 13 Ont. L. Rep. 656, 7 Ann. Cas. 500.

In *Zabriskie v. Smith* (N. Y.) supra, a cause of action for deceit was held not assignable. The court makes the test of assignability whether or not the cause of action survives; if it does not, it is not assignable; if it does, it is. The court in *Fried v. New York C. R. Co.* (1858) 25 How. Pr. (N. Y.) 285, criticizes the conclusion in *Zabriskie v. Smith* (N. Y.) supra, that the action for deceit is not assignable, and states that the statutes of New York made great changes in the rights and liabilities of parties with reference to choses in action, and cites a statute as follows: "For wrongs done to the property, rights or interests of another, for which an action might be

maintained against the wrongdoer, — such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer; and after his death against his executors or administrators, in the same manner and with the like effect in all respects as actions founded on contract." A subsequent section of the statute limits the section just quoted by providing that it shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator. Under this statute, the court, in the *Fried Case*, states that an erroneous conclusion was reached in *Zabriskie v. Smith*. It was held in *Fried v. New York C. R. Co.* that a right of action for carelessly and negligently setting fire to and burning up grass and fences and hay stacked upon a farm is assignable.

The theory of the foregoing cases, that the assignability of an action *ex delicto* for injuries to property is determined by whether or not it survives, without reference to a statute providing that an action shall be brought in the name of the real party in interest, but that nothing therein contained shall be deemed to authorize the assignment of a thing in action not arising out of contract, has not been followed in all cases. But it has been held that a statute providing generally for the survival of certain actions, which, if standing alone, might be regarded as modifying the common-law rule so that all rights of action which survive might pass by assignment, will not be held to have this effect, where another statute adopted at the same time provides that "every action must be prosecuted in the name of the real party in interest except as otherwise provided in . . . (a subsequent section) but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." *Kansas Midland R. Co. v. Brehm* (1895) 54 Kan. 751, 39 Pac. 690.

— An action against the railroad company for the destruction of property by fire negligently set by it was held not assignable in *Kansas City, M. & O. R. Co. v. Shutt* (1909) 24 Okla. 96, 138 Am. St. Rep. 870, 104 Pac. 51, 20 Ann. Cas. 255. Several statutes were involved in this case. It seems that statutes the same as those involved in *Kansas Midland R. Co. v. Brehm* (Kan.) *supra*, and also an additional statute providing that "a thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner; upon the death of the owner it passes to his personal representative except where, in the case provided by law, it passes to his devisees or successors in office." It was urged that the claim was assignable by virtue of this statute, but in answer to this contention the court states that when this statute is considered in connection with the provision that the section authorizing an action to be brought in the name of the real party in interest shall not be deemed to authorize an assignment of the thing in action not arising out of a contract, the contention seems to be ill founded.

According to the court in *McCormack v. Toronto R. Co.* (1907) 13 Ont. L. Rep. 656, 7 Ann. Cas. 500, the supreme court of Queensland held that a right to recover damages for injuries to a cargo of wool sustained in a collision was a legal chose in action, and assignable as such, under a statute such as that set out in the *McCormack Case* (Ont.) *supra*. Upon appeal to the privy council, in *King v. Victoria Ins. Co.* [1896] A. C. (Eng.) 250, the Lords, although expressly stating that they did not dissent from the view taken in the court below of the construction of the Judicature Act with reference to the term "legal chose in action," preferred to avoid discussing this question, which is stated to be not free from difficulty, and sustained the right of an insurance company which had paid a loss for injuries to a cargo of wool, and to which the right to recover damages therefor had been assigned, on the "broader and simpler ground that a payment honestly made

by insurers, in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured." W. A. E.

DAVID M. RUBIN et al.

v.

ERIK P. STRANDBERG, Jr., Appt.

*Illinois Supreme Court—April 15, 1919.*

(288 Ill. 64, 122 N. E. 808.)

**Infant — ratification — ignorance of rights.**

1. Ignorance of his legal right to disaffirm at the time a minor who has attained full age makes a payment upon a contract made during minority does not prevent the payment from being a ratification of the contract.

[See note on this question beginning on page 137.]

— right to disaffirm contract.

2. A minor may disaffirm a contract made by him during minority, within a reasonable time after attaining major-

ity, and he may, by acts recognizing the contract after becoming of age, ratify it.

[See 14 R. C. L. 235, 247.]

**APPEAL** by defendant from a judgment of the Appellate Court, First District, Second Branch, reversing a judgment of the Superior Court for Cook County (Foell, J.) in favor of defendant on his cross bill, in an action brought to annul and remove, as a cloud upon title to certain lands, a contract between defendant and complainants to purchase real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Joel C. Carlson, for appellant:

An infant may disaffirm any contract made by him during minority, within a reasonable time after attaining full age, and four months after reaching majority is a reasonable time in which to disaffirm.

Heinz v. Baldwin County Colonization Co. 195 Ill. App. 265; Rapid Transit Land Co. v. Sanford, — Tex. Civ. App. —, 24 S. W. 587; Blankenship v. Stout, 25 Ill. 132; Tunison v. Chamblin, 88 Ill. 378; Keil v. Healey, 84 Ill. 104.

In order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences, and with the express intent to ratify what is known to be voidable.

Coe v. Moon, 260 Ill. 76, 102 N. E. 1074.

Where the same lack of knowledge exists at the time of an alleged ratification of a contract made during minor-

ity, as existed at the time the contract was made, the alleged ratification is held to be a part of the original transaction and is ineffectual.

Ibid.; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Davidson v. Young, 38 Ill. 145; Rapid Transit Land Co. v. Sanford, — Tex. Civ. App. —, 24 S. W. 587.

There can be no ratification without intelligent action as to the law, as well as facts, and, accordingly, if a man does not know that he has a right to disaffirm a contract made in infancy, no act with reference to that contract may charge him as by ratification.

Hammon, Contr. p. 262; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Harmer v. Killing, 5 Esp. 103; Tucker v. Moreland, 10 Pet. 76, 9 L. ed. 352; Burdette v. Williams, 30 Fed. 697; Fetrow v. Wiseman, 40 Ind. 148; Thing v. Libbey, 16 Me. 55; Trader v. Lowe, 45 Md. 1; Baker v. Kennett, 54 Mo. 82;

*Bresee v. Stanly*, 119 N. C. 278, 25 S. E. 870; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Hinely v. Margaritz*, 3 Pa. St. 428; *Curtin v. Patton*, 11 Serg. & R. 305; *Norris v. Vance*, 37 S. C. L. (3 Rich.) 165; *Reed v. Boshears*, 4 Sneed, 118; *Coe v. Moon*, 260 Ill. 76, 102 N. E. 1074.

The executed contracts of an infant are valid and operative until disaffirmed, while his executory contracts are invalid unless he ratifies them.

*Hammon*, Contr. pp. 252, 255.

The infant may recover back money paid.

*Heinz v. Baldwin County Colonization Co.* 195 Ill. App. 265; *Coe v. Moon*, 260 Ill. 76, 102 N. E. 1074; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Rapid Transit Land Co. v. Sanford*, — Tex. Civ. App. —, 24 S. W. 587.

All payments under the contract were made by the minor.

*Harms v. McCormick*, 132 Ill. 105, 22 N. E. 511; *Gautzert v. Hoge*, 73 Ill. 30.

*Messrs. H. J. Rosenberg, Louis Becker, and Irving Zimmerman*, for appellees:

The acts of an infant after minority must be viewed in the light of actual knowledge as to the right to disaffirm; if such acts would amount to a ratification if the infant had actual knowledge of the law, ignorance of his legal right to disaffirm will not change the effect of such acts.

1 *Whart. Contr.* § 57; *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. Rep. 687; *Ring v. Jamison*, 66 Mo. 424, 2 Mo. App. 584.

Where an infant after arriving of age, with full knowledge of the facts, takes the benefits of a contract entered into during minority and performs acts in execution of said contract, he thereby ratifies such contract.

*Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045; *Daivson v. Young*, 38 Ill. 145; *Penn v. Heisey*, 19 Ill. 295, 68 Am. Dec. 597; *Dewey v. Burbank*, 77 N. C. 259; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Keegan v. Cox*, 116 Mass. 289; *Wilson v. Darragh*, 55 Hun, 605, 7 N. Y. Supp. 810; *Wheaton v. East*, 5 Yerg. 41, 26 Am. Dec. 251; *Henry v. Root*, 33 N. Y. 526.

Where the contract of an infant calls for the performance of a series of acts, a portion of which are to be performed after he arrives at maturity, and if the

minor after arriving at maturity continues performance of the contract, he thereby ratifies the same.

1 *Whart. Contr.* §§ 56, 58, 59; *For-syth v. Hastings*, 27 Vt. 646; *Miller v. Sims*, 20 S. C. L. (2 Hill) 479; *Whittingham v. Murdy*, 60 L. T. N. S. 956.

A contract to purchase property upon instalments, as to the instalments that have been paid, is deemed an executed contract and cannot be recovered by the minor upon repudiation of the contract after arriving at his majority.

*Rice v. Butler*, 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275.

After an infant has ratified a contract made during minority, he cannot thereafter disaffirm same.

*Curry v. St. John Plow Co.* 55 Ill. App. 82.

An infant disaffirming a contract after arriving at his majority cannot recover payments made thereunder by persons other than himself.

*Jennings v. Hare*, 47 S. C. 279, 25 S. E. 198; *Cohen v. Valley Stream Realty Co.* 90 Misc. 343, 152 N. Y. Supp. 1075.

*Farmer, J.*, delivered the opinion of the court:

David M. Rubin, Ike Rubin, and Jacob L. Rubin, partners engaged in the real estate business in Chicago, filed their bill in the superior court of Cook county to annul and remove, as a cloud upon title to certain lands described, a contract between complainants and Erik P. Strandberg, Jr., and in the alternative that Strandberg be required to pay the amount due under said contract, and that upon making such payments the contract be reinstated and declared in full force and effect, and for other relief. Strandberg answered the bill and filed a cross bill. After answers and replications the cause was heard in open court, and a decree entered denying the relief prayed in the original bill and dismissing the same, and granting the relief prayed in the cross bill. On appeal to the appellate court for the first district, that court reversed the decree of the superior court and remanded the cause, with directions to dismiss the cross bill and to grant the prayer of the original bill. The appellate court granted a certificate of importance, and Strandberg

(hereafter referred to as defendant) has prosecuted a further appeal to this court.

The facts out of which this litigation arises are as follows:

On the 4th of March, 1915, the Rubins (hereafter referred to as complainants) entered into a contract with defendant by which the former agreed to sell, and the latter to purchase, certain lots described in the contract, situated in the city of Chicago, for the sum of \$6,600, to be paid for as follows: \$1,000 in cash on the date of signing the contract; the balance in monthly instalments of \$150 each, payable the 4th day of each month until the balance was paid, with interest at 6 per cent per annum on the sum remaining unpaid from time to time. The contract provided that, in case of the failure of defendant to make either of the payments, the contract should, at the option of complainants, be forfeited, and defendant should forfeit all payments made by him, and they should be retained by complainants in liquidation of damages sustained by them, and they should have the right to re-enter and take possession of the premises. The \$1,000 cash payment appears to have been made; also the further payments, with interest from the date of the contract up to and including the payment December 4, 1915. The aggregate amount paid, including interest, was \$2,575.

At the time the contract was entered into defendant was a minor. He attained his majority October 7, 1915. The payments made in November and December were made after he was of age. No payment was made in January or February, 1916, but on the 4th of February defendant, accompanied by his counsel, tendered back to complainants the contract for the purchase of the property, together with a quitclaim deed conveying all defendant's interest therein to complainants, and at the same time he demanded that complainants pay back to him the money which he had paid

them under the contract, for the reason that he was a minor under twenty-one years of age when the contract was entered into, and also because he claimed complainants had misrepresented to him the property.

Complainants refused to pay the money back or receive the quitclaim deed and contract, and shortly thereafter filed their bill alleging defendant had made all payments according to the terms of the contract up to and including the payment due December 4, 1915, together with interest, which payments had been duly credited on the contract, and that he had defaulted in the payments due January 4 and February 4, 1916, respectively, but had caused the contract to be recorded in the recorder's office January 3, 1916. Defendant answered the bill, alleging his minority when the contract was entered into; that he did not learn of his right to disaffirm the contract until February 1, 1916, at which time he was informed by his solicitor that he had a right, under the law, to disaffirm the contract; and that he thereupon elected to disaffirm it, and tendered complainants said contract and the quitclaim deed for the property, and demanded a return of his money paid under the contract. The answer also charged complainants with fraud and misrepresentation in inducing defendant to enter into the contract. Defendant also filed a cross bill, setting forth substantially the same matters alleged in his answer. As above stated, on the hearing the court denied the relief prayed in the original bill and granted the relief prayed under the cross bill, which decree was reversed by the appellate court, and the cause remanded, with directions to the court to dismiss the cross bill and grant the relief prayed in the original bill.

It is not disputed that defendant was a minor when the contract was entered into, and that he attained his majority October 7, 1915; but

complainants contend that the payments made by defendant after he became of age, and his act in causing the contract to be recorded in January, 1916, constituted a ratification of the contract after he attained his majority. The defendant's answer to this contention is that at the time these acts were performed he did not know he had the legal right to disaffirm the contract upon attaining his majority, and that before said acts can be held to be a ratification of the contract it is necessary that the defendant should have known, at the time of their performance, that he had a right to disaffirm the contract on the ground that it was entered into during his minority.

There was a failure of the proof to sustain the allegations of the answer and cross bill of defendant that he was induced to enter into the contract by fraud and misrepresentation, and his right to disaffirm the contract rested alone upon whether he had ratified it after becoming of age. A minor may disaffirm a contract made by

**Infant—right  
to disaffirm  
contract.**

him during minority, within a reasonable time after attaining his majority, and he may by acts recognizing the contract after becoming of age ratify it. There can be no doubt that the acts of the defendant after attaining his majority, in making the monthly payments and causing the contract to be recorded, were a ratification of the contract, unless the law is, as contended by defendant, that it was essential, in order to constitute said acts a ratification, that he knew at the time he performed the acts that the law authorized him to disaffirm the contract. Cases decided by this court relied on by defendant are *Davidson v. Young*, 38 Ill. 145, *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480, and *Coe v. Moon*, 260 Ill. 76, 102 N. E. 1074. In none of those cases was the question of the knowledge of the party, at the time of the alleged ratification, that he had a

right, under the law, to disaffirm, involved. In the *Davidson Case* the court held the act or circumstance relied on as a ratification of a deed made while the grantor was a minor was not of a character to constitute a ratification. The court said: "In order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences, and with an express intent to ratify what is known to be voidable."

Whether the grantor knew at the time of the alleged ratification that she had the legal right to disaffirm the deed is not mentioned or referred to. The case of *Sayles v. Christie*, supra, is the same in substance. In *Coe v. Moon*, supra, the grantor, after attaining his majority, sought to disaffirm and set aside a deed made by him while a minor. The deed he had made was to property in Eureka, Illinois, exchanged for farm land in Kansas. The grounds upon which he sought to disaffirm after becoming of age were that he had been defrauded by the party with whom he dealt in making the trade, both as to the value and location of the land in Kansas, and the proof sustained that charge. It was claimed in that case that the grantor had ratified the deed after attaining his majority, but the proof showed that at the time of the alleged acts of ratification he had no knowledge of the fraud on account of which he sought to disaffirm, and did not acquire such knowledge until after said acts. The court said: "Where the same lack of knowledge exists at the time of the alleged ratification as existed at the time of the original contract or deed, in such case the ratification is held to be a part of the original transaction and to be ineffectual."

In none of the above cases was the question here under consideration involved. In this case the proof failed to show that defendant had been induced by fraud and misrepresentation to enter into the contract. He had no reason for dis-



affirming it, except that he had changed his mind. His change of mind was not the result of any discovery of the truth of facts which had been fraudulently misrepresented to him by complainants and upon which he relied in making the contract. He simply concluded that he had made an unprofitable contract, and sought to disaffirm solely because he was a minor when it was made. Just when he reached that conclusion does not definitely appear. He defaulted in the January, 1916, payment, and on the day the February payment was due notified complainants of his election to disaffirm. He then would have had the legal right to disaffirm the contract, if he had not previously, and since attaining his majority, ratified it. The payments in November and December, 1915, evidenced his intention to comply with his contract and were a ratification of it, unless, as contended, he did not then know the law authorized him to disaffirm it. In our opinion defendant's acts after becoming of age must be regarded as done in the light of knowledge of his legal right to disaffirm; that he was presumed to

—ratification—  
ignorance  
of rights.  
know the law, and  
cannot be heard  
to say that he was  
ignorant of his legal right in that

respect and performed the alleged acts of ratification in ignorance of that right. Upon this particular question the authorities are not altogether in accord, but in our opinion the more logical reasoning sustains that proposition. Wharton on Contracts (volume 1, § 57), in discussing the question, says: "Hence the better opinion is that a ratification made by a person of sound mind on arriving at his majority will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law."

The proposition that it is not necessary to a binding ratification that the party sought to be charged knew at the time of the act that he had the legal right to avoid the contract is sustained in *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. Rep. 687; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; 14 R. C. L. 249.

In our opinion the appellate court did not err in holding defendant's acts after attaining his majority were a ratification of the contract, and its judgment is affirmed.

## ANNOTATION.

### Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority.

There is a conflict of judicial opinion upon the question whether knowledge of the fact that one's contract or conveyance is voidable by reason of infancy is a necessary element of a ratification thereof after reaching maturity.

The view that it is necessary is supported by decisions and dicta in the following cases:

**United States.**—*Tucker v. Moreland* (1836) 10 Pet. 59, 9 L. ed. 346; *McCormick v. Walker* (1842) 1 Hayw. & H. 86, Fed. Cas. No. 8,728.

**Alabama.**—*Eureka Co. v. Edwards*

(1881) 71 Ala. 248, 46 Am. Rep. 314; *Flexner v. Dickerson* (1882) 72 Ala. 318, but see, contra, *American Mortg. Co. v. Wright* (1893) 101 Ala. 658, 14 So. 399.

**District of Columbia.**—*Manning v. Gannon* (1915) 44 App. D. C. 98.

**Kentucky.**—*Petty v. Roberts* (1870) 7 Bush, 410.

**Maine.**—*Thing v. Libbey* (1839) 16 Me. 55.

**Maryland.**—*Trader v. Lowe* (1876) 45 Md. 1.

**Massachusetts.**—*Smith v. Mayo* (1812) 9 Mass. 62, 6 Am. Dec. 28;

Ford v. Phillips (1822) 1 Pick. 202; Owen v. Long (1873) 112 Mass. 403. But see, *contra*, Morse v. Wheeler (1862) 4 Allen, 570.

Missouri.—Baker v. Kennett (1873) 54 Mo. 82; *contra*, Ring v. Jamison (1877) 66 Mo. 424.

North Carolina. — Alexander v. Hutcheson (1823) 9 N. C. (2 Hawks.) 535; Dunlap v. Hales (1855) 47 N. C. (2 Jones, L.) 381; Turner v. Gaither (1880) 83 N. C. 357, 35 Am. Rep. 574; State ex rel. Petty v. Rousseau (1886) 94 N. C. 355.

Pennsylvania.—Curtin v. Patton (1824) 11 Serg. & R. 305; Hinely v. Margaritz (1846) 3 Pa. St. 428.

South Carolina.—Norris v. Vance (1846) 37 S. C. L. (3 Rich.) 164; Tolar v. Marion County Lumber Co. (1912) 93 S. C. 274, 75 S. E. 545, Ann. Cas. 1914D, 844.

Tennessee. — Scott v. Buchanan (1850) 11 Humph. 468; Reed v. Boshars (1856) 4 Sneed, 117.

Texas.—Fletcher v. A. W. Koch Co. (1916) — Tex. Civ. App. —, 189 S. W. 501.

Vermont.—Hatch v. Hatch (1887) 60 Vt. 160, 13 Atl. 791.

England.—Harmer v. Killing (1804) 5 Esp. 102.

In Manning v. Gannon (D. C.) *supra*, it was said, with reference to the rule that, to effect a confirmation of a contract entered into during infancy, the act must have been done with knowledge that the contract was voidable: "This is a reasonable rule, since it cannot be said that an infant intends to affirm a contract when he is in ignorance that affirmation is necessary; that is, when he is ignorant of his rights. It is for this reason that it generally has been held that mere acquiescence, though long continued, will not amount to ratification."

In Fletcher v. A. W. Koch Co. (Tex.) *supra*, the court, after alluding to the difference of opinion on the question, said: "It is well settled, both by reason and authority, that, in order to constitute a ratification or confirmation of something which has been previously done, it must appear that the party charged with having ratified or confirmed the transaction, at the time

he committed the acts tending to show such confirmation, knew that the former transaction was not at that time binding upon him. In other words, applying that rule to this case, appellant must have intended to adopt or ratify the contract so as to make it binding upon him; and, in order to have such intention, he must at that time have known of the defect in the contract, and that it was not binding upon him. An intention to ratify cannot exist in the absence of knowledge of a necessity for ratification; and, this being the case, it would seem to be immaterial whether the fact, knowledge of which is essential to constitute ratification, constitutes a proposition of law, or some other fact disconnected from the law. The expression that all persons are presumed to know the law is often misleading as is shown by our supreme court in *Stooksbury v. Swan* (1893) 85 Tex. 572, 22 S. W. 966, where the court, speaking through Mr. Chief Justice Stayton, said: 'It is said that every sane person who has reached years of discretion is presumed to know the law; but it is not meant by this that an inference is to be drawn that such persons do actually know the law of the land in which they live. The expression is misleading, for there is no inference based on, probabilities that any such knowledge exists; but public policy requires that all such persons shall be held to responsibility for their acts, without reference to their knowledge or want of knowledge of the law.' We are not to be understood as holding that it is necessary in any case to produce direct testimony to show that the party alleged to have ratified his former contract had knowledge at that time of the defect in it. That fact, as well as almost any other fact, may be shown by circumstantial evidence. In this case no evidence was produced that shed any light upon that subject, unless it be the circumstance that four months had elapsed between the time the appellant attained his majority and when he wrote the letter relied on as constituting ratification of the contract; and we are not willing to hold that such brief lapse of time will justify a finding that appellant

knew that the contract was not binding upon him."

The view that it is not necessary to a binding ratification that the party sought to be charged knew at the time the promise was made or acts done that he or she had the right to avoid the contract is supported by the following cases:

**Alabama.**—*American Mortg. Co. v. Wright* (1893) 101 Ala. 658, 14 So. 399, disapproving dictum to the contrary in *Flexner v. Dickerson* (1882) 72 Ala. 318; see also, *contra*, *Eureka Co. v. Edwards* (1881) 71 Ala. 248, 46 Am. Rep. 314.

**Connecticut.**—*Bestor v. Hickey* (1898) 71 Conn. 181, 41 Atl. 555.

**Illinois.**—*RUBIN v. STRANDBERG* (reported herewith) ante, 138, explaining *Davidson v. Young* (1865) 38 Ill. 145.

**Indiana.**—*Clark v. Van Court* (1884) 100 Ind. 113, 50 Am. Rep. 774, disapproving dictum to the contrary in *Fetrow v. Wiseman* (1872) 40 Ind. 148; and compare *Ogborn v. Hoffman* (1876) 52 Ind. 439, in which there was held to be no inconsistency between an instruction that an infant, to ratify his contract after he becomes of age, must know that he was not bound by his infantile contract, and an instruction that every person of sound mind and mature age is presumed to know the law.

**Massachusetts.**—*Morse v. Wheeler* (1862) 4 Allen, 570; but see dicta to the contrary in *Owen v. Long* (1873) 112 Mass. 403, and *Smith v. Mayo* (1812) 9 Mass. 62, 6 Am. Dec. 28.

**Missouri.**—*Ring v. Jamison* (1877) 66 Mo. 424, *contra*, *Baker v. Kennett* (1873) 54 Mo. 82.

**New York.**—*Taft v. Sergeant* (1854) 18 Barb. 320.

**Ohio.**—*Anderson v. Soward* (1883) 40 Ohio St. 325, 48 Am. Rep. 687.

**Canada.**—*Foley v. Canada Permanent Loan & S. Co.* (1883) 4 Ont. Rep. 38.

A distinction is suggested in 2 Greenleaf, Ev. § 367, between those acts and words which are necessary to ratify an executory contract and those which are sufficient to ratify an

executed contract, the author saying: "In the latter case any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of a purchase of land or goods, if, after coming of age, he continues to hold the property and treat it as his own. But in order to ratify an executory agreement made during the infancy, there must be not only an acknowledgment of liability, but an express confirmation or new promise, voluntarily and deliberately made by the infant upon his coming of age, and with the knowledge that he is not legally liable." It is not, however, possible to reconcile all the cases upon this distinction.

In *Morse v. Wheeler* (Mass.) *supra*, the court, after pointing out that what was said in *Harmer v. Killing* (1804) 5 Esp. (Eng.) 102, upon this point, was of an obiter character, said: "Even if it had been adjudged, in 5 Esp. 102, that knowledge of an infant's rights was necessary to the ratification of his contracts after he comes of age, such judgment would have been virtually overruled by the numerous cases decided since, in which the requisites of a ratification have been judicially stated, without mention of such knowledge, and if such knowledge be necessary to the ratification of an infant's contract, by a new promise after coming of age, why is it not necessary in those cases of ratification, not by promise, but by acts done or omitted? We see no difference in principle between the cases."

In discussing the difference of opinion on this question, it was said in *Bestor v. Hickey* (1898) 71 Conn. 181, 41 Atl. 555: "There are dicta to be found in some textbooks, and in opinions of the court in cases decided elsewhere, and some cases hold, that the promise of the adult to bind himself by a contract made in infancy must not only be voluntary and explicit, but must be made with knowledge that he is not legally liable unless the promise is made. The claim of the necessity of such knowledge first appears in a dictum in *Harmer v. Killing* (1804) 5 Esp. (Eng.) 102, a *nisi prius* case tried after the date of our independence. The

error has been exposed, and its effect traced, by the Massachusetts court in *Morse v. Wheeler* (Mass.) *supra*. But the erroneous dictum afterwards crept into a brief and hasty opinion of the same court in *Owen v. Long* (1873) 112 Mass. 403. It is difficult to account for this error. Possibly it arose from treating the promise, not as a mere adjunct of an infant's contract, authorized by the public policy which controls such contracts, but as an independent act and strictly analogous either to a waiver, or a ratification, or a new contract. Such a promise is frequently indicated by all these names; they have been indifferently used in several of our decisions as terms of convenience and partial illustration, but it certainly cannot be accurately described by either. In a sense such a promise operates as a waiver; but the contract of an infant cannot be relieved from the original want of capacity to bind, through the operation of the law of waiver; the voluntary specific confirmation of the adult is required to perfect the contract of the infant. Nor is it, except by figure of speech, a ratification. The infant is not an unauthorized agent of the adult, and the contract is not strictly analogous to one tainted by fraud. Perhaps the promise comes more closely to being a new undertaking, but it clearly is not one. The action must be brought on the original contract; the promise affects only the liability, and has no effect unless there is an existing contract; when that is established through the acts of the infant, the liability must be proved and is limited by the promise of the adult. *Reeve*, Dom. Rel. 240; *Edgerly v. Shaw* (1852) 25 N. H. 514, 57 Am. Dec. 349. We deem it immaterial whether the promise, if it could be treated as being strictly a waiver, or a ratification, or a new contract, could or could not be held invalid by reason of ignorance of the law. The validity of the promise does not depend upon such analogies. The option of the adult to confirm or rescind is an attribute of the infant's contract; the validity of a promise to pay is derived from the exceptional law which con-

trols the contracts of infants; it is an exercise of deferred capacity involved in the original contract. That an adult may relieve himself from the legal effect of such an act by setting up an unexpressed and secret belief as to the law which everyone is presumed to know, involves an addition, novel in this state certainly, to the law of infants' contracts, and for obvious reasons obnoxious to sound public policy."

But even where knowledge is not essential to a valid ratification by an express promise, the lack of knowledge of the invalidity of the contract may be material as coloring the act from which ratification is sought to be implied.

Thus, in *Healy v. Kellogg* (1914) 145 N. Y. Supp. 943, it was held that no intention or desire on the part of a former infant to ratify a contract for the purchase of real estate on the instalment plan would be presumed from payments made after reaching majority, where it appeared that before making such payments she expressed her desire to avoid the contract, but was induced to make them by the statements of the defendant's agent that she was bound to pay or go to jail, she being ignorant of her rights.

And in *Pedro y Varona v. Pedro y Baro* (1911) 71 Misc. 296, 127 N. Y. Supp. 997, it is held that delay in disaffirming is no evidence of ratification where the infant did not know he was entitled to disaffirm.

Knowledge of the fact that the party was not bound by a contract made in infancy may be inferred where there is no other explanation of the renewal of the promise than that the promisor knew that such renewal was necessary to create legal liability. *Hatch v. Hatch* (1887) 60 Vt. 160, 13 Atl. 791.

And in the absence of any proof to the contrary, it is to be presumed that at the time of making the new promise the former infant knew the facts necessary to establish his exemption from legal liability. *Taft v. Sergeant* (1854) 18 Barb. (N. Y.) 320.

E. S. O.

JOSEPH SIGLER  
v.  
J. W. PHARES et al., Appts.

*Kansas Supreme Court — June 7, 1919.*

(105 Kan. 116, 181 Pac. 628.)

**Mortgage — redemption — cutting off second mortgage.**

1. The holder of a first mortgage on a tract of land brought an action to foreclose it. A second mortgagee, who was made a party, asked the foreclosure of his lien as well. The owner of the fee pleaded that the second mortgage had been paid. The trial of this issue was postponed to a later term of court; and before it was had, judgment was rendered in favor of the first mortgagee, and the land was sold thereon and bid in by him for the amount of his lien; and the sale was confirmed. Four months after the sale a judgment was rendered in favor of the second mortgagee, declaring that he held a second lien and was entitled to all the rights and benefits of the Redemption Laws with respect to the sale under the first lien. Eleven months after the sale the owner of the fee made a redemption therefrom. Two months later the second mortgagee attempted to redeem by paying the amount of the bid, with interest and costs, to the clerk. Held, that such attempted redemption was ineffectual, inasmuch as the exercise of the owner's exclusive right to redeem within twelve months of the sale vested in him a title freed from all claims of the second mortgagee.

[See note on this question beginning on page 145.]

**— purchaser of equity of redemption.**

2. One to whom land has been conveyed subject to a mortgage, and who is made a party in an action to foreclose it, is the person referred to by the statute giving an exclusive right of redemption for twelve months to the "defendant owner."

**— equitable interference.**

3. The circumstances presented are held not to justify an interference upon equitable grounds with the ordinary operation of the Redemption Law.

**Judgment — mortgage foreclosure — construction.**

4. A judgment in favor of cross petitioner seeking foreclosure of a second mortgage in a suit to foreclose another mortgage in which the mortgagors did not appear, rendered after judgment in favor of the first mortgage and sale of the property, merely recognizes the fact that the second mortgage had not been satisfied, as contended by the owner of the equity of redemption, and does not establish a new lien upon the property.

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Headnotes 1-3 by MASON, J.

APPEAL by defendants from a judgment of the District Court for Trego County (Ruppenthal, J.) in favor of plaintiff in an action brought to have certain land sold for the satisfaction of the lien of his judgment, and for other relief. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Herman Long, for appellants:  
The statute forbids any further sale of the land to satisfy plaintiff's claim.

Case v. Cherokee Lanyon Spelter Co. 62 Kan. 69, 61 Pac. 406; Gille v. Enright, 73 Kan. 245, 84 Pac. 992;

Kueker v. Murphy, 86 Kan. 332, 120 Pac. 362; Bowers v. Jett, 91 Kan. 364, 137 Pac. 786.

The court erred in permitting the appellee, who held a second mortgage, to redeem from the owner after the

owner had made redemption within twelve months from the date of sale.

*Case v. Cherokee Lanyon Spelter Co.* supra; *Mercer v. McPherson*, 70 Kan. 617, 79 Pac. 118; *Norris v. Evans*, 102 Kan. 583, 171 Pac. 606; *Kueker v. Murphy*, 86 Kan. 332, 120 Pac. 362; *Gille v. Enright*, 73 Kan. 247, 84 Pac. 992; *Reaves v. Bank of Hartsville*, — Tenn. —, 64 S. W. 307.

The judgment allowing plaintiff to redeem from the owner of the land, and ordering the execution of a deed to him, was erroneous.

*Kueker v. Murphy*, 86 Kan. 332, 120 Pac. 362; 1 Black, *Judgm.* § 123; *Clay v. Hildebrand Bros.* 34 Kan. 694, 9 Pac. 466; *Sharp v. McCole*, 79 Kan. 772, 101 Pac. 659; *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550; *Knowles v. Muscatine*, 20 Iowa, 249; *Southern Bank v. Humphreys*, 47 Ill. 227; *Shroyer v. Richmond*, 16 Ohio St. 455; *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813; *Wright v. Bowden*, 54 N. C. (1 Jones, Eq.) 15, 59 Am. Dec. 600.

Messrs. David Ritchie and S. M. Hutzel, for appellee:

J. W. Phares was not the defendant owner of this land within the meaning of the Redemption Statute.

*Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672; *Clark v. Pahl*, 75 Neb. 161, 106 N. W. 420; *McNaughton v. Burke*, 63 Neb. 704, 89 N. W. 274; *Gibson v. Lyon*, 115 U. S. 441, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; *Henderson v. New England Loan & T. Co.* 6 Kan. App. 279, 51 Pac. 61; *Hadley v. Clark*, 8 Idaho, 497, 69 Pac. 319.

The judgment rendered on the cross petition of plaintiff gave him the right to redeem from the sale on the Patterson mortgage.

*Piatt v. Flaherty*, 96 Kan. 42, 149 Pac. 734; *Norris v. Evans*, 102 Kan. 583, 171 Pac. 606.

Mason, J., delivered the opinion of the court:

In 1909 Lou A. Sigler, the owner of a tract of land, executed a first mortgage upon it for \$1,600 to T. M. Patterson, and a second mortgage for \$800 to Joseph Sigler, his wife joining in the execution of the mortgages and the notes which they secured. In 1913 Lou A. Sigler was adjudged a bankrupt and his trustee conveyed the land, subject to all liens and encumbrances, to J. W. Phares, for \$25. In December, 1914, Patterson brought an action

to foreclose his mortgage, Phares and Joseph Sigler, the second mortgagee, being among the defendants. The mortgagors were also named as parties, but were served only by publication and did not appear. Joseph Sigler filed a cross petition asking the foreclosure of his mortgage, and Phares answered, alleging that it had been paid. On March 2, 1915, a judgment was rendered in favor of the first mortgagee, Patterson, the trial of the issue between the second mortgagee and the owner being postponed until the September term of court. In May, 1915, an order of sale was issued on the judgment already rendered, and the land was sold to Patterson for substantially the amount of his lien, confirmation being made the same month. In September, 1915, Joseph Sigler obtained a judgment, finding that he had a second lien on the land for the amount of his claim, and adjudging that he was entitled to redeem from the sale under the first mortgage. In April, 1916, Phares redeemed the land by paying the amount of the bid, with interest. In the following June Joseph Sigler deposited with the clerk of the court a like amount, with the additional interest, for the purpose of effecting a redemption in his own behalf. In December, 1917, he brought the present action asking that the land be sold to pay his lien, and for such other relief as might be deemed just. Judgment was rendered in his favor declaring that his attempt to redeem was effective, and ordering the sheriff to make him a deed. Phares appeals; other defendants joining with him.

The decision of the case depends largely upon the interpretation of the judgment rendered in the former action. The portion of the record thereof material for present purposes reads as follows: "And thereupon this cause is tried to the court, and the court, after hearing the evidence, finds: That the allegations and averments of the answer and cross petition herein are true. That there is due from the defendants Lou A. Sigler and Lillie B. Sigler,

his wife, to the defendant Joseph Sigler, the sum of one thousand two hundred and seventy-four dollars and thirty-four cents (\$1,274.34) on the note and mortgage sued on in the cross petition herein. That said note specifies that said indebtedness shall bear and draw interest at the rate of eight (8) per cent per annum from its date until paid. The court further finds that the lien claim and judgment of the said Joseph Sigler is a second lien on the land and tenements described in his cross petition and set forth in the petition of the plaintiff. . . . It is therefore considered, ordered, and adjudged by the court: That the said defendant Joseph Sigler do have and recover of and from the said defendants in rem the said sum of one thousand two hundred and seventy-four and  $\frac{3}{4}$ 100 dollars, the amount so as aforesaid found to be due to said defendant. That said judgment for \$1,274.34 draw and bear interest at the rate of eight (8) per cent per annum from this date until paid, and upon request of the said Joseph Sigler execution issue. That the said defendant Joseph Sigler is a judgment creditor of the said defendants Lou A. Sigler and Lillie B. Sigler, and entitled to all the rights and benefits of the Redemption Laws of the state of Kansas from the sale of the said real estate under the mortgage lien of the plaintiff herein, T. M. Patterson."

We regarded this record merely as a statement that the court had decided the issue of fact between Joseph Sigler and Phares—as to whether the second mortgage had been paid—in favor of Sigler, and in addition thereto a recital of the legal consequences resulting from such decision; the announcement of a decree carrying into effect the rights that attached to the ownership of the mortgage, now that it was found not to have been extinguished by payment. Inasmuch as personal service had not been made upon the mortgagors, and they had not appeared in the action, the judg-

ment did not run against them personally, and Joseph Sigler's only lien was in virtue of his mortgage, although we do not see that the result would be any different if the fact were otherwise. The language in which the judgment is couched shows no purpose

Judgment—  
mortgage  
foreclosure—  
construction.

to create a lien; it indicates rather that the lien created by the mortgage is found to be still in existence. This seems the reasonable construction, although there is a sense in which all pre-existing liens may be said to have been extinguished by the sale and confirmation, and in which by a somewhat literal reading the declaration that Joseph Sigler's claim still constitutes a lien might be thought to imply that new life had been given it. That such was not the meaning intended is obvious from the fact that the lien is described as a second one, implying to the same extent the continued existence of the first. The same verbal difficulty (if it be regarded as such) appears in the statute, which allows redemption to be made by a creditor whose claim becomes a lien prior to the expiration of fifteen months from the day of sale (Gen. Stat. 1915, §§ 7381, 7382, [Code Civ. Proc. §§ 478, 479]), although a creditor, by putting his claim in judgment after the sale, can hardly in strictness be said to acquire a lien on the land, in view of the fact that "the right of redemption shall not be subject to levy or sale on execution" (Gen. Stat. 1915, § 7396 [Code Civ. Proc. § 492]),—a provision not found in the Iowa statute, from which our own is taken. Yet a judgment obtained after the sale, which gives a lien upon the real estate of the debtor or owner, is held by this court to confer a right to redeem. *Case v. Lanyon Spelter Co.* 62 Kan. 69, 61 Pac. 406; *Gille v. Enright*, 73 Kan. 245, 84 Pac. 992. And such is the practice elsewhere. See *Falbe v. Caves*, 151 Wis. 54, 138 N. W. 87;

**Brown v. Markley**, 58 Iowa, 689, 12 N. W. 721.

The clause of the judgment providing that Joseph Sigler should be "entitled to all the rights and benefits of the Redemption Laws of the state of Kansas from the sale of said real estate under the mortgage lien of the plaintiff herein, T. M. Patterson," means, as we interpret it, that Sigler's rights of redemption are those defined by the statute. No purpose is shown to treat the case as exceptional, and to allow him other rights than such as, under the general law, flow from the fact that he has been found to be the owner of a valid second mortgage. By virtue of such ownership he was entitled to redeem, but this right was held by him in subordination to the exclusive right lodged by the statute in the owner of the fee, provided redemption should be made within twelve months after the sale. Gen. Stat. 1915, § 7381 (Code Civ. Proc. § 477). If the owner had failed to act within that period, Joseph Sigler could have redeemed by paying the selling price, with interest and costs, thereby adding the amount of his claim (or so much thereof as he should see fit to release) to the sum which anyone else would have been required to pay in order to redeem from him. Gen. Stat. 1915, § 7391 (Code Civ. Proc. § 487).

This interpretation of the judgment and statute results in the second mortgagee being placed at this disadvantage: In order fully to protect himself against the loss of the fruits of his lien he was required to make a bid at the sheriff's sale (or see that one was made) larger than the amount of the first mortgage debt, at a time when the existence of his own claim was contested, and when possibly he might not have been sure that it would be upheld. He was entitled to have his claim adjudicated before the sale, if this could be done without prejudice to other interests. **Hines v. Kays**, 93 Kan. 209, 144 Pac. 240. That result could have been ac-

complished by an order of the court postponing the sale until the decision of the question whether the mortgage had been paid; but such a postponement might have worked an injustice to the first mortgagee. **Lynn v. McCue**, 96 Kan. 114, 116, 150 Pac. 523. Except for the disadvantage referred to, which appears to be a necessary consequence of the statute, and to be in accordance with the general statutory purpose of protecting primarily the interests of the owner whose land is sold on execution or order of sale, the second mortgagee was left in just as favorable a situation as though his lien had been confirmed as a part of the original judgment foreclosing the first mortgage. By exercising his exclusive right to redeem within twelve months after the sale, the owner obtained a title freed from the claim of the second mortgagee, by virtue of the provision of the statute that "real estate once sold upon order of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for." Gen. Stat. 1915, § 7401 (Code Civ. Proc. § 497).

2. In behalf of the second mortgagee it is contended that Phares, claiming only under a deed made subject to the existing mortgages, could not obtain full title without paying them off, and was not the "defendant owner," within the meaning of that term as used in the statute giving the person so described the exclusive right to redeem within twelve months after the sale. It is argued that the word "defendant" in this connection applies only to one who is making a defense against an obligation he was required to perform or to protect his property against a claim

Mortgage-redemption—cutting off second mortgage.



made in an action at law, as distinguished from an equitable proceeding. We think it clear that Phares, although taking the land subject to the mortgages (as the original owner held it after their execution), was the person to whom in this case the phrase "defendant owner" refers; moreover, he could have exercised the same rights as the holder of the legal title. Gen. Stat. 1915, § 7397 (Code Civ. Proc. § 493).

3. Under exceptional circumstances, upon equitable considerations, the right of redemption has sometimes been extended somewhat beyond the bare letter of the statute. We do not regard the sit-

uation here presented as of such a character as to justify judicial interference with the ordinary operation of the law. The sale was legally made, and the statute gives the owner of the fee the right to redeem by paying the amount of the bid. The exercise of that right cut off the remedy of the second mortgagee against the land. His loss results from the property having brought at the sale no more than the amount of the first lien.

A reversal is ordered, and the cause is remanded, with directions to render judgment against the second mortgagee.

Dawson, J., not sitting.

## ANNOTATION.

### Effect on subordinate lien of redemption by owner or his grantee from sale under prior lien.

#### Subordinate lien barred.

In accord with the ruling in the reported case (SIGLER v. PHARES, ante, 141), it is held in Iowa that the grantee of a debtor who has redeemed real property from a sale on foreclosure of a lien takes the property divested of any rights of subordinate lienors who were made parties to the foreclosure proceedings, and who failed to avail themselves of their opportunity to protect their interest. *Curtis v. Millard* (1862) 14 Iowa, 128, 81 Am. Dec. 460; *Moody v. Funk* (1891) 82 Iowa, 1, 31 Am. St. Rep. 455, 47 N. W. 1008; *Bevans v. Dewey* (1891) 82 Iowa, 85, 47 N. W. 1009; *Wells v. Ordway* (1899) 108 Iowa, 86, 75 Am. St. Rep. 209, 78 N. W. 806; *Co-operative Sav. & L. Asso. v. Kent* (1899) 108 Iowa, 146, 78 N. W. 911; *People's Sav. Bank v. McCarty* (1902) — Iowa, —, 88 N. W. 1076; *Cooper v. Maurer* (1904) 122 Iowa, 321, 98 N. W. 124; *Stastny v. Pease* (1904) 124 Iowa, 587, 100 N. W. 482; *Witham v. Blood* (1904) 124 Iowa, 696, 100 N. W. 558.

In *Co-operative Sav. & L. Asso. v. Kent* (1899) 108 Iowa, 146, 78 N. W. 911, the court stated the principle as follows: "When the grantee of the

mortgagor acquires the right to redeem, and a junior lien holder fails to exercise his privilege, and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title himself."

And as a basis of the rule it has been pointed out that a junior lienor may protect himself by bidding the property in at the foreclosure sale, or he may later exercise his statutory right of redemption; and if he does not see sufficient profit in availing himself of such opportunities he may not complain when the grantee of the debtor chooses to redeem the property and take it divested of the lien. When lien holders fail to redeem, it is presumed that "the debt-paying power of the debtor's property in the land has been exhausted; and when that is done the lien has served the purpose of its creation, and as to such item of property is *functus officio*." *Cooper v. Maurer* (1904) 122 Iowa, 321, 98 N. W. 124.

It is no ground for objection that the grantee took his conveyance after foreclosure, but prior to sale thereunder. *Cooper v. Maurer* (Iowa) supra.

Nor may the subordinate lienor who fails to protect his interest claim that he is shielded by a clause in the deed which states that the grantee takes a title subject to the said junior lienor. *Co-operative Sav. & L. Asso. v. Kent* (Iowa) *supra*.

When redemption is made by a judgment debtor who has conveyed his title, the redemption inures to the benefit of the grantee. *Witham v. Blood* (1904) 124 Iowa, 695, 100 N. W. 558.

In the reported case (*SIGLER v. PHARES*, ante, 141), the court went further than the Iowa cases and held that under the Kansas statute the junior lienor's only opportunity for protection was his chance to bid the property in at the foreclosure sale, since the owner had the exclusive right to redeem within twelve months thereafter.

But a subordinate lien will not be barred where redemption was made by the debtor's grantee before the expiration of the statutory period during which the junior lienor may redeem. *People's Sav. Bank v. McCarty* (1902) — Iowa, —, 88 N. W. 1076.

So, a junior lienor will not be barred by a redemption by the debtor's grantee from a sale at foreclosure where he has not been made a party to the foreclosure proceedings. *Stastny v. Pease* (1904) 124 Iowa, 587, 100 N. W. 482.

Likewise, if redemption is made by the mortgagor or judgment debtor himself, the rule does not apply, and the property will be liable for his debts. So it has been said by way of dictum: "If, when the process of redemption is complete, the property is again vested in the debtor, either by his having been the last to redeem or by conveyance from the holder of a sheriff's deed, then the unsatisfied creditor may reach it, for the simple reason that all the debtor's property is liable for the payment of his debts unless specifically exempted by statute." *Cooper v. Maurer* (Iowa) *supra*.

In *Dickerman v. Lust* (1885) 66 Iowa, 444, 23 N. W. 916, it appeared that there were three mortgages on property. The plaintiff had acquired

the first two and had foreclosed and purchased under the first; the defendant, the third mortgagee, then redeemed the property from the foreclosure sale. It was held that the third mortgagee redeemed as owner, and that the result of his paying off of the first mortgage was not to bar the lien of the second mortgage, but to make it a first lien on the property. Compare the reported case (*SIGLER v. PHARES*, ante, 141).

In *Curtis v. Millard* (1862) 14 Iowa, 128, 81 Am. Dec. 460, it appeared that a mortgagee purchased property sold under foreclosure proceedings brought by him; the defendants later obtained a judgment against the mortgagor, the plaintiff thereafter purchasing from the mortgagor his interest in the property, including the right of redemption, and redeeming said property thereunder. Prior to the plaintiff's purchase, however, the defendants levied on their judgment against the mortgagor, and shortly after the said redemption the said property was advertised for sale and the plaintiff brought an action to restrain the sale. It was held that the lien of the defendants' judgment was on the land at the time of the plaintiff's purchase thereof, and that while the failure of the defendants to redeem from the purchaser at the foreclosure sale within the statutory period barred their right thereto, it did not divest them of their lien against their debtor, the mortgagor, or his grantee, the plaintiff, when they redeemed.

In *Moody v. Funk* (1891) 82 Iowa, 1, 31 Am. St. Rep. 455, 47 N. W. 1008, it appeared that the plaintiff's grantor had placed a mortgage on the property and a few days later had executed a second mortgage thereon to the defendant. The first mortgage was thereafter foreclosed and the land sold to the first mortgagor, the defendant having been made a party to the action, and following this the property was conveyed to the plaintiff, who redeemed it from the sale, and who then sought to have his title quieted as regards the second mortgage. The court said: "We are of the opinion that the grantee of the execution debtor, who,

as in this case, acquires the interest of his grantor after the right of a junior lien holder to redeem is barred by lapse of time, may redeem without removing such bar, and thus perfect in himself the title to the land sold."

In *Bevans v. Dewey* (1891) 82 Iowa, 85, 47 N. W. 1009, it was shown that the plaintiff's husband had placed three mortgages on the property in question, the first and third being held by one Fullerton and the second by the defendant. Fullerton brought an action to foreclose his mortgages, making the defendant a party thereto, and judgment was given on all the mortgages. Fullerton then purchased the property sold under an execution on the debts due him, and the plaintiff, having received a conveyance of the interest of her husband's heirs, redeemed it and brought suit to quiet her title as against the defendant. It was held that the defendant, having been made a party to the action, had notice of the sale, and that, having failed to redeem while she had an opportunity to do so, she had lost her lien against one who redeemed not as the judgment debtor, but as his widow and the grantee of his heirs.

In *Wells v. Ordway* (1899) 108 Iowa, 86, 75 Am. St. Rep. 209, 78 N. W. 806, it appeared that an owner of land placed a mortgage thereon and then conveyed it to plaintiff's grantor, who granted to the defendant two separate mortgages. Defendant purchased the first mortgage on said property, brought suit thereon, and purchased the said property on foreclosure. The plaintiff purchased the premises from the second and third mortgagor, redeemed from the defendant, and demanded a release of the second and third mortgages. The court, following *Moody v. Funk*, and *Bevans v. Dewey* (Iowa) *supra*, held that the defendant's liens had been lost by his failure to redeem, and that the plaintiff took the property freed therefrom.

In *Co-operative Sav. & L. Asso. v. Kent* (1899) 108 Iowa, 146, 78 N. W. 911, it appeared that the owners of a piece of land placed a first mortgage thereon and later gave to the plaintiff a second mortgage on the same prop-

erty. The first mortgagee, on foreclosure proceedings brought by himself, and to which the second mortgagee had been made a party, purchased the lots. Some months thereafter the mortgagors, by a deed reciting "that the conveyance was subject to plaintiff's mortgage," conveyed the premises to one who conveyed to parties who redeemed the land from the purchaser under the foreclosure sale and received a deed therefor. More than a year after the sale on foreclosure the plaintiff attempted to foreclose the second mortgage. It was held that as the plaintiff had failed to exercise its right of redemption when it had the opportunity, its lien was extinguished thereby, and not by the redemption accomplished by the mortgagor's remote grantees. And the fact that the redeeming grantees took with notice of the plaintiff's mortgage was held not to affect the case; they took subject to a right of redemption which the plaintiff failed to exercise. The court said: "When the grantee of the mortgagor acquires the right to redeem, and a junior lien holder fails to exercise his privilege, and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title himself."

In *People's Sav. Bank v. McCarty* (1902) — Iowa, —, 88 N. W. 1076, it appeared that the plaintiffs had recovered judgments against one who had, prior thereto, placed two mortgages on the land in question which were thereafter foreclosed and two sales made thereon. After the recovery of the aforesaid judgments, the judgment debtors conveyed the property to the defendants, who redeemed the land about seven months after the sale, both judgments having been entered within seven months thereof. A statute gave a debtor or his assignee the exclusive right to redeem the property within the first six months after a sale, and, in the absence of any such redemption during the first six months, any creditor obtaining a lien within nine months of the sale might redeem in the period after six and within nine months thereafter. The court held that the statute intended to give cred-

itors a full period of three months for exercising their right of redemption, and that while the debtor and his assignees are given the right to redeem within the period of one year following the sale, it is, if exercised within the above-mentioned period granted creditors for redemption, not sufficient to bar the liens of said creditors. It was pointed out that the plaintiff had not been made a party to the decrees in this case. Plaintiff's judgments were declared to be liens.

In *Stastny v. Pease* (1904) 124 Iowa, 587, 100 N. W. 482, it appeared that the owner of the land now in dispute had placed a mortgage upon it. Subsequently the defendant obtained a judgment against the mortgagor and his wife which became a lien inferior to the mortgage. The mortgagee purchased the property at a sale ordered by foreclosure to which the defendant had not been made a party. The mortgagor and his wife thereafter sold their interest to the plaintiff, who, in the name of the mortgagor, redeemed the property from the foreclosure sale, the plaintiff having no notice of the defendant's judgment. The defendant later purchased the property when sold under execution issued on his judgment. The plaintiff then brought suit to quiet title and sought to be subrogated to the rights of the holders of the liens which he had paid. It was held that the defendant was not bound by the original foreclosure suit, since he had not been made a party thereto, and the court pointed out that if the mortgagor had redeemed the property from the said foreclosure sale, the defendant's judgment would have become a first lien thereon.

In *Witham v. Blood* (1904) 124 Iowa, 695, 100 N. W. 558, it appeared that a tract of land was subject to the plaintiff's mortgage, which was junior to another mortgage lien; the first mortgage was foreclosed and the land sold thereunder. The original owners of the land conveyed it to another, and redeemed from the sale, and the property was later leased to the said owners and their grantee, with a right to purchase. The plaintiff, more than

nine months after the sale on foreclosure, obtained a sale on the foreclosure of her second mortgage, purchased at the said sale, and then sought to have her deed declared superior to the rights of the several defendants. It was held that if the plaintiff had been a party to the foreclosure under the first mortgage, her right to redemption was limited by statute to the period of nine months following the sale; and if that right had not been exercised, the legal title redeemed from the foreclosure sale and in the hands of a third person was divested of the junior lien, and the plaintiff's title obtained under the second foreclosure was null and void. The redemption was by one of the mortgagors; but since, prior thereto, he had conveyed the land by warranty deed, the benefit of the redemption inured to his grantee.

In *Cooper v. Maurer* (1904) 122 Iowa, 321, 98 N. W. 124, it appeared that a mortgagee foreclosed on his mortgage, making parties to the suit the mortgagor and his judgment creditor and assignee, the said judgment being junior to the mortgage. The mortgagor conveyed the legal title to the plaintiff, and the following day the property was sold to the mortgagee, by virtue of his execution on the foreclosure suit. An assignee of the judgment creditor attempted, within the statutory period, to redeem the property, but failed through noncompliance with a provision of the statute, and the plaintiff later redeemed. The assignee having obtained a deed at a sheriff's sale under her judgment, the plaintiff brought an action to quiet title. The court said that it would treat the case as if the assignee of the judgment creditor had made no attempt to redeem, since the said attempt was of no avail. It was held that the grantee of a mortgagor's title, whether her conveyance be executed before a foreclosure sale or thereafter, "and during the statutory period of a redemption, may redeem from sale, and thereby acquire a title freed from the claims of junior lien holders who have been made parties to the proceedings and have failed to redeem

within the time prescribed therefor." The owner of the judgment was made a party to the foreclosure proceedings, and by failure to accomplish redemption within the statutory period, the lien was lost as regards the plaintiff.

**Subordinate lien not barred.**

In at least two jurisdictions it is held that a subordinate lien is not divested under any circumstances by reason of the redemption of the property from a sale under a prior lien, by a judgment debtor or his grantee. *Walsh v. Robinson* (1903) 135 Mich. 16, 97 N. W. 55, rehearing denied in (1903) 135 Mich. 22, 99 N. W. 282; *De Roberts v. Stiles* (1901) 24 Wash. 611, 64 Pac. 795.

In the case last cited it appeared that the owner of the land in question placed a mortgage on it, and then sold it subject to the mortgage, accepting in payment a mortgage thereon executed by his grantee. The property was sold on foreclosure proceedings brought under the first mortgage, and purchased by the first mortgagee, the first mortgagor and his grantee having been made parties to the proceedings. The property was later sold by the grantee to one Fry, who had notice of the existence of the mortgage executed by his grantor, and who later redeemed the property from the purchaser at the foreclosure sale. The holder of the second mortgage assigned the same to the plaintiff, who claimed a lien by reason thereof. It was held that Fry stood in the shoes

of his grantor, who had created the second mortgage, and when he redeemed the property he was merely exercising the right of his grantor to redeem, with the result that "the estate was restored as if no sale had been made." The grantee of the judgment debtor, it was held, has no greater rights than the judgment debtor himself, and redemption by the owner removed any effect on the plaintiff's second mortgage caused by the foreclosure proceedings.

In *Walsh v. Robinson* (Mich.) *supra*, it appeared that the defendant was the owner of an equity of redemption obtained after five mortgages had been placed upon the property in question. The first mortgagee acquired title to the said land on foreclosure proceedings to which the junior mortgagees, but not the defendant, had been made parties, and then conveyed the said title to the second mortgagee, who sought to foreclose both first and second mortgages against the defendant, who claimed that the foreclosure proceedings on the first mortgage barred all liens against his title except that of the first mortgage, and this claim was founded on the fact that he had not been made a party to the proceedings. The court, on the petition for rehearing, said: "It is sufficient to say that the owner of the equity of redemption, not being a party to the first foreclosure proceedings, was not bound thereby, and cannot claim that the liens of the mortgages were thereby extinguished." R. S.

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MAX J. KENNEDY et al.

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY.

*Kansas Supreme Court—May 10, 1919.*

(104 Kan. 708, 181 Pac. 117.)

**Damages — for injury to freight — charges.**

1. In an action against a carrier for damages on account of injury to an animal in transit, where delivery was made at the point of destination, the plaintiff cannot recover for freight charges paid, although the animal

Headnotes by MASON, J.

was so injured as to be entirely worthless, and the amount of recovery was limited by the value stated in the bill of lading.

[See note on this question beginning on page 152.]

— expense of treatment.

2. Where an animal has been killed or rendered entirely worthless by such an injury, a recovery may sometimes be had in excess of its value by reason of money spent in an unsuccessful, but reasonable, effort to restore it to usefulness; but this can be true only of expenditures made in a just expecta-

tion of reducing the carrier's liability by the amount expended; and where the recovery is based upon the valuation placed on the animal in the shipping contract, the expectation must be that the recoverable damages will be reduced below that amount.

[See 4 R. C. L. 997.]

(Johnston, Ch. J., and Mason, J., dissent in part.)

**MOTION** by defendant to make mandate more definite and certain, after appeal from a judgment of the District Court for Wilson County (Brown, J.) in plaintiff's favor, in which the judgment was reversed with directions, in an action brought to recover damages for injury to certain race horses, alleged to have been caused by defendant's negligence while in transit. *Motion allowed.*

The facts are stated in the opinion of the court.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

There could be no judgment entered against the Railway Company in excess of \$450, unless it should be for repairs for cart, sulky, trunk, and halters, \$26.50.

*Greening v. Chicago & N. W. R. Co.* — Mo. App. —, 183 S. W. 1121; *Bassett v. Chicago & N. W. R. Co.* 168 Wis. 617, 171 N. W. 749; *Boyle v. Bush Terminal R. Co.* 210 N. Y. 389, 104 N. E. 933; *Baird v. Denver & R. G. R. Co.* 49 Utah, 58, 162 Pac. 79; *Western Transit Co. v. A. C. Leslie & Co.* 242 U. S. 448, 61 L. ed. 423, 37 Sup. Ct. Rep. 133.

If the shipment in question had been an interstate shipment, the court would permit judgment only for the released value authorized by the tariffs and specified in the contract.

*Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *Southern Nursery Co. v. Winfield Nursery Co.* 89 Kan. 522, 135 Pac. 149; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Metz v. Chicago, R. I. & P. R. Co.* 90 Kan. 460, 135 Pac. 667; *Watt v. Missouri, K. & T. R. Co.* 90 Kan. 466, 135 Pac. 600; *Christl v. Missouri P. R. Co.* 92 Kan. 580, 141 Pac. 587; *Miller v. Atchison, T. & S. F. R. Co.* 97 Kan. 782, 156 Pac. 780; *Mollohan v. Atchison, T. & S. F. R. Co.* 97 Kan. 51, L.R.A. 1918A, 175. P.U.R. 1916C, 537, 154 Pac. 248.

To permit plaintiffs to recover more than the valuation of the horses upon which the rate they paid was based would obviously be a discrimination in their favor, constituting a violation of the Railroad and Utilities Acts.

*Pacific Exp. Co. v. Foley*, 46 Kan. 457, 12 L.R.A. 799, 26 Am. St. Rep. 107, 26 Pac. 665; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Metz v. Chicago, R. I. & P. R. Co.* 90 Kan. 462, 135 Pac. 667.

Messrs. J. T. Cooper and Farrelly & Evans for appellees.

Mason, J., delivered the opinion of the court:

In this case it was held that, because the value of three horses shipped by rail was stated in the bill of lading to be \$150 each, the shipper was precluded from asserting that they were worth more than that in an action for damages on account of their being injured in transit. In reversing the judgment the direction was given "to deduct therefrom all that was allowed in excess of \$450 on account of the injury to the horses." A difference of opinion has arisen between the parties as to whether or not certain items of the amount recovered are to be regarded as having been allowed "on account of the injury to the horses," within the meaning of

the phrase as used in the opinion and mandate. The defendant has filed a motion, upon which counsel have been heard, asking that the language be made more definite, so that a further appeal may be avoided. The broad question argued and determined on the appeal was whether the plaintiff's recovery was limited by the value stated in the bill of lading; and, having decided this in the affirmative, the court overlooked the fact that there was room for a difference of opinion as to the exact effect the decision should have on the various items entering into the amount allowed by the trial court—a matter which was fairly involved, although it had not been specifically discussed. The mandate ought not to remain in such form as to give occasion for controversy as to its meaning, and will be made definite in accordance with the defendant's request.

The district court awarded the plaintiff \$4,600 on account of the diminution in the value of the horses, resulting from their injuries. This of course should be reduced to \$450. An allowance of \$26.50 was made for injury to other property, and is not affected by the reversal. The items over which the present dispute has arisen are: For freight paid, \$33.94; for the services of a veterinary, medicine, and treatment of horses, \$43; and for the expense of caring for the horses for a period of about two months following the accident, \$237.50.

1. The court is of the opinion (which the writer does not share) that the plaintiff was not entitled to any recovery on account of what he paid for the transportation, since the service was actually performed, although the value of two of the animals was found to have been entirely destroyed, and that of the third reduced to \$100.

2. The defendant maintains that nothing should be allowed on account of the services of a veterinary or other treatment of the

horses, because the fixing of their value at \$150 each in the shipping contract made that amount the absolute limit of the plaintiff's recovery by reason of any injury to them. The stipulation did not in so many words restrict the plaintiff's right of recovery to any specific sum. It merely stated a value which fixed the freight charges, thereby estopping him to assert that the horses were worth more than \$150 each. The question presented, therefore, is this: Can he recover by reason of the injury to them more than their full value? The rule as commonly formulated seems to preclude this, although the usual statement may be affected by the fact that a reference to compensation for loss of the use of the property is included. 2 *Thomp. Neg.* § 2211; note in 5 *Ann. Cas.* 416, foot of first column. If expenditures made in an effort to restore to usefulness an injured animal are to be charged against the person whose negligence caused the injury, on the ground that he has been benefited by them through a reduction of damages, it is obvious that the total recovery should not exceed the value of the animal. But, if the plaintiff may recover for money spent in an honest, but unsuccessful, effort to improve the condition of his injured animal, not because the defendant actually derives any benefit therefrom, but because the expenditure was made in good faith in hopes of such an effect, then an allowance on that account would seem permissible, even although it resulted in a recovery in excess of the full value of the animal. And the courts which have directly passed upon the question have taken that view, holding that where death results the owner may recover, in addition to the full value of the animal, whatever he has expended in a reasonable effort to save it. 1 *R. C. L.* 1195; note in 5 *Ann. Cas.* 416, second column; *Ft. Worth & D. C. R. Co. v. Jordan*, — *Tex. Civ. App.* —, 155 *S. W.* 676. But, while such an expenditure, to be chargeable against the defendant, need not have

Damages—  
for injury to  
freight—  
charges.

actually inured to his benefit, it must have been incurred in a reasonable effort to accomplish a result that would have that effect. Here no expenses for the care of any of the injured animals can be charged against the defendant unless they were made in the reasonable expectation, not merely of improving the condition of the horse, but of improving it so much that the impairment in its value would be less than \$150, since otherwise the defendant would have no concern in the matter. The allowances made by the trial court were obviously based on the full value of the horses, and cannot be permitted to stand, in view of the \$150 limitation. It seems improbable that the plaintiff would wish to undertake to show that any part of the expense of the care of the horses was justified by a reasonable belief that the amount for which the defendant was liable could thereby be reduced below \$150 each, but, if he shall so desire, the opportunity will be offered. The judgment will be reduced to \$476.50, and, if the plaintiff shall so elect, a new trial may be had upon a single issue whether he shall also recover a further judgment for expenditures incurred in caring for the horses, under the test just laid down.

—expense of treatment.

**Burch, Porter, West, Marshall, and Dawson, JJ., concurring.**

**Mason, J., dissenting in part:**

The general rule is well settled that, where animals are killed or property is lost in transit, in an action against the carrier the measure of damage is the market value at the point of destination, less the freight, if it has not been paid; no recovery being allowed for freight if it has been paid. I understand that the basis of this rule is the theory that the amount of the freight charged is deemed to enter into the valuation at destination, so that, if the owner were allowed freight as such, he would recover it twice. *Merriam, Claims between Shippers & Carriers*, §§ 568, 569. Here two of the horses were found to have been so injured as to become entirely worthless, and the amount of the recovery is not the value of the horses at destination, but the agreed value at the point of shipment. The plaintiff, as to these animals, gained no benefit from the transportation, and, as the freight did not enter into the amount he recovered, I think he should be reimbursed on account thereof.

**Johnston, Ch. J., concurs in the partial dissent.**

Petition for rehearing denied.

### ANNOTATION.

#### Freight as an element of damage where contract fixes value or limits carrier's liability for property lost or damaged.

The contract before the court in the reported case (*KENNEDY v. ATCHISON, T. & S. F. R. Co.* ante, 149) fixed the value of the property for the purpose of computing the freight charges, but did not expressly provide that the carrier's liability was to be limited to the value as fixed. The court held in its original opinion, 104 Kan. 129, 179 Pac. 314, that such an express provision is unnecessary to limit the liability to the value as fixed. Apparently the contract was silent also as to the time and place with reference to

which the value was fixed. Unfortunately, Judge Mason did not state, in writing the majority opinion, the theory or reasoning upon which the court arrived at the conclusion that freight paid by the shipper was not recoverable; but from what he says in his dissenting opinion it seems reasonable to suppose that the majority regarded the fixed value to be that of the property at destination. If they were correct in so regarding it, their conclusion, under the authorities, is irresistible. On the other hand, if the



fixed value is to be regarded as the value at the point of shipment, as he regarded it, his conclusion is no less irresistible.

It is assumed here that the rule to be applied in the absence of a stipulation fixing the value or limiting the liability, as well as the reason for the rule, is correctly stated in the dissenting opinion. See also quotation from the opinion in *The Oneida* (Fed.) *infra*. This assumes that, where the contract fixes neither the value nor the time and place of fixing it, the value at destination will be taken. But in the instant case the value was fixed. There are no other reported cases involving recovery of freight charges in which only the value is fixed, with no indication as to time and place with reference to which it was fixed; but there are many cases in which the time and place of shipment are specified for the purpose of fixing value in case of loss or injury to the property. In all such cases it is held that freight, if paid, is recoverable, and, if not paid, is not to be deducted.

Where it is agreed, either in the carriage contract or by stipulation in court, that the damages shall be computed on the basis of the value of the property at the time and place of shipment, it is proper to allow plaintiff to recover freight charges if he has paid them, or, if he has not paid them, no deduction thereof is to be made:

**United States.**—*Pennsylvania R. Co. v. Olivit Bros.* (1916) 243 U. S. 574, 61 L. ed. 908, 37 Sup. Ct. Rep. 468; *Pennsylvania R. Co. v. Carr* (1916) 243 U. S. 587, 61 L. ed. 914, 37 Sup. Ct. Rep. 472, affirming (1916) 88 N. J. L. 235, 96 Atl. 588; *The Oneida* (1904) 63 C. C. A. 239, 128 Fed. 687, certiorari denied in (1904) 194 U. S. 632, 48 L. ed. 1159, 24 Sup. Ct. Rep. 856.

**California.**—*Pierce v. Southern P. Co.* (1879) 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211, 3 Am. Neg. Rep. 686; *Olcovich v. Grand Trunk R. Co.* (1918) — Cal. —, 176 Pac. 459.

**Colorado.**—*Denver & R. G. R. Co. v. Peterson Grocery Co.* (1915) 59 Colo. 125, 147 Pac. 663.

**Georgia.**—*Lamb v. W. H. Mitchell & Co.* (1915) 15 Ga. App. 759, 84 S. E. 218.

**Minnesota.**—*Shea v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1895) 63 Minn. 228, 65 N. W. 458, as modified by *Davis v. New York, O. & W. R. Co.* (1897) 70 Minn. 37, 72 N. W. 823.

**Missouri.**—*Dean v. Toledo, St. L. & W. R. Co.* (1910) 148 Mo. App. 428, 128 S. W. 10.

**South Carolina.**—*Kelly v. Southern R. Co.* (1909) 84 S. C. 249, 137 Am. St. Rep. 842, 66 S. E. 198.

**Texas.**—*Missouri P. R. Co. v. Barnes* (1885) 2 Tex. App. Civ. Cas. (Willson) 507.

**Wisconsin.**—*Wegener v. Chicago & N. W. R. Co.* (1916) 162 Wis. 322, 156 N. W. 201.

And where there is a partial loss and expense incurred in an effort to reduce the amount of damages for the carrier, the amount recoverable is limited to the value of the goods at point of shipment, plus freight if it has been paid, and interest upon the claim. *Olcovich v. Grand Trunk R. Co.* (1918) — Cal. —, 176 Pac. 459.

And under such a provision in the bill of lading, the carrier cannot, where the claim is based wholly upon a shortage in the amount of corn called for in the bill of lading, insist upon the enforcement of the clause, and at the same time retain the whole amount of freight paid to it, on the supposition that the bill of lading correctly showed the amount of corn in the car. *Tibbits v. Rock Island & P. R. Co.* (1893) 49 Ill. App. 567.

The reason for the rule was stated in *The Oneida* (1904) 63 C. C. A. 239, 128 Fed. 687, certiorari denied in (1904) 194 U. S. 632, 48 L. ed. 1159, 24 Sup. Ct. Rep. 856, *supra*, by Wallace, J., as follows: "The general rule is that, in case of a loss of the goods, the carrier is liable to the shipper for their market value at the point of destination, less the amount of the freight charges due for their transportation; and the same rule applies where the goods are merely damaged, and are delivered in their damaged condition, with the qualification that the value of the goods in their damaged condi-

tion is to be deducted. Presumably the cost of transportation to the place of destination is an element of the market value of the goods at that place; and when the shipper recovers their market value, or upon the basis of their market value at that place, he obtains full indemnity. As the shipper thus gets the benefit of the transportation, the carrier should not lose the freight. In the present case, however, the general rule is deflected by the peculiar condition in the bill of lading. That condition was as follows: 'It is further mutually agreed that in case any loss, detriment, or damage is done to or sustained by any of the goods or property herein receipted for during transportation, . . . in ascertaining the amount of such damage the same shall be computed at the value or cost of said goods or property at the time and place of shipment.' Obviously, this clause cannot be construed literally, as it would be preposterous to suppose that the parties intended that, in case of a partial or even a trifling damage, the loss should be estimated at the whole value or cost of the goods. In reason it must mean either that the damage recoverable shall not exceed the cost or value of the goods at the time and place of shipment, or, alternatively, that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination. The language is more consistent with the latter meaning. The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. Reading it as intended to eliminate an element of uncertainty in estimating possible loss, it can be given due effect without burdening the shipper with the cost of the transportation of the goods. Under a bill of lading like the present, the shipper's loss is

fairly measured by the difference between the cost or value of the goods at the time and place of shipment, and their damaged condition at the place of delivery, together with the expenses incurred for their transportation. The carrier really obtains the benefit of the transportation, and the shipper does not, because, applying this rule of damages, the carrier is allowed the value of the damaged goods at their place of delivery. There is no justice in requiring the shipper to pay for a benefit which inures wholly to the carrier."

In *Wegener v. Chicago & N. W. R. Co.* (1916) 162 Wis. 324, 156 N. W. 201, *supra*, the court said: "The bill of lading contained this provision: 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.' The bill of lading and the tariff constituted the contract of shipment, and defendant claims that under it the market value at the place of shipment, plus freight, drayage, and commissions, and not the market value at the place of destination, measured the damages. This is correct. Such stipulations as to measure of damages or other reasonable conditions touching the shipment are valid and binding upon the shipper. *Ullman v. Chicago & N. W. R. Co.* (1901) 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; *Willard v. Chicago & N. W. R. Co.* (1912) 150 Wis. 234, 136 N. W. 646; *Cohen v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1916) 162 Wis. 73, 155 N. W. 945; *Inman v. Seaboard Air Line R. Co.* (1907; C. C.) 159 Fed. 960;

*Miss v. New York, O. & W. R. Co.* (1897) 70 Minn. 37, 72 N. W. 823; 4 R. C. L. 930. The evidence shows that, after crediting plaintiff with freight, drayage, and commissions at New York, the market value of the poultry at the place of shipment, including the lost poultry, was \$318.46 less than its market value at the place of destination as found by the jury. If, therefore, defendant is liable for the poultry lost, the judgment should be reduced \$318.46, and, if not, it should be reduced \$392.71; the value of the lost poultry being \$74.25."

In *Fine v. Southern Exp. Co.* (1911) 10 Ga. App. 161, 73 S. E. 35, there was a clause in the express receipt which

limited the liability of the carrier to \$50, and the court refused to permit the deduction of the express charges from the value of the goods in making up the verdict; but the case is not in point on the question here being considered for the reason that the claim and verdict were for an amount less than \$50, so that the limitation clause could not operate. The holding is based upon the ground that the carrier did not perform the service, the package being lost and never delivered. This, of course, makes the holding one upon the general question of allowing carriage charges, and takes the case out of the scope of the note.

J. W. M.

CORNELIA J. MAXWELL, Appt.,

v.

GREGORY PAGE and Wife.

*New Mexico Supreme Court—September 29, 1917.*

• (23 N. M. 356, 168 Pac. 492.)

**Tax — irregularities — curative provisions — validity.**

1. The curative provisions of § 25, chap. 22, Laws 1899, providing that no sale or tax title had in accordance with the act should be invalidated except upon the ground that the taxes were paid before sale, or that the property was not subject to taxation, are to be given effect according to their terms, and are held to control other provisions of the act which are merely directory. A tax sale held prior to the time appointed by the act is nevertheless valid by reason of said curative provisions, and cannot be avoided by reason of being premature, the time of sale appointed by the statute being held to be directory, and not mandatory.

[See note on this question beginning on page 164.]

**— due process of law.**

2. This statute, as thus construed, is held not to be violative of the constitutional guaranty against depriving a person of his property without due process of law.

**— constitutional requirements — notice.**

3. The constitutional guaranty against the taking of property without due process of law has to do, in taxation proceedings, with the essentials of taxation only. All other matters may be varied according to the legislative will. The legislature may provide by

law what shall be essential, and what not essential, in taxation proceedings, subject only to the fundamental principle that the taxpayer must have notice and opportunity to be heard as to the amount of the charge laid upon his property. Notice of every step in the tax proceedings is not necessary. The owner, if he has notice and opportunity to be heard either before or after the tax lien is fixed upon his property, has due process of law.

**— assessment to unknown owner — court proceeding.**

4. Section 29, chap. 22, Laws 1899,

Headnotes by PARKER, J.

construed, and held not to require a judgment of the district court in all cases where property is assessed to unknown owners, but to require only the same procedure as in other cases.

**Appeal — question not presented below.**

5. A question not presented to the lower court will not be considered here. [See 2 R. C. L. 69.]

**APPEAL** by plaintiff from a decree of the District Court of McKinley County (Raynolds, J.) in favor of defendants in a suit to quiet title to certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. H. B. Jamison for appellant.

Messrs. McFie, Edwards, & McFie for appellees.

Parker, J., delivered the opinion of the court:

This is a suit to quiet title to certain lots situate in the town of Gallup. The suit was brought by W. A. Maxwell, the appellant, against Gregory Page and his wife, and resulted in a decree in favor of the appellees. From that decree the appellant has appealed.

The claim of title to the premises in controversy by the appellant is based upon a conveyance from the probate judge of McKinley county, trustee of the Gallup townsite, dated October 24, 1891. The appellees claim title to the lands under tax certificates and a deed subsequently executed by the county of McKinley. The record discloses that the lands in controversy were assessed to unknown owners for the tax years of 1900 to 1903, inclusive. In 1903 the land was advertised to be sold on the fourth Monday in October, 1903, on account of certain delinquent taxes chargeable against the land. On October 26, 1903, the property was sold to the county of McKinley, and, although the record is not emphatic on this point, it would appear that the sale to the county was for the taxes, interest, penalties, and costs chargeable against the lands for the year 1903. On the same day the duplicate certificates of sale, issued by the county, were assigned to the appellees upon the payment to the county of \$20.13. On February 12, 1908, the collector of the county of McKinley executed in favor of appellees its deed for the premises. All

of the proceedings herein were taken under the Tax Law of 1899. That law (Laws 1899, chap. 22), together with certain sections appearing in the Compiled Laws of 1897 (title 41), constituted a comprehensive system for the assessment, levy, and collection of taxes. In brief, it required all property owners, or persons in control of property, to list the same for taxation purposes. In the event the owners failed to list their property the assessor returned the property for taxation. The assessor was authorized to increase the assessed value of property listed by the owners thereof when, in his opinion, the valuation should be increased. In cases where the owner of property was absent or unknown the assessor returned the land for taxation purposes. Assessments in the name of unknown owners were made by the assessor wherever the owner of property was unknown. Whenever the assessor increased the assessed valuation of property over the amount returned by the owner, the law provided for notice of such action to the owner. County boards of equalization were created whose business it was to equalize all assessments. Notice to owners of any equalization of values affecting their property was also required. The time and place of all meetings of this board were fixed by public law. Property owners were given full opportunity to appear before said board and register such complaints with reference to their assessments as they chose to make. Appeals from that board to the state board of equalization were provided by law. The law further pro-

vided that one half of the taxes for the last preceding year became delinquent on January 1st following, and the other half on July 1st following. If the taxes were not paid within ninety days thereafter the collector was required to commence publication of the delinquent tax list. This list was published four times, once a week for four consecutive weeks. Where the delinquency amounted to more than \$25, the law required a judgment of the district court, with order of sale to be obtained from the court. Where the delinquency was less than \$25, the sale of the property was authorized without resort to proceedings in the district court. Sales of this latter class were required to be held on the first Monday in May for taxes becoming delinquent on January 2d preceding, and the first Monday in November for taxes becoming delinquent on the 2d day of July, preceding. The law permitted such sales to be continued from day to day, not to exceed sixty days. Where the property offered for sale was not sold to private persons, the same was struck off to the county for the taxes, interest, penalties, and costs, and the law permitted the county, in such cases, to sell duplicate certificates of sale to individuals. The certificates of sale, by express statutory enactment, vested in the purchaser, and the county was declared to be a purchaser under the act, a complete legal title to the property, subject only to the right of redemption, within three years after sale. Section 25 of the act provided the following: "No bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes . . . had been paid, before the sale, or that the property was not subject to taxation."

There were other curative or healing provisions in the act not

necessary to mention in this connection.

The appellant assails the validity of the appellees' tax title on the grounds that neither the notice of sale nor the sale itself pretended to comply with the law, and therefore there is an entire lack of jurisdiction in the tax proceedings; that the legislature was without power to pass a curative or healing statute so as to cut off jurisdictional attacks upon tax titles; that the taxes in the case at bar amounted to more than \$25, and no order of sale by the district court was obtained; hence the sale is a nullity; and that the sale was tainted with legal fraud because the property was sold to the appellees for less than 50 per cent of the taxes, interest, penalties, and costs.

In order to get a clearer view of the questions involved, it may be well to here restate some of the general principles governing such matters. The guaranty contained in the 14th Amendment to the Federal Constitution against the taking of property without due process of law, and the guaranty contained in like provisions of our Constitution, is a guaranty that the essentials of taxation only shall be observed in the taking of the property. All other matters depend upon the lawmaking power of the state, and may be varied or changed as the legislative will of the state shall see fit to ordain. Cooley, Taxn. 3d ed. pp. 56, 57; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507. In the Castillo Case, supra, the supreme court of Louisiana had decided that under the Louisiana statute the placing of the name R. Castillo instead of Rafael Maria del Castillo on the assessment roll was such an irregularity as could not be taken advantage of by the taxpayer, the statute of that state making the deed conclusive evidence of the suf-

Tax-constitutional requirements-notice.

iciency of the assessment of the property sold under it. The notice of sale contained the true name of the taxpayer, but added thereto "or her estate or heir." These irregularities the state court disregarded. The Supreme Court of the United States pointed out that the law of Louisiana provided for the placing of the name of the owner on the assessment roll, and also that it fixed the time when the assessment rolls should be exposed for examination and correction, and furnished ample opportunity, not only for revision as to valuation, but also for judicial correction of any legal error which might be asserted to exist in the assessment. It points out that the statute of Louisiana might have dispensed entirely with the requirement that the name of the owner should appear in the published notice. The court cites, on this point, *Williams v. Albany County*, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244, and quotes from the opinion of Mr. Justice Field as follows: "The mode in which the property shall be appraised, by whom its appraisalment shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings. The omission or defective performance . . . may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired."

The court in the *Castillo Case*

then proceeds as follows: "The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616."

The legislature may prescribe, by law, what shall be essential and what unessential in taxation proceedings, subject only to the fundamental principle that a person whose property is to be subject to

taxation must have notice and an opportunity to be heard as to the amount of the charge upon his property, or, in other words, that due process of law must be provided for. *Smith v. Cleveland*, 17 Wis. 556. The statute of Wisconsin provided that a tax deed should be conclusive evidence that the proceedings had been regular from the valuation of the land up to the execution of the deed and to an existence of all conditions precedent in any way affecting the validity of such deed, except that it should be *prima facie* evidence only of the liability of the land to taxation, the nonpayment of the tax, and the nonredemption of the land after sale. The court said: "But aside from the sanctions of authority, the question seems very plain to us on principle. The only constitutional restraint is that requiring the rule of taxation to be uniform. In all other respects the power of the legislature is supreme. The machinery of taxation—the mode of levying, assessing, and collecting—is subject entirely to its discretion. The liability to taxation and nonpayment of the taxes being admitted, the legislature may, as to all other things, declare what shall or shall not be essential to the validity of the proceedings. The same power which imposes a duty may dispense with its performance. It may say that the proceeding shall be void for nonperformance, or that it shall nevertheless be valid. The difference is between mandatory and directory statutes. . . . The legislature might have fixed the time and provided for a sale without notice or advertisement. They may surely by proper legislation in advance, guard against errors and cure mistakes when notice is required."

See also 1 *Cooley on Taxation*, 3d ed. 521 et seq., where many cases are collected in the notes.

Notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process of law if he has

an opportunity to question the validity or the amount of such tax or assessment, either before that amount is finally determined or in subsequent proceedings for its collection. 1 *Cooley, Taxn.* 3d ed. 60; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324. In the *Palmer-McMahon* Case the statute of New York provided that if a taxpayer refused or neglected to pay a tax imposed upon him for personal property, he might be fined in a sum sufficient in amount to pay the tax, costs, and expenses, the proceeds whereof were to be applied to the payment thereof. The statute made no provision for notice to the taxpayer of the application to the court for the imposition of the fine, but gave opportunity for objection before the tax commissioners as to the amount to be charged against the property, and, if dissatisfied with the final action of the commissioners, he could have their action reviewed on certiorari. It was objected to the constitutionality of the law that the taxpayer under the statute had no notice or opportunity to be heard at the time of the application to the court for the imposition of the fine. The court said: "The imposition of taxes is in its nature administrative, and not judicial, but assessors exercise quasi judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. *Hagar v. Reclamation Dist.* 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663."

In *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335, it was held that the statute of Louisiana, which provided for no notice or opportunity to be heard when a tax is first assessed, is nevertheless constitutional; there being provision made for

the testing of the validity of the tax by an injunction suit in a court of justice. In *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, the court considered the Pennsylvania statute, which provided that banks should make their report to the auditor general, and specifically directed him to hear any stockholder who might desire to be heard at the time specified. The court held the statute and the obligation thereby imposed upon the auditor general to hear complaints as to the valuation of shares of stock to be due process of law, and quotes from *Hagar v. Reclamation Dist.* 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663, 668, as follows: "The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

Making application for some of the foregoing principles, it will appear that our first duty in this case is to determine the meaning of the tax statute under consideration. As has been heretofore pointed out, it is first made the duty of the taxpayer to list and value his property and return the same for taxation. If the assessor deems the valuation too low, he has the power to raise the same, and is required to notify the taxpayer. If the taxpayer is aggrieved by the action of the assessor, there is a day appointed by law for him to appear before the county board of equalization and there seek such remedy as he deems himself entitled to. If still aggrieved by the county board of equalization, he has the right to appeal to the territorial board of equalization, the action whereof is final. He thus has two opportunities to litigate before a competent tribunal the question of the valuation of his property and its liability to taxation.

The statute provides for a sale of all property in the county upon which taxes have become delinquent at certain specified times each year after certain specified notices by publication thereof. The legislature, however, provided, as has been heretofore pointed out, that no title acquired at any such tax sale should be invalidated in any proceeding, except upon the ground that the taxes had been paid before the sale, or that the property was not subject to taxation. This curative feature of the statute stands out conclusively against any technical objection to a tax title. This provision, if it is to be given the force and effect which its language requires, prohibits the interposition of any objection to a tax title, except such as are named in the provisions itself. All other directions and provisions in regard to the procedure to be employed by the tax-

—irregularities—  
curative  
provisions—  
validity.

ing officers must yield to this provision, or it must be held to be of practically no force and effect. In view of the whole act we conclude that the legislature intended that the curative feature of the statute should prevail over any irregularity which might occur in the tax proceedings. It is true that the legislature directed that tax sales should take place at a certain time after a certain notice. It is likewise true that the curative provision in the statute must be held to have the force and effect of rendering the directions in regard to the procedure merely directory, and not mandatory, and to amount, in effect, to saying to taxing officers that they shall proceed as provided in the act, but as saying to the taxpayer that if they fail to so proceed, that fact shall not be a defense to him, and shall not invalidate the tax title.

The question then is, Is the statute, as thus construed, violative of the constitutional guaranty against the taking of property without due process of law? As we have heretofore pointed out, the constitutional



guaranty is applicable only to the substance and essentials of things, not to formalities and procedure. The essentials of taxation are the existence of the subject-matter which is to be subjected to taxation and its liability to the imposition of the tax, the assessing of the property for taxation, and the levying of the tax thereon. If, upon all of these subjects, the taxpayer has had notice and opportunity to be heard, he has had due process of law. It is not an essential in taxation proceedings that the state should proceed to enforce the collection of the tax in any particular way, or at any particular time. Therefore it is within the legislative discretion to give directions to the taxing officers to proceed to a sale in a certain way and at a certain time each year for the purpose of collecting the taxes due from the taxpayers. But the legislature might well have provided that another and entirely different procedure should be resorted to for the purpose of the collection of the tax. These provisions are enacted in the interest of the state for the purpose of enabling it to promptly collect its public revenue. The manner of collecting the tax after it has, with due notice to the taxpayer, been fixed upon his property, is a matter in which the taxpayer has no legal interest. Thus in *De Treville v. Smalls*, 98 U. S. 517, 25 L. ed. 174, Congress had laid a tax upon all of the real property in the states which were in insurrection during the Civil War in proportion to the amount justly due from them for the support of the government. The act of Congress provided that the amount of the tax to each individual owner should be apportioned by tax commissioners in such proportion as the value of the particular piece of property bore to the whole property of the state as rendered for taxation in the next preceding year, as shown by the state tax rolls. The act further provided that the certificate of sale of the commissioners should not be affected as evidence of the

5 A.L.R.—11.

regularity and validity of the sale, except by establishing that the property was not subject to the taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act. The court said: "Besides, all possible attack upon the prima facies of the certificate was limited by the express provisions of the act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands subject to the tax every substantial right. It was his duty to pay the tax when it was due. His land was charged with it by the act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax; that his land was not taxable; that he had paid what was due; or that he had redeemed his land after sale. He was thus permitted to assert everything of substance,—everything except mere irregularities."

This same doctrine was affirmed in *Keeley v. Sanders*, 99 U. S. 441, 25 L. ed. 327. Our statute, now under consideration, was before the territorial court in *Straus v. Foxworth*, 16 N. M. 442, — A.L.R. —, 117 Pac. 831, and before the Supreme Court of the United States on appeal in 231 U. S. 162, 58 L. ed. 168, 34 Sup. Ct. Rep. 42. In that case the original owner brought suit to remove the cloud on his title created by the tax deed. The defendant demurred to the complaint upon the ground that under the provisions of the statute such title could be invalidated only upon the grounds stated in the curative section of the law. The demurrer was sustained and, the plaintiff electing

to stand on the complaint, a judgment of dismissal was entered from which the appeal was taken. The territorial court affirmed the judgment of the district court, holding that the curative clause of § 25 of the act excluded all inquiry into questions of procedure in the tax proceedings, and, as thus construed, the act was

—due process  
of law.

not unconstitutional as providing for the taking of property without due process of law. The court pointed out that under the decisions of the Supreme Court of the United States, and others, a taxpayer is not entitled, as a matter of right, to have his property sold to satisfy the tax, and that it might be forfeited without a sale, citing *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925, and other cases. The cases relied upon by the territorial court upon this particular point were all from West Virginia, where the Constitution of the state provided for forfeiture, without notice to the taxpayer, of all lands for the nonlisting or nonpayment of taxes thereon for five years. There was provision, however, for a proceeding in a court to obtain an order for the sale of such property as forfeited property, in which proceeding the owner was to receive notice and was entitled to be heard. That is the only difference between the laws of West Virginia and those of this jurisdiction in this particular. Our laws give notice to the taxpayer and opportunity to be heard before the tax lien is fastened upon the property, while in West Virginia the notice comes after the forfeiture of the property.

We see no reason to depart from the holding in the *Straus-Foxworth Case*, as we consider the reasoning of that case sound upon the considerations mentioned herein.

*Nevin v. Bailey*, 62 Miss. 433, holds that an act substantially in the terms of our statute is constitutional.

*Allen v. Armstrong*, 16 Iowa, 508, is an instructive case upon this sub-

ject. In Iowa the statute provided that the tax deed should be conclusive evidence that the property had been listed and assessed as required by law; that the taxes were levied according to law; that the property was advertised as required by law; that it was sold as stated in the deed; that the grantee was the purchaser; that the sale was conducted as required by law; and that all the prerequisites of the law had been complied with. In order to defeat the tax title in the above case the defendant offered to show that the advertisement of sale was not sufficient, and that the lands were described as being delinquent for the year 1839 instead of 1859. He also offered to show that the assessor assessed the property before he was qualified, and that he did not reassess it after he was qualified. In discussing the statute the court held the tax title valid, and said: "If any given step or matter in the exercise of the power to tax (as for example the fact of a levy by the proper authority) is so indispensable that, without its performance, no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and with respect to that the owner cannot be concluded from showing the truth by a mere legislative declaration to that effect."

The court in applying the rule laid down by it, as stated above, to the facts in that case, said: "The legislature might provide for the sale of property for delinquent taxes, on a given day, without requiring any notice. And hence they may provide, as they have done in cases of ordinary sales on execution by sheriffs, . . . that the omission to give notice, while it subjects the officer to damages, shall nevertheless not affect the validity of the sale. As it is competent for the legislature to declare that a notice in all respects regular is not essential, so it is competent for it to say that a deed shall, in the purchaser's favor, be conclusive evidence of due notice."

See also *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214, where a fine and extensive discussion of the law on this subject is to be found. In *Clark v. Thompson*, 37 Iowa, 536, this same statute was before the court, and it was there held that the tax deed was conclusive evidence as to the time of sale which, it is there said, is not jurisdictional matter. In *Shawler v. Johnson*, 52 Iowa, 472, 3 N. W. 604, the lands were omitted from the published notice and were sold upon a day not provided by the statute. It was held that neither of these was jurisdictional, and that the sale was nevertheless valid under the provisions of the statute. The Iowa statute, above referred to, was before the Supreme Court of the United States in *Callanan v. Hurley*, 93 U. S. 387, 23 L. ed. 931, and was, by that court, upheld.

The courts differ upon the question as to what is an indispensable essential in taxation and what is not indispensable. If they agree upon this question, they all agree upon the question of the constitutionality of the statute. We hold it is not indispensable under our statute to hold tax sales upon the very day appointed by statute, and that therefore the legislature has power to provide, as it has provided, that an irregularity as to the time of sale shall not invalidate the title of the purchaser.

Counsel for appellant cites many cases holding that a premature sale, such as was had in this case, is necessarily invalid and void. These conclusions are reached upon a consideration of the statute of the particular state in which they were rendered. We construe our statutes as providing that a sale had prior or subsequent to the time directed by the statute shall be a valid sale, because otherwise the curative clause of § 25 can have no operative effect.

We are not unmindful in this connection of the quite general holding of the courts that the provisions of the taxing statute in regard to the

time and manner of the sales are to be strictly construed. Thus it is said by Judge Cooley: "The sale must be made at the very time and place provided by law for that purpose. In this regard the utmost strictness is required, since otherwise the whole purpose of the notice, both as regards information to the public and protection to the owner of the land, will be defeated. . . . So a sale either before or after the time which has been named for the purpose is wholly without warrant of law, and cannot be sustained." 2 Cooley, Taxn. 3d ed. 938, 939.

Many cases are collected in marginal notes. This statement embodies the general trend of opinion throughout the country. The fact remains, however, that under a statute like ours, which provides, in effect, that the tax title shall not be invalidated on account of any error in this regard, or in any other regard except the two mentioned in the statute, we are compelled to hold that the provisions in regard to the time, place, and manner of sale are directory merely to the taxing officers, and that the sale is valid, notwithstanding any irregularity therein.

Counsel for appellant urge that the tax sale is void for the reason that it was for more than \$25, alleging that it was for \$28.71. They found this objection upon the provisions of § 15 of the act which provides that, in case the taxes amount to more than \$25, a judgment of the district court must be obtained before a sale can be made. Assuming, without deciding, that such a proposition might be put forward for the purpose of invalidating a tax sale, the same is not available in this case. It appears from the record that the property sold consisted of eleven city lots in the town of Gallup, and it also appears that eleven tax sale certificates were issued. It is fairly inferable from the record, therefore, that each lot was sold separately, and that a tax sale certificate was issued for each

of the same. This would obviate, completely, the objection made in this regard. The tax deed contains a recital that it was issued upon the surrender of eleven tax certificates.

Counsel for appellant put forward the proposition that in all cases where property is assessed to unknown owners there must be a judgment of the district court before sale of the property can be had. They rely upon § 29 of the act, which is as follows: "When any property is listed upon the assessment roll as the property of unknown owners, the same proceedings shall be had as provided for in this act against the property of known owners and the judgment rendered shall be against the property as listed."

We can see no merit in the proposition. The section makes the broad, general provision that the procedure in case of property assessed to unknown owners shall be the same as it is when it is assessed against known owners, and simply provides that any judgment rendered shall be

—assessment  
to unknown  
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proceeding.

against the property as listed. The section means that when judgment is required, that is, when the tax amounts to more than \$25, the judgment shall run against the property instead of against some person, as it would do in case of a known owner. We can see nothing in the section requiring a judgment in all cases regardless of the amount of the tax due.

Appellant complained of the fact that the appellee bought the tax certificates for \$20.13 from the county when the amount due upon them was \$51.74. We fail to appreciate the force of the claim made. Even though there were merit in the claim, we are precluded from passing upon the question for the reason that it was

Appeal—  
question not  
presented below.

neither pleaded nor presented in any form to the court below.

For the reasons stated the judgment of the court below will be affirmed; and it is so ordered.

Hanna, Ch. J., and Roberts, J., concur.

Petition for rehearing denied November 8, 1917.

## ANNOTATION.

**Constitutionality and applicability of curative provisions of taxing statutes where sale is irregular.**

- I. Scope, 164.
- II. Introductory, 165.
- III. Irregularities as to time of sale, 165.
- IV. Sale for excessive amount, 170.
- V. Sale of excessive quantity and failure to offer less quantity, 172.

### I. Scope.

This note deals only with irregularities in the tax sale itself, and not with defects or irregularities in the proceedings prior or subsequent to the sale. It embraces not only statutes expressly providing that the tax sale may not be attacked except for specified causes, but also statutes providing that the tax deed shall be conclusive evidence of certain facts either at

- VI. Sale of separate parcels together, 173.

- VII. Irregularities respecting purchaser, 174.

- VIII. Miscellaneous irregularities, 174.

- IX. Validity and application as respects courts of equity, 176.

once or after a specified lapse of time, and also special statutes of limitations applicable to tax deeds. It does not, however, embrace statutes providing that the tax deed shall be prima facie evidence, and, while it embraces statutes providing that the deed shall be conclusive evidence, it does not embrace questions as to whether the recitals in the deed are conclusive against the purchaser that the law was not complied with.

*II. Introductory.*

In exercising the taxing power, the legislative department of the government cannot pass a law which shall amount to a legislative transfer without cause and without due process of law of the property of A to B. And there are indispensable requisites of the power of taxation which must be observed or the owner's title cannot be divested or transferred to another. These essential requisites cannot be dispensed with. There are, however, minor matters in regard to the *mode or manner* of exercising the power which may be dispensed with, and consequently whose observance it is within the power of the legislature to provide may be presumed from certain evidence or certain other facts. But if any given step or matter in the exercise of the power to tax is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and with respect to that the owner cannot be concluded from showing the truth by a mere legislative declaration to that effect. *Dillon, J., in Allen v. Armstrong* (1864) 16 Iowa, 508.

*III. Irregularities as to time of sale.*

By the weight of authority the legislature may constitutionally provide that a tax sale shall not be invalid because of irregularities with respect to the time of the sale, such as a sale at a time other than that prescribed, or a sale subsequent to the prescribed time without any proper adjournment to that date, or may provide that the deed shall be conclusive evidence of regularity in these respects.

**United States.**—*Ford v. Delta & P. Land Co.* (1890) 43 Fed. 181, affirmed in (1897) 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230.

**Iowa.**—*McCready v. Sexton* (1870) 29 Iowa, 356, 4 Am. Rep. 214; *Phelps v. Meade* (1875) 41 Iowa, 470; *Shawler v. Johnson* (1879) 52 Iowa, 472, 3 N. W. 604; *Slocum v. Slocum* (1886) 70 Iowa, 259, 30 N. W. 562.

**Michigan.**—*Grand Haven Arbeiter Unterstutzungs Verein v. Soule* (1913) 175 Mich. 210, 141 N. W. 691.

**Missouri.**—*Roth v. Gabbert* (1894) 123 Mo. 21, 27 S. W. 528.

**Nebraska.**—*Larson v. Dickey* (1894) 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167.

**New Jersey.**—*State, Jones, Prosecutor, v. Landis Twp.* (1888) 50 N. J. L. 374, 13 Atl. 251.

**New Mexico.**—*MAXWELL v. PAGE* (reported herewith, ante, 155).

**Pennsylvania.**—*Coxe v. Deringer* (1875) 78 Pa. 271.

And see *Nevin v. Bailey* (1884) 62 Miss. 433, and *McLemore v. Anderson* (1907) 92 Miss. 42, 43 So. 878, 47 So. 801, upholding a statute of limitations as applied to such irregularity.

Thus, in *Ford v. Delta & P. Land Co.* (Fed.) supra, the court said that if a tax sale was made on a day or at a place which the legislature might have authorized, or for delinquent taxes for several years, made at one time after default in each year, or if there were other such irregularities, these might be cured by subsequent legislation. Accordingly, objections to the time and manner of sales for the nonpayment of levee taxes, which objections were not stated in detail, were held cured by statutes providing that all tax sales should be valid and not subject to be impeached or questioned except for fraud or upon proof that the taxes had been paid; that no suit to set aside any title acquired under such a sale should be brought unless within five years from the date of the sale, and that upon the expiration of five years from any sale for levee taxes no testimony or evidence to impeach or invalidate the deed should be entertained except in case of fraud.

In *McCready v. Sexton* (Iowa) supra, the court said that the listing and assessing of the property, a levy of the taxes, a tax warrant, and a sale were essential and jurisdictional, but that the legislature might prescribe the time or manner in which these essential and jurisdictional acts should be done, and having this power might make the deed *prima facie* or conclusive evidence that the law as to time and manner was complied with. The judgment, however, seems to have been reversed on other grounds without

making any application of the court's holding regarding the validity of the statute, to any particular defects in the proceedings.

Under the Iowa statute making a tax deed conclusive evidence that all the prerequisites of the law to make a good and valid sale and vest the title in the purchaser had been complied with, except as to the liability of the land to taxation, the nonpayment of the taxes, and nonredemption from the sale, it was held in *Shawler v. Johnson* (1879) 52 Iowa, 472, 3 N. W. 604, and *Slocum v. Slocum* (1886) 70 Iowa, 259, 30 N. W. 562, that the deed could not be contradicted by evidence that the sale was advertised for, and held at, a different time from that prescribed by law.

And under a statute providing that no tax sale should be set aside after confirmation except where the taxes were paid or the property was exempt from taxation, it was held in *Grand Haven Arbeiter Unterstutzungs Verein v. Soule* (1913) 175 Mich. 210, 141 N. W. 691, that it could not be urged after confirmation of a tax sale that it was made subsequent to the date on which the sale was commenced without any adjournment being made or announced.

And under a statute requiring land to be sold on the first Monday in October, but providing that if for any cause it could not be advertised and sold on that day, the sale should be made on the first Monday in November, the failure of a tax deed to show why the sale was had on the first Monday in November, and why it could not have been had on the first Monday in October, was held not a fatal defect, where the statute further provided that the deed should be conclusive evidence of certain facts, including the fact that the property was duly sold for taxes as stated in the deed, and that the manner in which the sale was conducted was in all respects regular, and as the law directed, and that all things whatsoever required by law to make a good and valid sale and to vest title in the purchaser were done. *Roth v. Gabbert* (1894) 123 Mo. 21, 27 S. W. 528.

In *State, Jones, Prosecutor, v. Landis Twp.* (1888) 50 N. J. L. 374, 13 Atl. 251, a statute validating all tax sales theretofore or thereafter made, though the time at which they were held was not between the hours prescribed by an earlier statute requiring all tax sales to be held between the hours of 12 and 5, was applied to a sale advertised for and held at 10 o'clock, though a certiorari proceeding to review such sale was pending when the validating act took effect. The court said that whether the hour of sale should be in the morning or afternoon was entirely within the legislative control and discretion, and that if, by mistake, a sale took place at an earlier hour than allowed by the existing statute, such defect could be cured by subsequent legislation.

In *Coxe v. Deringer* (1875) 78 Pa. 271, a sale on a day other than that prescribed for tax sales, with no entry of any adjournment to such day, was held cured by a statute providing that no alleged irregularity in the assessment or in the process should be taken or construed to affect the title of the purchaser, but that the same should be declared good and legal. The court said that the absence of entries of adjournments from day to day was a defect of form and detail; that it was "irregularity in the process," and not the omission of any essential requisite to support the title.

In *Nevin v. Bailey* (1884) 62 Miss. 433, the court held that a statute providing that no suit should be commenced to invalidate any tax title after three (3) years from the time the land was sold for taxes was valid as applied to any defective or irregular execution of those powers or duties conferred or imposed on the officers conducting the sale by the legislature, and not by the Constitution, and that a sale on the wrong day fell within this limit, and the statute precluded such objection more than three (3) years after the sale. The court said: "It may be seriously doubted whether the statute partakes more of the character of a statute of limitations than of one declaring a rule of evidence or operating as a curative

act. Whatever its appropriate name may be, its effect is to preclude any inquiry into the validity of a tax sale made after its passage and more than three years before the institution of the suit in which the deed of the purchaser is assailed as to any defective or irregular execution of those powers or duties which are conferred or imposed on the officers conducting the sale by the legislature, and not by the Constitution of the state. Wherever there has been an assessment, charge, and sale which complied with the requirements of the Constitution, but which failed in any respect of conforming to those things which rested solely on legislative will and which might have been constitutionally dispensed with, or provided to be done in the manner in which they were done, and a default on the part of the owner, then in the states of case named in the statute the title of the purchaser is protected from attack. Where, as in this case, the objection is made that the sale was made on the wrong day, the statute is to be read as especially and distinctly authorizing the sale to be made on the day named in the law, or on that on which it was made. To the objection that the roll was received and examined by the board of supervisors at an adjourned meeting, it replies by authorizing in advance that meeting to be held for that purpose on that day. It existed as a part of the revenue laws of the state, and its declaration was an admonition to those owning property subject to taxation, and an assurance to those who should become purchasers at tax sales, that after the lapse of a certain time from the day of the sale for taxes, all those requirements imposed by the legislature should be read as directory, and not mandatory, laws, and that no failure to conform thereto should be held to invalidate the title acquired by the purchaser."

And in *McLemore v. Anderson* (1907) 92 Miss. 42, 43 So. 878, 47 So. 801, a deed of a date subsequent to the commencement of a tax sale, to which date the sale was not shown to have been regularly adjourned, was treated as validated by the Statute of

Limitations, though it was held that, by another statute, the Statute of Limitations had been waived by the state, which was the purchaser at the sale.

In the reported case (*MAXWELL v. PAGE*, ante, 155) a tax sale held prior to the time appointed by the statute was held cured by the statute providing that no sale or tax title should be invalidated except upon specified grounds, and the statute as so construed was held valid.

But in *Taylor v. Van Meter* (1890): 53 Ark. 204, 13 S. W. 699, it was held, in effect, that the legislature could not give a statute of limitations, which ran from the time of the sale though the owner was still in possession, the effect of cutting off the defense that the sale was not made on the day appointed by law. The statute purported to cut off all defenses against a tax title after the lapse of two years except that the land was not taxable, that the taxes had been paid, or that the sale had been redeemed from, and it had been held in an earlier case to deny due process of law as applied to any meritorious defense, meaning, as said by the court, any act or omission of the revenue officers in violation of the law, and prejudicial to the rights or interests of the owner, as well as those jurisdictional and fundamental defects which affected the power to levy the tax or to sell for its nonpayment; and, therefore, to be restricted to mere irregularities or illegalities in a tax sale consisting in a mere failure to observe some requirement imposed, not by the Constitution, but by the legislature, the nonobservance of which did not deprive the former owner of any substantial right. Under this decision it was held in the *Taylor Case* that the statute did not cut off the defense that the sale was not made on the day appointed by law.

In *Kelly v. Herrall* (1884) 10 Sawy. 161, 20 Fed. 364, a sale after the warrant to the sheriff to collect the taxes should have been returned pursuant to the statute was held not cured by a statute which made a tax deed prima facie evidence of title, to be overcome only by showing certain facts, thus in effect making it conclusive that there

was a sale. The court apparently held that it would deny due process of law to make the deed conclusive that the sale was made during the life of the warrant. It said: "It being assumed, as has been said, that the Act of 1865 must be construed so as to allow the tax deed to be overcome by showing that there was no sale of the premises, the question arises whether a sale upon a warrant after the time within which it is required to be made is a valid sale. If a sale is actually made upon or in pursuance of the authority of a lawful warrant, no mere irregularity in the manner and time of making such sale can be shown to avoid the deed. On the contrary, it is conclusive evidence of the regularity of the sale in all such respects. For instance, it cannot be shown that the sale was without or upon an insufficient notice, or that it was made elsewhere than at the courthouse door, or otherwise than between the hours of 10 and 4 o'clock in the daytime, as prescribed by § 93 (Oregon Laws, 768). But where the sale is made without any authority in the officer for that purpose, as where there is no warrant for the collection of the tax, the fact may be shown to avoid the deed. And taking it for granted that the authority to sell under the warrant of May 3d was gone before July 6th, then the sale in this case was essentially illegal, and the deed made in pursuance thereof void."

Curative statutes were also held inapplicable to irregularities of this kind in the following cases, though apparently not on constitutional grounds: *Allen v. Ozark Land Co.* (1892) 55 Ark. 549, 18 S. W. 1042; *Butler v. Delano* (1876) 42 Iowa, 350; *Thompson v. Ware* (1876) 43 Iowa, 455; *Burdick v. Bingham* (1888) 38 Minn. 482, 38 N. W. 489; *Collins v. Sherwood* (1901) 50 W. Va. 133, 40 S. E. 603; *Hardman v. Brannon* (1912) 70 W. Va. 726, 75 S. E. 74.

In *Allen v. Ozark Land Co.* (1892) 55 Ark. 549, 18 S. W. 1042, the statute provided that, in order to defeat a tax title, the party claiming adversely thereto should be required to prove that the land was not subject to tax-

ation, that the tax had been paid, that the property had been redeemed, or that there had been an entire omission to list or assess the property or to levy the taxes or give notice of the sale or sell the property. It was held in effect that where the tax sale should have been commenced on June 8th, but was commenced on June 11th, and the property then sold, there was an entire omission to sell the property within the meaning of the statute. The court after saying, by way of illustration, that if the officers of the probate court should meet at a time not fixed by law for holding court, and make an order for the sale of lands of a deceased person, it would be void, though within the jurisdiction of such court, proceeded: "This principle applies directly to the levy of the county taxes because they must be levied by the county court. It is also applicable to tax sales. For the law fixes the day on which they shall begin, as it does for the courts. The collector cannot legally begin the sale on any other day. He is not clothed with any discretion. The statute confines his authority to sell on a fixed day. If, beginning on that day, he does not sell all the delinquent lands, he can adjourn from day to day until all of them are sold. But if he should begin and sell on a day not authorized by law, the sale would be void, a nullity, and would have no more legal efficacy than it would have had, had it been made by any other person. It would be without the authority or sanction of law."

In *Butler v. Delano* (1876) 42 Iowa, 350 (followed in *Thompson v. Ware* (1876) 43 Iowa, 455), the statute required lands to be offered for sale at public sale and required the treasurer to offer separately each tract or parcel advertised and continue the sale from day to day as long as there were bidders or until the taxes were all paid; it provided that when all the parcels had been offered and a portion remained unsold, the treasurer should adjourn the sale to some day, not exceeding two months from the time of adjournment, and give notice at the time of adjournment; at the close of the annual sale in October, the treas-



urer announced that the sale was adjourned from day to day, and posted a notice to that effect; thereafter, until the following June, sales were made whenever parties came in to buy, and the land was not offered at any other time and no adjournment to a day named was ever made; when the sales were made no proclamation was made and the treasurer did not read the list of lands sold, but merely held up the list, announced that he offered each tract for sale, and then struck off land to persons on behalf of whom a clerk in his office was acting, the clerk handing him a list of the lands he proposed to take, the names of the purchasers, and verbally offering to take such land for the amounts of the taxes, interest, and penalties due thereon; there probably were no other persons present. The court said: "The statute requires that lands upon which taxes are delinquent shall be sold at public sale on a day prescribed, or on some other day to which the sale is regularly adjourned. The purpose of a public sale is to secure competition and the payment of the taxes for as small a portion of the delinquent lands as possible. Any arrangement between the treasurer and the purchaser which substitutes a private for the public sale which the law contemplates operates as a fraud upon the owner of the land and renders the sale invalid. We hold that the sale in question was private, and hence fraudulent, and that the deed is not conclusive evidence that it was public and legal."

Sales were made in substantially the same way in *Burdick v. Bingham* (1888) 38 Minn. 482, 38 N. W. 489, and the court held that a statute providing that a tax judgment and sale should not be set aside unless the action for that purpose was brought within nine months of the date of the sale did not apply. The court said that, to start the statute running, there must be at least an attempt to make such a sale as the statute provided for, and that the officer making the sale did not assume nor attempt to make a sale at public vendue, and

that the time never began to run, the sale being utterly void.

But see *Clark v. Thompson* (1873) 37 Iowa, 536, holding that, under a statute making tax deeds conclusive evidence of certain matters, the deed is conclusive evidence of compliance with the law in adjourning the sale, which pertains merely to the time of the sale, which is not a jurisdictional matter, and that it cannot be defeated by other evidence contradicting such presumption and showing that by mistake a sale on December 3, 1862, was adjourned to December 8, 1864, instead of December 8, 1862.

In *Collins v. Sherwood* (1901) 50 W. Va. 133, 40 S. E. 603, where a sale was void because of an adjournment for over a month, contrary to a statute which only authorized the sale to be continued from day to day, it was held that a curative statute which might have made the deed good notwithstanding such defect did not have any retroactive force, and therefore did not cure the defect. The court said that ordinarily statutes were not retroactive unless expressly made so, that statutes intended to affect the validity of tax sales did not seem to be exceptions to this rule, and that the statute contained no word expressly or impliedly making it retroactive.

In *Hardman v. Brannon* (1912) 70 W. Va. 726, 75 S. E. 74, the statute provided that tax deeds should have the effect thereby given them, notwithstanding any irregularity in the proceedings in which land was sold not therein provided for, unless such irregularity appeared on the face of the proceedings of record in the office of the clerk of the county court, and were such as materially to prejudice and mislead the owner of the real estate as to what portion of his real estate was so sold, and when, and for what year or years, it was sold, or the name of the purchaser thereof, and not then unless it was clearly proved that but for such irregularity the former owner of such real estate would have redeemed it. It was held that where the statute required the sale to be commenced on the first day of the term of the circuit court in

February, a sale commenced on March 2d was not cured. The court said: "The time for making the sale is material for the reasons hereinbefore named. The sheriff has no authority in law to sell at any other time. He cannot appoint his own time; he must pursue the statute strictly. The error or mistake as to the time the sale was made appears on the record in the manner in which we have hereinbefore pointed out, and it is not one of the mistakes or irregularities embraced within any of the curative provisions of § 25." The statute seems to have cured such irregularities as did not mislead the owner "as to what portion of his real estate was so sold, and when and for what year or years it was sold or the name of the purchaser thereof." How a mistake in the date of the sale could mislead him in any of these respects is not apparent.

But in *Excelsior Min. Co. v. Lochead* (1915) 35 Ont. L. Rep. 154, 9 Ont. Week. N. 285, a premature sale was held cured by a statute providing that a tax deed should be valid and binding unless questioned within two years, notwithstanding any neglect, omission, or error of the municipality or any agent or officer thereof in respect to imposing or levying the taxes or in any proceeding subsequent thereto. Another statute required the sale to be held not less than ninety-one days after the first publication of the advertisement of sale in a certain paper. The sale was advertised in two papers, and was advertised in one of them for thirteen weeks before the sale, but such sale was within ninety-one days of the first publication in the prescribed paper. The court held that this fell under the head of neglect, error, or omission, and was cured.

#### IV. Sale for excessive amount.

Statutes of the kind under consideration have been held valid as applied to sales for an excessive amount, in the following cases: *Parker v. Sexton* (1870) 29 Iowa, 421; *Larson v. Dickey* (1894) 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167; *Straus v. Foxworth* (1911) 16 N. M. 442, — A.L.R. —, 117 Pac. 831, affirmed in (1913) 231 U. S. 162, 58 L. ed. 168, 34 Sup. Ct. Rep. 42.

And such statutes have been applied to such sales in *Geekie v. Kirby Carpenter Co.* (1882) 106 U. S. 379, 27 L. ed. 157, 1 Sup. Ct. Rep. 315; *Shuttuck v. Smith* (1896) 6 N. D. 56, 69 N. W. 5; *Iddings v. Cairns* (1853) 2 Grant, Cas. (Pa.) 88; *Milledge v. Coleman* (1879) 47 Wis. 184, 2 N. W. 77; *Claxton v. Shibley* (1885) 10 Ont. Rep. 295.

Thus, in *Parker v. Sexton* (1870) 29 Iowa, 421, supra, a statute providing that the invalidity of a part of the tax for which land was sold should not affect the validity of the sale or the right and title conveyed by the treasurer's deed, providing the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, was held not unconstitutional. The court said that if any portion of the tax was legal, the power to sell would arise therefrom; that the fact that the erroneous or illegal taxes were associated with the valid and legal would not defeat the power any more than if they had been entirely omitted; but that so far as the power and right to sell existed as to any part of the taxes, the owner was not prejudiced by the erroneous or illegal part, since his property would be sold for the valid part, and he was entitled to have the erroneous portion refunded.

And in *Larson v. Dickey* (1894) 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167, it was held competent for the legislature to make a tax deed conclusive evidence that a tax sale was for a proper amount.

In *Straus v. Foxworth* (1911) 16 N. M. 442, — A.L.R. —, 117 Pac. 831, the statute quoted in the opinion in the reported case (*MAXWELL v. PAGE*, ante, 155) was held to cure a sale for \$4.02, where the tax was only \$3.78, even if the difference was not, as claimed, covered by interest and expenses of sale, which the law permitted the county to add. The court also held that the irregularity complained of was not such as would defeat the jurisdiction, and that, as applied thereto, the statute was valid. The court said: "To hold that such a trivial defect invalidated the appellee's

title would be to return to the old way instead of following the new, in conformity to the spirit and intention of the statute under consideration." The United States Supreme Court (1913) (231 U. S. 162, 58 L. ed. 168, 34 Sup. Ct. Rep. 42) held that there was no excess in fact, without passing on the constitutional question.

In *Geekie v. Kirby Carpenter Co.* (1882) 106 U. S. 379, 27 L. ed. 157, 1 Sup. Ct. Rep. 315 (see also *Rose's Notes* to this case), and *Milledge v. Coleman* (1879) 47 Wis. 184, 2 N. W. 77, a statute providing that no action should be brought by the former owner to avoid a tax deed or recover possession unless brought within three years was held to apply, though the county treasurer, in making the sale, included in the amount for which the land was sold 5 cents, in addition to the taxes on each tract, for a revenue stamp to be affixed to the certificate of sale, and though this was an irregularity which would have entitled the owner to relief within the three years. In the case from the United States Supreme Court, that court said: "The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed, the statute puts at rest all objections raised after the time specified against the validity of the tax proceeding, from and including the assessment of the land, to and including the execution of the deed. If the deed is valid on its face, and purports to convey the land on a sale for the nonpayment of taxes, it is, during the three years, *prima facie* evidence of the regularity of the tax proceeding; and, after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The general authority of the taxing officers and the liability of the land to taxation having existed, there was no want of authority to put the taxing power in motion. That being so, the lapse of time establishes conclusively the validity of the tax and of the sale as against the irregularity in question. There having

been jurisdiction, all error was conclusively barred by the statute."

In *Shattuck v. Smith* (1896) 6 N. D. 56, 69 N. W. 5, a sale was held not invalid because the interest and penalty charged against the property were too large, the court saying that the statute declared that no tax sale should be set aside or declared invalid except for certain reasons specified, which did not include a sale for an excessive amount.

In *Iddings v. Cairns* (1853) 2 Grant, Cas. (Pa.) 88, it was held that a statute of limitations applicable to tax titles gave a good title though the purchaser bought at a price greater than the amount of taxes and costs, and filed no bond for the surplus.

And where there was no excess in the amount of tax imposed, but merely a mistake in copying the amount from the collector's roll to the treasurer's books, it was held in *Claxton v. Shibley* (1885) 10 Ont. Rep. 295, that the defect was cured by a provision that a tax deed should not be invalid for any error or miscalculation in the amount of taxes or interest in arrears.

But in *Cooper v. Freeman Lumber Co.* (1895) 61 Ark. 36, 31 S. W. 981, 32 S. W. 494, it was held that a statute attempting to cut off all defenses except that the land was not subject to taxation, that the tax had been paid, that the property had been redeemed, or that there had been an entire omission to list or assess the property, or levy the taxes, or give notice or sell the property, could not cut off the defense that the amount for which the land was sold included certain amounts as costs which should not have been included, and that to so apply the statute would render it invalid. The court, after pointing out that it had been decided that the statute could not cut off any meritorious defense based on any acts of omission prejudicial to the former owner's rights or interests, said: "Can it be doubted—in fact, is it not very clear—that to sell a landowner's land for an amount not due upon it, and never levied upon it, and which, if levied, was unlawfully levied, has a direct tendency to injuriously affect his in-

terest and the power of the officer to sell for nonpayment? . . . The smallness of the amount of the excess over the amount due does not in a tax sale affect the question, as the maxim, 'De minimis non curat lex,' does not apply to tax sales."

And in *Yokham v. Hall* (1868) 15 Grant, Ch. (U. C.) 335, where two half lots, assessed separately, were united for purposes of sale, it was held that if the treasurer had a right to do this, the sale was for more than was due, because certain taxes or expenses would be less on the whole lot than on two half lots, assessed separately, and that the defect was not cured by a curative statute.

In *Fifth Louisiana Levee Dist. v. Concordia Land & Timber Co.* (1916) 141 La. 247, 74 So. 921, it was held that a tax sale for the taxes of two years when the taxes for one of the years had been paid was an absolute nullity, not protected by the prescription of three years applicable to actions to annul tax sales; but that a sale for the taxes of two years when the taxes for only one of such years had been assessed, although invalid, was protected by such prescription.

*V. Sale of excessive quantity and failure to offer less quantity.*

A statute making tax deeds conclusive evidence of the regularity and sufficiency of all proceedings upon which a tax sale and deed are made is in conflict with the Constitution so far as it makes the deed conclusive evidence of matters jurisdictional and essential in their nature; but as to the manner of the exercise of those jurisdictional matters which are entirely under the control of the legislature, the deed may be made conclusive evidence. Whether land shall be sold in parcels of 40 or 640 acres, and conveyed by like description, is a question pertaining to the manner of the sale, which is under the control of the legislature, and the deed may be made by law conclusive evidence thereof. It seems, therefore, that the deed may be made conclusive evidence that the property was sold in parcels of a quantity similar to those conveyed. *Martin v. Cole* (1874) 38 Iowa, 141.

In Louisiana, the failure of the collector to offer the least quantity of the land which any purchaser will take before selling the whole property affects the title with a vice for which it may be annulled in an action brought within the period of description, but which is not so radical as to protect the owner against the prescription applicable to actions to attack tax titles. *Cane v. Herndon* (1901) 107 La. 591, 32 So. 33; *Muller v. Mazerat* (1902) 109 La. 116, 33 So. 104; *Simoneaux v. White Castle Lumber & Shingle Co.* (1904) 112 La. 221, 36 So. 328.

But in Missouri, where the statute required the sale to be made to the person who would pay the taxes and costs for the least quantity of the land offered for sale, the failure of the collector to offer a less quantity than the whole tract, or to make any proposition to those present to take a portion of the land and pay the taxes, was held not cured by a statute making tax deeds conclusive evidence of certain facts, including the fact that the property was duly sold for taxes, as stated in the deed, and that the manner in which the sale was conducted was, in all respects, regular, and as the law directed, and that all things whatsoever required by law to make a good and valid sale and vest title in the purchaser were done. *Roth v. Gabbert* (1894) 123 Mo. 21, 27 S. W. 528. The court based its decision on the ground that the law expressly provided how property should be offered for sale, and that the express provisions of the statute should prevail over the general provisions of the curative statute.

And where the collector offered each subdivision of the land for sale, and then sold the whole body of land without adding to each body an additional subdivision until the whole was exposed, there was such a departure from the scheme provided by law as to defeat the sale, notwithstanding a curative act providing that no defense should avail against a title unless the taxes were paid before the sale, since this does not prevent the owner from showing in defense a total departure

from the provisions of the law governing the assessment and sale of land for taxes. *Griffin v. Ellis* (1885) 63 Miss. 348.

*VI. Sale of separate parcels together.*

While the general assembly cannot make a tax deed conclusive evidence of the fact of a tax sale, it may make it conclusive evidence that a tract assessed in separate forties was not sold in gross, but in separate parcels as assessed, and the deed cannot be attacked on this ground. *Rima v. Cowan* (1870) 31 Iowa, 125.

And where the taxes on land were unpaid for two years, and the taxes on other lands jointly assessed with that in question were unpaid for four years, a sale of all such lands for the taxes of the whole four years was irregular and invalid, and could have been avoided if it had been seasonably attacked, but the irregularity was cured by a statute making tax deeds theretofore made, which had been recorded two years, conclusive evidence that the sale and all proceedings prior thereto were regular, but providing that the deeds might be canceled by the comptroller or a court of competent jurisdiction by reason of the payment of the taxes, or because they were levied by a town or ward having no legal right to assess the land, or by reason of any defect affecting the jurisdiction upon constitutional grounds. And the statute was not invalid because it would put the owner to the cost and trouble of a proceeding to vacate the sale under peril of losing his estate, he not having been in possession. *Marsh v. Ne-ha-sa-ne Park Asso.* (1898) 25 App. Div. 34, 49 N. Y. Supp. 384. The court said: "But can a person upon whose estate an unlawful charge has been placed be put to the costs and trouble of a proceeding to remove the charge under peril of losing his estate? Yes. When danger threatens, we must resort to whatever measures are needful to avert it or abide its perils. The state must collect its taxes; it may make mistakes in doing so, and it is not unreasonable, especially in respect to unoccupied lands, that the owners of such lands should be charged with the

burden of showing the mistake within a reasonable time. . . . If the owner had been in possession of the lands, then I think it quite probable that a different rule would apply, for the reason that statutes of limitation do not give validity to bad or imperfect titles, as against a possessor who is not given notice to defend against them until after the limitation has expired. . . . But when he is out of possession, non constat but that he is out because he has no right to be in; and hence there is no apparent reason why, when he is absent and silent during all the time the statute allows him to protect his title against the proceeding of the state to confiscate it, he should not be held to have abandoned it or to have admitted the right of the state to divest him of it."

Under the Iowa statute making tax deeds conclusive evidence except as to certain matters, the deed is conclusive that land was sold in quarter sections as authorized by law, and not en masse with other land, this merely relating to the manner of the sale, as to which the deeds are conclusive. *Clark v. Thompson* (1873) 37 Iowa, 536.

But if different tracts are sold en masse, and the deed first executed so recites, a second deed reciting a sale of the land in parcels is void, and not conclusive of a lawful sale, since it was not executed to correct any mistake, misdescription, inaccurate recital, or other matter in conflict with the facts in the original deed. *Gould v. Thompson* (1877) 45 Iowa, 450.

A sale together of lots assessed separately is at most "an illegality in fixing the tax or in the proceedings for its collection" within the meaning of a statute providing that a tax deed shall not fail or be defeated by reason of any such illegality if no substantial injury was done to the owner by reason thereof; and substantial injury does not appear where it does not appear that exactly the same result would not have ensued if the lots had been sold separately. *Nichols v. Older* (1911) 78 N. J. Eq. 101, 78 Atl. 689.

But see *Yokham v. Hall* (1868) 15 Grant, Ch. (U. C.) 335, holding that if the treasurer had no right to unite

for the purposes of sale lots assessed separately, the defect was not cured by a statute the terms of which are not stated.

Sales in bulk of land assessed in parcels are cured by statutes of limitation applicable to tax sales or by statutes providing that the deed shall be conclusive evidence after a certain lapse of time that the sale was regular. *Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts)* (1899) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642, affirming (1897) 83 Fed. 436; *Thomas v. Stickle* (1871) 32 Iowa, 71; *Douglass v. Tullock* (1872) 34 Iowa, 262; *Bullis v. Marsh* (1881) 56 Iowa, 747, 2 N. W. 578, 6 N. W. 177; *Monk v. Corbin* (1882) 58 Iowa, 503, 12 N. W. 571; *Francis v. Grote* (1883) 14 Mo. App. 324.

#### *VII. Irregularities respecting purchaser.*

After the Statute of Limitations against actions to avoid tax deeds has run, it is held in Iowa that the objection cannot be raised that the sale was made to an officer forbidden by law to purchase. *Lawrence v. Hornick* (1890) 81 Iowa, 193, 46 N. W. 987; *Waggoner v. Mann* (1891) 83 Iowa, 17, 48 N. W. 1065.

But in Mississippi, it is held that as the chancery clerk could not legally become the purchaser at a tax sale because of his duties in respect to tax conveyances, the Statute of Limitations applicable to tax titles did not apply to a tax deed made by him. *Barker v. Jackson* (1907) 90 Miss. 621, 44 So. 34.

A "ring sale" (one at which the bidders agree to bid in turn, and not in competition with each other) is voidable only, and cannot be questioned after the lapse of five years from the completion of the sale. *Bullis v. Marsh* (1881) 56 Iowa, 747, 2 N. W. 578, 6 N. W. 177.

Where a bidder at a tax sale failed to comply with his bid, the act of the county treasurer in striking his name out of the certificate and inserting the county's name as purchaser, without again offering the land for sale, and then striking it off to the county for want of bidders, was cured by the

Statute of Limitations applicable to tax titles, and was not such fraud as prevented the statute from running. *Herbst v. Land & Loan Co.* (1908) 134 Wis. 502, 115 N. W. 119.

See also *Detroit F. & M. Ins. Co. v. Wood* (1898) 118 Mich. 31, 76 N. W. 136, where the statute required land to be offered a second time on a day subsequent to the day it was first offered before striking it off to the state, and it was claimed that it was struck off to the state on the first day of the sale, but it was held that such irregularity could not avail after confirmation of the sale by the court, whether or not a statute providing that no sale should be set aside after confirmation unless the taxes had been paid or the land was exempt was invalid as illegally restricting the equity powers of the court.

#### *VIII. Miscellaneous irregularities.*

An objection that a tax sale was continued from day to day and the land sold on a day subsequent to the first day, but certified by the treasurer as sold on the opening day, is an irregularity which cannot avail the owner where he waited eight years without asserting his title and was seeking the cancellation of the deed in the face of a statute providing that it should be conclusive evidence that the sale was conducted in the manner required by law and that all the prerequisites of the law with certain exceptions were complied with, especially where it was doubtful whether there was any irregularity. *Callanan v. Hurley* (1876) 93 U. S. 387, 23 L. ed. 931 (see also *Rose's Notes* to this case). The court referred approvingly to an Iowa case holding that under the statute a deed was conclusive evidence that the sale was made at the proper time and in the proper manner.

Where there was an illegal arrangement between certain public officers and bidders at a tax sale, by which the bidders were only to be required to pay at the time of the purchase the amount of the taxes due the state, and the sale was had under such arrangement, a statute subsequently passed declaring such sales valid was held

invalid and ineffective to cure such sale. *Conway v. Cable* (1865) 37 Ill. 82, 87 Am. Dec. 240. The court said: "It will be seen that the arrangement, at the time it was entered into, was illegal and without warrant of law. If, therefore, it has any validity, it must be by reason of this enactment. But few principles are better settled than that the legislature is powerless to divest, by enactment, an individual of a vested legal right. That laws, prospective in their character, enjoining the performance of an act, and declaring that its omission shall subject the person omitting the duty to a penalty, is clearly within the legislative power, is equally true. And that the legislature may pass a law authorizing sales for taxes, subsequently made, to be on credit, there can be no doubt. In such a case as the present, however, it seems to us, there can be no doubt that a citizen may permit his real estate to pass to sale for delinquent taxes, and rely upon the want of compliance with the law authorizing a sale. He, by the law then in force, incurred no forfeiture by permitting his lands to be struck off at a sale for taxes, not conducted according to law. The purchaser was bound to see that all of the essential requirements of the law had been performed before he could acquire any title at a tax sale. This proceeding, by which an individual is deprived of his property in a summary mode, and usually for but a trifling part of its value, has always been held to require a strict compliance with the provisions of the law authorizing the sale. No one can imagine that were a sheriff to sell real estate without a judgment or an execution, that the legislature could afterwards impose such a condition upon the owner before he could make a defense to a suit for the recovery of the land. To do so would be to transfer, by legislative enactment, the property of one person to another. We are unable to see any difference between an invalid sheriff's and an invalid tax sale. As well might the legislature attempt to impose conditions upon the assertion of title by a person who had executed a void deed,

when sued for the recovery of the land. Such legislation, under our form of government, has always been supposed to be unwarrantable, as being opposed to the principles of natural justice, and depriving persons of their property contrary to due course of law."

Where the county treasurer received written bids and, in the absence of any other bids, entered the land as sold without publicly crying the bid or publicly striking down the land as sold, there was a sale in fact and merely an irregularity in the manner of making the sale, and evidence of such facts could not be received to impeach the tax deed, it being conclusive as to the manner of making the sale under the Iowa statute. *Leavitt v. Watson* (1873) 37 Iowa, 93.

And where the sale was held at the proper time and place and in a public manner, the deed was conclusive that it was made in the manner provided by law, and could not be defeated by showing that it was irregular in that the deputy treasurer merely went through the list and checked off lands to a person who had previously told him he would purchase them. *Slocum v. Slocum* (1886) 70 Iowa, 259, 30 N. W. 562.

But, in connection with the cases just cited, see *Butler v. Delano* (1876) 42 Iowa, 350, *Thompson v. Ware* (1876) 43 Iowa, 455, and *Burdick v. Bingham* (1888) 38 Minn. 482, 38 N. W. 489, cited under III. *supra*.

It is competent for the legislature to make a tax deed conclusive evidence that a tax sale was held at the proper place, that the sale was for the taxes of the proper year, and that the sale was for a proper amount. *Larson v. Dickey* (1894) 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167.

Under the Iowa statute a tax deed is conclusive that the amount of the bid was paid forthwith as required by statute, this relating solely to the manner of conducting the sale. *Farmers' Loan & T. Co. v. Wall* (1906) 129 Iowa, 651, 106 N. W. 160.

But see *Horton v. Salling* (1909) 155 Mich. 502, 119 N. W. 912, where a sale for delinquent taxes seems to

have been held void, notwithstanding a statute providing that no sale should be set aside after confirmation except where the taxes had been paid, or the land was exempt, because the purchaser did not at the time of the purchase become the purchaser of the state's title, acquired under prior sales as required by statute. The court said that the curative act limited the general discretionary powers of courts of equity to set aside sales for inadequacy of price or irregularity, but did not affect the authority of the court to hear and determine the validity of decrees and sales, and that the sale being void, it might be so treated and the question raised in ejectment or by suit to quiet title.

If a sale is held at the proper time and place and all of the taxes are due and unpaid, any error in conducting the sale will not invalidate it, under a statute providing that no tax sale shall be invalidated except by proof that the land was not liable to sale or that the taxes for which it was sold had been paid before sale, or that the sale had been made at the wrong time or place. Therefore, it seems that a sale of one of two tracts jointly assessed for the proportionate part of the tax, the owner of the other tract having paid the part proportionate to his tract, is cured by such statute. *North v. Culpepper* (1910) 97 Miss. 730, 53 So. 419.

But where the sheriff offered first one and then another of a number of 40-acre tracts, without describing or designating in any way what tract he was offering, the sale was void, and was not cured by such a statute, or by a constitutional provision requiring the court to apply the same liberal principles in favor of tax titles as in sales by execution. The statute did not cure a total departure from the manner of sale prescribed by law, nor make immaterial the things which are fundamentally vital to a valid sale, nor did the constitutional provision cure a vital error of this kind. "To give the statute the construction contended for by appellee would sanction a tax sale at midnight." *Nelson v. Abernathy* (1896) 74 Miss. 164, 21 So. 150.

Where land was assessed as seated land, and was fixed with that character for the payment of county and school taxes, its sale as unseated land for nonpayment of a road tax was not cured by a statute providing that all sales of seated or unseated land for taxes should be held, deemed, and taken to be valid and effective, irrespective of the fact whether such lands were seated or unseated at the time of the assessment of such taxes. Such statute was merely intended to validate a sale, though the assessors in determining the status of the property made a mistake, and was not intended to cure the shifting of the land from its assessed class to the other class. *Pittsburg Hunting Club v. Snyder* (1912) 51 Pa. Super. Ct. 174.

See also the following cases:

—*Long v. Boast* (1907) 153 Ala. 428, 44 So. 955, where, though tax sales were "irregular and did not convey title to the land," it was held that the short Statute of Limitations, applicable to tax sales, set at rest all inquiry into the irregularity;

—*Williams v. Conroy* (1905) 35 Colo. 117, 83 Pac. 959, where the former owner's title was held extinguished by a statute providing that no action for the recovery of land sold for taxes should lie unless brought within five years after the execution and delivery of a deed, though the tax sale was void because of "informality in the sale;"

—*Jeffrey v. Brokaw* (1872) 35 Iowa, 505, where it was held that "mere irregularity" in the proceedings pertaining to a tax sale are cured by the statute making a deed conclusive evidence of compliance with the statute;

—*Phelps v. Meade* (1875) 41 Iowa, 470, holding that if there is in fact a bona fide sale, no matter how informal and irregular, the tax deed is conclusive evidence that it was done at the proper time and in the proper manner, this being merely directory, and not fundamental.

#### *IX. Validity and application as respects courts of equity.*

The legislature may prescribe rules of evidence for equity as well as for law courts and can give tax deeds conclusiveness in equity as well as at



law. And as the Iowa statute makes tax deeds conclusive in all controversies and suits in relation to the rights of purchasers of land sold for

taxes, it has such conclusive effect in equity as well as at law. *Clark v. Thompson* (1873) 37 Iowa, 536.

A. McT.

**RE TRANSFER TAX UPON THE ESTATE OF JOHN G. WENDEL,  
Deceased.**

**COMPTROLLER OF THE STATE OF NEW YORK, Appt.**

**REBECCA A. D. W. SWOPE et al., Admrs., etc., of John G. Wendel,  
Deceased, Respts.**

*New York Court of Appeals—May 28, 1918.*

(223 N. Y. 433, 119 N. E. 879.)

**Tax — transfer — exercise of power of appointment by deed.**

1. The exercise by deed of a power of appointment created by will is subject to transfer tax under a statute providing that whenever any person shall exercise a power of appointment it shall be deemed a taxable transfer.

[See note on this question beginning on page 183.]

— constitutionality — discrimination  
in operation.

2. A tax upon a transfer of property by exercise of a power of appoint-

ment, either by deed or will, is not unconstitutional because applicable only to such form of transfer.

**APPEAL** by the Comptroller from an order of the Appellate Division of the Supreme Court, Second Department, reversing an order of the Surrogate's Court for Westchester County, assessing a transfer tax upon the estate of John G. Wendel, deceased. *Reversed.*

Statement by Chase, J.:

The appraiser appointed pursuant to the petition therefor in the matter of the transfer tax upon the estate of John G. Wendel, deceased, omitted from his report of property subject to a transfer tax certain real property described in the will of John D. Wendel, deceased, of which said John G. Wendel had a power of appointment. The appraiser stated in his report that "as the power of appointment was exercised by the decedent by deed, and not by will, the transfer of this property, of the value of \$1,525,000, cannot be taxed in this proceeding."

Orders were entered upon said report fixing the tax. The comptroller appealed to the surrogate from said orders so far as the same failed to

include the real property transferred pursuant to said power of appointment. The surrogate remitted the report of the appraiser to him, to correct the same by including therein the value of the said real property as of the date of the transfer thereof by John G. Wendel by deed, less the value of the life estate of John G. Wendel on that day. The appraiser made his supplemental report accordingly. The value of said real property at the date of transfer was fixed at \$1,525,000, and the life estate of John G. Wendel was computed at \$350,149. An order was made fixing the transfer tax on the value of said real property, less the value of said life estate, at \$20,955.53. *Re Wendel*, 95 Misc. 406, 160 N. Y. Supp. 822. The sup-

plemental report of the appraiser and the order fixing the tax thereon was thereafter duly confirmed by the surrogate. The administrators of the goods, etc., of John G. Wendel, deceased, and his next of kin individually, appealed to the appellate division from said orders so far as they included a tax on said real property, and stated in the notice of appeal "that if the Tax Law of the state of New York is to be construed as subjecting the transfers herein specified, or any of them, to taxation, it is, to that extent, unconstitutional under the Constitution of the state of New York, and under the United States Constitution, in that it denies the appellants and each of them, or their respective predecessors in interest, the equal protection of the laws, and deprives them of their property without due process of law."

The appellate division unanimously reversed the orders of the surrogate so far as they fixed a tax on the value of said real property. *Re Wendel*, 181 App. Div. 126, 168 N. Y. Supp. 297. The comptroller appeals to this court from said order of reversal. Other facts, so far as material, are stated in the opinion.

Mr. Francis A. Winslow, for appellant:

The devolution of the property by the exercise by deed of the power of appointment is taxable.

*Re Keeney*, 194 N. Y. 281, 87 N. E. 428.

A provision in a statute for the taxation of transfers by deed, in the exercise of the power of appointment, does not violate any provisions of the Constitution of the state of New York or the Federal Constitution.

*Cooley, Statutory Limitations*, 6th ed. p. 587; *McCulloch v. Maryland*, 4 Wheat. 416, 428, 4 L. ed. 603, 606; *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *People ex rel. Eisman v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Re White*, 208 N. Y. 67, 46 L.R.A.(N.S.) 714, 101 N. E. 793, Ann. Cas. 1914D, 75; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; *Re Keeney*, 194 N. Y. 281, 87 N. E. 428,

222 U. S. 525, 533, 56 L. ed. 299, 304, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

The transfers involved herein were properly taxed upon the value at the time the power of appointment was exercised.

*Re Vanderbilt*, 172 N. Y. 69, 64 N. E. 782; *Re Howe*, 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed in 176 N. Y. 570, 68 N. E. 1118; *Re Burgess*, 204 N. Y. 265, 97 N. E. 591; *Re Smith*, 80 Misc. 140, 141 N. Y. Supp. 798; *Re Field*, 36 Misc. 279, 73 N. Y. Supp. 512; *Re Green*, 153 N. Y. 223, 47 N. E. 292; *Re Zborowski*, 213 N. Y. 109, 107 N. E. 44.

Messrs. Lewis L. Delafield, George Flint Warren, Jr., and Alfred Gregory, with Messrs. Thompson, Koss, & Warren, for respondents:

The tax imposed by the statute is an inheritance or succession tax, and since the deeds made by John G. Wendel on January 23, 1911, were present transfers, *inter vivos*, and were not made in contemplation of death, nor to take effect in possession or enjoyment upon the death of the grantor, the title of the grantees was not derived from succession or inheritance, and the transaction is not within the statute.

*Re Keeney*, 194 N. Y. 281, 87 N. E. 428, affirmed in 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; *Re Stewart*, 131 N. Y. 274, 14 L.R.A. 836, 30 N. E. 184; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *Re Pell*, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *Re Lansing*, 182 N. Y. 238, 74 N. E. 882; *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed in 163 N. Y. 597, 57 N. E. 1127; *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Re Fearing*, 200 N. Y. 340, 93 N. E. 556.

The deeds made by John G. Wendel in 1911 constituted a present transfer. The possession and enjoyment of the grantees were not postponed until his death.

*Re Delano*, 176 N. Y. 493, 64 L.R.A. 279, 68 N. E. 871.

If by the true construction of the statute the transfer here involved is subject to the tax, such statute is, to that extent, unconstitutional.

*People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101;

Re New York, 190 N. Y. 350, 16 L.R.A. (N.S.) 335, 83 N. E. 299, 13 Ann. Cas. 598; Re Keeney, 194 N. Y. 281, 87 N. E. 428; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 35 L.R.A. (N.S.) 1079, 94 N. E. 1065; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; Re Delano, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871.

Chase, J., delivered the opinion of the court:

John D. Wendel died in 1876, leaving his son, John G. Wendel, and six daughters, all of whom were living on January 23, 1911. John D. Wendel left a will which was duly probated. The only part thereof affecting the question now before us is the twenty-first paragraph thereof, which is as follows: "Twenty-first. To my son, John G. Wendel, I devise the southerly half of the block of ground lying between Broadway and Seventh avenue and Thirty-eighth and Thirty-ninth streets, that is to say, eighteen lots of land known by the ward map numbers of the city as . . . . To have and to hold the said eighteen lots of land for and during his life, the rents, issues and profits I devote expressly to his own use and benefit, and I authorize him to appoint the said real estate to and amongst his lawful issue, or to his sisters or their issue, in such share and for such estates and on such conditions as he may think fit, by deed or by will, and in case he shall leave no such valid appointment I devise the said lots of land to his lawful issue, and if he shall leave no such issue, then to his sisters, their heirs and assigns, in fee simple forever."

On January 23, 1911, said John G. Wendel, by six deeds theretofore duly executed by him, transferred the real property described in said paragraph of the will of his father to his sisters. Said conveyances resulted in conveying to them, but in different proportions and interests, the fee of all of said real property. Each of said deeds recited that it was executed and delivered pursuant to the power and authority con-

ferred by the will of John D. Wendel, deceased. On the delivery of said deeds all of said property passed out of the possession of John G. Wendel, and into the possession of his said sisters. It is further found "that the said deceased made no transfer of any property by deed, grant, bargain, sale, or gift in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of said deceased."

John G. Wendel lived thereafter for nearly four years, and died on the 30th of November, 1914.

It is conceded that under subdivision 6 of § 220 of the Tax Law, if John G. Wendel had by his will executed the power of appointment given to him by the will of his father, the transfer made by such appointment and devise would be taxable. The only question involved on this appeal is whether the transfer is taxable under the section of the Tax Law mentioned, in view of the fact that John G. Wendel transferred the same, together with his life estate therein, to his sisters during his lifetime, *by deed*, and not in contemplation of death. We must first inquire whether the statutes imposing the tax by their terms include a transfer *by deed* pursuant to a power of appointment.

The first act in this state imposing a tax upon the devolution of property was chapter 483 of the Laws of 1885, entitled "An Act to Tax Gifts, Legacies and Collateral Inheritances in Certain Cases." It made all property subject to a tax that should pass to certain persons "by will, or by the intestate laws of this state, from any person who may die seised or possessed of the same," as in the act provided. It also made subject to a tax all property "transferred by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor." It was intended that the tax should be on the transfer of property passing upon the death of the grantor or bargainor, or by the will of decedent, or the

intestate laws of the state. That act was several times amended, but the amendments did not extend the tax to a transfer of property other than one that passes upon a death, or in contemplation of death.

By chapter 399 of the Laws of 1892 the statutes relating to gifts, legacies, and collateral inheritances were repealed, and a new act was passed, entitled "An Act in Relation to Taxable Transfers of Property." The title of the new act was broader and more comprehensive than that of the one repealed. That act imposed a tax on the transfer of property, as therein provided, when the same is by will or by the intestate laws of this state, and also upon transfers as therein provided, "made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment, at or after such death." Such act related wholly to transfers arising or taking effect upon a death, or in contemplation of death. The act was rewritten in the General Tax Law of 1896 (chap. 908), and became article 10 of that act. The terms of the act, so far as it affects the question under consideration, were not materially changed from those of the Act of 1892.

In 1897 (Laws 1897, chap. 284) § 220 of the Tax Law was amended, and by such amendment subdivision 5 thereof was added and included the provisions of subdivision 6 of that section as hereinafter quoted. The Tax Law was again rewritten in 1909, and it then became chapter 60 of the Consolidated Laws. Article 10 thereof relates to taxable transfers. Section 220 of that act was rewritten by an amendment in 1910 (chap. 706), and as then rewritten it existed at the time of the transfers by deed under consideration. That section provides: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal . . . or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by

law from taxation on real or personal property, in the following cases."

Following the part of the section quoted there are seven subdivisions. The 1st and 2d refer expressly to transfers "by will or by the intestate laws of this state." The 3d refers to property transferred by will. The 4th refers to transfers "by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death." The 5th refers to "any such transfer, whether made before or after the passage of this chapter."

The 6th is as follows: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

The 7th is not now material. It will be observed that the 6th subdivision is not limited to a particular form of transfer. It provides in clear terms that, whenever *any person or corporation* shall exercise a power of appointment derived from *any* disposition of property, the appointment shall be deemed a transfer taxable under the provisions of the chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will. The latter part of the subdivision quoted defines generally the intention of the legislature in prescribing in what manner the property shall be taxed. The subdivision by its terms provides for a tax upon *any transfer based upon a power of appointment*. It includes a corporation as a pos-

sible grantor under a power, as was necessary if every exercise of power was intended to be included. Certain corporations are given power to act in a trust capacity, and the exercise of such power is common.

A corporation does not die or have testamentary capacity in the sense intended in the statute. By the statute a transfer is taxable when made *by deed* in contemplation of death, even if intended to take effect at once, and without waiting until the death of the grantor before reducing the property transferred to possession. The section of the statute considers transfers by will and by deed. The language of the 6th subdivision of the statute was not inadvertent, but was written while the different forms of transfers were under consideration. The general language of the 6th subdivision should be construed in accordance with its ordinary meaning. It would seem that the legislature intended that an exercise of the power of appointment, as provided by said subdivision 6, should be taxed whether it is made by a person or corporation, and whether accom-

Tax—transfer—  
exercise of  
power of  
appointment  
by deed.

plished by deed or  
will duly authorized.  
The statutes prior  
to 1897 relate ex-  
clusively to trans-

ferees by succession or inheritance, or made in contemplation of death, but the amendment of that year extended their scope.

The statute does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The act, so far as it relates to the power of appointment, is constitutional when the power is exercised by will, even though the transfer would not be subject to a tax

—constitution-  
ality—  
discrimination  
in operation.

under the act, except for the exercise of the power of appointment. *Re Delano*, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp.

1079, affirmed in 163 N. Y. 597, 57 N. E. 1127; *Re Brez*, 172 N. Y. 609, 64 N. E. 958; *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Re Keeney*, 194 N. Y. 281, 87 N. E. 428; *Keeney v. Comptroller*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105.

The title to the property in the deed from the decedent to his sisters came from the decedent's father, but the grantees in the deed from decedent obtained their title there-to through his deed to them and the exercise of the power of appointment given by the will of his father. The power of appointment was a privilege vested in the decedent by a testamentary provision, not for his own benefit or advantage, but for the benefit and advantage of those within the terms of his father's will whom he might choose as the beneficiaries of the appointment. The constitutional power to impose a tax upon a transfer, pursuant to a privilege of appointment, is not dependent upon a particular manner of exercising the privilege. The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. *Cooley, Statutory Limitations*, 6th ed. p. 587. Taxation should not be excessive nor unnecessarily arbitrary. There are no other limitations upon its exercise except that due process of law must be observed. In *Re McPherson*, 104 N. Y. 306, 317, 58 Am. Rep. 502, 10 N. E. 685, this court, when considering the constitutionality of the Act of 1885, said that "it has never been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers."

In *People ex rel. Eisman v. Ronner*, 185 N. Y. 285, 291, 77 N. E.

1063, this court, when considering the Mortgage Tax Law, said: "There is no constitutional guaranty that taxation shall be just and equal, though underlying this great governmental power, and implied from the nature of our political institutions, is the principle that taxation shall be equal, in the sense that it shall not be arbitrary, and that there shall be no discrimination against persons, by laying greater burdens upon one than are laid upon others in the same calling or condition."

In *People ex rel. Hatch v. Rear-don*, 184 N. Y. 431, 443, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 973, 6 Ann. Cas. 515, this court, when considering the stamp tax, said: "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity, or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation."

In *Re Keeney*, 194 N. Y. 281, 285, 87 N. E. 429, this court, when considering the transfer tax, said: "It is not an inheritance or succession tax, but it is not necessary that it should be such to support the statute imposing it."

In the same case, on appeal to the United States Supreme Court (*Keeney v. Comptroller*, 222 U. S. 525, 533, 56 L. ed. 299, 304, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105, 106), that court said: "But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers inter vivos. The first, they say, is an excise, imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. . . . But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial

and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed, to take effect at death, have frequently been classed with death duties, legacy, and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments, where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever. . . . The 14th Amendment does not diminish the taxing power of the state, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection."

The respondents, the decedent's sisters, acquired their title by the exercise of the power of appointment given to their brother. It was not, however, a sale by John G. Wendel of his property (except so far as it included his life estate). It was not the exercise of a mere property right. We repeat that the exercise of the power of appointment was a privilege. The privilege was voluntarily given, and it was voluntarily exercised. The statute is not discriminatory in imposing a tax upon the transfers made by Wendel. The tax is imposed upon every person exercising a similar privilege. The fact that it is the same tax imposed by the exercise of a similar privilege through a testamentary provision shows that it is not arbitrary, beyond a degree that taxes are always arbitrary in the means or property by or upon which they are imposed. There is no prohibition against taxing the

privilege of exercising a power of appointment.

We conclude that it was the intention of the legislature to impose a tax upon all transfers by authority of a power of appointment given by deed or will, and that a tax upon a transfer by virtue of such a power of appointment is not so arbitrary as to be without reason, or to defeat

the judgment and direction of the legislature.

The order of the Appellate Division should be reversed, and that of the Surrogate's Court affirmed, with costs in both courts.

Hiscock, Ch. J., and Collin, Cuddeback, Hogan, Cardozo, and McLaughlin, JJ., concur.

## ANNOTATION.

### Succession tax on property appointed by deed under power of appointment.

Whether property appointed by deed by the donee of a power of appointment is subject to the inheritance or succession tax is dependent largely upon the taxing statute. Under the New York statute set out in the reported case (*RE WENDEL*, ante, 177), it was held in that case that the property is taxable.

Money received under a power given by will to a trustee to appoint the residuary estate to any of certain persons was held to be taxable under the New York Inheritance Tax Law of 1885, imposing a tax upon all property which would pass by will or by the Intestate Law from any person who might die seized or possessed of the same to all but certain excepted persons, in trust or otherwise, or by reason whereof any but the excepted persons should become beneficially entitled in possession or expectancy to any property or the income thereof. *Re Stewart* (1892) 131 N. Y. 274, 14 L.R.A. 836, 30 N. E. 184.

Property taken by a contingent remainderman in fee simple under a deed executed in pursuance of a power of appointment was held not taxable in *Atty. Gen. v. Selborne* (1902) 85 L. T. N. S. (Eng.) 714. The English act under which this case was decided provides that, when the title to a succession is accelerated by the surrender or extinction of any prior interest, the succession duty shall be payable thereon at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place. It was urged in this case that there was an acceleration

within the meaning of this section of the statute when, in pursuance of the power of appointment, the life estate was terminated and the property appointed to the remainderman in fee simple. In denying this contention, Collins, M. R., states that immediately upon the execution of a power of appointment the remainder estate, limited in default of the appointment, ceased and was defeated, and the estates limited under the power took effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power. "The execution of the power, therefore, could not have the effect of accelerating the succession created by the settlement of 1883 [the original settlement], since its effect was to annul and defeat that succession altogether, and substitute for it the estate created by the execution of the power. Lord Wolmer [the remainderman] did not take the fee as upon an acceleration of the estate conferred by the settlement, but by a new title under the appointment. For the same reason there was no acceleration by virtue of the surrender or extinction of any prior interest. The execution of the power no doubt extinguished the life interest of the first Lord Selborne under the settlement. But it equally extinguished the succession under that disposition, and the estate given to Lord Wolmer by the execution of the power was not only an estate given by a different title, viz., under the power, and not under the settlement in default of appointment, but was also in itself a different

interest; for whereas, under the settlement Lord Wolmer took only a fee, subject to defeasance on his predeceasing his father, and with certain limitations over to his children in that event, he took under the appointment an absolute fee simple."

But in *Ex parte Sitwell* (1888) L. R. 21 Q. B. Div. (Eng.) 466, 59 L. T. N. S. 539, 37 Week. Rep. 238, sums advanced by trustees of a marriage settlement in pursuance of deeds of appointment authorized by the terms of the settlement were held subject to the succession tax under this statute. The court held that by the advancement of sums under deeds of appointment there had been an acceleration within the meaning of this section, and the sums thereof were subject to the tax.

Under the Statute of 45 Geo. III. chap. 28, § 4, which makes a gift of money charged on lands liable to the payment of legacy duties, an annuity charged upon land by a deed poll in favor of a wife, for her jointure and in bar of her dower, is held to be taxable upon the death of the husband. *Sweeting v. Sweeting* (1853) 17 Jur. (Eng.) 123, 22 L. J. Ch. N. S. 441, 1 Week. Rep. 122. The power of appointment in this case was a special one, authorizing the appointment of the remainder estate to the use of the child or children of the donee of the power, and also authorized an appointment in favor of a woman whom the donee might marry, for her jointure and in bar of dower. It was urged from the fact that the power was special, and not general, that the legacy was not taxable. This argument, however, was disallowed, the court stating that there is no force in the argument, nor any distinction between a special and general power upon the question before the court. It was further held in this case that the gift must be regarded as a gift to a stranger in blood to the testator, and liable to the full amount of duty payable in such cases.

Those to whom property was appointed by a deed by the donee of a general power of appointment were held liable to pay a succession tax, al-

though a legacy duty had been paid on the whole residuary personal estate of the donor of the power, in *Atty. Gen. v. Mitchell* (1881) L. R. 6 Q. B. Div. (Eng.) 548. The Succession Duty Act of 1853 (16 & 17 Vict. chap. 51) § 2, provides that "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act to any other person in possession or expectancy shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession,' and the term 'successor' shall denote the person so entitled and the term 'predecessor' shall denote the settlor, disposer, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived." A subsequent section of this act provided that no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Act, in respect to any property subject to such duties, shall be charged also with the duty granted by the Succession Duty Act, in respect to the same acquisition of the same property. The legacy duty paid by the creator of the power of appointment was held to have been paid in respect of different persons, and therefore its payment was held not to bar a payment of the tax under the Succession Duty Act.

In *Atty. Gen. v. Staff* (1833) 2 Crompt. & M. 124, 149 Eng. Reprint, 700, 4 Tyrw. 14, 3 L. J. Exch. N. S. 6, property bequeathed in trust, with power of appointment to the daughter of the testator, was held subject to a probate duty upon her death, where she had exercised the power of ap-



pointment shortly after the death of testator, by deed appointing the property to herself and another person

subject to a new power of appointment in herself, which she exercised by will. W. A. E.

**RHODE ISLAND HOSPITAL TRUST COMPANY, Exr., etc., of William H. Bridgham, Deceased,**

v.

**SAMUEL W. BRIDGHAM et al.**

*Rhode Island Supreme Court—March 28, 1919.*

(— R. I. —, 106 Atl. 149.)

**Will — issue as children.**

1. The word "issue" in a bequest to one and his issue is not, as a rule, limited to children, but extends to descendants generally, unless that interpretation is controlled by the context.

[See note on this question beginning on page 195.]

**— construction — point of view.**

2. In construing a will, the court should bear in mind the circumstances under which it was made, so as to look at it, as far as possible, from the testator's point of view.

**Definition — issue.**

3. The word "issue" used in a will as a word of limitation is equivalent, not to heirs, but to heirs of the body, which import not a fee simple, but a fee tail.

[See 24 R. C. L. 904; see annotation 2 A.L.R. 930.]

**Will — bequest to issue — purchase.**

4. In a bequest of personalty to one and his issue, the word "issue" is more readily construed as a word of purchase than it is in a devise of real estate.

[See 24 R. C. L. 904.]

**— estate of first taker.**

5. A bequest to one and his issue does not constitute an absolute gift to the first taker.

**— limitation of estate.**

6. A gift by will to one and his issue cannot be construed as a limitation, giving the first taker an estate tail in the real estate and an absolute estate in the personalty.

[See 10 R. C. L. 658.]

**— construction of language — fee tail.**

7. Language which, in a devise of real estate, will create an estate tail, will generally give an absolute estate if the property is personalty.

[See 10 R. C. L. 657.]

**— cutting down fee simple.**

8. An estate in fee simple is not to

be cut down in the construction of a will, to a lesser estate, by subsequent ambiguous words, unless the will shows a clear intention in the testator to do so.

**— issue as word of purchase.**

9. The word "issue" in a bequest to one and his issue should be regarded as a word of purchase, so as to vest an interest in the issue.

[See 24 R. C. L. 904.]

**— distribution by representation.**

10. Under a devise to one and his issue, the word "issue" will ordinarily be held to import representation, and will not require distribution per capita among all descendants whether they have living parents or not.

[See 9 R. C. L. 30, 31; see annotation 2 A.L.R. 963.]

**— statutory construction.**

11. A statute providing for interpretation of the word "issue," in case of a devise to one for life with remainder to his issue, does not control in case of a devise to one and his issue.

[See 17 R. C. L. 622.]

**— method of distribution.**

12. In case of a bequest to one for life, and after his death to testator's brother and his issue, the remainder passes to the brother and his issue living at death of the life tenant, and if the brother is dead at that time the estate passes to his descendants per stirpes.

[See 9 R. C. L. 30, 31; see annotation 2 A.L.R. 963.]

**CERTIFICATION** by the Superior Court for Providence and Bristol Counties for determination by the Supreme Court of a bill filed for the construction of the will of William H. Bridgham, deceased, and for instructions to complainant as executor of said will. *Executor instructed, and decree ordered.*

The facts are stated in the opinion of the court.

Messrs. Tillinghast & Collins and Edward A. Stockwell for complainant.

Mr. Thomas A. Jenckes, for respondent Ida F. Bridgham:

The court are to put themselves in the situation of the testator with reference to the property and the relative claims of his family, the relations subsisting between him and them, and the circumstances which surrounded him.

*Perry v. Hunter*, 2 R. I. 80; Boardman's Petition, 16 R. I. 131, 13 Atl. 94.

It is fundamental in the construction of wills to ascertain and give effect to the intention of the testator as gathered from the whole will.

*Frelinghuysen v. New York L. Ins. & T. Co.* 31 R. I. 150, 77 Atl. 98, Ann. Cas. 1912B, 237; 30 Am. & Eng. Enc. Law, 664, 665.

It was the intent of the testator, as gathered from the whole will and in the light of the circumstances surrounding the testator at the time of the execution of the will, to give to his brother Joseph the residue of his estate "in fee simple absolutely and forever."

*Parkin v. Knight*, 15 Sim. 83, 60 Eng. Reprint, 548, 15 L. J. Ch. N. S. 209, 10 Jur. 23.

The word "issue" should be construed to mean children.

4 Kent, Com. 278; 2 Redf. Wills, 37, 38, note 5; Ralph v. Carrick, L. R. 11 Ch. Div. 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505; *Union Safe Deposit & T. Co. v. Dudley*, 104 Me. 297, 72 Atl. 166; *Soper v. Brown*, 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; *Palmer v. Horn*, 84 N. Y. 516; *Drake v. Drake*, 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114; *Chwatal v. Schreiner*, 148 N. Y. 683, 43 N. E. 166; *Wright v. Mercein*, 34 Misc. 414, 69 N. Y. Supp. 936; *Emmet v. Emmet*, 67 App. Div. 183, 73 N. Y. Supp. 614; *Barstow v. Goodwin*, 2 Bradf. 413.

The word "issue" in the present case should be restricted to descendants taking by right of representation.

*Jackson v. Jackson*, 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112; *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311; *Union Safe Deposit & T. Co. v. Dudley*, 104 Me. 297, 72 Atl.

166; *Coyle v. Coyle*, 73 N. J. Eq. 528, 68 Atl. 224.

The word "issue," as used only in the will, would, in the case of realty, create an estate tail, and "language which, in a devise of realty, would create an estate tail, will, if the property be personally, give an absolute estate."

*Bailey v. Hawkins*, 18 R. I. 573, 27 Atl. 512; *Hartwell v. Tefft*, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; *Re Tillinghast*, 25 R. I. 338, 55 Atl. 879; 2 Jarman, Wills, 6th ed. 1930.

The meaning of the word "children" in a will should not be extended by construction so as to include grandchildren.

*Williams v. Knight*, 18 R. I. 333, 27 Atl. 210; *Tillinghast v. D'Wolf*, 8 R. I. 69; *Re Reynolds*, 20 R. I. 429, 39 Atl. 896; *Winsor v. Odd Fellows' Beneficial Asso.* 13 R. I. 149; *Tiffany v. Emmet*, 24 R. I. 411, 53 Atl. 281; *Eddy v. Mathewson*, 32 R. I. 53, 78 Atl. 506.

The gift in the present case is not a gift to a class.

*Hazard v. Stevens*, 36 R. I. 90, 88 Atl. 980; *Church v. Church*, 15 R. I. 138, 23 Atl. 302.

A gift to issue means per stirpes, and not per capita, and the issue do not compete or take concurrently with their living parent upon distribution.

*Sanger v. Bourke*, 209 Mass. 481, 95 N. E. 894; *Silsbee v. Silsbee*, 211 Mass. 105, 97 N. E. 758; *Manning v. Manning*, 229 Mass. 527, 118 N. E. 676; *Re Farmers' Loan & T. Co.* 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551; *Ross v. Ross*, 20 Beav. 645, 52 Eng. Reprint, 753; *Robinson v. Sykes*, 23 Beav. 40, 53 Eng. Reprint 16, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895; *Re Orton*, L. R. 3 Eq. 376, 36 L. J. Ch. N. S. 279, 16 L. T. N. S. 146, 15 Week. Rep. 251.

Messrs. Samuel W. Bridgham and Everard Appleton also for respondent Ida F. Bridgham.

Mr. Livingston Ham, for other respondents:

"Issue," as used in the will, is a word of purchase.

*Leake, Property in Land*, 137; 2 Jarman, Wills, 6th Eng. ed. 1930; *Mills v. Seward*, 1 Johns. & H. 733, 70 Eng. Re-

print, 938, 7 Jur. N. S. 654; 1 Schouler, Wills, § 554; Nes v. Ramsay, 155 Pa. 628, 26 Atl. 770; Manchester v. Durfee, 5 R. I. 549; Lees v. Mosley, 1 Younge & C. Exch. 589, 160 Eng. Reprint, 241, 5 L. J. Exch. Eq. N. S. 78, 25 Eng. Rul. Cas. 643; Slater v. Dangerfield, 15 Mees. & W. 263, 16 L. J. Exch. N. S. 139, 10 Eng. Rul. Cas. 759; Re Wilmot, 76 L. T. N. S. 415, 45 Week. Rep. 492; Powell v. Domestic Missions, 49 Pa. 46; Watson v. Woods, 3 R. I. 226; Bailey v. Hawkins, 18 R. I. 573, 27 Atl. 512, 29 Atl. 65; Gammell v. Ernst, 19 R. I. 292, 33 Atl. 222; Hamilton v. West, Jr. L. R. 10 C. L. 75; Morgan v. Thomas, L. R. 9 Q. B. Div. 643, 51 L. J. Q. B. N. S. 556, 47 L. T. N. S. 281, 31 Week. Rep. 106; Gaboury v. McGovern, 74 Ga. 133.

"Issue," as a word of purchase, does not include the whole line of descent, unborn as well as born.

Bullock v. Waterman Street Baptist Soc. 5 R. I. 273; Burges v. Thompson, 13 R. I. 712; Williams v. Angell, 7 R. I. 145; Pearce v. Rickard, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38; Hartwell v. Tefft, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; Luttgen v. Tiffany, 37 R. I. 416, 93 Atl. 182.

"Issue" is more readily construed as a word of purchase when the subject-matter is personality.

2 Jarman, Wills, 1930; Ex parte Wynch, 5 De G. M. & G. 188, 43 Eng. Reprint, 842, 23 L. J. Ch. N. S. 930, 18 Jur. 659; Law v. Thorp, 27 L. J. Ch. N. S. 649, 4 Jur. N. S. 447, 6 Week. Rep. 480; Re Coulden [1908] 1 Ch. 320, 77 L. J. Ch. N. S. 209, 98 L. T. N. S. 389, 52 Sol. Jo. 172; Clay v. Pennington, 7 Sim. 370, 58 Eng. Reprint, 879, 6 L. J. Ch. N. S. 183; Hawkins, Wills, 242; Re Pennock, 11 Phila. 623; Burges v. Thompson, 13 R. I. 712; Taylor v. Lindsay, 14 R. I. 518; Forth v. Chapman, 1 P. Wms. 663, 24 Eng. Reprint, 559; Whitford v. Armstrong, 9 R. I. 394; Herrick v. Franklin, L. R. 6 Eq. 593, 37 L. J. Ch. N. S. 908.

Where there is nothing in the context to restrain its meaning, issue includes all the living descendants, taking equally as between themselves, though of unequal degree.

Pearce v. Rickard, 18 R. I. 242, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38; Hawkins, Wills, 117; 2 Jarman, Wills, 1590; Leake, Property in Land, 141; Watson v. Woods, 3 R. I. 226; Lywood v. Kimber, 30 L. J. Ch. N. S. 507, 29 Beav. 38, 54 Eng. Reprint, 539, 7 Jur. N. S. 507, 9 Week. Rep. 88; Clay

v. Pennington, 7 Sim. 370, 58 Eng. Reprint, 879, 6 L. J. Ch. N. S. 183; Inglis v. McCook, 68 N. J. Eq. 27, 59 Atl. 630; Security Trust Co. v. Lovett, 78 N. J. Eq. 445, 79 Atl. 616; Phelps v. Cameron, 109 App. Div. 798, 96 N. Y. Supp. 1014; Jay v. Lee, 41 Misc. 13, 83 N. Y. Supp. 579; Bassett v. Wells, 56 Misc. 81, 106 N. Y. Supp. 1068; Re Bauerdorf, 77 Misc. 655, 138 N. Y. Supp. 682; Soper v. Brown, 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; Schmidt v. Jewett, 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110; Gest v. Way, 2 Whart. 445; Corbett v. Laurens, 26 S. C. Eq. (5 Rich.) 301; Barksdale v. Macbeth, 28 S. C. Eq. (7 Rich.) 125; Ridley v. McPherson, 100 Tenn. 402.

Where the gift is to a class of persons who, either by the terms by which they are described or by their natural relation to each other, form a group of objects, the gift will be understood as made to those of the class who are in being when the gift becomes operative, unless an intention to give a fixed fractional part to each individual can be found.

1 Jarman, Wills, 6th Eng. ed. 336, 431, 432; 40 Cyc. 1473; Hazard v. Stevens, 36 R. I. 90, 88 Atl. 980; Kingsbury v. Walter [1901] A. C. 187, 7 B. R. C. 775, 70 L. J. Ch. N. S. 546, 84 L. T. N. S. 697; Boston Safe Deposit & T. Co. v. Reed, 229 Mass. 267, 118 N. E. 333; M'Kay v. M'Kay [1900] 1 Ir. R. 213; Morse v. Church, 15 R. I. 336, 5 Atl. 501; Re Wilmot, 76 L. T. N. S. 415, 45 Week. Rep. 492; Re Phillips, 25 R. I. 254, 55 Atl. 696; Chase v. Peckham, 17 R. I. 385, 22 Atl. 285; Swallow v. Swallow, 166 Mass. 241, 44 N. E. 132; Perry v. Brown, 34 R. I. 203, 83 Atl. 8; Meserve v. Haak, 191 Mass. 220, 77 N. E. 377; Records v. Fields, 155 Mo. 314, 55 S. W. 1021; Greene v. Rathbun, 32 R. I. 145, 78 Atl. 528.

Sweetland, J., delivered the opinion of the court:

The above-entitled cause is a bill in equity asking for a construction of certain provisions of the will of William H. Bridgham, late of East Providence, deceased, and for instructions to the complainant, as executor of said will. Said cause, being ready for hearing for final decree, has been, in accordance with the statute, certified by the superior court of this court for determination.

Said will was executed April 28, 1906. The testator died July 29, 1916. Said will was duly admitted to probate in the town of East Providence. By the first article of the will the testator provides for the place of his burial; by the second and third articles the testator makes two pecuniary legacies; the fourth article contains the provision as to which construction is sought and direction is requested by the complainant; and in the fifth and concluding article the testator appoints the complainant executor of the will and revokes all other and former wills by him made. Said fourth article is as follows:

"Article fourth. All the rest, residue, and remainder of my estate of every whatsoever, real, personal, and mixed, I give, devise, and bequeath to the Rhode Island Hospital Trust Company, in trust, nevertheless, to collect and receive the rents and profits, interest and income thereof, and to pay over and apply the same to the use of my wife, Honorine G. Bridgham, during and for the term of her natural life, and upon her death, I give, devise, and bequeath all such rest, residue, and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham, and his issue.

"This disposition of my residuary estate to my brother Joseph Bridgham and his issue is made because my brother Samuel W. Bridgham has an ample estate of his own."

By the allegations of the bill, which are admitted by the respondents, it appears that the testator's wife, Honorine G. Bridgham, and the testator's brother, Joseph Bridgham, died during the testator's lifetime, and that "all of the property which is the subject-matter of this bill is personal property, and is either personal property of which said William H. Bridgham was possessed at the time of his death, or the proceeds or accumulations of such personal property, and that none of said property is the proceeds of real es-

tate of which the said William H. Bridgham died seised."

The complainant seeks the direction of the court "as to its duties as executor under the circumstances set forth, and particularly as to which and how many of the respondents are entitled to share in the distribution of the residue of said estate under the provisions of said fourth article, and as to in what proportions such respondents are entitled to share such residue." The respondents are Samuel W. Bridgham, Ida F. Bridgham, and Eliza H. Appleton, children of Joseph Bridgham, Frances M. Bridgham, Samuel W. Bridgham, Jr., and Jesse C. F. Bridgham, grandchildren of Joseph Bridgham and children of the respondent Samuel W. Bridgham. These three children and three grandchildren constitute all of the descendants of Joseph Bridgham. They were all alive at the time of the execution of said will except the last-named grandchild, Jesse C. F. Bridgham, who was born May 4, 1908, eight years before the death of the testator. All of said children are of full age. Said grandchildren are minors, and are represented before us by a guardian ad litem.

The three respondents first named, the children of Joseph Bridgham, in their answer and before us, claimed that they are exclusively entitled to one third each of said estate in the distribution of the residue. It is claimed before us by the guardian ad litem in behalf of the infant respondents that each of said infant respondents, as one of the issue of Joseph Bridgham, living at the time of the death of the testator's wife, is entitled to either one sixth or one seventh of the residuary estate to be distributed.

The portion of the fourth article with reference to which construction is sought is that in which the testator provides for the disposition of his residuary estate after the death of his wife. The language of the provision is as follows: "And upon

her death, I give, devise, and bequeath all such rest, residue, and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham, and his issue."

As to this provision the adult respondents, children of Joseph Bridgham, suggest to the court three possible constructions, either of which, if adopted by us, will support their claim to the entire residue of the estate. These claims are: First, that said provision should be held to constitute a devise in fee simple to Joseph of the testator's real estate and an absolute bequest to Joseph of the testator's personal estate, and that said bequest of personalty did not lapse by reason of the death of Joseph in the lifetime of the testator, but took effect and operated as a bequest to said three respondents in accordance with the provision of chapter 254, § 31, Gen. Laws 1909; second, that the words, "and his issue," may be construed as words of limitation, giving to Joseph a fee tail in the testator's real estate and an absolute gift of the personal estate, in accordance with the rule that language, which in a devise of realty would create an estate tail, will, if the property be personalty, give an absolute estate; and, third, if the word "issue" shall be regarded as a word of purchase, and not of limitation, it should be construed to mean "children," and not descendants generally. And if the gift to Joseph and his issue should be held to constitute a bequest to a class, of which Joseph was one member, then said children would take the whole of said residue as the members of such class surviving at the time of the death of the testator's wife; or, if the bequest should be held to be a gift to Joseph and his issue as individuals, then each of said children would take one fourth of said estate under the provisions of the will, and the one-fourth share bequeathed to Joseph would fall to said children under chapter 254, § 31, Gen. Laws 1909, *supra*, which provides that certain legacies shall not lapse. And said respondents further urge that,

whether the word "issue" be interpreted as meaning "children," or as meaning "descendants," said adult respondents should take by right of representation to the exclusion of the other respondents, the remoter issue of Joseph. Said respondents have not explicitly formulated all of said claims, but those which we have named appear to be fairly deducible from the argument and brief of their counsel, and seem to us to state the limit and extent of their contention made before us. We will consider these claims in the order in which we have stated them.

As to all of said claims the adult respondents urge upon us the generally accepted doctrine that "it is the duty of a court in construing a will to bear in mind the circumstances under which it was made, so as to look at it, as far as possible, from the testator's point of view." Boardman's Petition, 16 R. I. 181, 13 Atl. 94.

Will—construction—point of view.

And the respondents quote in their brief the first portion of the following language of this court in *Perry v. Hunter*, 2 R. I. 80: "In construing a will, we admit the rule that the court are to put themselves in the situation of the testator with reference to the property and the relative claims of his family, the relations subsisting between him and them, and the circumstances which surrounded him. But this rule is intended to aid in the construction of the will, where the provisions are doubtful or may admit of more than one interpretation, but not to control the plain meaning of the language of the will. Where this language is clear and explicit, it must prevail."

The only information which we have as to the circumstances surrounding the testator at the time of making said will is that afforded by the will itself, and the undisputed facts alleged in the bill or agreed to by the parties. From those sources it appears that the testator married somewhat late in life; that previous to his marriage he resided at the

Bridgham farm in East Providence, sharing and occupying with his brother, Samuel W. Bridgham, a house on said farm; that the testator's brother Joseph, with his family, occupied another house on said farm; that the respondent Samuel W. Bridgham, son of Joseph, with his family, also occupied a house on said farm; that these residences were in close proximity to each other; that said testator was on terms of greatest intimacy with his brother Joseph and his children, and was well aware of the existence of the infant respondents, Frances M. Bridgham and Samuel W. Bridgham, Jr.; that shortly before the execution of said will the testator married, and soon after its execution he went abroad with his wife, and did not thereafter reside on said Bridgham farm; that the respondent, Ida F. Bridgham, at the time of the making of said will, was unmarried, and is now unmarried; that the respondent, Eliza H. Appleton, was at the time of the making of the will unmarried, and is now married, but without issue; that the infant respondent Jesse C. F. Bridgham was born May 4, 1908, after the execution of said will.

If by reason of ambiguity in the language of the will we were justified in seeking intrinsic aid as to its construction, we would find nothing in the facts recited above which would throw light upon the intention of the testator with regard to the provision under consideration.

As to the first claim of the adult respondents that the provision in question may be construed as a devise in fee simple to Joseph of the testator's entire real estate and an absolute bequest to Joseph of all the testator's personal estate, these respondents urge that such intent may be found in an examination of the whole will and in the circumstances surrounding the testator. We have already pointed out that the testator's circumstances fail to furnish the basis for even a conjecture as to his intention, and the only general intent to be found in the will

is the wish to give the income of his residuary estate to his wife during her life, and upon her death to make an absolute gift of said estate, the meaning of which latter provision we are now seeking to determine. These respondents further urge that the concluding sentence of the fourth article indicates the testator's intention to give the residue, after the death of his wife, to Joseph absolutely. The apparent purpose of that sentence is to explain the testator's reason for making no gift to his brother Samuel, and its language affords no assistance in the determination of the nature of the gift to Joseph, unless by the repetition of the words, "and his issue," it should be regarded as furnishing some indication that those words were used by the testator as words of purchase in the gift "to my brother, Joseph Bridgham, and his issue." This first position of said respondents requires us either to ignore the words, "and his issue," or to treat them as superadded words of limitation. They should not be disregarded. They must be taken either as words of purchase or as words of limitation. The testator has specifically made an absolute gift in fee simple. To support a claim that the words, "and his issue," are used merely as superadded words of limitation after the devise in fee simple, they must be construed as equivalent to the expression, "and his heirs;" but the word "issue," used in a will as a word of limitation, is not equivalent to "heirs," but to "heirs of the body," which im-  
**Definition—issue.**  
port, not a fee simple, but a fee tail. Such construction would lead to the ambiguity of a gift in fee simple to be held in fee tail, which ambiguity is avoided if said  
**Will—bequest to issue—purchase.**  
words are treated as words of purchase. In a bequest of personalty the word "issue" is more readily construed as a word of purchase than it is in a devise of realty.

"In gifts of personalty the tend-

ency seems to be to treat 'issue' as a word of purchase rather than a word of limitation." 2 Jarman, Wills, 1930n(h).

"The construction by which a devise of real estate to A. and his issue is held to give A. an estate tail effectuates the intention as far as possible, while to hold that a bequest of personal property to A. and his issue gives A. an absolute interest defeats the intention, because the issue takes nothing." 2 Jarman, Wills, 1199.

The second position of said adult respondents is equally untenable.

The rule that language, which in a devise of realty would create an estate tail, will, if the property be personalty, give an absolute estate, although not always followed by the courts, may be considered as a generally accepted rule in the construction of wills. Such rule has been recognized by this court. *Bailey v. Hawkins*, 18 R. I. 573, at page 584, 27 Atl. 512, 29 Atl. 65; *Hartwell v. Tefft*, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; *Re Tillinghast*, 25 R. I. 338, 55 Atl. 879. In the will before us the testator has in terms coupled a disposition of both real and personal estate, although at the time of his death he was possessed of personalty only. In the consideration of this suggestion of the adult respondents, it is necessary to examine the language devising the realty and determine if it would create an estate tail; for that is the condition upon which depends the application of the rule invoked. The testator in terms provides for the creation of an estate "in fee simple, absolutely and forever." This language, considered alone, undoubtedly created a fee-simple estate. Does the addition of the words, "and his issue," change such devise to a fee tail? It is a fundamental principle of construction that an estate in fee

simple is not to be cut down to a lesser estate by subsequent ambiguous words, unless the will shows a <sup>—cutting down fee simple.</sup> clear intention in

the testator to do so. *Briggs v. Shaw*, 9 Allen, 516; *Schmaunz v. Goss*, 132 Mass. 141. The word "issue" is in its nature ambiguous. It may be of purchase or of limitation, and its use alone would be insufficient to reduce the explicitly devised estate in fee simple to an estate tail. The effect of the language of the devise differs materially from that of a devise to a man and his heirs followed by a limitation over in case of his dying without issue. The latter form of devise is the subject of a well-recognized exception. In such a devise the fee simple, ordinarily created by a devise to a man "and his heirs," is reduced to a fee tail by implication, "on the ground that the testator has, by the words introducing the limitation over, explained himself to have used the word 'heirs' in the preceding devise in the qualified and restricted sense of heirs of the body." 1 Jarman, Wills, 657. The basis upon which said respondents have asked for the application of the rule does not exist in this case, as the language of the devise before us would not create an estate in fee tail in the realty.

We are of the opinion that there is no warrant to be found in the will for disregarding the expression, "and his issue," or for treating it as embodying words of limitation, which either create an absolute gift to Joseph alone, or cut down the devise of a fee simple to a fee tail and give the personality absolutely to Joseph. The testator's plainly expressed intention is effected by treating such expression as words of purchase.

We now reach the third position of the adult respondents, which in part is that the word "issue," if treated as a word of purchase, should be interpreted to mean "chil-

—estate of first taker.

—limitation of estate.

—construction of language—fee tail.

—issue as word of purchase.

dren," and not descendants generally. In urging this as an unqualified rule, the claim is clearly contrary to the great weight of authority in this country and in England. Said respondents are not supported by most of the reported cases which are cited by them as authorities upon this point. When used as a word of purchase, "issue" is not a term of exact and inflexible meaning. By the context it may appear that the testator used it in the sense of "children," and then it must be so interpreted, but unless that is apparent, or unless its meaning has been fixed by statute, it will be interpreted in its legal sense of "descendants." Chancellor Kent, in his Commentaries, has urged that the intention of a testator will generally be effected by treating the word as synonymous with "children," unless a contrary intention appears in the will. And this view is approved by Judge Redfield in 2 Redfield on the Law of Wills, p. 38, note 9; but courts generally have not followed these text-writers. It has been frequently claimed, and was so argued before us by these respondents, that "in the ordinary parlance of laymen it means children, and only children." It is by no means clear that this contention as to the popular meaning of the term "issue" is justified. Lord Loughborough, in *Freeman v. Parsley*, 3 Ves. Jr. 421, 30 Eng. Reprint, 1085, said: "In the common use of language, as well as the application of the word 'issue' in wills and settlements, it means all indefinitely."

And in *Soper v. Brown*, 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768, the court, in speaking of what was the popular meaning of the word, said: "It is very unusual, I think, for a parent to speak of his children as his issue, either during life or in a testamentary instrument. When one speaks of the 'issue' of a person deceased, I think in most cases he would intend his descendants in every degree. In popular language, if one speaks of the issue

of a marriage, he probably means the children of the marriage. The collocation of the words 'issue' and 'marriage' makes this, in the case supposed, the natural meaning."

This view as to the popular meaning of the word is embodied in the Massachusetts statute. Revised Laws of Massachusetts 1902, chap. 8, § 5. The Massachusetts court states that the legal meaning of the word is also its popular meaning in that commonwealth. *Jackson v. Jackson*, 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112. This court, in a very carefully considered opinion in *Pearce v. Rickard*, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38, approved the doctrine "that the word 'issue,' unconfined by any indication of intention, includes all descendants, and that intention is required for the purpose of limiting the sense of that word, restraining it to children only." It appears to us that that is the interpretation of the word established by our decisions and amply supported by the weight of authority. In the case of *Pearce v. Rickard*, supra, the court was considering a bequest to a trustee for the benefit of one R., with direction that at the time of the decease of R. said trustee should pay, transfer, and deliver over the said trust property then remaining to the lawful issue of said R. then alive. The court in that case carried the interpretation of the word "issue" to what may be termed its logical result, and directed that upon the death of R. the trust fund should be distributed per capita among the descendants of R. then living, grandchildren taking equal shares with children, and the children of living children taking in competition with their parents. The court found nothing in the gift to issue in any way substitutional in its nature, or as indicating that issue were to take in a representative or quasi representative way, and probably felt constrained to reach its conclusion upon the matter of distribution as the result of its general determina-



tion that "issue," in the provision before it, meant descendants generally, and not immediate descendants or children. In *Freeman v. Parsley*, supra, the court had under consideration a gift to be divided between the lawful issue of R., share and share alike. The court held that the descendants of R. living at the time of her death took *per capita*, and not *per stirpes*.

In that case Lord Loughborough said: "I very strongly suspect that in applying that to this will I am not acting according to the intention, but I do not know what enables me to control it. If a medium could be found between a total exclusion of the grandchildren, and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention, as by letting in those whose parents were deceased to take the share the parents, if living, would have taken."

In *Cancellor v. Cancellor*, 2 Drew. & S. 194, 62 Eng. Reprint, 595, the vice chancellor said: "Now it is certainly not very probable, a priori, that a testator should intend that parents and children and grandchildren should take together as tenants in common *per capita*; and the court will not very willingly adopt such a construction."

It is apparent that courts generally have had a strong feeling that, in directing the distribution *per capita* of a gift to issue, they may be defeating the real intention of the testator, when such distribution will result in giving to issue of a more remote generation an equal share with those of a nearer generation; as, for instance, permitting grandchildren and great grandchildren of deceased and living children to receive the same shares individually as the living children. Hence courts have sought for and have followed very slight indications of an intention on the part of a testator to use the word "issue" as an expression of representation; and they have been governed by such indications, not only in the devise or bequest under

consideration, but also when it could only be inferred from the language of other parts of the will, entirely disconnected with such devise or bequest. In *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551, the court said: "The difficulty which was felt by Lord Loughborough in *Freeman v. Parsley*, 3 Ves. Jr. 421, 30 Eng. Reprint, 1085, in finding a medium between total exclusion of grandchildren and the admission of them to share with their parents, does not strike us as insuperable, supposing that he would have felt it in such a case as this. Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant."

And the court in that case also said: "'Issue' is a word which lends itself very easily to the expression of representation."

In *Jackson v. Jackson*, 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112, the bequest under consideration was substantially as follows: The sum of \$10,000 should be put in trust, the income thereof paid to one Susan during her life, and at her death said trust fund should be paid to her issue. Upon her death said Susan left four children and five grandchildren, the children of a living child. There was certain ambiguous language in the will from which it might be found that the testator intended the issue of Susan to take by right of representation. With reference to that matter the court said, "But we do not think it necessary to determine this," and then passed upon the question of the distribution of said trust fund, plainly without reference to such ambiguous language. The court said: "The tendency of our decisions has been more and more to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants and importing representation, and certainly, when the issue take as of a particular time after the death of the testator, and only the

issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors."

The court then stated the following rule of general application: "We are of the opinion that, when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living, it is to be presumed that the intention was that the issue should include all lineal descendants, and that they should take per stirpes, unless from some other language of the will a contrary intention appears."

After an extended consideration of the question, we are of the opinion that in circumstances such as are presented in the case at bar, and such as were before the court in *Jackson v. Jackson*, supra, unless such intention appears, a distribution among descendants per capita will be contrary to the intention of the testator, and that in such case

the word "issue" should be held to import representation. We have less hesitation in thus disregarding the authority of *Pearce v. Rickard*, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38, in this particular, because since that decision the general assembly has by statute changed the rule of construction laid down in that case with reference to a devise or bequest to one for life, and thereafter to his issue; such statutory provision being now chapter 254, § 11, Gen. Laws 1909, which is as follows: "Whenever a devise or bequest is made to one for life and thereafter to his issue, in any will hereafter made, such issue shall be construed to be the children of the life tenant living at his decease, and the lineal descendants of such children as may have then deceased, as tenants in common, but such descendants of any deceased child taking equally amongst them the share only which their deceased parent, if then living, would have taken."

In so far as in said section the word "issue" is interpreted to mean "children," we must hold that it does not apply to the bequest now before us, as that is not one for life with the remainder over

to the issue of the first taker, and the statute changes the rule of the common law merely with reference to such devises and bequests as are expressly named in said section. It is with reference to the construction of devises and bequests to issue after a life estate that the question of the manner of distribution most frequently arises, and as to such bequests the statute now provides for distribution per stirpes. Hence we feel greater freedom in changing the rule with reference to the distribution of those estates, extremely few in number, that are not within the scope of said statutory provision, in order that the construction of language similar to that now under consideration may conform to what seems to us is the intention of the testator, indicated by the use of the word "issue" without qualification.

Applying the conclusions which we have reached to the construction of the testamentary gifts under consideration, we say that the testator's intention was, upon the death of his wife, to give the remainder of his estate to his brother Joseph, and all his descendants then living. Since both the testator's wife and his brother Joseph predeceased the testator, the gift passed to the descendants of Joseph living at the death of the testator per stirpes, and not per capita. As all of the first generation after Joseph survived the testator, the estate will be distributed among them in equal shares.

The complainant executor is instructed to distribute the remainder of said estate in its hands among the respondents, Samuel W. Bridgham, Ida F. Bridgham, and Eliza H. Appleton, in equal shares. The parties may present to the court on April

4, 1919, a form of decree in accordance with this opinion.

A motion for rehearing having been filed, the following *Per Curiam* response was handed down on April 8, 1919:

After the opinion of the court in the above-entitled case, the infant respondents, by their guardian *ad litem*, by leave of court, have filed their motion for reargument. Said

motion makes no contention favorable to these respondents which was not fully considered by the court before rendering its opinion. The motion for reargument is denied.

The form of order and decree presented by complainant and adult respondents, with certain additions, made by the court, is approved. Said order and decree, as amended, are entered.

## ANNOTATION.

### Meaning of term "issue" where used as a word of purchase.

As shown by the annotation in 2 A.L.R. 930, on the question above stated, to which the present note is supplementary, the reported case (RHODE ISLAND HOSPITAL TRUST CO. v. BRIDGHAM, ante, 185) is in accord with the weight of authority in holding that the term "issue," where used as a word of purchase, includes descendants of every degree, and is to be given that meaning in the absence of an explanatory context showing that it was used in a restricted sense as meaning children only. But in departing from the rule followed in the earlier case of *Pearce v. Rickard* (1893) 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38, and adopting instead the Massachusetts rule that the word "issue," where its meaning is unrestricted by the context, will be construed as importing representation, it is at variance with the courts of other states (see 2 A. L. R. pp. 963, 964), others of whom, it is to be hoped, will also give their adherence to the Massachusetts rule.

The tendency of the courts to break away from the rule that under a gift to "issue," where the word "issue" is without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita, and not per stirpes, as primary objects of the disposition,—is also evidenced by *Petry v. Petry* (1919) 186 App. Div. 738, 175 N. Y. Supp. 30, in which the court, although feeling it-

self constrained to follow such rule, expressed the opinion that such construction did violence to the intention of the testator. The court said: "Because of the feeling that the rule that 'issue' means all descendants, and that, where used in a gift by will or deed, they all take per capita, grandchildren taking equally with their living parents, does not effectuate the intention of the testator, the courts of this state have seized upon very slight indicia of a stirpital meaning, and held the rule did not apply, giving effect to a very faint glimpse of such intention. *Ferrer v. Pyne* (1880) 81 N. Y. 284; *Vincent v. Newhouse* (1881) 83 N. Y. 513; *Palmer v. Horn* (1881) 84 N. Y. 519; *Drake v. Drake* (1892) 134 N. Y. 220, 17 L.R.A. 664, 82 N. E. 114; *Chwatal v. Schreiner* (1896) 148 N. Y. 683, 43 N. E. 166; *New York L. Ins. & T. Co. v. Viele* (1899) 161 N. Y. 19, 76 Am. St. Rep. 238, 55 N. E. 811; *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Re Union Trust Co.* (1915) 170 App. Div. 176, 156 N. Y. Supp. 32. In fact, the exceptions to the rule seem to have a more general application than the rule. Feeling that such a result argued a fallacious rule, I have carefully read many English cases to discover the origin and reason for the rule as declared by their courts. While I have not found these reasons distinctly set forth in any opinion, I am of opinion that those reasons may be found to proceed from two sources, and when I have applied these tests to

the various cases they seem to afford a substantial basis for the decision. First. The word 'issue,' when used in a conveyance or devise of real estate, was synonymous with 'heirs of the body,' and created an estate in tail. In order to render the entail effective, it was necessary that it should comprehend all the descendants in the line to the remotest degree. The estate, however, did not devolve on all simultaneously, but successively. While it was held that 'issue' *prima facie* was equivalent to 'heirs of the body,' it was more easily restricted by the context, and the use of the words of distribution, as, for instance, the adding of the words, 'share and share alike,' would show an intention not to entail the estate as a distribution would destroy the entail. Therefore, the rule was stated to be that the word 'issue,' unless controlled by the context, embraced descendants of every degree whatsoever existent. See 2 Jarman, Wills, 411. If the word 'issue' was given the limited meaning of 'children,' then the children would take an absolute fee, and the estate would not be entailed. So far as its application to deeds of real estate or devises is concerned, the comprehensive meaning which would establish an entail was favored. Second. A bequest to the issue of a man was a bequest to a class. All these persons living at the time of the taking effect of the bequest, who were within the designated class, took equally. If the word 'issue' were given the limited meaning of 'children,' then all the children living at that time would take per capita. Children of deceased children, not being in the class, would take nothing. If, however, the word 'issue' was given the meaning of descendants of every degree, then all that were within the designation of the class would share equally. As the right did not come through the parent, but because the grandchild was an original object of the bequest, because of its being one of the class designated, the grandchildren or great grandchildren would take per capita, and without regard to stock. This explains the dif-

ficulty which confronted Lord Loughborough in *Freeman v. Parsley* (1797) 3 Ves. Jr. 421, 30 Eng. Reprint, 1085, of which Judge Holmes makes light in *Dexter v. Inches* (1888) 147 Mass. 325, 17 N. E. 554, stating that the 'finding of a medium between total exclusion of grandchildren and the admission of them to share with their parents does not strike us as insuperable. . . . Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant.' There was no such difficulty under the laws of Massachusetts, nor is there any such difficulty under the laws of New York. But there was an insurmountable difficulty under the laws of England, as they then existed. In the opinion in *Freeman v. Parsley* (Eng.) supra, Lord Loughborough said: 'When you put the question, whether he meant all these grandchildren should take with their parents, I think he would say he did not; yet if he was asked the other way, if it should go to the survivor while there was a descendant, I am equally sure he would not have given it to the survivor.' This was the alternative, and he gave that construction which would allow the grandchildren, being children of a deceased child, to take, rather than that which would disinherit them. These two rules, one of which has reference to the word 'issue,' in a devise, where it would create an estate in tail, and where the same word, when used in a bequest, would confer absolute ownership in all living descendants, explains the comment of Lord Thurlow in *Knight v. Ellis* (1789) 2 Bro. Ch. 570, 29 Eng. Reprint, 312; for he said in the case of real estate A would take for the purpose of transmitting the property through him to his issue, and he was therefore considered as taking an estate tail, which would descend to his issue. An estate in chattels is not transmissible to his issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing,

gives the whole interest to the first taker. Our courts have adopted these rules for the construction of instruments of gift where the word 'issue' is used, although the reason that caused the English courts to adopt them does not obtain in the laws of this state. Estates tail were favored by the English law. They were abolished in this state. Under our Statute of Descent and Distribution, if there are lineal descendants of equal degree of consanguinity of the intestate, the real estate descends to them in equal parts; that is, per capita. If any of the descendants be living, and any be dead leaving issue living, so that there are lineal descendants in unequal degrees, 'each living descendant shall inherit such share as would have descended to him, had all the descendants in the same degree of consanguinity, who shall have died leaving issue, been living; and so that issue of the descendants who shall have died shall respectively take the share their ancestors would have received,' that is, per stirpes (Decedent Estate Law, §§ 82, 83), while in the distribution of the personal estate the same rules apply to the distribution among lineal descendants (§ 98, subd. 1). The children of an ancestor and the grandchildren, being children of a deceased child, do take under our law. The Statutes of Descent and Distribution both recognize the right of descendants of unequal degrees to take per stirpes. It is not necessary to allow the living children of living parents to take, in order that living children of deceased parents may not be disinherited. Therefore, the reason for the rule having ceased, or rather not having existed in this state since 1782, when our first Statute of Descent (Laws 1782, chap. 2; Laws 1786, chap. 12) and of Distribution (Laws 1788, chap. 12) was enacted, the rule should be abrogated. 'The law favors that construction of a will which will make a distribution as nearly conformed to the general rule of inheritance as the language will permit.' *Rivenett v. Bourquin* (1884) 53 Mich. 14, 18 N. W. 539. In my opinion such a construction is just, and more likely to conform to the

intention of the testator, unless there is some expression in the will that would show a contrary intent. The Statutes of Descent and Distribution were drawn with the experience of generations as a guide, and represent the fairest and most equitable distribution of the property of a decedent that those skilled in the law have been able to devise. Those who drafted our statutes had a deep knowledge of the English statutes and decisions of courts bearing upon the subject. The statutes that they drew were intended to and did prevent many of the defects and vices of the English system of land tenure and intestate succession from becoming a part of our law. We have continued a definition of the word 'issue' which the courts of England adopted with reluctance, and only because their laws would not permit an avenue of escape, without doing substantial injustice, when a definition according to our own laws of descent and distribution would have furnished the very avenue of escape that the English judges sought, but could not find, in their law. For these reasons, if I were not controlled by the decisions of the court of appeals, I would construe the word 'issue,' when not controlled by the context of the will, to mean lineal descendants capable of inheriting or succeeding to the property under our Decedent Estate Law, and that the issue take in the manner therein provided; when of equal degree, per capita; when of unequal degree, the remoter degree take by representation the share that would have fallen to their ancestor in the other class, if living; within each class the distribution inter sese to be per capita."

Although the conclusion of the learned court in the foregoing case that the so-called English rule is not calculated to effectuate the probable intention of the testator is sound, it is submitted that the court is in error in attributing the English rule to the reasons which it has stated. The reason why the word "issue" was deemed to include descendants of every degree, unless controlled by the context, was not that an entail might be creat-

ed, since such a result would follow only where the word was used as a word of limitation, and not of purchase, while the question whether it is to be taken as meaning "children" or descendants generally rests on the premise that it is used as a word of purchase, and not of limitation (see note in 2 A.L.R. at page 930). The real reason for the English rule is that as between a construction which would admit more remote descendants to take equally with less remote and children to take in competition with their parents, and a construction which would admit only living children and exclude the issue of a deceased child, the former was deemed the lesser evil. And the reason why the English courts felt confined to these alternatives is that they did not feel at liberty to read into the will the words, "per stirpes," without any basis other than pure conjecture.

In *Petry v. Petry* (1919) 186 App. Div. 738, 175 N. Y. Supp. 30, supra, it was held that there was nothing in the context of a will by which a testator bequeathed a share of his estate "un-

to the issue of my deceased brother John" to take the case out of the established rule that, under a gift to "issue," where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita, and not per stirpes, as primary objects of the disposition,—especially as it appeared in another part of the will that when the testator intended to make a gift to the children of a brother he said so in terms.

Another decision bearing upon the question, reported since the compilation of the note above referred to, is *Ernst v. Rivers* (1919 — Mass. —, 123 N. E. 93, in which it is said that where a gift is made to members of a class described as "heirs" or "issue," grandchildren and their descendants will not be allowed to compete with their parents unless such was the intention of the testator.

E. S. O.

## MORGAN COUNTY

v.

MARTHA GOANS, Plff. in Certiorari.

*Tennessee Supreme Court — October 27, 1917.*

(138 Tenn. 381, 198 S. W. 69.)

**Highways — alteration of grade — obstruction of branch — liability.**

1. One owning land on a branch road may recover damages for the alteration of the grade of a highway so as to cut off access to it by means of that branch.

[See note on this question beginning on page 200.]

— prescriptive use — 'right of public.

continued use of a highway by twenty years' adverse user.

2. The public may secure a right to

[See 13 R. C. L. 33.]

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Criminal and Law Court for Morgan County (Hicks, J.) in favor of plaintiff in an action brought to recover damages for alleged wrongful obstruction of a right of way. *Reversed.*

The facts are stated in the opinion of the court.

(138 Tenn. 381, 198 S. W. 69.)

Mr. W. Y. Boswell for plaintiff in certiorari.

Mr. J. W. Stone, for defendant in certiorari:

For negligent injury to realty, resulting from a cause susceptible of remedy or removal, the owner is entitled to recover of the person whose negligence caused the injury only such damages as had actually accrued on account of the impaired use of the property at the commencement of the suit; and for continuance or recurrence of injury from same cause he must seek relief by successive actions.

Nashville v. Comar, 88 Tenn. 415, 7 L.R.A. 465, 12 S. W. 1027; Doss v. Billington, 98 Tenn. 378, 39 S. W. 717; Chattanooga v. Dowling, 101 Tenn. 346, 47 S. W. 700; Harmon v. Louisville, N. O. & T. R. Co. 87 Tenn. 614, 11 S. W. 703.

A county is not liable for the negligence of its officers.

White's Creek Turnp. Co. v. Davidson County, 14 Lea, 73; Cooley, Const. Lim. 4th ed. 302; Wood v. Tipton County, 7 Baxt. 112, 32 Am. Rep. 561; McAndrews v. Hamilton County, 105 Tenn. 400, 58 S. W. 483; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416.

It was absolutely necessary, before Mrs. Goans could recover, for her to show that she had acquired an easement in this particular roadway over the land of Fred Duncan, and which was cut off and destroyed by the cut when the pike was constructed, and that she had acquired this easement either by purchase or by prescription.

McKinney v. Duncan, 121 Tenn. 268, 118 S. W. 683; Saunders v. Simpson, 97 Tenn. 385, 37 S. W. 196; 2 Washb. Real Prop. 342; Bowman v. Wickliffe, 15 B. Mon. 84; 14 Cyc. 1155, § (D); Davis v. Brigham, 29 Me. 403; Day v. Allender, 22 Md. 529; Dodge v. Stacy, 39 Vt. 566; Thomas v. Marshfield, 13 Pick. 240; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; 19 Am. & Eng. Enc. Law, 17, 18; Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754; Jackson v. State, 6 Coldw. 535.

Mr. L. Riseden also for defendant in certiorari.

Lansden, J., delivered the opinion of the court:

This suit was brought by Mrs. Goans in the criminal and law court of Morgan county to recover damages for the obstruction of a right of way. The circuit judge, sitting without the intervention of a jury,

awarded her \$90 damages. From this judgment the county appealed to the court of civil appeals, in which court the judgment was reversed and the suit dismissed. The case is before us upon writs of certiorari. The facts are these:

Mrs. Goans is the owner of a small tract of land abutting on a road which leads from the main Wartburg road through the lands of Duncan to her place. She has no other means of access to the main turnpike road than this way. There is evidence to show that the road leading by the premises of Mrs. Goans has been in existence more than twenty years. One witness says that he has known the road since 1884, and the public generally has traveled it continuously since that time as a matter of right. The road has not been worked by the county, so far as the evidence discloses. When trees would fall across the road, they would not be removed, but travelers along the road would go around the trees and then back into the old way. It was traveled by foot, horse, and vehicle travelers. There has been continuously a plainly marked road leading from the main Wartburg road through the premises of Duncan by the premises of Mrs. Goans. The obstruction complained of is that the county, in building a turnpike, reduced the grade of the main Wartburg road where the road in question comes into it, so as to completely obstruct the latter road. There is an embankment at the point of confluence 8 or 10 feet high. The court of appeals was of opinion that the evidence did not establish a prescriptive right of the public to the road, it holding that the public used the road by the permission of the landowner. However, the circuit judge held to the contrary, and there is evidence to support his findings.

Twenty years' adverse user will establish a right of way either in the public or in private persons. Louisville & N. R. Co. v. Hays, 11 Lea, 382, 47 Am. Rep.

Highways—  
prescriptive use  
—right of public.

291; *Ferrell v. Ferrell*, 1 Baxt. 329, and cases cited.

Therefore the question arising is whether Mrs. Goans, not abutting upon the main Wartburg road, has such a right therein as to recover damages for the obstruction of her way to this road.

—alteration of  
grade—obstruc-  
tion of branch—  
liability.

We are of opinion that she has. An investigation of the cases shows that the authorities are in hopeless conflict. It is not possible to reconcile them or to extract from them any harmonious reasoning upon which a general rule could be founded. The great weight of authority is to the effect that a member of the general public, showing special damages, can recover for an obstruction of a public road. Mrs. Goans has suffered special damages within the meaning of the authorities. As stated, the point at which the obstructed road enters the main Wartburg road has been reduced in grade until there is an embankment 8 or 10 feet high. All of the evidence is to the effect that this embankment destroys her ingress and egress to and from the main Wartburg road. Since the embankment has been made, Duncan has constructed a bridge across the main Wartburg road, but Mrs. Goans has no right to use the bridge. Duncan has permitted her to do so;

but this, of course, does not meet her situation, because the permission granted could be withdrawn at any time. The easement which she acquired in the road leading from her premises to the main Wartburg road is appurtenant to her land and is a vested right. Any substantial interference with this right is a special injury to her property for which she can maintain an action for damages. No question is made on the measure of damages fixed in the court below. We will not review the cases, but content ourselves with citing a few of them. Many more can be found. *Sholin v. Skamania Boom Co.* 56 Wash. 303, 28 L.R.A. (N.S.) 1053, 105 Pac. 632; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96; *Miller v. Schenck*, 78 Iowa, 372, 43 N. W. 225; *Husband v. Cotton*, L.R.A. 1917A, 1150, and notes there cited (171 Ky. 177, 188 S. W. 380).

It results that the judgment of the Court of Civil Appeals is reversed, and that the circuit judge is affirmed.

Petition for rehearing denied February 16, 1918, with the direction that the case was not one of recurring damages, but that the sum allowed in this case covered the entire injury.

## ANNOTATION.

**Right of one whose access by means of a right of way or branch road to a highway is interfered with by an obstruction in the latter.**

The circumstances under which a recovery for obstruction in a highway has been sought vary widely, from the case of an abutting owner whose access to his property is cut off, to the case of a traveler on the highway whose only injury is in being compelled to take a more circuitous route. 13 R. C. L. p. 224, §§ 190 et seq. No other case has been found in which a recovery was sought under circumstances such as existed in the reported case (*MORGAN COUNTY v. GOANS*, ante, 198). Various tests have been an-

nounced by the courts to determine the right of an individual to recover for obstructions in a highway. One general test is that he must have suffered a special injury. 13 R. C. L. p. 227, § 192. In case of a landowner seeking to recover, the distance of his property from the obstruction, and the effect upon access to his property, have been considered. 13 R. C. L. p. 231, § 195. No general rule can be stated that will determine all cases.

W. A. E.



BENJAMIN BOND  
v.  
BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.

*West Virginia Supreme Court of Appeals — September 17, 1918.*

(82 W. Va. 557, 96 S. E. 932.)

**Negligence — imputing.**

1. Where one undertakes to rescue another from danger, the antecedent negligence of the person rescued is not imputable to the person effecting the rescue.

[See note on this question beginning on page 206.]

**—rescue — right.**

2. The right of a person to rescue another from danger of any kind, though voluntarily exercised, is as perfect and complete as any other personal right, and the fact that the danger springs from a negligent act of a third person does not in any way affect or impair the right of rescue, or the moral obligation to exercise it.

**Rescue — duty.**

3. Such right and obligation are analogous to those of prevention of crime and protection of others from criminal injury.

**Negligence — error of judgment.**

4. As the right is usually exercised on occasions of emergency, the actor ordinarily finds it necessary to determine his course of conduct without time or opportunity for deliberation and mature consideration as to the danger to himself attending his effort, wherefore the law does not hold him responsible for a mere error of judgment.

[See 20 R. C. L. 134, 135.]

**Proximate cause — injury in rescue.**

5. The proximate cause of an injury inflicted in the effectuation of a rescue, by means of the negligence causing the danger and necessitating the rescue, is the negligent act causing both the danger and the injury.

**Damages — mental suffering.**

6. An injury severe enough to cause pain, require professional treatment, and inflict disability to perform labor for a week or two justifies the giving of instructions authorizing an allowance for mental suffering in the assessment of damages.

[See 8 R. C. L. 513.]

**Trial — instruction — refusal.**

7. An instruction stating an hypothesis having no basis in the evidence is properly refused.

[See 14 R. C. L. 786.]

**Appeal — abstract instruction — error.**

8. Though it is technically erroneous to give an instruction embodying applicable law in abstract form, it is not reversible error nor ground for a new trial.

[See 2 R. C. L. 256.]

**Evidence — negligence — failure of railroad company to maintain lookout over track.**

9. Failure by a railroad company to maintain an adequate lookout over the entire track when running a train into a station at which passengers are required to cross the track from the station to the platform where they are to take the train is evidence of negligence.

**Carrier — negligence of passenger — crossing track.**

10. A passenger, who, after purchasing a ticket, walks leisurely across the track to the platform where he is to take the train, without looking to see if it is approaching, although it is due, is negligent.

[See 5 R. C. L. 40.]

**— effect of negligence of passenger.**

11. The negligence of a passenger in crossing the track to the platform from which he is to board an approaching train, without looking to see where the train is, does not absolve the railroad company from negligence in failing to maintain a lookout over the track.

**ERROR** to the Circuit Court for Doddridge County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. S. Stuart, H. L. Hammond, and McClintic, Mathews, & Campbell, for plaintiff in error:

In the absence of failure to aver and prove negligence in the discharge of some duty owed by the defendant, either to the plaintiff Bond, or to Doris Smith, there can be no legal liability against it.

*Anderson v. Northern R. Co.* 25 U. C. P. 301; *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, 16 Am. Neg. Cas. 146; *Atlanta & C. Air-Line R. Co. v. Leach*, 91 Ga. 419, 44 Am. St. Rep. 47, 17 S. E. 619; *DeMahy v. Morgan's L. & T. R. & S. S. Co.* 45 La. Ann. 1329, 14 So. 61; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Hirschman v. Dry Dock, E. B. & B. R. Co.* 46 App. Div. 621, 61 N. Y. Supp. 304; *Corbin v. Philadelphia*, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, 7 Am. Neg. Rep. 563.

An engineer, seeing one approaching a railroad track, has the right and duty to presume that he will stop and not step in front of the train, in the absence of something to indicate helplessness or inability of such person.

*Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Southern R. Co. v. Daves*, 108 Va. 378, 61 S. E. 748; *Riedel v. Wheeling Traction Co.* 63 W. Va. 522, 16 L.R.A.(N.S.) 1123, 61 S. E. 821; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77, 12 Am. Neg. Cas. 401.

**Mr. J. Ramsey** for defendant in error.

**Poffenbarger, P.**, delivered the opinion of the court:

Whether a person, injured in rescuing another from danger occasioned by the negligence of the defendant, is precluded from right of recovery by his knowledge of the danger incident to his attempt to effect the rescue, is an inquiry raised on this writ of error to a judgment for \$500 in favor of a person bearing such relations to the defendant and a third party, one Doris Smith. Other grounds relied upon for reversal are denial of

proof of negligence and alleged errors in rulings upon instructions.

While Doris Smith was leisurely crossing a sidetrack and the main track of the defendant's railroad at its West Union Station, in the customary and designed method of reaching the platform from which she intended to board one of its trains, after having purchased a ticket entitling her to carriage on said train, the station and platform being on opposite sides of the tracks, the train came in at a comparatively low rate of speed and would have run her down and probably killed her, but for the assistance rendered her by the plaintiff, according to the testimony of himself and other witnesses. He says he stepped down on the track, grabbed her, and threw her toward the platform, and was then struck by the pilot beam of the engine. Two other witnesses agree that the engine struck him, but not that he stepped off of the platform. They say he reached from the platform and caught her. Others say the engine struck the girl only and knocked her against him, in consequence of which he fell and his knee was injured by contact with a clinker in the cinder platform. The train was in sight when the girl started across the tracks, but she seems not to have seen or heard it. When she got to the main track and, then seeing the train, quickened her pace, it was within 6 or 8 feet of her, and within a foot or two of her when the engineer discovered her and the plaintiff grabbed her. The engineer was on the right-hand side of his engine, keeping a lookout; but the girl was approaching from the left-hand side and beyond his view, partly because of a slight curve in the track. He had his engine under reasonable control and stopped it by means of the emergency brake within a short distance, he says about its length, but

other witnesses say several feet more than that. He did not discover her until the engine was almost upon her. There was no evidence of a lookout on the other side by the fireman, and neither he nor Miss Smith testified in the case. The train could have been seen from a distance of 540 feet from the point at which she crossed the space between the tracks, about 250 feet from the waiting room of the station, and about 150 feet from the platform.

Failure to maintain an adequate lookout covering the entire track, while running into the station, under the circumstances shown, was evidence of negligence. *McGuire v. Norfolk & W. R. Co.* 70 W. Va. 538, 74 S. E. 859; *Schoonover v. Baltimore & O. R. Co.* 69 W. Va. 560, L.R.A.1917F, 1, 73 S. E. 266, Ann. Cas. 1913B, 964. This rule seems to be general, and it is especially applicable here, in view of the necessity for the crossing of the tracks by passengers, to obtain access to the cars from the platform, known to the servants and employees of the defendant company. If such a lookout had been maintained, the perilous situation of Miss Smith would have been discovered in ample time to have prevented danger to her, by stopping or checking the train. For some reason, she had evidently failed to observe it until it was almost upon her. Of course, she was guilty of negligence. She should have seen the train and hurried across, or abstained from crossing; but this fact does not absolve the defendant from liability for its subsequent negligence. *Schoonover v. Baltimore & O. R. Co.* supra; *Riedel v. Wheeling Traction Co.* 63 W. Va. 522, 16 L.R.A. (N.S.) 1123, 61 S. E. 821. There was evidence of its last chance to prevent injury, amply sufficient to warrant submission to

Evidence—  
negligence—  
failure of rail-  
road company to  
maintain look-  
out over track.

Carrier—negli-  
gence of pas-  
senger—crossing  
track.

—effect of neg-  
ligence of  
passenger.

the jury of the issue as to its existence.

As to the relation between the negligent act and the person injured, this court seems to have acquiesced in the weight of authority. A person injured in effecting the rescue of another from danger occasioned by the negligence of a third party is not precluded from right of recovery, on the ground of his own immunity from danger, or his voluntary incurrence of risk. If his intervention was not a rash or clearly imprudent act, under the circumstances, he may recover. *Walters v. Appalachian Power Co.* 75 W. Va. 676, 684, 84 S. E. 617, 13 N. C. C. A. 99; *Schwartz v. Shull*, 45 W. Va. 405, 414, 31 S. E. 914, 5 Am. Neg. Rep. 496. An overwhelming weight of authority denies that voluntary incurrence of risk in effecting a rescue from danger occasioned by negligence amounts to contributory negligence, unless the act of intervention was performed

under such circumstances as would make it rash or reckless in the estimation of ordinarily prudent persons. *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721; *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 17 Am. St. Rep. 430, 6 So. 690; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594; *Corbin v. Philadelphia*, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, 7 Am. Neg. Rep. 563; *Schroeder v. Chicago & A. R. Co.* 108 Mo. 322, 18 L.R.A. 827, 18 S. W. 1094; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L.R.A. 190, 29 Am. St. Rep. 553, 28 N. E. 172; *Pittsburg, C. C. & St. L. R. Co. v. Lynch*, 69 Ohio St. 123, 63 L.R.A. 504, 100 Am. St. Rep. 658, 68 N. E. 703, 15 Am. Neg. Rep. 169; *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L.R.A. 842, 71 Am. St. Rep. 441, 42 Atl. 60; *Connell v. Prescott*, 20 Ont. App. Rep. 49; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac.

Negligence—  
rescue—right.

562; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696; *Gibney v. State*, 137 N. Y. 1, 19 L.R.A. 365, 33 Am. St. Rep. 690, 33 N. E. 142; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692, 1 Am. Neg. Cas. 17; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367; *Wright v. Atlantic Coast Line R. Co.* 110 Va. 670, 25 L.R.A.(N.S.) 972, 66 S. E. 848, 19 Ann. Cas. 439; *Adamson v. Norfolk & P. Traction Co.* 111 Va. 556, 69 S. E. 1055; *Southern R. Co. v. Baptist*, 114 Va. 723, 77 S. E. 477; *Perpich v. Leetonia Min. Co.* 118 Minn. 508, 137 N. W. 12; *Shearm. & Redf. Neg. § 85b*; *Elliott, Railroads, § 1265h*; *Thomp. Neg. §§ 138, 198, 199, 1780, & 1881*. These authorities further hold that contributory negligence on the part of the person rescued does not preclude right of recovery on the part of the rescuer. If, however, the latter has himself brought about the danger to the person rescued, or the negligence of such person is imputable to him, he cannot recover. *Atlantic & C. Air Line R. Co. v. Leach*, 91 Ga. 419, 44 Am. St. Rep. 47, 17 S. E. 619; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367; *De Mahy v. Morgan's L. & T. R. & S. S. Co.* 45 La. Ann. 1329, 14 So. 61.

There are a few decisions, and some judicial expressions in dissenting opinions, to the contrary. *Anderson v. Northern R. Co.* 25 U. C. C. P. 301; *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, 16 Am. Neg. Cas. 146; *Mitchell, J., in Corbin v. Philadelphia*, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 7 Am. Neg. Cas. 563. 45 Atl. 1070. They deny any basis for the rule in legal principle or logic. If there is any right of intervention, under circumstances making it possible without danger on the part of the rescuer, such right is certainly not denied or destroyed by conditions that would not preclude the

exercise of other rights. The right of one person to render another assistance, when the latter is in danger from any cause, under conditions rendering it safe to do so, is as clear as his right to perform any other lawful act. Voluntariness does not vitiate or impair it, nor detract from it in any sense. That quality is inherent in most of our acts. We walk abroad for mere exercise, often unnecessary, or to gratify idle curiosity, as we have clear right to do, and, if injured by somebody's negligence in the exercise of such rights, we may recover. There is a moral obligation, as well as legal right, to effect rescues from all sorts of danger, when it is practicable to do so. That the danger is occasioned by a negligent act does not affect either the obligation or the right. Hence it cannot logically affect the consequences of wrongful injury in the exercise thereof.

In almost every instance of rescue, there is an emergency calling for quick determination of the course of action, and leaving practically no time for deliberation. When this happens in the exercise of other rights, the law makes due allowance for it, and does not hold the injured party responsible for his -error of judgment. error of judgment

as to his course of conduct. *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Haney v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 570, 18 S. E. 748; *Woodell v. West Virginia Improv. Co.* 38 W. Va. 23, 17 S. E. 386; *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 55 Am. Rep. 292, 7 Am. Neg. Cas. 111; *Bogress v. Chesapeake & O. R. Co.* 37 W. Va. 297, 23 L.R.A. 777, 16 S. E. 525, 7 Am. Neg. Cas. 134; *Normile v. Wheeling Traction Co.* 57 W. Va. 132, 68 L.R.A. 901, 49 S. E. 1030; *Warth v. County Ct.* 71 W. Va. 184, 76 S. E. 420; *Roberts v. Baltimore & O. R. Co.* 72 W. Va. 370, 78 S. E. 357. The lawful right of rescue necessarily falls within the same principle. A person exercising it is generally confronted by

an emergency born of the negligence of the defendant in the action, and suffers injury from the

Proximate cause same cause. Here, -injury in as in other cases, rescue.

allowance is made for erroneous judgment under circumstances excluding time and opportunity for deliberation, and recovery permitted, if the act of intervention was not rash or imprudent.

The right of intervention finds support also in the principle of analogy. Negligence is wrongful, but not necessarily nor ordinarily criminal; but wrong and crime bear a close relation in principle. Any citizen has a perfect legal right

to interpose for prevention of the commission of crime, and protection of others threatened with criminal injury. It is his duty to prevent the perpetration of a felony, and his killing of the felon, as a necessary means of doing so, when it cannot otherwise be prevented, is justifiable. He may also justifiably take life in the protection of another from death or serious bodily injury, under the law of self-defense. If a person, intending to kill his personal enemy, mistakenly attack his friend, he is guilty of assault with intent to kill. *McGehee v. State*, 62 Miss. 772, 52 Am. Rep. 209; *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218. In negligence, the intent is immaterial, but the element of civil wrong is present in it as well as in crime, and the actor is responsible for his wrongful acts resulting in injury. If criminally responsible for injuries intended for one person and falling upon another, why may a man not be consistently held liable civilly for a wrongful act which threatened one person but actually fell upon another, though the act be merely negligent and void of intent to inflict injury? Right of action for an injury suffered in effecting a rescue from danger occasioned by negligence, when the act of intervention was not reckless, seems to have solid support in legal

principle as well as the weight of authority.

Plaintiff's instruction No. 3, telling the jury the negligence of Doris Smith was not imputable to the plaintiff, is fully

sustained by the Negligence—imputing.

conclusion just stated, and the court properly overruled the objection to it and gave it.

Two other instructions given were excepted to because they authorized inclusion of compensation for mental suffering in the assessment of the damages. Plaintiff's injuries were not serious. One of his knees was sprained and bruised, and he was disabled for a week or two. Such an injury may have carried a degree of pain and mental suffering. The instructions left it to the jury to say whether it did or not, and, if any, to determine the degree thereof. There was some evidence of it, and that justified the giving of the instructions.

Plaintiff's instruction No. 2 was objected to because it was abstract in form, and imposed duty upon the defendant toward passengers, in the absence of an allegation that the plaintiff was a passenger. It is technically erroneous to give an instruction in the abstract, but not cause for reversal, if the law proposition—error.

Appellate—abstract instruction—error.

Applicable to the case. *Parker v. National Mut. Bldg. & L. Asso.* 55 W. Va. 134, 46 S. E. 811. The reference to passengers in the instruction was justified by the allegation that Doris Smith and others present were passengers, and that the negligence consisted of want of care in the running of the train to the passenger station. The nature of the place and the character of the people generally assembled there imposed the omitted duty, and the plaintiff, whether a passenger or not, was within its protection; it being general in its nature and not dependent upon a peculiar personal relation of the injured party.

Defendant's instruction No. 5 was properly refused for lack of evidence to sustain the theory it propounded. It is an admitted fact that Doris Smith was not seen by anybody on the engine until it was almost upon her. Relative duties dependent upon a dif-

**Trial-instruction—refusal.**

ferent state of facts were not involved for that reason. As the engineer did not know she was on the track, he could not have been deemed to have assumed that she would get off.

For the reasons stated, the judgment will be affirmed.

## ANNOTATION.

### Imputability to rescuer of antecedent negligence of rescued person.

#### Generally.

It is generally conceded that a person who imperils himself in order to rescue a person who is in danger of being injured or killed through the negligence of another person may recover damages from the negligent person for injuries received while effecting such rescue. See 20 R. C. L. title, "Negligence," § 108.

By the weight of authority, in case of an injury in attempting to rescue another, the antecedent negligence of the person rescued is not imputable to the rescuer. *Pierce v. United Gas & E. Co.* (1911) 161 Cal. 176, 118 Pac. 700; *Walters v. Denver Consol. Electric Light Co.* (1898) 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5; *Norris v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 505, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017; *Pittsburg, C. C. & St. L. R. Co. v. Lynch* (1903) 69 Ohio St. 123, 63 L.R.A. 504, 100 Am. St. Rep. 658, 68 N. E. 703, 15 Am. Neg. Rep. 169. And see the reported case (*BOND v. BALTIMORE & O. R. Co.* ante, 201). Compare *Scates v. Rapid Transit Co.* (1914) — Tex. Civ. App. —, 171 S. W. 503.

In *Pierce v. United Gas & E. Co.* (1911) 161 Cal. 176, 118 Pac. 700, it appeared that several children were playing with a loose guy wire, when one of them happened to bring the guy wire into contact with a power wire, the insulation of which had become defective or disintegrated, and thereby received a shock. One of the boys, on being dared, drew the guy wire taut against the power wire, and was instantly killed. One of his younger brothers, on seeing his predicament,

went to his rescue and was also killed. In an action for the recovery of damages for the death of the children by their mother, the court held that the mere fact that the negligence of the older brother contributed to his death would not free the defendant from liability as to the younger, who attempted to rescue his brother. It was said: "Whether or not a recovery could be had on account of Walter's death, assuming that he was not guilty of contributory negligence, depends entirely, we think, upon the question whether or not there was any negligence on the part of defendant in so far as Albert was concerned, regardless entirely of whether Albert was guilty of contributory negligence. In other words, defendant cannot be liable for Walter's death, caused by his effort to save Albert from injury, however praiseworthy that effort was, unless Albert's dangerous condition was due, in part at least, to defendant's negligence. Unless defendant was guilty of negligence toward Albert, it could not be liable at all under the undisputed facts of this case. But if it was guilty of negligence toward Albert, in maintaining the condition of affairs shown by the evidence in this case, then the mere fact that Albert's negligence, if there was such negligence on his part, contributed to his death, would not free defendant from liability as to Walter, unless Walter was also guilty of contributory negligence."

In *Walters v. Denver Consol. Electric Light Co.* (1898) 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5, it appeared that a child endeavored to

replace an electric wire underneath its window, when it received an electric shock. The mother rushed to the child's rescue, and also received a shock. The court impliedly held that the negligence of the child could not be imputed to the mother in attempting to save it, saying: "The complaint of Levina E. Walters, after setting forth the facts upon which negligence was charged against the defendant, in substantially the language of Clifton Wood Walters's complaint, averred that she was the mother of Clifton, and that, upon learning that he was in a situation of danger, she went in great haste to his assistance, seized upon him to remove him from the wire, and received a charge of electricity, which passed from the wire through the body of Clifton into her body, and that she so sustained the injury of which she complained. What we have heretofore said on the subject of negligence, and on the subject of proximate cause, is applicable here, and need not be repeated, but on the question whether her complaint shows contributory negligence in her we think it well to venture a few observations. It is in voluntarily taking hold of Clifton while he was still in contact with the wire that the negligence is said to have consisted. She stated in her complaint that, at the time, she had no knowledge that her act would be attended by any danger to herself, but the allegation is unimportant, and might as well have been omitted. The instincts of a mother, when she sees her child in distress, will lead her to rush headlong to its rescue, without stopping to count the cost, or measure the risk which she is incurring; and to say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind. The law is not the creature of cold-blooded, merciless logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her negligence,

or at any time, or in any matter, used to her detriment."

In *Norris v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 505, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017, it appeared that the plaintiff and another were walking at night along a railroad track which was commonly used by pedestrians. The plaintiff's companion, being tired, sat down on the end of a tie. Suddenly the plaintiff became aware of the approach of an engine and tender running backwards at a high rate of speed, only a short distance away. In an effort to save his companion, who seemed unconscious of the approach of the engine, the plaintiff tried to pull him off of the track, but was injured. The court held that the contributory negligence of the imperiled person should not be allowed to affect the question of the defendant's liability to the plaintiff. It was said: "When the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question. It is always required in order to establish responsibility on the part of defendant, that the company should have been in fault, but, when this is established, the issue is then between the claimant and the company; and when one sees his fellow man in such peril, he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend the help which the occasion requires; and his efforts will not be imputed to him for wrong, according to some of the decisions, unless his conduct is rash to the degree of recklessness; and all of them hold that full allowance must be made for the emergency presented."

In *Pittsburg, C. C. & St. L. R. Co. v. Lynch* (1903) 69 Ohio St. 123, 63 L.R.A. 504, 100 Am. St. Rep. 658, 68 N. E. 703, 15 Am. Neg. Rep. 169, it ap-

peared that the plaintiff was a watchman at one of the defendant's railroad crossings. In an attempt to save a woman from imminent harm from a "kicked" caboose, the watchman received serious injuries. In an action to recover damages for his injuries, the court held that the plaintiff's right of recovery was not affected by the contributory negligence on the part of the person saved. The court said: "With respect to the general instructions given to the jury upon the subjects of negligence and the measure of recovery, it is sufficient to say that they were in substantial accordance with the familiar cases. But regarding the peculiar circumstances of the case, counsel for the company insist that the rescuer could not recover for the injury to him if the person rescued was in peril because of such contributory negligence on her part as would have prevented a recovery by her if she had been injured. The trial judge was not requested to give to the jury an instruction embracing that view of the law; but the verdict for the plaintiff appears to have been returned without regarding the evidence tending to show negligence on her part, and it is assumed that this was in accordance with the instruction given that the law will not impute negligence to one attempting to save human life, unless the attempt is made under such circumstances, or in such a manner, as to constitute rashness or recklessness. The jury had been told in another portion of the charge that there was no presumption of negligence against either party, and they perhaps understood the word impute to be used in its theological sense, and the instruction to signify that his right of action was not affected by her negligence. . . . If the view now urged by counsel is considered as unaffected by the decided cases, it must be rejected because of the impracticability of applying it. It invokes the principle of subrogation as the test of the plaintiff's right to recover. If that principle should be adopted to determine his right to recover, for equal reason it should determine the amount of his recovery. By what

process could it be ascertained what the extent of her injury would have been if the attempted rescue had failed? The view presented would lead to the conclusion that, if the attempted rescue had failed and she had been injured without her fault, no right of action would have accrued to him, because such right would have accrued to her. The insurmountable difficulties which would be met in an attempt to apply the suggested doctrine, in an action under the statute for the benefit of the next of kin when the injuries of the rescuer prove fatal, need not be stated. It seems clear that the law will not admit of the suggested refinement."

But in *Scates v. Rapid Transit R. Co.* (1914) — *Tex. Civ. App.* —, 171 S. W. 503, it appeared that in an effort to remove a companion, who was intoxicated, from the car tracks on which he was lying, the plaintiff was injured by a car. The court held that the intoxicated person's dangerous position was brought about by his own negligence. Therefore, as the defendant company was not responsible for his injuries, it was not responsible for the injuries received by the rescuer. The court said: "The evidence showing that the question of discovered peril does not arise in this case, and the evidence showing conclusively that Wells was guilty of contributory negligence in being intoxicated and lying on the track, the question arises: Is appellant chargeable with the negligence of Wells, and his right of recovery defeated thereby? When intoxication is shown to exist in the party injured, which is the cause of the injury, it, as a matter of law, is contributory negligence and defeats a recovery, though the agency by which he is injured is guilty of negligence. *San Antonio Traction Co. v. Kelleher* (1908) 48 *Tex. Civ. App.* 421, 107 S. W. 64. Wells's dangerous position being brought about by his own negligence, and the negligence of appellee being in no sense responsible therefor, it follows that appellant's right of recovery is defeated. As we understand it, the rule is that, when a party seeks to rescue another from a perilous posi-



tion, who has negligently placed himself in such position through no fault of the railroad, and the party attempting the rescue is injured, no liability on the part of the railway company exists, and he cannot recover. . . . Contributory negligence being shown, the failure of appellee's servants to keep a lookout, and the running at a greater rate of speed than permitted by the ordinance, does not authorize a recovery in this case."

**Contributory negligence of parent as affecting rescue of child.**

It has been held that the contributory negligence of a parent in allowing a child to get into a position of danger will not preclude a recovery for injury received by the parent in attempting to rescue the child. *Donahoe v. Wabash, St. L. & P. R. Co.* (1884) 83 Mo. 560, 53 Am. Rep. 594. In that case it appeared that in attempting to save her child, which was on the defendant's tracks, from being killed by an approaching engine, the plaintiff received the injuries complained of. In an action to recover damages for such injuries, the court held that the parent's contributory negligence in permitting her child to be on the railroad track would not prevent her from recovering damages for the injury sustained in attempting to rescue, saying: "If the defendant's servants were guilty of negligence after *Mrs. Donahoe* got upon the track, in not stopping or checking the speed of the train, that cancels her prior contributory negligence and takes that question out of the case, if it was ever properly in it. Their contributory negligence in permitting the child to be on the track would not prevent a stranger from recovering damages for an injury sustained in attempting its rescue, and we are inclined to the opinion that the mother or father would have the same right, and certainly a much greater inclination, to save its life. No negligence is imputable to a child as young as the one killed by this train."

In *West Chicago Street R. Co. v. Liderman* (1900) 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367, it appeared that a mother, in an attempt to save her child from being

injured by a car, was injured. The mother had just come from a store, when she met a friend and stopped to talk for a few moments. When she first stopped she had the child by the hand, but during the conversation unconsciously let go of it. A moment later she saw the child on the track of defendant, in front of an approaching car; she thereupon instantly ran toward it, and was injured. The court held that whether the mother was negligent in allowing her child on the street, unattended for a moment, was a question where reasonable minds might differ, and therefore for the jury. But if the child escaped from her for the time, she had a right to presume that others would not negligently injure it, and if she saw it become suddenly exposed, it was her duty, as well as her right, to attempt to rescue it. It was said: "It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. . . . If, in this case, the plaintiff had simply permitted her child to be upon this street unattended, and it had been injured or killed through the negligence of the defendant company, and she had brought an action for that injury, it is clear that, under the authorities, the question whether she was guilty of such contributory negligence as would defeat her action would have been a question for the jury. Can it be said, as a matter of law, that she exercised a less degree of care in this case? It is true that nothing was shown tending to prove her inability to keep constant watch over her child, or to employ others to do so; but did she so far fail to exercise reasonable care in restraining it from being exposed to danger that a court can say, as a matter of law, that she was guilty of contributory negligence? As before stated, her own evidence shows that she held the child by the hand, and that it slipped away from her only for a mo-

ment, and that she immediately pursued it. Can the court say, as a matter of law, that she was bound to hold the child in her arms, or hold it by the hand, or keep her eyes on it, constantly, while upon the street? . . . It seems to us clear beyond controversy that all reasonable persons would not say, under the facts showing the conduct of this mother prior to the time that her child got upon the street car track, that she was guilty of negligence, that very many would consider her reasonably careful. The question was therefore one of fact, and proper to be submitted to a jury. She had a right reasonably to presume that if the child for the time escaped from her, and became exposed to danger, others would not negligently injure it, and, seeing it suddenly so exposed, she had the right, and it was her duty, not only to the child, but to the defendant itself, to make all reasonable efforts to rescue it from that danger."

Compare *White v. Chicago* (1905) 120 Ill. App. 607, wherein it appeared that a mother and her child crossed a dangerous part of a sidewalk on their way to a store. After doing her shopping the mother started back the same way. When nearing the dangerous portion of the sidewalk the child let go the mother's hand and started toward the dangerous section. In trying to save her child the mother lost her balance and fell off that section of the sidewalk. The court held that the dangerous position in which the child placed itself was brought about by the mother, and therefore she was not entitled to recover for injuries sustained by her through her own negligence. It was said: "The accident in question was brought about by the negligence of appellant. A few minutes prior to her injury she had led her child over these planks, and on her return she was again approaching them with the intention of recrossing upon them. The natural inclination of the child to return the way it came led it to pass from the sidewalk to and upon the planks when it reached them. The danger, if any, to the child, in crossing the planks ahead of the moth-

er, was fully known to appellant. In our opinion, appellant, under all circumstances of the case, was guilty of such negligence as deprives her of a right of recovery. . . . In the case at bar the dangerous position in which the child placed itself, and from which the mother attempted to rescue it, was brought about by and through the negligence of appellant."

In *De Mahy v. Morgan's L. & T. R. & S. S. Co.* (1893) 45 La. Ann. 1329, 14 So. 61, it appeared that a child was jolted from a platform of a railroad coach through the space between the coaches, underneath another. The mother, in an effort to save the child who was lying with her head on the rail of the track, put her arm under, pushing the child further underneath the coach. While she was so engaged a wheel of the coach crushed and broke her arm. The court held that it was contributory negligence on the mother, in an effort to save the child, go upon the platform, and said: "This suit is not for damages for injury done to the child, but for those received by the mother, and for injuries by the mother not as the direct and immediate result of the coupling upon herself, but as the result of her going out, after the jolt had taken place, and she had received no personal harm therefrom, and placing her arm under the car in her effort to guard and save her child. Plaintiff's counsel contend that in doing so she was not only not to blame, but that she showed the greatest heroism and greatest devotion. In this he is certainly correct, for the mother's conduct, both at the time and afterward, was such as to command the highest admiration, but counsel is mistaken in thinking that the contributory negligence which defendant charges was in that act. What he charges as contributory negligence was the failure of the mother to have kept the child inside of the coach, and to have allowed her to go upon the platform. It is most deplorable that she should have lost sight of her, but for the consequences upon herself of having done so she cannot hold the defendant responsible." R. C. L.

UNITED STATES OF AMERICA, Plff. in Err.,  
v.  
JAMES M. MINCEY, Claimant of One Ford Automobile, 1916 Model,  
Five Passenger.

*United States Circuit Court of Appeals, Fifth Circuit—November 8, 1918.*

(254 Fed. 287.)

**Forfeiture — automobile used to defraud Revenue Laws — innocence of owner.**

An automobile which is intrusted to an employee for transacting business for his employer is subject to forfeiture if the employee uses it, without the knowledge or consent of the owner, to transport intoxicating liquor in violation of the United States Revenue Laws.

[See note on this question beginning on page 213.]

(Batts, Circuit Judge, dissents.)

**ERROR to the District Court of the United States for the Northern District of Georgia (Newman, District Judge) to review a judgment in favor of defendant in a proceeding for the forfeiture of an automobile alleged to have been used in transporting liquor in violation of the United States Revenue Laws. Reversed.**

The facts are stated in the opinion of the court.

Argued before Walker and Batts, Circuit Judges, and Sheppard, District Judge.

Mr. Hooper Alexander, for plaintiff in error:

The automobile in question was subject to forfeiture.

United States v. 1 Black Horse, 129 Fed. 167; The Frolic, 148 Fed. 921; Dobbins's Distillery v. United States, 96 U. S. 395, 24 L. ed. 637; United States v. 2 Bay Mules, 36 Fed. 84; The Scow No. 36, 75 C. C. A. 572, 144 Fed. 932; United States v. 2 Barrels of Whisky, 37 C. C. A. 518, 96 Fed. 479; United States v. 220 Patented Machines, 99 Fed. 559; United States v. Distillery at Spring Valley, 11 Blatchf. 255, Fed. Cas. No. 14,963; United States v. The Reindeer, 2 Cliff. 57, Fed. Cas. No. 16,144; United States v. 1,960 Bags of Coffee, 8 Cranch, 398, 3 L. ed. 602; United States v. 7 Barrels of Distilled Oil, 6 Blatchf. 174, Fed. Cas. No. 16,253; United States v. 2 Horses, 9 Ben. 529, Fed. Cas. No. 16,578; United States v. 246½ Pounds of Tobacco, 103 Fed. 791; United States v. 1 Black Horse, 147 Fed. 770; United States v. Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244.

Mr. John S. Wood for defendant in error.

Walker, Circuit Judge, delivered the opinion of the court:

This was a proceeding for the forfeiture of one Ford automobile, on the alleged ground that before its seizure it was, by one W. F. Mincey, used in the removal and for the deposit and concealment of 25 gallons of distilled spirits, with intent to defraud the United States of the tax thereon, which had not been paid. James M. Mincey interposed a claim to the automobile.

In the trial it was conceded that the automobile had been used as charged, in violation of law, and for the purpose alleged. The evidence for the claimant tended to prove that the automobile was the property of the claimant, who was a farmer and merchant living in Dawson county, Georgia; that W. F. Mincey was in the employment of the claimant, and that on the day in question the claimant had sent W. F. Mincey in said automobile to the town of Gainesville, in Hall county, Georgia, with instructions there to procure certain hardware

and other lawful merchandise; and that claimant had no knowledge of the fact that W. F. Mincey would use the automobile for any other purpose, and had no reason to apprehend that W. F. Mincey had the purpose of defrauding the United States, or would use the automobile for that purpose.

Exceptions were duly reserved to instructions of the court to the jury to the effect that the automobile was not subject to forfeiture if it was used for the illegal purpose charged without the claimant's consent, and without reason on his part to apprehend that it would be used for an improper purpose.

The proceeding is based upon the following statute: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels, proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, . . . respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." U. S. Rev. Stat. § 3450, Comp. Stat. § 6352, 4 Fed. Stat. Anno. 2d ed. p. 311.

Nothing in the terms of this statute indicates an intention to make the right to a forfeiture dependent upon the property being owned by the person guilty of a specified unlawful use of it, or upon the fact that the owner of the property shared in the guilt of the unlawful user of it. It has been authoritatively decided that, under similar statutes, property may be forfeited for misconduct not participated in

by the owner of it. *Dobbins's Distillery v. United States*, 96 U. S. 395, 24 L. ed. 637; *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244. In each of the cases cited the court sustained a judgment forfeiting property for an unlawful use of it by a party other than the owner, to whom the owner had intrusted possession of it for an entirely lawful purpose. It is not a novelty to subject property used for an unlawful purpose to forfeiture, though the owner of it was not a participant in the wrongful conduct, and no criminality is imputed to him. In the opinion rendered in the first-cited case, it was said: "Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault."

We understand it to be settled that, under statutes like the one in question, property is subject to forfeiture, though the owner did not share in the guilt of the user of it, to whom the owner had intrusted possession and control. *The Frolic* (D. C.) 148 Fed. 921; *United States v. 1 Black Horse* (D. C.) 129 Fed. 167; *United States v. 220 Patented Machines* (D. C.) 99 Fed. 559. Whether the automobile would have been subject to forfeiture if the person who made use of it for the purpose of committing a fraud on the public revenue had acquired possession of it without the knowledge or consent of the owner is a question not presented by the facts of the case. On the facts disclosed, the nonparticipation of the owner in the unlawful use of his property was not a bar to the forfeiture sought. The court erred in the above-mentioned rulings.

Because of that error, the judgment is reversed.

**Batts**, Circuit Judge, dissenting:

The holding in *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555,

Forfeiture—  
automobile  
used to defraud  
Revenue Laws—  
innocence  
of owner.

10 Sup. Ct. Rep. 244, that buildings and fixtures erected for distilling, and leased and used for that purpose, may be forfeited for failure of lessee to comply with the Revenue Laws, may be justified by the owner's destination of the property for a business necessarily under strict regulations, with knowledge of the consequences of their infraction.

To hold that § 3450, U. S. Rev. Stat. Comp. Stat. § 6352, 4 Fed. Stat. Anno. 2d ed. p. 311, subjects property designed for and used in transportation generally to forfeiture, when used in carrying distilled spirits upon which the tax has not

been paid, by one to whom it has been let for an innocent and proper purpose, the owner being without fault, is to ascribe to the legislative department an indifference to fundamental constitutional principles not warranted so long as another construction is possible.

That the powers incidental to taxation are necessarily strong, and that in their practical administration inequalities and injustices almost necessarily result, can afford no justification for the disregard of basic rights which the government was formed to protect.

### ANNOTATION.

#### Forfeiture of property unauthorizedly used by servant in violating law.

The cases found on this subject have been in relation to intoxicating liquors or to ships and cargoes.

The innocence of the owner will not prevent the forfeiture of his property, unauthorizedly used by his servant or agent in violation of the Liquor Laws. *Bush v. United States* (1885) 24 Fed. 917; *United States v. 1 Distillery & Fixtures* (1911) 193 Fed. 720; the reported case (*UNITED STATES v. MINCEY*, ante, 211); *Osborne v. State* (1906) 77 Ark. 439, 92 S. W. 406; *Com. v. Certain Intoxicating Liquors* (1895) 163 Mass. 42, 39 N. E. 348.

It will be seen that it is held in the reported case (*UNITED STATES v. MINCEY*) that an automobile driven by the servant of the owner, who has been sent by him to procure certain lawful merchandise, will be forfeited to the United States if the servant, though without his master's knowledge or consent, uses it to transport liquors in violation of the United States statute forfeiting conveyances used in the removal of goods or commodities with intent to defraud the United States of the tax thereon.

In a proceeding for a forfeiture, the court charged the jury: "The law is, gentlemen, that if a distiller,—that is, the owner or the proprietor of a registered distillery,—his agent or

servant, commits certain unlawful acts in the operation of the distillery, thereby the distillery, its equipment, and whatever distilled spirits are on hand, are forfeited to the United States, and become the property of the United States." *United States v. 1 Distillery & Fixtures* (1911) 193 Fed. 720, *supra*.

In *Bush v. United States* (1885) 24 Fed. 917, *supra*, a distillery was forfeited for acts of the owner's servants or agents, done without his personal knowledge or consent.

It was held that whisky was properly seized to be destroyed under the Arkansas statute, where a distiller, having the right under a United States license to sell liquor in quantities of not less than 5 gallons, shipped whisky to his agent in a prohibited district, instructing him to sell the same in legal quantities, and the agent, without his knowledge or consent, was selling the same in violation of law. *Osborne v. State* (1906) 77 Ark. 439, 92 S. W. 406, *supra*, where the court said: "The liquor in controversy was kept in a prohibited district, and was being sold contrary to law. That brought it within the ban of § 5137 of Kirby's Digest. It was wholly immaterial as to who owned the liquor, or what his purpose concerning it was. The statute is directed against the liquor it-

self that may be 'kept in or shipped into any prohibited district, to be sold contrary to law.' When it is shown, as it is here, that the liquor is being sold contrary to law, the nuisance exists, and it boots not the owner to say that it was being sold without his knowledge and against his will. The fact remains that the agent whom the owner intrusted with the liquor was selling it contrary to law. The proceeding is in rem. The liquor is the offender, so to speak; it is contraband, and to be destroyed when it is being used, no matter by whom, contrary to law."

Intoxicating liquors, the property of a corporation, were held subject to forfeiture as kept and intended for sale by one Wright contrary to law, where they were kept in a store owned and occupied by the corporation for its business, and were intended by the directors to be sold lawfully by Wright, the treasurer of the corporation and salaried manager of the store, under a license held by him, and Wright was selling and intending to sell them unlawfully, but this was without knowledge or consent of the directors. *Com. v. Certain Intoxicating Liquors* (1895) 163 Mass. 42, 39 N. E. 348, supra.

A case close to the subject of this note was *Com. v. Certain Intoxicating Liquors* (1871) 107 Mass. 396, where it was held that the innocent owner of liquors, which he stored, and which were, without his knowledge or consent, unlawfully sold by the keeper, cannot object to their forfeiture where the statute (of 1869) provided that if it appears that the liquor, or any part thereof, was, at the time of making the complaint, owned or kept by the person alleged therein, for the purpose of being sold in violation of the act, the court or justice shall render judgment that such or so much of the liquor so seized as was so unlawfully kept, and the vessels in which it was contained, shall be forfeited to the commonwealth. The court said: "If the claimant was not the keeper, his intent is not made material. The liquors are forfeited on account of the intent with which they were kept.

The object of the legislature was to adapt the process to the nature of the evil to be prevented. . . . If the claimant had owned a valuable dog, and sent him here to be kept according to law, and his agent had kept him illegally, or if a trespasser had done so, it would have been the duty of the officers of the law to kill him. There is nothing in the reported facts to exempt this liquor from forfeiture. It was no less a nuisance, and subject to be seized and forfeited, than if the claimant's agent had acted by authority from him." The court further observed that the jury must have found, under the instructions, that the liquors came into the hands of the keeper by the owner's consent; and stated that there was nothing to show that they were stolen.

But in *State v. Intoxicating Liquors* (1873) 63 Me. 121, it was held that, to justify the forfeiture of liquors as kept for unlawful sale, there must be the intention in this respect of the person who owns them, not the intention of a mere bailee who had no authority to sell them.

That the owner of a ship is innocent will not save his ship from forfeiture, where the master or crew have made use of the ship in violation of law. *United States v. The Adhel* (1844) 2 How. (U. S.) 233, 11 L. ed. 249 (see also *Rose's Notes* to this case); *United States v. The Little Charles* (1818) 1 Brock. 347, Fed. Cas. No. 15,612 (stating the rule); *The Napoleon* (1863) Blatchf. Pr. Cas. 357, Fed. Cas. No. 10,013; *United States v. The Cuba* (1869) 2 Hughes, 489, Fed. Cas. No. 14,898; *Idle v. Vanheck* (1727) Bunbury, 230, 145 Eng. Reprint, 657; *Mitchell v. Torup* (1766) Parker, 227, 145 Eng. Reprint, 764; *The Judith* (1799) 1 C. Rob. (Eng.) 150; *The Orozembo* (1807) 6 C. Rob. (Eng.) 433.

It is said in *Rolle's Abridgment*, 530, that if a letter of marque commit piracy on a friend of the King, without the notice or assent of the owner, yet for this the owner shall lose his vessel by the Admiralty Law, of which our law ought to take notice.

The innocence of the owner of a vessel whose captain and crew commit

acts of piratical aggression will not save the vessel from confiscation, under the statute providing that the vessel from which the aggression is made shall be condemned; but the cargo of such owner will escape. *United States v. The Adhel* (1844) 2 How. (U. S.) 233, 11 L. ed. 249, *supra* (see also *Rose's Notes* to this case).

In a proceeding under the Embargo Law to forfeit a ship, *Marshall, Ch. J.*, said, in holding the declaration of the master evidence against the owner: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel, which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master." *United States v. The Little Charles* (1818) 1 Brock. 347, Fed. Cas. No. 15,612, *supra*.

That the master was ignorant of the character of the service on which he was engaged, and that there was no delinquency on the part of the owner, will not prevent the forfeiture of a vessel captured in time of war. It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. *The Orozembo* (1807) 6 C. Rob. (Eng.) 433, *supra*.

A vessel violating the blockade is subject to forfeiture, though seven eighths of her are owned by a loyal citizen having no part or intention in her illegal conduct, but doing his best to prevent it. *The Napoleon* (1863) Blatchf. Pr. Cas. 357, Fed. Cas. No. 10,013, *supra*, where *Betts, J.*, said: "Notwithstanding his [the owner's] individual integrity the vessel is responsible, in law, in rem, for the malfeasance of the agent who had control of her, in violating the penal laws of navigation. The most distinguished and unblemished reputation on the

part of a shipowner will not protect his vessel from confiscation, when it is engaged, though through untrustworthy agents, and without his knowledge and against his prohibition, in illicit employments, in infractions of revenue and fiscal laws, and, pre-eminently, in violating the laws of war. The *res culpabilis* has meted out to it the mulct or confiscation legally applicable to an agent acting voluntarily in violation of law."

In *The Judith* (1799) 1 C. Rob. (Eng.) 150, *supra*, *Sir W. Scott* said: "Taking the fact to be that there was a blockade, and that the cargo was put on board after the knowledge of the blockade, I should have no hesitation in saying what I have indeed before laid down, that the act of the master of the vessel binds the owner in respect to the conduct of the ship as much as if it was committed by the owner himself. There are powers with which the law invests him; and if he abuses his trust, it is a matter to be settled between him and the person who constituted him master; but his act of violation is, as to the penal consequence, to be considered as the act of the owner."

In *Idle v. Vanheck* (1727) Bunbury, 230, 145 Eng. Reprint, 657, *supra*, it was held that a ship was forfeit where, without the knowledge of the master, goods were put on board by the mariners or passengers in order to smuggle them into England. Similarly, in *Mitchell v. Torup* (1766) Parker, 227, 145 Eng. Reprint, 764, *supra*, it was held that a ship was forfeit on which mariners, without knowledge or consent of the master, mate, or owners of the vessel, put on board goods in order to smuggle them into England.

Where the chief engineer of a vessel, without the knowledge of her owners or of her captain or first officer, secretly smuggled cigars, it was held that the vessel was forfeited, under the statute (of 1799) providing that no goods, etc., brought from foreign ports, shall be landed at night or without the authority of the proper officer of the port, that all goods so landed contrary to such provision shall become forfeited, and that, if their high-

est market value be over \$400, the vessel, tackle, apparel and furniture shall be subject to like forfeiture. *United States v. The Cuba* (1869) 2 Hughes, 489, Fed. Cas. No. 14,898, *supra*.

But in *the Ocean Bride* (1871) 1 Haskell, 331, Fed. Cas. No. 10,404, where a vessel licensed for the fisheries was forfeited for bringing in liquors under the statute (§ 32, of 1793) providing that "if any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, every such ship or vessel with her tackle, etc., and the cargo found on board of her, shall be forfeited," and she was owned, one fourth by the master and one of the crew, and three fourths by their father, and the owners protested their innocence, the court said: "If these statements of the claimants are credited by the court, the defense is sustained, as I do not hold that a vessel would be subject to confiscation, when goods have been put on board of her secretly without the knowledge of her officers. Those in authority should consent to, or connive at, the employment, in order to subject the vessel to forfeiture." But the court found that the master was guilty.

It seems to be taken for granted in *The Porpoise* (1855) 2 Curt. C. C. 307, Fed. Cas. No. 11,284, that a vessel is liable for the act of the master in transporting slaves from one foreign place to another, under the statute providing for forfeiture of the right or property of any citizen or resident of the United States in any vessel employed or made use of for such transportation.

In *Phoenix Ins. Co. v. Pratt* (1810) 2 Binn. (Pa.) 308 it was held that, if a general agent of neutral owners of cargo tries to mask belligerent goods under neutral cover, the owners are liable to have all their goods on board condemned.

It may be noted that in *United States v. Hutchinson* (1868) 1 Haskell, 146, Fed. Cas. No. 15,431, it was held that the master of a vessel is liable to the penalty of the value of goods imported, not on the manifest, where the statute provides for such liability, though the same were brought in secretly by the second mate, against the general orders of the master.

For forfeiture by innocent vendor of articles sold conditionally, and used by vendee in violation of law, see the annotation to *H. A. White Auto Co. v. Collins*, 2 A.L.R. 1596. B. B. B.

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BEN H. ARKIN, Admr., etc., of Annie Marie Christiansen, Deceased,  
v.

SETH H. PAGE, Impleaded, etc., Plff. in Certiorari.

*Illinois Supreme Court — April 15, 1919.*

(287 Ill. 420, 123 N. E. 30.)

**Automobile — family car — liability of owner for injuries.**

1. One who has provided an automobile for use in his family is not liable for injuries caused by it to a stranger, when it is being driven by a member of the family who is using it for a purpose of his own.

[See note on this question beginning on page 226.]

**Parent and child — liability of parent for tort of child.**

2. A parent is not liable for the tort of his minor child merely because of the relationship.

[See 20 R. C. L. 627.]

**Automobile — dangerous agency — liability of owner.**

3. An automobile is not so dangerous an agency as to make the owner liable for injuries caused by it when in charge of another person, to travelers



on the highway, regardless of the agency of the driver.

[See 2 R. C. L. 1190; 18 R. C. L. 815.]

**Master and servant — liability for act of servant — injury by automobile.**

4. The owner of an automobile is not

liable for injury done with it by a servant at a time when the servant was engaged in business of his own.

[See 2 R. C. L. 1199; 18 R. C. L. 813.]

(Cartwright and Farmer, JJ., dissent.)

**CERTIORARI** to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court for Cook County (Scanlon, J.) in favor of plaintiff in an action brought to recover damages for the death of his intestate, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Landon & Holt, for plaintiff in certiorari:

A parent is not liable for the torts of a capable minor child, occurring when the child is driving the parent's automobile, not upon the business of the parent, but solely upon the business and pleasure of the child without the parent's knowledge or consent.

Blair v. Broadwater, 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632; Hays v. Hogan, 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127; Dougherty v. Woodward, 21 Ga. App. 427, 94 S. E. 636; Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 1835, 131 Am. St. Rep. 677, 71 Atl. 296; Cohen v. Meador, 119 Va. 429, 89 S. E. 876, Ann. Cas. 1917D, 375; Parker v. Wilson, 179 Ala. 361, 43 L.R.A.(N.S.) 187, 60 So. 150; McFarlane v. Winters, 47 Utah, 598, L.R.A.1917D, 618, 155 Pac. 437; Johnston v. Cornelius, 193 Mich. 115, 159 N. W. 318; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; Doebr v. Abell, 174 Mich. 590, 140 N. W. 926; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731.

If the act is not done by the son in furtherance of the father's business, but in furtherance of some independent design of his own, the father is not liable.

Blair v. Broadwater, 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Parker v. Wilson, 179

Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150.

There is no proof of positive negligence on the part of Seth H. Page. The declaration does not set out and state the relationship of parent and child, nor any other relation out of which liability may be said to arise upon the pure doctrine of respondeat superior.

Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Mulchey v. Methodist Religious Soc. 125 Mass. 487.

In an accident case resulting in the death of a child, there can be no recovery if the parent of the child is guilty of contributory negligence.

Ohnesorge v. Chicago City R. Co. 259 Ill. 425, 102 N. E. 819.

Where a driver of an automobile is proceeding under ordinary circumstances in middle of block, and a child darts across the street and runs into the side of his car, the driver is not guilty of negligence.

Trafelet v. Chicago City R. Co. 202 Ill. App. 131.

Messrs. Thomas D. Nash, Michael J. Ahern, and J. A. Arkin, for defendant in certiorari:

Where the driver of a car, through his negligent inattention to the operation of it, brings it into collision with a young child, there is liability, regardless of the heedless actions of the child.

Perryman v. Chicago City R. Co. 242 Ill. 269, 89 N. E. 980.

The question of the contributory negligence of the parent in an action for the death of a child was properly one for the determination of the jury.

Illinois C. R. Co. v. Warriner, 229 Ill. 91, 82 N. E. 246; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553.

A cause of action may be stated against a defendant for negligence of his servant, directly and without notice.

ing the servant, by alleging that the defendant committed the act.

Klugman v. Sanitary Laundry Co. 141 Ill. App. 422; Johnson v. Magnuson, 68 Ill. App. 448.

Where a case is dismissed as to one or more defendants who have been sued jointly, the fact that the declaration charges the negligence of the defendants jointly is immaterial, unless drawn to the court's attention as a variance by motion.

Linquist v. Hodges, 248 Ill. 491, 94 N. E. 94.

A servant may properly be joined with his master in an action on the case.

Johnson v. Magnuson, 68 Ill. App. 448; Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 81 N. E. 411; Sullivan v. Corn Products Ref. Co. 245 Ill. 9, 91 N. E. 643; Wendzenski v. Madison Coal Corp. 203 Ill. App. 1; 18 R. C. L. pp. 780, 786, §§ 241, 247.

A parent is liable for injuries resulting from the negligent operation of his automobile by his child, when driven under a general authority from the parent and with his consent, express or implied, upon the business of the parent, and his business may be the pleasure, convenience, comfort, or education of his family, or any member thereof, as well as the trade, occupation, employment, or undertaking from which he derives financial gain.

Blakemore's Babbitt, Motor Vehicles, 2d ed. 1917, §§ 902 et seq.; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Stowe v. Morris, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35; Hufft v. Dougherty, 184 Mo. App. 374, 171 S. W. 17; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Guignon v. Campbell, 80 Wash. 543, 141 Pac. 1031; Moon v. Matthews, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; Carrier v. Donovan, 88 Conn. 37, 89 Atl. 894; Hazzard v. Carstairs, 244 Pa. 122, 90 Atl. 556; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Cohen v. Borgenecht, 83 Misc. 28, 144 N. Y. Supp. 399; McHarg v. —, 163 App. Div. 782, 149 N. Y. Supp.

244; Crawford v. McElhinney, 191 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Lynde v. Browning, 2 Tenn. C. C. A. 262; Griffin v. Russell, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Winn v. Haliday, 109 Miss. 691, 69 So. 685; Levine v. Ferlisi, 192 Ala. 362, 68 So. 269; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Hutchins v. Haffner, — Colo. —, L.R.A.1918A, 1008, 167 Pac. 966; Boes v. Howell, 24 N. M. 142, L.R.A.1918F, 288, 173 Pac. 966; Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595; Crouse v. Lubin, 260 Pa. 329, 103 Atl. 725; King v. Smythe, 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296; 20 R. C. L. p. 629, § 34.

The issue as to the relationship of master and servant between two parties defendant should be raised by special plea.

Johnson v. Hull, 199 Ill. App. 258; Kuchler v. Stafford, 185 Ill. App. 199.

Dunn, J., delivered the opinion of the court:

On June 24, 1914, Annie Marie Christiansen, a little girl three and one half years old, was run over by an automobile on one of the streets of the city of Chicago and received injuries from which she died. Her administrator brought suit to recover damages for her death against George J. Page, the driver of the car, and Seth H. Page, its owner. On the trial the plaintiff dismissed the action as to George J. Page and recovered a judgment for \$1,700 against Seth H. Page, who appealed to the appellate court, where the judgment was affirmed. Upon the petition of Seth H. Page a writ of certiorari was awarded and the record has been brought to this court for review.

George J. Page is the son of Seth H. Page, and in June, 1914, was twenty years old. At the time of the accident he was on his way from his home to the Lewis Institute for the purpose of seeing if he could register in a course of study at the summer school. He was alone in the automobile, which he had taken from the garage at his home without telling anybody that he was going to take the car out, or that he

was going to the Lewis Institute. He had not talked with his father about going to the school or the question of paying tuition, which he expected to pay himself out of money of his own which he had in the bank. The automobile belonged to his father and was bought in 1911. The family consisted of the father and mother, the young man, and his sister. George had learned to drive a car the year before the automobile was bought, and during the first year that his father owned the car he was the only one of the family who drove it. Later, both his father and sister learned to drive. In June, 1914, all the members of the family drove the car except the mother, and when she went out in it one of the other members of the family would drive. George had the whole mechanical care of the car. The father knew that George was in the habit of taking out the car, and, though he had not said either that he might or might not take it out at any time, he did not object to his taking it out, and it is to be inferred that George took the car whenever he wanted to, when it was not in use.

The defendant asked the court to instruct the jury to find a verdict in his favor, and it is argued that there is no evidence in the record of any negligence in the management of the car. Other questions also are argued; but the important question in the case is whether, assuming that negligence was shown in the driving of the machine, the plaintiff in error is liable for that negligence.

A parent is not liable for the tort of his minor child, merely from the relationship. There is no evidence or claim that George J. Page was not a competent chauffeur. An automobile is not so dangerous an agency as to make the owner liable for injuries caused by it to travelers on the highway, regardless of the agency of the driver.

Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433. The owner of an automobile who merely permits another to use it for his own purposes is not liable for the negligence of the borrower in the use of the machine. Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126. The owner of an automobile is not liable for an injury occasioned by the negligent use of the machine by his servant, if the servant was, at the time, at liberty from the service of his master and not engaged in doing his master's business, but was pursuing his own interests exclusively. Reilly v. Connable, 214 N. Y. 586, L.R.A.1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133.

Master and servant—  
liability for act of servant—  
injury by automobile.

The liability of Seth H. Page, if any, must rest upon the agency of George J. Page. Is the owner of an automobile, who has provided it for the use of his family for their pleasure, liable for an injury caused through the negligent driving of the automobile by a member of the family while using it for some personal purpose of his own? This question has arisen in many cases, and the decisions of the courts have been directly contrary, though all agree that the liability, if any, must rest upon the relation of master and servant between the driver of the automobile and the owner; that is, upon the fact that the driver of the automobile was at the time engaged in doing the owner's business. Those courts which have held the owner liable have done so on the theory that, when a father has bought an automobile for the pleasure of the family, he has made it his business to furnish entertainment

Parent and child—liability of parent for tort of child.

Automobile—dangerous agency—liability of owner.

for members of his family, and therefore, when one of them was permitted to use the automobile, even for his own personal and sole pleasure, he was carrying out the purpose for which it was owned and so was using it in the owner's business, who was, therefore, the principal, and liable for the agent's neglect. Such was the view of the supreme court of Washington in *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, which holds that a daughter driving for her own pleasure, her father's car, kept for the use of the family, is his servant, for whose negligence in operating the car he is liable. It was said that such use of the car was in furtherance of the very purpose for which the car was owned, and was used by one of the persons by whom it was intended that purpose should be carried out, and that the car was, in every just sense, being used in the owner's business by his agent. "It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair,—that is, his business,—and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance, abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purpose unconnected with the general purpose for which the machine was owned and kept."

Other cases in which, under varying conditions, a parent has been held liable for the negligence of his child in the operation of the parent's car owned and used for the family convenience and pleasure,

are *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Griffin v. Russell*, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; *King v. Smythe*, 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296; *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595. In some of these cases the child was driving with other members of the family, so that the question is not exactly the same as that presented here and in *Birch v. Abercrombie*, supra, and the distinction is noticed in *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742, where, in referring to the case of *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, which held that where a father purchases an automobile for the use of his family and their pleasure, and his minor son uses the car for his own pleasure, having in it neither any members nor any guests of his father's family, the relation of master and servant exists in the operation of the car by the son for his own pleasure, the supreme court of Oklahoma says that it is not to be understood as approving the length to which the rule is extended in that case, since it was not essential to determine that question in order to dispose of the case before the Oklahoma court. The doctrine of *Daily v. Maxwell*, supra, and of other cases in the Missouri court of appeals, was later overruled by the supreme court of Missouri in *Hays v. Hogan*, 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127, as unsound in principle and unsupported by the weight of authority; the court saying that "after a careful consideration of all the authorities cited, we have reached the same conclusion, and hold that the mere ownership of an automobile, purchased by a father for the use and pleasure of himself and family, does not render him liable

in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had his father's special or general permission to so use the car is wholly immaterial."

The cases cited by the defendant in error fully sustain the rules of law under which he claims the right to recover. On the other hand, there are many authorities which hold precisely the contrary. The doctrine announced in *Hays v. Hogan*, supra, which has just been quoted, is in accordance with the rules of law declared in *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Van Blaricom v. Dodgson*, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150; *McFarlane v. Winters*, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; *Blair v. Broadwater*, 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632; *Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876, Ann. Cas. 1917D, 375; *Linvile v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

It seems rather a fantastic notion that a son, in using the family automobile to take a ride by himself for pure pleasure, is the agent of his father in furnishing amusement for himself, is really carrying on his father's business, and that his father, as principal, should be liable for the result of the son's negligent manner of furnishing the entertainment to himself. It is said in the case of *Hays v. Hogan*, supra, that "the creation of the relation of master and servant should not be based upon the purpose which the parent had in mind in buying the automobile, and the permissive use by a member of his family. One might keep an automobile for the use of the members

of a club, the students of a certain school, the residents of a certain town, or for the general public; yet who will say, in case he permits such persons to use the machine and they injure a third party, that the relation of master and servant existed, and that, in using the automobile for one of the purposes for which it was bought, the club man, or the student, or a member of the general public was in the business of the owner, and that he is, therefore, liable for their acts."

The proposition announced is that a father, by the furnishing of the means of amusement to his family, has made their amusement his business, so that each member of the family, in using for his own personal enjoyment, upon his own initiative, any of the means so furnished, though engaged exclusively in the pursuit of his own peculiar ends, without the direction, control, advice, consent, or knowledge of any other person, is still engaged, as agent, in carrying on the business of another. If the son is his father's agent to amuse himself with an automobile, he must also be a like agent for his own amusement with bicycles, horses and buggies, guns, golf clubs, baseballs and bats, row boats, and motor and sail boats, if these should happen to be provided, and if, in carrying on his father's business by the use of any of these articles, as his father's agent, to amuse his father's son, he should negligently injure anyone, his father would be liable as principal. Such a refinement of reasoning has not been recognized until since the advent of the automobile, or in the case of any other instrumentality. A parent who has permitted his child to have firearms or use horses for his own amusement has not been held liable for the child's negligence in using them as the father's agent. He has been held liable only for his own fault, and not for the child's and accordingly, where a son was driving a horse for his own amusement, and not in his father's business, the fa-

Automobile-family car—  
liability of owner for injuries.

ther was not liable for his negligence. *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 199; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336. Where one was injured by the negligent use of a gun by a child, the parent was held liable, not for the child's negligence, but his own, in permitting the gun to come into the possession of one who was incompetent to use it. *Meers v. McDowell*, 110 Ky. 926, 53 L.R.A. 789, 96 Am. St. Rep. 475, 62 S. W. 1013.

The relation of master and servant is not established by the mere fact that the purpose for which the father purchased the machine was the pleasure of the family, and that he permitted his son to use it for his own pleasure. In *Doran v. Thomsen*, 76 N. J. L. 762, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, an instruction was given which stated, substantially, that these facts would create the relation of master and servant, and the court, in commenting upon the instruction, said: "It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons,—that such use must be in furtherance of, and not apart from, the master's service and control,—and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she, ipso facto, became a servant. So that the charge thus, in fact, left the legal relation of master and servant out of account, and raised it in name only,

because the daughter was allowed to drive the machine. In this there was also error."

In *Parker v. Wilson*, 179 Ala. 368, 43 L.R.A. (N.S.) 87, 60 So. 150, it is said: "The meager facts before us, though interpreted with favor to the appellant, present the case of a mere permissive use of the father's vehicle by the son for his own purposes of business or pleasure. On what principle can it be said, in this state of the case, that the son was the servant of the defendant, and acting within the course or scope of his employment? It seems clear that the ordinary rule of master and servant has no application to such a case, and, prior to the advent of the automobile, the contrary doctrine had no general currency in this country or England. . . . The doctrine contended for amounts to this: That the pleasure of the family, in its utmost detail, is the business of the father. As applied to the case at hand, it means that the son, in pursuit of his own pleasure with an automobile owned by his father, was engaged in the business of the father. But the doctrine, we think, has no firm foundation in reason or common sense. In theory, it overlooks well-settled principles of law; in practice, it would interdict the father's generosity and his reasonable care for the pleasure, or even the well-being, of his children, by imposing an universal responsibility for their acts."

Again it is said: "Automobiles are not to be classed with such highly dangerous agencies as dynamite or savage animals. They are not dangerous per se. Prudently driven, they are safer than the horse-drawn vehicle. But the special training needed for their operation, though simple and easily acquired, as well as the temptation to speed which they constantly present, should impose upon owners a special degree of care in the selection of experienced and judgmatic drivers for them. No doubt liability will arise where the owner in-

trusts a machine of such dangerous potentialities to the hands of an inexperienced or incompetent person, whether child or servant. In the case of a mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver, —negligence of the one in intrusting the machine to an incompetent driver; of the other in its operation. No such case is presented by either the pleading or the evidence shown in this record."

The new doctrine really seems to have its origin in the belief that there should be a distinction between an automobile and other vehicles and instrumentalities, and a greater liability on the part of the owner because the danger arising from its negligent use is greater. Thus, in *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125 (which the supreme court later reversed), the Missouri court of appeals, in affirming the judgment of the trial court, said: "We think that when an automobile . . . is being used by another member of the family than the owner, but with the owner's consent, that he should not be heard to say that such other is not his agent or servant. No dangerous rule is thus established, but one in harmony with and conducive to the proper recognition of the legislative enactment."

And in *Birch v. Abercrombie*, 74 Wash. 496, 50 L.R.A. (N.S.) 59, 133 Pac. 1020, it is said: "We think that both on reason and authority the daughter, in the present instance, should be held to be the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous."

So, in *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595, it is said, after a quotation from *Birch v. Abercrombie*, supra: "We are satisfied that the rule thus laid down is the correct one, not only because of the fact that the use of the machine by the son for his own pleasure was contemplated when it was purchased, but also because of the very nature of the automobile itself. While it is true that the automobile is not, in itself, a dangerous instrument, nevertheless it demands a very high degree of care and skill in its management upon the highway; and it must be recognized that, in the hands of an incompetent or reckless youth, it has immense potentiality for harm to others."

In *King v. Smythe*, 140 Tenn. 225, L.R.A.1918F, 293, 204 S. W. 296, the supreme court of Tennessee said: "It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and

streets, or he can forbid its use altogether. He must know the nature of the instrument, and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature as automobiles."

This argument may be sound enough, but it has no application to the doctrine of master and servant.

The instruction to find a verdict for the defendant should have been given.

The judgments of the Appellate Court and of the Circuit Court are reversed, and the cause is remanded to the Circuit Court.

**Cartwright and Farmer, JJ., dissenting:**

The opinion adopted by the majority is contrary to the weight of authority, as perhaps is sufficiently apparent from the opinion. In 20 R. C. L. 629, the conclusion of the courts on the question is stated as follows: "Where a parent purchases an automobile for the use of his family, a child using it for his own pleasure is held by the weight of authority to be the servant of his parent in doing so, and if, in the course of his travels, he negligently manipulates the machine, the act is within the scope of his employment."

The same doctrine is stated in

Berry on Automobiles, § 653: "The rule is followed in most of the states in which the question has been decided that one who keeps an automobile for the pleasure and convenience of himself and his family is liable for injuries caused by the negligent operation of the machine, while it is being used for the pleasure or convenience of a member of his family."

In Blakemore's Babbitt on Motor Vehicles, 2d ed. § 902, the same rule is stated: "There is a class of cases where the head of a family buys an automobile for the use and pleasure of his family, and the courts incline to hold that when a car bought for family use is used for that purpose the owner is liable for negligence in its operation,"—and this is followed by cases supporting the doctrine.

In § 903 of the same work, it is said the weight of authority now is that when a father provides an automobile for the pleasure of his child he is liable for the child's negligence in running the car, with this statement: "If a father owns an automobile and permits his son to run it, the son is, as a matter of law, his agent"—citing *Winn v. Haliday*, 109 Miss. 691, 69 So. 685, in which case a son of the owner was driving an automobile accompanied by his brother and friends on his way to a ball game.

We see nothing fantastic in these statements of the relation between the owner of an automobile furnished for general family use and a member of the family operating it in the authorized use, nor in the decisions of many courts to the same effect. The relation is not based upon the purpose which the parent has in mind in buying the automobile, but upon the authorized application to the family use, and there is no similarity whatever between providing an automobile for the use of the owner's family, and keeping one for use of a club, school, or general public, between whom and the owner there is no relation or obligation to furnish an



automobile or anything else. Neither is there any ground for comparison between furnishing golf clubs, baseballs and bats, or the like, to be used on private grounds, and furnishing an engine-driven car to be used on the public streets and highways, where the owner must anticipate that negligence in operation may produce the most serious results.

The leading case in support of the opinion adopted in this case is *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, which is generally cited by the courts adopting the same theory; but in *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322, the court stated rules at variance with the former decision. In the later case the question was one of agency, where the son was driving his father's automobile with his mother and sister and guests, and the court said: "It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation, just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways."

The refusal of the trial court to direct a verdict against the plaintiff was approved and judgment affirmed. The court said that the relation of principal and agent may be either expressed or implied, and the real question is whether the act is done with the assent of the person charged, whether expressed or implied. The court saw some ground of difference between that case and the former one, but declared that the operation of an automobile furnished by a parent for the use of his family is his business, and the authority to use it may be either expressed or implied.

There is no possible ground of difference concerning liability, whether there is one member of the family in the automobile or the whole family. If it is within the

5 A.L.R.—15.

scope of a father's business to furnish members of his family with an automobile for family use, just the same as it is his business to furnish them with food and clothing, or to minister to their health in other ways, it was just as much the business of the plaintiff in error, when his son drove the automobile for his convenience, as if all the family had been riding in it. The only ground upon which it can be said that he was not liable for negligence in the operation of the automobile would be that it was none of his affair, which is not only contrary to the weight of authority, but against the public interest and natural justice. It is not contended that the liability arises out of the mere fact of the relation of parent and child, or upon the duty of a parent to furnish an automobile for the use of the members of his family, but it rests on the doctrine of agency, which is not confined to commercial business transactions, and which arises from the fact of the parent furnishing an automobile for family use, with a general authority, expressed or implied, that it may be used for the pleasure, comfort, and entertainment or outdoor recreation of members of the family. The correct doctrine has been stated and applied in numerous cases under conditions similar to those shown by the record in this case. *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Griffin v. Russell*, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; *King v. Smythe*, 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296; *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595.

## ANNOTATION.

**Liability of owner under "family-purpose" doctrine, for injuries by automobile while being used by member of his family.**

- I. Generally, 226.
- II. Where child is driving with other members of family, 227.
- III. Where car is being used by child alone, 228.
- IV. Liability where spouse of owner is using car, 232.

V. Where owner's parent is using car, 233.

- VI. Where members of family are being driven by owner's chauffeur, 233.

*I. Generally.*

As to validity, construction, and effect of statutes which make owner responsible for negligence of another person operating automobile, see annotation to *Wolf v. Sulik*, 4 A.L.R. 361.

For liability of parent for injury to child's guest by negligent operation of car, see annotation to *Flynn v. Lewis*, 2 A.L.R. 900.

This note does not include the question of an owner's liability, so far as it involves the application of the generally accepted principles for the determination of the relation of master and servant or principal and agent, but covers merely the question of liability under the so-called "family-purpose" doctrine. This doctrine holds the owner of an automobile, which was purchased and maintained for the pleasure of his or her family, liable for injuries inflicted by the machine while it is being used by members of the family for their own pleasure, on the theory that the car is being used for the purpose or business for which it was kept, and that the person operating it is, therefore, acting as the owner's agent or servant in using it. It is to be observed that this doctrine presupposes that the car is kept for family use, and does not apply to a car not so kept, but which a member of the family was allowed to take on a particular occasion. In its full scope, the doctrine applies equally, whether the member of the family who was driving the car was alone or was accompanied by other members of the family. Some courts, however, even those which emphasize the point that the car was kept for family use, draw a distinction between the two cases.

It may be observed in this connection that if, upon the particular occasion in question, the son, under the direction or request of the owner of the car, takes out other members of the family, the owner might be held responsible upon general principles of master and servant, or principal and agent, and without invoking the distinctive doctrine now under consideration. But if it merely appears that, without any such direction or request, the car was being used for the pleasure of two or more members of the family, it is not so clear that the case can be distinguished from one where the car was being used by a single member of the family, in circumstances otherwise the same. The dissenting opinion in the reported case (*ARKIN v. PAGE*, ante, 216) expressly denies the possibility of such a distinction, stating that there is no possible ground of difference concerning liability, whether there is one member of the family in the automobile, or the whole family. The New Jersey court of errors and appeals, however, as subsequently shown, does draw such a distinction. It may perhaps be said in support of the distinction, even as applied to a case where the decision must rest upon the fact that the car was being used in furtherance of the family purpose for which it was kept, that the family purpose, as distinguished from the individual purpose of the member of the family who was driving the car upon the occasion in question, is emphasized when he is accompanied by other members of the family, and that, conversely, the individual purpose overrides the family purpose, when no

other members of the family are present. At all events, the distinction is one that cannot be safely disregarded in considering the cases.

A direct conflict exists among the courts concerning the doctrine under consideration; some have squarely rejected it, while others have as unqualifiedly approved and adopted it. The doctrine undoubtedly involves a novel application of the rule of respondeat superior, and may, perhaps, be regarded as straining that rule unduly. There are, however, undoubted practical considerations in favor of the doctrine, since it puts the financial responsibility of the owner behind the car while it is being used by a member of the family, who is likely to be financially irresponsible, in pursuit and furtherance of the purpose for which the car is kept; and relieves the injured person from the difficult task of meeting the owner's claim that, upon the occasion in question, the car was not being used for his pleasure or business. The doctrine of course, extends its protection not only to pedestrians, but to other automobilists who may be injured in person or property by the negligence of a member of the family of the owner of the car in question. It may be observed that the practical results accomplished by this doctrine, without the aid of a statute, are secured in Michigan, and perhaps some other states, by a statute which, in effect, holds the owner responsible for all injuries negligently inflicted while the car is being used by another with the owner's consent, express or implied. See *Stapleton v. Independent Brewing Co.* (1917) 198 Mich. 170, L.R.A.1918A, 916, 164 N. W. 520. Such a statute, however, goes further than the doctrine, and covers cases beyond its reach, e. g., where the car is not kept for family use, but is loaned upon a particular occasion.

## II. *Where child is driving with other members of family.*

In the following cases, in which an automobile was kept for the pleasure and convenience of the owner's family, it was held that he was liable, under the "family-purpose" doctrine, for an injury caused by it while it was be-

ing occupied and used with his express or implied permission by members of his family, who were being driven by one of his children; at least, they emphasize the point that the car was kept for and habitually used by the members of the family. *Denison v. McNorton* (1916) 142 C. C. A. 631, 228 Fed. 401; *Lemke v. Ady* (1916) — Iowa, —, 159 N. W. 1011; *Collinson v. Cutter* (1919) — Iowa, —, 170 N. W. 421; *Dircks v. Tonne* (1918) — Iowa, —, 167 N. W. 103; *Uphoff v. McCormick* (1918) 139 Minn. 392, 166 N. W. 788; *Missell v. Hayes* (1914) 86 N. J. L. 348, 91 Atl. 322; *Boes v. Howell* (1918) 24 N. M. 142, L.R.A.1918F, 288, 173 Pac. 966; *McNeal v. McKain* (1912) 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742.

The rule was stated and adopted in *Denison v. McNorton* (1916) 142 C. C. A. 631, 228 Fed. 401, *supra*, that where a father provides an automobile for the pleasure of his family, the use of the car for such purpose is within the scope of his business analogously to the furnishing of food or clothing, or ministering to their health.

In *Stowe v. Morris* (1912) 147 Ky. 388, 39 L.R.A.(N.S.) 224, 144 S. W. 52, where the owner's son had implied permission to use the car, and, at the time an injury occurred, was driving it for pleasure, accompanied by his sister and their friends, the court said: "In the first place, it may be said that a considerable part of the discussion of counsel is addressed to the idea that, even though the son was generally the agent or servant of the father in the operation of the car, the father is not liable under the facts stated here, because the son was engaged at the time in an enterprise of his own, the seeking and giving of pleasure to himself, his sister, and their friends, upon an excursion of his own, in which the father had no interest, and which was not in the line or scope of the son's employment. The question ordinarily is a vital one in cases of this character; but it is of no consequence here. For the only ground upon which the father can be held answerable for this act of his son excludes the idea of an independent

venture, under the facts detailed. That ground is, as contended for by the appellee, that the machine was bought and operated for the pleasure of the family; that, at the time of the accident, the son was engaged in carrying out the general purpose for which the machine was bought and kept, and that, as he took it out at the time in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it, the purpose for which it had been bought, he was engaged in the execution of his father's business, i. e., the supplying of recreation to the members of the father's family. In order that our statement may be clear, we again repeat that this is the only basis upon which it is possible to predicate the recovery against the father in the case at bar; for it is established generally that the father is not liable for the torts of the son, committed without his knowledge or authority, express or implied. Nor is it charged in the present case that the father had turned the son loose with a dangerous agency, so that the question of whether that state of fact, if proved, would have rendered the father liable, is not before us. There is the single question stated. We find that the principle has been a good deal discussed in the different states within the few years that motor vehicles have been in current use. The courts are not in harmony. The question is largely a new one in Kentucky, and we have endeavored to arrive at a correct answer, based upon precedent and upon the general principles of law which affect or are ancillary to a just exposition of the law. The spirit of our determination, it may be remarked, is founded upon a Kentucky case which, though cited but rarely in later Kentucky cases, has been largely cited in the cases from other states, in the textbooks, and in the general authorities upon the subject. The case is that of *Lashbrook v. Patten* (1864) 1 Duv. (Ky.) 317. In this case the appellant's minor son, whilst driving, with his father's approbation, the latter's carriage and team, conveying the

son's two sisters to a picnic, negligently ran against the carriage of another. An action was brought against the father for the damage. This court said that 'the son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant.' The opinion commented upon the fact that the occupants of the carriage were the members of the father's family, and that the journey to the picnic, which, of course, was purely in the pursuit of pleasure, was undertaken with the father's approbation. In the case at bar, the journey was a journey in pursuit of pleasure, of which at least two members of the father's family were the beneficiaries. There had been, it is true, no express consent for the particular journey, but the consent was broader; for it was a consent so general as that it embraced any time and any journey for which the pleasure-seeking young members of the family might see fit to use the car."

*III. Where car is being used by child alone.*

The doctrine under consideration was also adopted and applied in the following cases, in which the owner's car was being used by one of his children alone at the time an injury was caused by it, it being held that notwithstanding this fact the owner was liable, since the child was using the machine for the purpose for which the owner kept it:

Arizona.—*Benton v. Regeser* (1919) — Ariz. —, 179 Pac. 966.

California.—*Crittenden v. Murphy* (1918) 36 Cal. App. 803, 173 Pac. 595.

Georgia.—*Griffin v. Russell* (1915) 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994 (disaffirming contrary view in *Schumer v. Register* (1913) 12 Ga. App. 743, 78 S. E. 731).

Minnesota.—*Kayser v. Van Nest* (1914) 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Jensen v. Fischer* (1916) 134 Minn. 366, 159 N. W. 827; *Johnson v. Evans* (1919) — Minn. —, 2 A.L.R. 891, 170 N. W. 220; *Johnson*

*v. Smith* (1919) — Minn. —, 173 N. W. 675.

Missouri.—*Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351; *Hays v. Hogan* (1914) 180 Mo. App. 237, 165 S. W. 1125, reversed in (1917) 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127; *Marshall v. Taylor* (1912) 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313.

Montana.—*Lewis v. Steele* (1916) 52 Mont. 300, 157 Pac. 575.

South Carolina.—*Davis v. Littlefield* (1914) 97 S. C. 171, 81 S. E. 487.

Tennessee.—*King v. Smythe* (1918) 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296.

Texas.—*Allen v. Bland* (1914) — Tex. Civ. App. —, 168 S. W. 35.

Washington.—*Birch v. Abercrombie* (1913) 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Guignon v. Campbell* (1914) 80 Wash. 543, 141 Pac. 1031; *Switzer v. Sherwood* (1914) 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216.

The decisions of the Missouri court of appeals above cited have, however, been overruled by the supreme court of that state, see *infra*.

The court in *Birch v. Abercrombie* (1913) 74 Wash. 493, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, *supra*, said: "It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance, abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purpose, unconnected with the general purpose for which the machine was owned and kept."

And, after criticizing the court's

reasoning in *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443, *infra*, where the "family-purpose" doctrine was rejected, the court in *King v. Smythe* (1918) 140 Tenn. 225, L.R.A.1918F, 293, 204 S. W. 296, *supra*, said, "If a father purchases an automobile for the pleasure and entertainment of his family and, as Dr. Smythe did, gives his adult son, who is a member of his family, permission to use it for pleasure, except when needed by the father, it would seem perfectly clear that the son is in the furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business transactions. It is true that an automobile is not a dangerous instrumentality, so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument, and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of

justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature of automobiles."

The "family-purpose" doctrine appears to have been partially relied upon, at least, by the court in *Ploetz v. Holt* (1913) 124 Minn. 169, 144 N. W. 745, in holding the evidence sufficient to require the submission of the owner's liability to the jury, in an action for an injury inflicted by his machine while it was being used by his son.

It will be observed, however, that in the reported case (*ARKIN v. PAGE*, ante, 216) where the defendant's car, kept for family purposes, was being used by his son for his own pleasure when an injury was caused by it, the court rejected the family-purpose doctrine.

And in the following cases, where a car kept for family purposes caused an injury while being used by a child of the owner alone, for his pleasure, the courts refused to hold the owner liable under the doctrine in question: *Watkins v. Clark* (1918) 103 Kan. 629, 176 Pac. 131; *Hays v. Hogan* (1917) 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127; *Bolman v. Bullene* (1918) — Mo. —, 200 S. W. 1068; *Doran v. Thomsen* (1909) 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Heissenbittel v. Meagher* (1914) 162 App. Div. 752, 147 N. Y. Supp. 1087, affirmed in (1917) 221 N. Y. 511, 116 N. E. 1050; *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; *Blair v. Broadwater*

(1917) 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632; *B. & R. Co. v. McLeod* (1912) — Alberta L. R. —, 7 D. L. R. 579, reversed on other grounds in (1914) 18 D. L. R. 245.

The decision in *Doran v. Thomsen* (1909) 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, was distinguished in *Missell v. Hayes* (1914) 86 N. J. L. 348, 91 Atl. 322, on the ground that, in the *Doran* Case, the automobile was occupied only by the defendant's daughter and her friends, while, in the *Missell* Case, the defendant's son and other immediate members of the family were in the car.

The court in *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443, supra, said: "It has always been supposed that a person who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. *Reilly v. Connable* (1915) 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656. The attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use, and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter, and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification, or in debate of

'the query whether such a liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative answer has been given by the courts of some states. *Birch v. Abercrombie* (1913) 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Marshall v. Taylor* (1912) 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan* (1914) 180 Mo. App. 237, 165 S. W. 1125, reversed in (1917) 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127; *Davis v. Littlefield* (1914) 97 S. C. 171, 81 S. E. 487; *Griffin v. Russell* (1915) 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct, which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for family use a horse, or wagon, or boat, or set of golf sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family that, if sometime he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out, not his own purposes, but, as agent, the business of his father."

And in rejecting the doctrine in *Watkins v. Clark* (1918) 103 Kan. 629, 176 Pac. 131, *supra*, the court said: "The purchase of the automobile by the defendant for the use of his family, including his daughter, operated as a gift to them of the right to use it. When using it to accomplish his purposes, whether business or pleas-

ure, they represent him, but when they exercise their privilege and use it to accomplish their own distinct purpose, whether business or pleasure, they act for themselves, and are alone responsible for their negligent conduct. The fact that the automobile was purchased for use by the owner's family did not make him generally responsible for its subsequent operation, and because the car was subject to appropriation by the members of his family for their own use, there is no presumption that any particular trip was made in his behalf. The use made of the car on any particular occasion is a question of fact, to be determined by evidence showing the fact, and in this instance there was no evidence that anybody was concerned except the daughter. The development of the law on this subject has been attended by a rather slow process of clarification. When the automobile was new and strange, and was regarded with some wonder and considerable fear, there was a tendency to look upon it as a dangerous thing, fraught with such possibility for harm that the owner should always be held responsible for its use. When it commenced to take the place of the family horse, this view had to be abandoned. The notion, however, of general liability on the part of the owner for use of his car having been planted in the mind, it lingered there like a superstition. Courts were reluctant to ignore it, and, as a result, an adaptation of the law of master and servant, and principal and agent, was resorted to, to explain the liability. If a man purchased an automobile and allowed his wife and his son and his daughter to use it, the use was his by virtue of representation, whether representation existed in fact or not. The deduction was facilitated by employment of the fine art of definition—putting into the definition of the term 'business' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.' As this incongruity be-

came more and more apparent, a further concession was sometimes made. If the owner allowed a member of his family to use the automobile, he might not be liable, but it was 'presumed' the use was his by representation. If son took his best girl riding, *prima facie* it was father's little outing by proxy, and if an accident happened, *prima facie* father was liable. Some courts were inclined to get rid of the difficulty of resting liability on the one existing fact, ownership of the car, by declaring that the question of 'agency' was one for the jury, a process known in some quarters as 'passing the buck.' The sooner the courts settle down and deal on the basis of fact and actuality with a vehicle which has revolutionized the business and the pleasure of the civilized world, the better it will be, not only for society, but for the court."

And the supreme court of Missouri in *Hays v. Hogan* (1917) 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127, in an interesting opinion, stated that the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby through the negligence of his minor son while operating it in furtherance of the son's business or pleasure, whether he had his father's special or general permission to use the machine. The car in this case, however, appears to have been taken against the father's orders.

It has been held that, although a father may purchase an automobile for the general use of his family, he nevertheless retains the right to deny its use to any member when he sees fit, and that, when he does so, he cannot be held liable where the member surreptitiously takes the car and negligently operates it to the injury of another. *Jensen v. Fischer* (1916) 134 Minn. 366, 159 N. W. 827.

And in *Linville v. Nissen* (1913) 162 N. C. 95, 77 S. E. 1096, it was held that no recovery could be had against the owner of an automobile for an injury resulting from its negligent op-

eration by his son, where there was evidence that the latter took the car against his father's prohibition, for a pleasure ride, although it also appeared that the machine had been bought for family use, that the son had sometimes acted as chauffeur, and that the father knew that he was a careless driver, but did not lock the garage.

And in *Cohen v. Meador* (1916) 119 Va. 429, 89 S. E. 876, no liability was held to attach to the owner of an automobile for an injury which occurred while his son, who acted as chauffeur, was using the car without his father's knowledge, to take the son's friends for a ride. There was no mention in this case, however, that the car was one kept for family purposes.

#### *IV. Liability where spouse of owner is using car.*

The family-purpose doctrine has been applied where a car kept for family purposes was being used by the owner's spouse at the time an injury resulted from its operation.

*Hutchins v. Haffner* (1917) — Colo. —, L.R.A.1918A, 1008, 167 Pac. 966. The court here said: "The decisions bearing upon the liability of an owner of an automobile kept for family use, for the negligence of a member of his family in driving the machine with his consent, cannot be reconciled. A majority of this court have chosen to adopt the doctrine that a husband is liable for an injury inflicted by his automobile, which he purchased for family use, while it was being operated by his wife solely for her own pleasure, under his general permission to use the machine whenever and wherever she pleased, upon the theory that the wife was the husband's agent in carrying out one of the purposes for which the car was purchased and owned."

In the following cases, however, in which the car was being driven by the owner's spouse, or a member of the family other than a child, when an injury was inflicted by it, the courts refused to hold the owner liable under the family-purpose doctrine. *Mast v. Hirsh* (1918) 199 Mo. App. 1, 202 S. W. 275; *Tanzer v. Read* (1914) 160



App. Div. 584, 145 N. Y. Supp. 708; *Farthing v. Strouse* (1916) 172 App. Div. 523, 158 N. Y. Supp. 840.

In *Tanzer v. Read* (1914) 160 App. Div. 585, 145 N. Y. Supp. 708, *supra*, the court said: "I know of no law, however, which compels a husband to afford his wife either the opportunity or means for recreation; but if he does so, I do not think that, while engaged in such recreation, she is in any sense acting as her husband's agent, even though she utilize his property as a means for her pleasure. Section 57 of the Domestic Relations Law (Consol. Laws, chap. 14; Laws 1909, chap. 19) provides that 'she is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation, and such coercion or instigation shall not be presumed, but must be proved.'"

In *Crawford v. McElhinney* (1915) 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221, where an injury resulted while the defendant's wife was operating his machine, which was occupied by defendant and his guests, the fact that the car was purchased for his pleasure and that of his wife was one element entering into the decision that the question of her agency was for the jury.

#### *V. Where owner's parent is using car.*

The family-purpose doctrine has been applied, and liability held to result, in a case where a daughter kept an automobile and furnished a chauffeur for her mother, and an injury resulted from its negligent operation while the mother was using the car. *Crouse v. Lubin* (1918) 260 Pa. 329, 103 Atl. 725. The court in this case quoted from *Berry* on the Law of Automobiles, as follows: "The rule is followed in most of the states in which the question has been decided that one who keeps an automobile for the pleasure and convenience of himself and family is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure . . . of his family."

#### *VI. Where members of family are being driven by owner's chauffeur.*

Most of the cases involving liability for injuries inflicted by an owner's car while members of his family are being driven by his chauffeur are based on the doctrine of master and servant, apart from the family-purpose doctrine. A few cases, however, mention the family use of the car as one element, at least, leading up to the decision.

Thus, in *Cohen v. Borgenecht* (1913) 83 Misc. 28, 144 N. Y. Supp. 399, where a father kept an automobile for the general use of his family, and employed a chauffeur to operate it, and gave his sons general permission to use it with the chauffeur, he was held liable on the theory of master and servant, for an injury occurring through its negligent operation while it was being used by his sons for their own pleasure, without the father's special permission, and being driven by the chauffeur under the sons' orders. The court said: "While the authorities hold that where even a member of the owner's family, or an employee, borrows an auto and uses it for his own purpose, the owner cannot be held liable (*Clark v. Buckmobile Co.* (1905) 107 App. Div. 122, 94 N. Y. Supp. 771; *Maher v. Benedict* (1908) 123 App. Div. 580, 108 N. Y. Supp. 228), I am of the opinion that said authorities do not apply to the case at bar. Here the evidence is that the machine was in general use for the members of defendant's household; that the chauffeur, who operated the machine at the time of the injury to plaintiff, was not only in the employ of the defendant and subject to his control at that time, but was acting in obedience to the general orders of defendant to take the machine at any time to such places as might be required by members of defendant's family. To hold defendant not responsible for the acts of his employee under such circumstances would be subversive of law and justice."

And in *Freeman v. Green* (1916) — Mo. App. —, 186 S. W. 1166, where the owner of an automobile was held liable

for an injury which occurred while being driven by his chauffeur for the convenience of the owner's son-in-law, who was a member of the owner's household, and had permission to use the machine for his pleasure or business when it was not being used by the owner, the court stated that the chauffeur was following the owner's general directions in driving the machine for the benefit of a member of the owner's household.

And in *Winfrey v. Lazarus* (1910) 148 Mo. App. 388, 128 S. W. 276, where the owner of an automobile when he went abroad left his machine for the convenience of his family, it was held that he was liable for an injury occurring while the car was being driven by the owner's chauffeur, under orders

of his married daughter who was a member of the owner's household.

In *Hazzard v. Carstairs* (1914) 244 Pa. 122, 90 Atl. 556, where, at the time of a collision, an owner's car was being driven by her chauffeur and occupied by her daughter, the question of responsibility was held properly left to the jury by an instruction that if the car was under the control of a member of the owner's family, and was permitted to be used for the benefit and pleasure of members of the family, it was for the jury to say whether it would be a legitimate inference to draw that it was being used within the scope of the employment of the chauffeur, and that, if so, the defendant would be liable for his negligence. J. T. W.

## H. W. CLARKE

v.

## BLUE LICKS SPRINGS COMPANY.

*Kentucky Court of Appeals — June 20, 1910.*

(184 Ky. 827, 218 S. W. 222.)

**Damages — contract to plug well — breach — recovery of lost profits.**

1. A well owner who has abandoned the project after the hole has reached a certain depth cannot recover lost profits because of the contractor's refusal to plug the well at a less depth and case it to that point so as to permit the owner to utilize valuable liquid there found, if the contract did not require him to do so.

[See note on this question beginning on page 240.]

**Well — contract for drilling — construction.**

2. A clause in a contract for drilling a well that if it is abandoned by the owner the contractor shall draw the casing and plug the well does not require the contractor to plug the well at some point between top and bottom which would require drawing the casing, inserting the plug, and replacing the casing to the point where the plug was placed, so as to make the well productive from that point.

**— duty to draw casing.**

3. One who, after contracting to drill a well, and reaching a certain depth and being notified of an intention by the owner to abandon and plug the well, inserts to the depth reached cas-

ing belonging to the owner, is bound to draw it upon demand even though the owner accompanies his demand with an illegal condition as to plugging.

**— injury to casing — cost of drawing.**

4. A well driller who wrongfully puts the owner's casing in the well after being notified of an intention to abandon and plug the well is chargeable with the cost of drawing it and the difference in its value between the times it was put in and taken out of the well.

**— conversion of casing — cost of drawing.**

5. A property owner whose casing is wrongfully put into a well by one who has contracted to drill the well is not

entitled to recover its value as though converted, if it can be drawn and its value is greater than the cost of drawing.

**Custom — part of contract — knowledge.**

6. To enable a meaning given to a word by custom which is different from its ordinary meaning to prevail in a contract, it must either have been known and understood by the parties when entering into the contract which

was made with reference to it, or it must have been in such universal use that it will be presumed to have been known to the parties.

**Well — reaming — what constitutes.**

7. A contract for extra pay for reaming a drilled well will not, in the absence of an understanding to that effect, include the depth to which the enlarged hole was extended by drilling beyond the bottom of the smaller one, which was enlarged by reaming.

**CROSS APPEALS** from a judgment of the Circuit Court for Nicholas County dismissing a petition filed to recover a balance alleged to be due under a contract to drill a well; plaintiff appealing from the judgment dismissing his petition and defendant appealing from so much of the judgment as dismissed his counterclaim. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Conley & McCartney for appellant.

Messrs. Holmes & Ross, for appellee:

Plaintiff, having failed to complete the well, had no right under the contract to cease drilling in said well without the direction of the defendant, or to claim that he had fulfilled his contract and demand the stipulated price therefor of the contract.

*Foster v. Watson*, 16 B. Mon. 377.

The court cannot place an unusual or peculiar or local meaning to this word "reaming," but will have to construe it in its ordinary true sense and meaning.

*Spring Garden Ins. Co. v. Imperial Tobacco Co.* 132 Ky. 7, 20 L.R.A. (N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234.

Mr. C. F. Spencer also for appellee.

Thomas, J., delivered the opinion of the court:

We shall refer to the parties as they were designated below; the plaintiff, H. W. Clarke, being the appellant here, and the defendant, Blue Licks Springs Company, a corporation, being the appellee here.

On May 28, 1912, the parties entered into a written contract whereby plaintiff agreed to bore on the land of defendant in Nicholas county a well for the purpose of obtaining Blue Lick water, petroleum, oil, or natural gas. He was to receive as compensation for his work \$1,000 for the first 600 feet in depth of the well, and \$1 per foot

for its depth thereafter, not to exceed a total of 1,600 feet, but at any time before reaching that depth defendant had the right, if acceptable Blue Lick water was found, to stop the boring and accept the well as a completed one to the point reached. If the well was accepted at any depth, plaintiff agreed to put in the prescribed casing and clean the well out, after which his compensation under the contract would be due; but if the well was not accepted at any point to which it was bored, and defendant should abandon it entirely, plaintiff then agreed to draw the casing and plug the well, when he would be entitled to collect for his work. It was agreed that the well, if accepted, should be finished with 6½-inch casing unless defendant concluded to finish it below 600 feet with 4½-inch casing, all casing to be furnished by defendant and put in the well by plaintiff, who was also to furnish all machinery and appliances necessary for doing the work. If, at any time during the progress of the work, it became necessary to finish the well according to contract, any reaming was required, plaintiff was to receive 50 cents per foot for all reaming done by him. Furthermore, if it became necessary during the progress of the work to shut off objectionable water or to prevent a cave-in, any casing should be put in

the well plaintiff agreed to do it, and afterwards draw such protecting casing and prepare the well for the agreed sized pipe as for a finished well.

As the work progressed Blue Lick water was found at different points, but in such quantities, quality, and force as not to be acceptable to defendant, and finally, after about eighteen months from the time of beginning, the well had reached a depth of about 1,545 feet. In the meantime there had been an agreement to substitute, for the 4 $\frac{1}{2}$ -inch casing, 5-inch casing, and about 1,550 feet of it had been put upon the ground. Some time prior to January 3, 1914, there had been some conversation about procuring an additional 50 feet of 5-inch casing. Letters had passed between the parties concerning it, and on the date mentioned defendant, by its manager, C. C. Coe, wrote plaintiff this letter:

"Yours of the 1st was not received by me until this A. M., not in time to reply by to-day's mail. I did not order the 50' of casing you suggested in your letter, and if you strike water again below the amount of casing we have we will be willing to quit off there and measure up; hoping that you will not strike any more snags before you strike the end, as it certainly has been a long, wearisome job. Will try and arrange for the balance of the money when the job is done."

After receiving that letter plaintiff sunk the well to the depth of the 5-inch casing then on hand, and about 6 feet in addition, and without notification to defendant put in the 5-inch casing from the top to the bottom of the well, a total depth of 1,545 feet, leaving a space at the bottom of about 6 feet uncased, in which space there was a stream of Blue Lick water found, but as to its quantity, quality, etc., the record is silent.

A few days after that casing was put in plaintiff made out his account against defendant, amounting to

\$2,386.50, credited by \$500 advanced to him on October 7, 1912, leaving a balance of \$1,886.50, for which he demanded payment of defendant, but which was refused, because it claimed that the well had not been finished according to contract; that plaintiff had wrongfully inserted in the well all of the 5-inch casing, and demand was made of him to draw that casing, and to plug the well at a point about 1,000 feet from the top, all of which he declined to do. He afterwards filed a lien for what he claimed to be due him, as is provided in § 2463, Carroll's Kentucky Statutes, and later filed this suit to recover the amount of his claim and to assert a lien upon defendant's land to secure it.

The answer consisted of a denial of the allegations of the petition, and in other paragraphs asserted a counterclaim, which consisted of \$250 paid to plaintiff on August 30, 1913, and a like sum on November 6, 1913, and \$345, being the value of 1,545 feet of 5-inch casing, which it was claimed plaintiff wrongfully put in the well, \$1,200 loss in profits which could have and would have been made in the sale of Blue Lick water if plaintiff had finished the well according to the contract as construed by defendant, and a few other smaller items claimed to have been paid by defendant, and which it averred were properly chargeable to plaintiff under the terms of the contract.

A reply completed the issues, and upon submission the court at its September term, 1915, adjudged that the well had not been completed according to contract, and that plaintiff had wrongfully inserted in it the 5-inch casing referred to, and which the court found was done against the consent of defendant, and when he knew that defendant did not want it done. The judgment then proceeds: "He [plaintiff] is now given until the first day of the next term of this court to draw said string of 5-inch casing, and he shall complete said well pur-

suant to the contract, if said defendant wishes him to do so."

Plaintiff did nothing towards obeying that order, and at the succeeding term of court, which was held in February, 1916, his petition was dismissed, as was also defendant's counterclaim, to which judgment both parties objected and excepted, and they both have appealed to this court.

During the progress of boring the well a stream of Blue Lick water was found at a depth of between 950 and 975 feet, which was not only the strongest stream found at any time, but it was of the best quality and had the greatest force; the water from it coming to within 13 feet of the surface and flowing in such quantities as that it could not be lowered with the use of a pump. At that time plaintiff insisted that the well should be cased in and accepted by defendant; but inasmuch as it had the right to require as much as 1,600 feet of boring, it insisted on going deeper, with the final result which we have above stated. Later, when it became evident that no better or acceptable stream of Blue Lick water could be found, defendant insisted that under the contract it had the right to require plaintiff to draw the casing and to plug the well at any point it desired, and case it in from the surface down to that point, thereby giving it the right to abandon a part of the well and accept another part, while defendant insisted that under the terms of the contract plaintiff was compelled to either accept or abandon the well at the depth to which it was bored, and that he was not required to plug the well at any point, unless it was entirely abandoned by plaintiff; and it is chiefly out of these different constructions put upon the contract by the respective parties that this litigation grew.

That part of the contract which we think is decisive of the question reads: "If the well, or wells, are abandoned by the second party [defendant] at any time before com-

pletion, or at completion, the first party [plaintiff] shall draw all casing from same and plug the well, or wells, free of charge, with the exception that the said second party shall furnish the plugs."

Other parts of the contract provide that, if the well is accepted by defendant, plaintiff was to thoroughly bail and sand-pump it and clean it out, and in no event was any part of the contract price to be paid until the well was completed or abandoned as per terms of the contract.

We have closely read the testimony, as well as the contract, together with briefs of counsel, more than once, and after a careful consideration we have concluded that the proper construction of the quoted clause from the contract and the intention of the parties to be gathered therefrom support the contention of plaintiff rather than that of defendant. It will be seen that the clause in question gave defendant the right to abandon the well, either before completion or at completion, and it was then that plaintiff should draw all casings from the well and plug it. The plugging called for by the contract could be done at any point in the well, since the purpose of it was to prevent the escaping of any gases, oils, or other mineral, and thereby prevent any dangerous condition, as well as to preserve those substances from waste, and such plugging did not require any recasing of the well. This, no doubt, is the intention and purpose of §§ 3911 and 3912 of Carroll's Kentucky Statutes. The proof shows (as is perfectly manifest without it) that the hole of the size to receive the finished casing could not be plugged while any of that size casing is in the well, since the plug, in order to go through the casing, would be too small to fill up the hole below. This fact would necessitate the drawing of the casing and plugging the well, and then reinserting the casing down to that point. Clearly, if the well was accepted at the depth to which it was

bored, there would be no necessity of any plugging, for the bottom of the well would of itself be a natural plug. And when defendant insisted upon plaintiff drawing the pipe, and then plugging the well at a point between the bottom and the top, at a point about three fifths the distance to the bottom, it exacted

**Well—contract  
for drilling—  
construction.**

of him an obligation not contemplated by the contract. To plug the well at such a point is shown by the evidence to be more difficult, as well as expensive, than to plug it near the surface, and in addition it would require plaintiff to draw all the pipe from the bottom, or from whatever distance it had been inserted, and to plug the well at the given point, and then reinsert the casing down to that point.

So, when the matter was suggested to plaintiff, he was correct in his insistence that the demand that he should plug the well at or in the neighborhood of 1,000 feet from the top, so as to shut off all objectionable water below and enable plaintiff to appropriate the Blue Lick water found just above that point (950 feet), and thereby have a finished well of that depth, was not authorized by any of the terms of the contract. The contract nowhere provides for any plugging to be done, except in case the well was abandoned; not even an intimation is found in the contract that it could be partially abandoned by defendant, and plaintiff be required to plug it at any point which was passed in boring, so as to make it a completed and accepted well down to that point. We therefore conclude that it was the duty of defendant to have either accepted or rejected the well to the depth which plaintiff bored it. If accepted, it was then the duty of plaintiff to put in the casing as he did; but, if abandoned, it was his duty to draw the casing and plug the well as in case of an abandoned one, which, as we have seen, is one requiring no casing.

It is equally clear, however, that plaintiff wrongfully inserted the 5-inch casing in the well. A short while before he did so, there were conversations between the parties looking to the plugging of the well at about the depth of 1,000 feet, and he had gone so far as to instruct defendant as to the character of plugs, which under the contract it was required to furnish, that would be necessary for the purpose. Efforts were being made by defendant at the time to have the plugs manufactured, all of which plaintiff knew before inserting the 5-inch casing. He, however, had objected to plugging the well at the depth of 1,000 feet, as not being within the terms of his contract, and defendant had inquired of him what would be the extra cost for doing so. These conversations very clearly show two things: (a) That plaintiff knew the well would not be accepted at the depth he bored it; and (b) defendant knew that the plugging of the well at any intermediate point and recasing it down to that point was not included in the terms of the contract.

Under these conditions plaintiff should not have inserted the 5-inch casing; but, having done so, it was his duty to have complied with the order of the court by drawing it, which, as we have stated, he failed to do. However, defendant was not authorized to attach, as it did, the condition that plaintiff should plug the well at the point designated. This demand, however, did not dispense with the duty of plaintiff to, in the first instance, not insert the 5-inch casing, but, having done so, to draw it as the court directed. Plaintiff having failed in these particulars, it is clear that the rights of the parties demand that his claim should be credited with whatever it cost to draw the 5-inch casing, and, since he wrongfully put it in the well, he should also be charged with the difference in value, if any,

**—duty to draw  
casing.**

**—injury to  
casing—cost of  
drawing.**

of it at the time it was put in the well and at the time it should be withdrawn. Defendant is not entitled to credit by the entire value of the 5-inch casing, as though it had been converted by plaintiff,

—conversion of casing—cost of drawing.

since the cost of drawing it would be much less than its value, and when drawn it is the property of defendant. There is not sufficient proof in the record to enable us to say what the cost of drawing the casing would be, nor can we say from the record what, if any, would be the difference in the value of it when drawn, and upon a return of the case both parties will be allowed to take proof upon these issues.

Another contention arises between the parties as to the true meaning of the word "reaming," as found in the contract. It is claimed by plaintiff that in drilling the well he reamed 813 feet, for which he is entitled to charge 50 cents per foot, which is correct if he ascribes to that term the proper meaning as used in the contract. The definition of the word "reaming," as given by Mr. Webster, is: "To widen the opening of a hole; to enlarge or dress out a hole with a reamer." Plaintiff concedes such is the proper definition of the word, but he contends that a custom prevailing among those drilling wells has enlarged the meaning of the word, so as to include within the term all of the depths of the larger hole made after passing the bottom of the smaller one being reamed. For illustration: If a 5-inch hole extends the depth of 100 feet, and it is desired to ream it so as to make an 8-inch hole, and the latter dimensions are continued after passing the bottom of the 5-inch hole, the entire distance of the 8-inch hole is properly considered as reaming. In the first place, it is perfectly plain that the alleged customary definition is directly contrary to the meaning of the word as given

by Mr. Webster, and for it to prevail, and be allowed to affect the contract and the rights of the parties, it must be shown that the alleged custom through and by which it is done must either have been known and understood by the parties at the time of entering into the contract, and that the contract was made with reference to it, or the custom must have been of such universal use as that it would be presumed to have been known by the parties. 17 C. J. 450, 492; Postal Teleg. Cable Co. v. Louisville Cotton Oil Co. 136 Ky. 843, 122 S. W. 852, 125 S. W. 266; Rochester-German Ins. Co. v. Peaslee-Gaubert Co. 120 Ky. 752, 1 L.R.A.(N.S.) 364, 87 S. W. 1115, 89 S. W. 3, 9 Ann. Cas. 324.

Custom—part of contract—knowledge.

No such customary meaning of the word is shown to have existed in that community. It is true that plaintiff testified to the existence of such a custom among well drillers, and introduced a witness who testified as to the custom prevailing among drillers of oil wells in communities far removed from the vicinity where the well involved here was being drilled; but neither of them attempted to say that any such custom prevailed in that vicinity. Besides, a number of witnesses, some of whom were well drillers in the immediate vicinity, testified to the contrary, and further said that the word "reaming," as used in the contract, meant only the enlargement of a smaller hole to its bottom, and that the reaming ceased when the bottom of the small hole was reached, although the larger hole was continued on below that point. So we conclude that the only reaming in the contract under consideration for which plaintiff is entitled to collect at the rate of 50 cents per foot is actual reaming and enlarging of a smaller hole, as above indicated. The testimony as to the amount of this character

Well—reaming—what constitutes.

of reaming which plaintiff did is so vague, indefinite, and uncertain as to make it impossible to tell the amount due him for this item, and upon a return of the case further preparation should be made, so as to enable the court to determine the amount due plaintiff for the actual reaming he did under the contract.

The other items claimed by plaintiff include small sums, the aggregate of which is only \$29; and after considering the evidence we do not think it sufficient to entitle him to collect any of them.

This leaves the amount due plaintiff \$1,000 for the first 600 feet and \$951 for the remainder, making a total of \$1,951. To this should be added the sum found to be due him for the actual reaming he did. From this should be deducted payments made, with interest from the dates made, and the cost of drawing the 5-inch casing, plus any damage or depreciation in the value of it since being placed in the well; and he should be given a judgment for the difference, unless defendant is entitled to recover on some portion of its counterclaim.

The principal item in the counterclaim, aside from the value of the 5-inch pipe which we have considered, and payments made, is that seeking to recover \$1,200 for the loss of profits in being deprived of the use of the well; but since plain-

tiff was not required to plug the well, so as to enable plaintiff to use the water, as we have found, nothing can be recovered for this item, even if the proof and the pleadings were sufficient to enable it to do so, which, however, we do not find to be true. In the first place, the amount of such profits is purely speculative, and there is not sufficient evidence to show that defendant would or could have sold any of the water, if it could have obtained it.

The remaining items of the counterclaim consist of small sums alleged to have been paid by defendant during the progress of the work for repairs upon some of the machinery, which machinery it was required to and did furnish, for some packing, and perhaps for other purposes,—all of which it claims should have been paid by plaintiff; but they aggregate only a small amount, and the evidence concerning them is not by any means convincing the one way or the other, and upon the whole we have concluded that the rights of the parties will be properly adjusted by the rendition of the judgment which we have hereinbefore indicated.

Wherefore the judgment is reversed, with directions to proceed in accordance with this opinion.

## ANNOTATION.

### Measure of damages for defective performance of contract to bore or case well.

It is, in the few cases which have passed on the question, held that the measure of damages for the defective performance of a contract to bore or case a well is the amount it required to complete the well in such manner as to conform to the contract. Loss of profits which would have been made had the well been completed are held to be too uncertain and speculative to be considered as an element of damages. *Gayton v. Day* (1910) 101 C. C. A. 609, 178 Fed. 249; *Corbin Oil*

& Gas Co. v. Mull (1906) 30 Ky. L. Rep. 91, 97 S. W. 385; *Henry Oil Co. v. Head* (1914) — Tex. Civ. App. —. 163 S. W. 311. And see the reported case (*CLARKE v. BLUE LICKS SPRINGS Co. ante*, 234).

In *Gayton v. Day* (Fed.) *supra*, it appeared that the defendants agreed to drill a well for the plaintiff, which, it was expected, would produce oil. After the well had been sunk 4,100 feet without reaching oil, a new contract was made to increase the depth

Damages—contract to plug well—breach—recovery of lost profits.



of the well to 5,000 feet. The plaintiff paid the agreed price on the first contract. The second contract provided that if hard granite or hard flint or water should be encountered, making it impossible to proceed, or in case it became impossible for the defendants, with reasonable efforts and skill and with approved tools and apparatus, to continue drilling, the defendants might cease drilling, in which event the plaintiff agreed to pay them \$5 per foot for each foot actually drilled. When the well had reached the depth of 4,740 feet the sides caved in, and it became impossible for the defendants to proceed drilling although they used reasonable efforts and skill and approved tools and apparatus. The defendants put in a counterclaim for the agreed value of their services under the second contract, and it was admitted that no part of it had been paid by the plaintiff. The plaintiff denied that the defendants had used reasonable skill and approved tools and apparatus to overcome the obstruction caused by the caving in of the sides of the well. It was held that this issue of fact had been properly left to the jury by the court, but, as to the measure of the plaintiff's damages, it was held that the court erred in allowing the jury to take into consideration as a measure of damages, the amount the plaintiff had paid the defendants under the first contract. In that case it was said: "As we have before intimated, in this suit the damage suffered by plaintiff is measured by such expenditures as she has made by reason of the undertaking of the defendants in the second contract, or any definite, ascertained, and computable loss, not speculative in character, which has come to her by reason of the breach by defendants of their contract."

In *Henry Oil Co. v. Head* (1914) — Tex. Civ. App. —, 163 S. W. 311, it appeared that the plaintiff conveyed certain oil leases to the defendant oil company, in consideration of that company sinking a well to a depth of 1,200 feet, or to oil or gas in paying quantities. The oil company undertook to drill the well, but, after reaching a depth of 900 feet, abandoned it, with-

5 A.L.R.—16.

out the consent and against the protest of the plaintiff. The trial court allowed as to the measure of damages the value of the property conveyed to the defendant. It was held that this ruling was at least sufficiently favorable to the defendant. The court said: "To allow just compensation in every case demands the application of different rules for measuring the damage according to the circumstances of each case. In the present case we have no doubt but that appellee would have been entitled to complete the well undertaken by appellant, and to have charged appellant with the costs thereof, but the undisputed evidence is to the effect that this would have exceeded the amount of the judgment. We think appellant has no cause of complaint, since the recovery is limited to the amount actually expended on the contract."

In *Corbin Oil & Gas Co. v. Mull* (1906) 123 Ky. 763, 97 S. W. 385, it appeared that the defendant agreed to drill a well to the depth of 2,000 feet, unless oil or gas was sooner found in paying quantities, or unless he was directed to stop at a less depth. When the well had been sunk over 1,500 feet, the defendant abandoned it and failed to case it, so that it filled up, and, as the plaintiff claimed, drowned a flow of gas and oil which was of some market value. In measuring the damages for the breach of contract, it was held that there should be allowed the necessary cost of cleaning out the water or debris allowed to accumulate in the well, and of casing it as the defendant was required to do, and the excess cost of drilling it to 2,000 feet over the contract price for that work; that from this amount should be deducted the amount due the defendant for the number of feet below 1,500 for which he had not been paid; and that if it should be found that, owing to the caving in of the sides of the well, it would cost as much to clean it as to drill a new one, then the measure of damage to the plaintiff would be the amount paid to the defendant for doing the work which he had destroyed by his lack of attention and skill. It was held, how-

ever, that the value of the gas deposit was too speculative and uncertain to be allowed as damages caused by the caving in of the walls of the well, as there was no way of ascertaining whether such deposit contained sufficient gas to be a paying proposition; that the only way this could be done

was to allow the gas to flow long enough to demonstrate that it was not a pocket; and that in the absence of such a test it would be impossible to estimate the loss sustained by reason of the failure of the driller to keep the walls of the well from caving in.

B. F. D.

## BLISS B. WARD

v.

## GREAT ATLANTIC & PACIFIC TEA COMPANY.

*Massachusetts Supreme Judicial Court — September 11, 1918.*

(231 Mass. 90, 120 N. E. 225.)

### Sale — warranty — food in can.

1. The provision of the Sales Act that when the buyer expressly or by implication makes known to the seller the purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is manufacturer or not there is an implied warranty that the goods are reasonably fit for the purpose, applies to a sale by retail of food in sealed cans.

[See note on this question beginning on page 248.]

### Appeal — question open — case stated.

2. In a case taken to the supreme court by report on a case stated, no point is open as to form of action or pleadings unless expressly reserved.

### Sale — reliance on seller.

3. That one purchasing from a grocer a can of beans for food relies on the wisdom of the seller as to the quality of the product is a necessary inference from the relation of the parties.

[See 24 R. C. L. 195, 196.]

### Statute — construction foreign decisions.

4. Decisions of a foreign country construing a statute subsequently adopted with close similarity by the

local legislature are entitled to consideration in construing the statute.

### Food — pebbles in canned beans.

5. Beans canned for food are not fit for consumption if they contain pebbles of sufficient size to break a tooth.

[See 11 R. C. L. 1104.]

### Evidence — pebbles in beans.

6. It is a matter of common knowledge that pebbles are often found in raw and uncleaned beans.

[See 15 R. C. L. 1108.]

### Food — pebbles in beans — negligence.

7. Preparing beans for food with pebbles among them may be found to be lack of due care.

[See 11 R. C. L. 1118.]

(Crosby, J., dissents.)

REPORT by the Superior Court for Essex County (Jenney, J.) on a case stated, for the opinion of the Supreme Judicial Court of a question arising in an action brought to recover damages for an injury sustained by plaintiff while eating food purchased by him at defendant's store. *Judgment for plaintiff.*

The facts are stated in the opinion of the court.

Messrs. E. J. Carney, C. A. Green, and J. F. Doyle for plaintiff.

Messrs. Dunbar, Nutter, & McClenen, and John E. Peakes, for defendant:

On the facts, apart from the label, the defendant is not under any liability to the plaintiff.

Farrell v. Manhattan Market Co. 198 Mass. 280, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Gearing v. Berkson, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785; Boston Lodge v. Boston, 217 Mass. 177, 104 N. E. 453; Cunningham v. Connecticut F. Ins. Co. 200 Mass. 333, 86 N. E. 787; Bigelow v. Maine C. R. Co. 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396; Inter-State Grocer Co. v. George William Bentley Co. 214 Mass. 231, 101 N. E. 147; Gossler v. Eagle Sugar Refinery, 103 Mass 331; Rinaldi v. Mohican Co. 171 App. Div. 814, 157 N. Y. Supp. 561; Julian v. Laubenberger, 16 Misc. 646, 38 N. Y. Supp. 1052; Valeri v. Pullman Co. 218 Fed. 519; Travis v. Louisville & N. R. Co. 183 Ala. 415, 62 So. 851; Walden v. Wheeler, 153 Ky. 181, 44 L.R.A.(N.S.) 597, 154 S. W. 1088; Winsor v. Lombard, 18 Pick. 57; Kusick v. Thorndike & Hix, 224 Mass. 413, 112 N. E. 1025; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884.

The presence of the label does not alter or increase the liability of the defendant.

Carey v. Baxter, 201 Mass. 522, 87 N. E. 901; Boomer v. Wilbur, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Wilson v. B. S. Ferguson Co. 214 Mass. 265, 101 N. E. 381; Kusick v. Thorndike & Hix, 224 Mass. 413, 112 N. E. 1025; Jacobs v. Childs Co. 166 N. Y. Supp. 798.

Rugg, Ch. J., delivered the opinion of the court:

The defendant conducts a retail grocery store at Ipswich. It had for sale at this store beans in sealed all-tin cans, bearing this label: "Grandmother's Brand A. & P. Beans & Pork with Sauce, contents 2 lbs. 1 oz." "Remove contents of this can as soon as opened and place in earthenware dish." "The Great

Atlantic & Pacific Tea Co. Incorporated, Distributors, Jersey City, N. J., U. S. A."

These cans of beans were purchased by the defendants from the Thomas Canning Company, of Grand Rapids, Michigan, after canning. It furnished the labels which were affixed to the cans by the manufacturer. The defendant had no supervision of the process of canning, and no knowledge or means of knowledge that any foreign substance was in the cans. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company is an independent reputable manufacturer of canned goods, and in its processes employed all modern methods to prevent the presence of foreign substances in its products. Its goods were widely distributed, and were considered to be of good quality by the wholesale and retail stores which handled them. On or about March 16, 1917, the defendant, through the manager of its Ipswich store, sold to the plaintiff one of these sealed cans of beans. At no time after the sealing of the can until it was opened by the plaintiff was there visible indication that the contents were in any way defective, or that the can contained any foreign substance. The can contained baked beans, among which was a small pebble. The plaintiff was ignorant of its presence, and, while eating of the beans, broke his tooth on the pebble, and later, on account of this injury, was obliged to have the tooth extracted.

The case comes before us by report on a case stated. No point is open as to the form of action or pleadings. The only question is whether the plain-

Appeal-question open-case stated.

tiff can recover in any form of action. Smith v. Carney, 127 Mass. 179; Brettun v. Fox, 100 Mass. 234.

The transaction between the plaintiff and the defendant as to the can of beans necessarily involved a purchase of food to be eaten. That need not be stated in precise words. It was an underlying and essential

condition of the contract, implied without expression. It arose from the nature of the goods, the size of the purchase, and the terms of the label. It is provided by the Sales Act (Stat. 1908, chap. 237) § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

That provision governs the relations of the parties in the case at bar. In this respect, the statute is in substance, so far as concerns a dealer such as the defendant, simply a codification of the common law. It was said in *Farrell v. Manhattan Market Co.* 198 Mass. 271, 279-281, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 485, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, a case arising before the Sales Act: "Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and, if they are so ordered, he is liable if they are not fit to be eaten. . . . If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food, whether supplied under a pre-existing contract . . . or in response to an order not given in person, . . . or even when the order is given in person in the dealer's shop, provided . . . that the selection is left to the dealer. . . . But, even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer

that the provisions are unsound) if provisions are not fit for food."

The opinion in that case contains an exhaustive review of the authorities. See also in this connection, *Race v. Krum*, 222 N. Y. 410, 414, L.R.A.1918F, 1172, 118 N. E. 853; *Cook v. Darling*, 160 Mich. 475-481, 125 N. W. 411; *Parks v. C. C. Yost Pie Co.* 93 Kan. 334-337, L.R.A. 1915C, 179, 144 Pac. 202, 7 N. C. C. A. 100, and note in L.R.A.1917F, 472 to 475.

That statement of the law, which is but an amplification, so far as relates to the case at bar, of the terms of the Sales Act, governs the facts here presented. The defendant was a dealer, the plaintiff a buyer at retail. There arises inevitably the implication that the plaintiff made known to the defendant that he was purchasing the beans for consumption as food, and that he was relying, because from the character of the <sup>-reliance on seller.</sup> transaction he was bound to rely, upon the skill of the defendant in selecting the can which was offered to him.

It is not expressly stated in the agreed facts that the defendant selected the can for delivery to the plaintiff, or that the latter relied upon the skill and judgment of the defendant in selecting the can for delivery. But that he did so rely seems an almost irresistible inference from the facts stated. The cans in the defendant's stock were all alike in label, and in general appearance. The cans were sealed. Their contents could not, in the nature of things, be open to inspection before the sale. There could be no intelligent selection, based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or tradename. The situation is quite different from the

choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance, as in the *Farrell Case*. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express statement to the contrary, this must be regarded as a necessary inference from the relation of parties.

There appears to us to be no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. But the principle stated in *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 431, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, is a general one. It has long been established. Simply because it may work apparent hardship in certain instances is no reason for changing it to fit particular cases. It is a salutary principle. It has become wrought into the fabric of the law as the result of long experience. It may be assumed that the affairs of mankind have become adjusted to it. It has recently been adopted by the legislature in codifying the law as to sales. It imposes liability in the absence of an express contract between the parties governing the subject. It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss,

because he knows or comes in touch with the manufacturer. In the case at bar the plaintiff had no means of ascertaining the manufacturer from inspection of the goods bought. The retail purchaser in cases of this sort ordinarily would be at some disadvantage if his only remedy were against the manufacturer.

It was said by Farwell, L. J., in the course of a judgment in the court of appeal in *Jackson v. Watson & Sons* [1909] 2 K. B. 193, at 202, 3 B. R. C. 182; 16 Ann. Cas. 492: "The plaintiff sues for breach of contract of warranty of fitness for human food of certain tinned salmon supplied to and eaten by himself and his wife, and there is not (and indeed since *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608, 74 L. J. K. B. N. S. 386, 21 Times L. R. 300, 53 Week. Rep. 354, 92 L. T. N. S. 527, there could not well be) any question as to the sufficiency of his cause of action; the only question is as to the damages."

The *Frost Case* related to a sale of milk by a retail dealer. Both cases arose under the English Sale of Goods Act, § 14 (1), quoted at length in *Farrell v. Manhattan Market Co.* 198 Mass. 278, 279, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, which does not differ in any particular material to the present case, from § 15 (1) of our Sales Act. It is manifest, therefore, that the English courts hold that under the Sale of Goods Act there is no distinction between canned goods and goods not canned and open to inspection, so far as concerns the implied warranty of fitness in sales of food to the ultimate consumer. Decisions of this character, in view of the fact that the English Sale of Goods Act was enacted before our own, and of the close similarity of the pertinent section of each act, are entitled to consideration. See *McNicol's Case*, 215 Mass. 497, 499, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. Decisions of an

Statute—construction foreign decision.

inferior court in Illinois are precisely to the same effect, namely, that in sales by a retail dealer to a consumer canned goods are on the same footing as other foods. *Sloan v. F. W. Woolworth Co.* 193 Ill. App. 620; *Chapman v. Roggenkamp*, 182 Ill. App. 117, being based upon *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210.

There is nothing in *Winsor v. Lombard*, 18 Pick. 57, inconsistent with the conclusion here reached. That was a sale of goods, by description, by one dealer to another dealer. Both parties were taken to rely upon the description of the goods sold, which was founded on an inspection and branding under inspection laws. Apparently it was a sale of specified goods under a trade-name such as is now covered by § 15 (4) of the Sales Act, and where there is no implied warranty of fitness for any particular purpose. It is pointed out in the opinion in that case, at page 62, that it was not intended to apply to sale of food at retail for immediate use. It is to be noted that *Walden v. Wheeler*, 153 Ky. 181, 44 L.R.A. (N.S.) 597, 154 S. W. 1088, and *Bigelow v. Maine C. R. Co.* 110 Me. 105, 110, 43 L.R.A. (N.S.) 627, 85 Atl. 396, each arose at common law, and not under a Sales Act. But if and so far as they are inconsistent with the conclusion here reached, we cannot follow them.

No discussion is required to demonstrate that canned beans and pork

**Food—pebbles  
in canned  
beans.**

**Evidence—  
pebbles in  
beans.**

are not fit for consumption if they contain a pebble of sufficient size to break a tooth. It is matter of common knowledge that pebbles often are found in raw and uncleaned beans. In domestic use, careful sorting is required to free them from such substance. It is or may be found

**Food—pebbles  
in beans—  
negligence.**

lack of due care for one to prepare beans for eating with pebbles still among them. See *Watson v. Augusta Brewing Co.* 124 Ga. 121,

1 L.R.A. (N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, 19 Am. Neg. Rep. 107.

It follows that the plaintiff is entitled to recover, and since it is agreed that his damages are \$350, judgment may be entered in his favor for that sum.

So ordered.

**Crosby, J., dissenting:**

I cannot agree with the decision of the majority; and as the question presented has not before arisen in this court, I feel it to be my duty that I should state my views.

The plaintiff received an injury to his tooth while eating baked beans, among which was a small pebble. The beans were purchased by the plaintiff at the defendant's store, and were contained in a sealed tin can. They were purchased by the defendant with other beans in tin cans, from the manufacturer, the Thomas Canning Company of Grand Rapids, Michigan. The labels upon all the cans described the defendant merely as "distributors." There is nothing to indicate that the defendant prepared or manufactured the contents; no contention to that effect is made; and it is not contended that the presence of the pebble in the can, or the plaintiff's injury, was due to any negligence whatever on the part of the defendant. Although it is stated in the opinion that "it is or may be found lack of due care for one to prepare beans for eating with pebbles still among them," I do not understand the opinion to hold the defendant liable for negligence, but upon an implied warranty that the beans in the can were free from foreign substances and fit for human consumption.

The case comes before us by report on a case stated, in which it appears that the beans purchased by the plaintiff "were canned in a tin can such as is ordinarily used for such canning, and at no time after the sealing of the can and until it was opened by the plaintiff were there any visible indications that the contents were in any way defective, or that the can contained any for-

eign substances. . . . The defendant had no supervision of the process of canning these beans, and had no knowledge or means of knowledge of the presence of the pebble in the can. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company is and was at all times an independent reputable manufacturer of canned goods, and in its canning process employed all modern methods to prevent the presence of foreign substances in its canned products. The products of the company were widely distributed, and were considered by the wholesale and retail stores which handled them, to be of good quality."

It is provided by our Sales of Goods Act (Stat. 1908, chap. 237) § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

The above-quoted clause of the act does not differ from the rule as it existed before the enactment of the statute, but is declaratory of the common law so far as pertinent to this case.

I agree that the transaction was a purchase and sale of food to be eaten, and was so understood by the defendant. Notwithstanding this fact, in order that it may be charged upon an implied warranty that the goods sold shall be fit to be eaten, it must further appear, both at common law and under the act, "that the buyer relies on the seller's skill or judgment," unless there is something to show that the plaintiff relied on the defendant's skill or judgment, it is plain that the defendant cannot be charged with liability upon an implied warranty. That the plaintiff relied on the skill or judgment of the defendant in making the purchase is not expressly stated in

the report; nor, in my opinion, can it reasonably be inferred from the facts stated.

It appears that the cans in the defendant's stock of canned goods from which the plaintiff made the purchase in question were labeled alike, all were sealed, and their appearance was so similar that there was no way in which the contents of one could be distinguished from another. The fact that the cans were sealed made inspection of their contents before the sale impossible. It may fairly be inferred that it was necessary, in order to preserve the contents, that the cans should be sealed. There was no way in which the defendant as a seller could inspect or analyze or otherwise determine the quality or fitness of the contents of the cans before they were sold by him.

It was his duty to furnish to his customers goods of a reputable brand, properly inspected and prepared in accordance with approved methods, and purchased of a reputable manufacturer. It is agreed that in all respects the defendant fully complied with these requirements. While the plaintiff could make no intelligent selection based upon an observation of the can containing the beans, his situation was the same as that of the defendant. The position of a purchaser and that of a seller in selecting a particular can, so as to be able to judge of the quality, wholesomeness, and fitness for food of its contents, are identical. Under such a sale of canned goods, it seems plain that the buyer does not rely on the seller's skill or judgment; the buyer knows that the article he purchases is in a sealed can; he knows that it is impossible for the seller to have any more knowledge of the contents of the can than he (the buyer) has. They are in precisely the same situation; they are upon an equal footing. How, then, can it be said that the buyer relies upon the skill or judgment of the seller? How can it reasonably and fairly be inferred from the agreed facts in this case

that the plaintiff relied upon the skill or judgment of the defendant in selecting the can sold to him (the plaintiff), when the latter was fully aware of the fact that the defendant could not possibly have any knowledge of its contents? In my opinion, upon the facts stated, to infer that the plaintiff relied on the defendant's skill or judgment would be wholly unwarranted. The reasoning of the able opinion in *Bigelow v. Maine C. R. Co.* 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396, seems to me to apply with equal force to this case.

I am aware that in some jurisdictions a seller of food in sealed cans has been held liable upon an implied warranty, but it does not seem to me that such decisions are in accordance with sound principles. The rule which governs where a piece of meat, or other article of food which is open to examination and inspection, is sold, has no application to a sale of canned goods under the circumstances as described in the present case.

The case of *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, and similar cases, are clearly distinguishable upon the ground that the buyer, in

purchasing canned goods, does not and cannot, in the nature of things, rely upon the skill or judgment of the seller. The distinction between a sale of provisions which are open for inspection, and those which are sold in sealed packages or closed cans, was pointed out by Chief Justice Shaw in *Winsor v. Lombard*, 18 Pick. 57, at page 62, and referred to in *Bigelow v. Maine C. R. Co.* supra. In the case last referred to, it was said at pages 110 and 111 that, if the rule laid down in *Winsor v. Lombard* is to be followed, "the only possible conclusion is that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly what she ordered. She, therefore, assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent with the practical use of the product, to test its quality."

In the absence of negligence, I do not think the defendant should be held liable. The effect of the decision of the majority is to charge it with liability as an insurer. It would seem to be more in accord with the principles of justice and reason to hold that the plaintiff should seek his remedy against the manufacturer, who alone caused the injury.

## ANNOTATION.

### Implied warranty by other than packer of fitness of food sold in sealed cans.

As to implied covenant of fitness by one serving food, see the annotation following *Friend v. Childs Dining Hall Co.* post, —.

There is a square conflict of authority upon the question whether or not a dealer, in selling food in sealed cans, impliedly warrants that it is wholesome and fit for food, it having been held both that there is and that there is not such a warranty.

The preponderance, at least, of modern authority, is to the effect that upon the sale of food to be immediately put to domestic uses there is, as between the dealer and the consumer,

an implied warranty that such food is wholesome and fit to be eaten. This rule proceeds upon the assumption that the seller has some means of knowledge, opportunities for inspection, or sources of information which are not shared by the purchaser, in consequence of which, when the seller knows that the food was bought for consumption, he warrants as matter of law that the goods are fit for that purpose.

Applying this doctrine, it has been held that an exception to the general rule arises in the case of canned goods, the theory being that, when



the reason for the rule falls, the rule itself falls. In other words, it cannot be presumed that, in the case of goods sold in sealed cans, the dealer who did not make or pack them has a greater knowledge of the wholesomeness of the contents than the purchaser. To this effect is the decision in *Julian v. Laubenberger* (1896) 16 Misc. 646, 38 N. Y. Supp. 1052, wherein, in holding that the retailer of a can of salmon did not impliedly warrant that it was fit for human consumption, the court said: "The defendant sells a can of food. It is well known, and must be known to both parties, that he has not prepared it, that he has not inspected it, and that he is entirely ignorant of the contents of the can, except so far as he had purchased from reputable dealers in the market. It seems to me that it would be unreasonable to say that, at the time of the purchase here, the vendee relied upon the superior knowledge of the vendor; but it must be assumed that both parties knew, and must have necessarily known, that the vendor was entirely ignorant of, and without means of ascertaining, the condition of the article sold, and that the means of inspection were as much open to the purchaser as the vendor. Under such circumstances, if the purchaser desires to protect himself, he must have recourse to an express warranty. The law cannot be so unreasonable as to inject into a contract what neither party had, or could have had, in mind at the time the contract was made. Now, as above stated, the reason for the rule entirely ceases in a case like the one under consideration. In the progress of affairs, the manner of preparing and selling food has come to that condition that everybody purchasing ought to be presumed to know that the retail merchant, who sells to the consumer food sealed in cans, and with which he has no connection other than as a conduit between packer and the consumer, has no superior means of knowing the contents of the can than the purchaser has, and in that event, if the purchaser desires to protect himself, he may ask for an investigation at the time of purchasing, or he may get an express war-

ranty as to the quality of the goods, and, if he fails to do this, the maxim of *caveat emptor* must apply. If, knowing this, he purchases canned goods, opens them, and uses them without inspection, and without specific means of knowing whether the contents are wholesome or not, he is not protected by an implied warranty on the part of the vendor."

However, as above stated, there also is authority to the effect that there is no distinction between a sale of provisions open to inspection, and provisions packed in cans or sealed packages.

Thus, in *Chapman v. Roggenkamp* (1913) 182 Ill. App. 117, where it was held that the general rule that a retail dealer impliedly warrants the fitness and wholesomeness of goods sold for immediate domestic consumption, applied to canned peas, it was contended that since the retail dealer purchased the canned goods from a wholesaler or packer, and was not aware of the unwholesomeness of the contents, there could be no implied warranty, it being argued that, where a person purchases from a retail dealer articles of food in cans for immediate consumption, the buyer, from the nature of the transaction, must know that the seller had no greater knowledge of the condition of the contents than the buyer had, wherefore he does not rely on any superior knowledge, from which it follows that there is no implied warranty; but the court adopted the broad rule that public safety demands that in "all" sales of provisions by a retail dealer for immediate domestic use, there should be an implied warranty of the fitness and wholesomeness of such foodstuffs. And again, in *Sloan v. F. W. Woolworth Co.* (1915) 193 Ill. App. 620, the court expressly refused to draw a distinction between canned goods and those open for inspection, and held a retail dealer liable for injuries caused by the eating of a can of spoiled herring purchased from him. In reaching this conclusion it was further held that the Pure Food Laws are police regulations merely, so that they do not make lack

of knowledge upon the part of the dealer a defense to the action.

And in the reported case (*WARD v. GREAT ATLANTIC & PACIFIC TEA CO.* ante, 242), in reaching a similar conclusion under the Massachusetts Sales Act with respect to canned beans, it was said that there is no sound reason for ingrafting an exception on the general rule because the subject of the sale was canned goods, not open to the immediate inspection of the dealer.

And that an implied warranty that tinned salmon, sold by a retailer, is wholesome, arises under the English Sale of Goods Act 1893 (56 & 57 Vict. chap. 71, § 14, subd. 1), where it appears that the salmon was bought for food in such a way as to show that the buyer relied on the seller's skill and judgment as to its fitness for the purpose of food, see *Jackson v. Watson* [1909] 2 K. B. (Eng.) 193, 3 B. R. C. 182, 78 L. J. K. B. N. S. 587, 100 L. T. N. S. 799, 25 Times L. R. 454, 53 Sol. Jo. 447, 16 Ann. Cas. 492.

In *Inter-State Grocer Co. v. George William Bentley Co.* (1912) 214 Mass. 227, 101 N. E. 147, an action by one dealer to recover from another dealer the price paid for certain cases of sardines, it was held that upon a sale of

canned goods by name or description there is an implied condition that the goods are merchantable under such name or description, without reference to whether or not the seller is a manufacturer or packer, and irrespective of whether the defect is latent or obvious. However, in this case the recovery was upon the theory that the seller breached an implied condition of the contract requiring merchantable goods, rather than upon an implied warranty of quality arising from some supposed skill or knowledge of the seller. And again, in *Grocers' Wholesale Co. v. Bostock* (1910) 22 Ont. L. Rep. 130, where a wholesaler sold canned salmon to a retailer, it was held that there was an implied warranty that the fish was reasonably fit for human consumption as food. It was said that the warranty could be based either on the theory that the defendant undertook to supply salmon fit for food, or on the ground that the salmon was bought by description, implying a warranty of merchantable quality. It was further held that this implied warranty was not excluded by an express warranty that the cases of salmon were free from "blown, burst, dry, and leaks." G. J. C.

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JOHN P. COSTELLO, Appt.,

v.

ALICE G. SYKES et al., Respts.

*Minnesota Supreme Court—June 20, 1919.*

(— Minn. —, 172 N. W. 907.)

**Corporation — reliance on books — rescission of sale.**

1. The books of a bank showed that its paid-in capital was intact and that it had a surplus and undivided profits. In fact, its capital had become seriously impaired and it had no surplus or undivided profits. A stockholder sold part of his stock for a price equal to its book value. Both he and the purchaser believed that the books showed the true state of facts. There was no fraud or deception. Both parties were equally innocent in their mistaken belief.

Held, that the purchaser of the stock did not have the right to rescind the contract of sale on the ground that there had been a mutual mistake of fact.

[See note on this question beginning on page 255.]

Headnotes by LEES, C.

**Contract — rescission — mistake.**

2. A mistake relating merely to the attributes, quality, or value of the subject of a sale, or respecting a matter of inducement to the making of the contract, is not sufficient to authorize a court to rescind the contract at the suit of the aggrieved party, where the means of information were open alike to both parties, and there was no concealment of facts or imposition.

[See 23 R. C. L. 1294.]

— mistake not affecting substance.

3. If the parties were mistaken only

as to some point which did not affect the substance of the transaction between them, or go to the root of the matter involved, no case for rescission is presented.

[See 23 R. C. L. 1293.]

**Corporation — representation as to stock value — reliance.**

4. A person buying bank stock has no greater right to rely on the accuracy of the books and reports of the bank than he would have to rely on those of any other corporation whose stock he was buying.

(Hallam, J., dissents.)

**APPEAL** by plaintiff from an order of the District Court for Hennepin County (Rockwood, J.) sustaining a demurrer to the complaint in an action brought to set aside a sale of corporate stock because of alleged mutual mistake of fact. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. Daniel F. Foley, for appellant:  
Plaintiff was entitled to a rescission because of the mutual mistake.

Williston, Sales, § 656; Mechem, Sales, § 275; Black, Rescission & Cancellation, §§ 134, 141; Funch v. Abenheim, 20 Hun, 1; 1 Benjamin, Sales, 6th ed. § 445; Cox v. Prentice, 3 Maule & S. 344, 105 Eng. Reprint, 641, 16 Revised Rep. 288; Clark, Contr. 2d ed. p. 202; Chapman v. Cole, 12 Gray, 141, 71 Am. Dec. 739; Schirmer v. Union Brewing & Malting Co. 26 Cal. App. 169, 146 Pac. 194; Irwin v. Wilson, 45 Ohio St. 426, 15 N. E. 209; Wheadon v. Olds, 20 Wend. 174; Coon v. Smith, 29 N. Y. 392; Gardner v. Lane, 9 Allen, 492, 85 Am. Dec. 779; McDonald v. Benge, 138 Iowa, 591, 116 N. W. 602; Smith v. Evans, 6 Binn. 102, 6 Am. Dec. 436; Mann v. Pearson, 2 Johns. 37; Hitchcock v. Giddings, 4 Price, 135, 146 Eng. Reprint, 418, Daniell, 1, Wils. Exch. 32, 18 Revised Rep. 725; Hore v. Becker, 12 Sim. 465, 59 Eng. Reprint, 1211; Harvey v. Harris, 112 Mass. 32; Huthmacher v. Harris, 38 Pa. 491, 80 Am. Dec. 502; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380; Allen v. Hammond, 11 Pet. 63, 9 L. ed. 633; Montgomery County v. American Emigrant Co. 47 Iowa, 92; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61, 17 Mor. Min. Rep. 105; Sherwood v. Walker, 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919; Nestor v. Michigan Land & Iron Co. 69 Mich. 290, 37 N. W. 278; Thwing v. Hall & D. Lumber Co. 40 Minn. 184, 41 N. W. 815; Cobb v.

Cole, 44 Minn. 278, 46 N. W. 364; Newman v. Kay, 57 W. Va. 98, 68 L.R.A. 908, 49 S. E. 926, 4 Ann. Cas. 39; Hanna v. Steinman, 159 Cal. 152, 112 Pac. 1094; Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175.

Messrs. Lancaster & Simpson and James E. Dorsey, for respondents:

There is no relief for mutual mistake of fact as to value.

Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; 2 Kent, Com. 12th ed. p. 478; 1 Story, Eq. Jur. 14th ed. § 160; Story, Contr. 5th ed. § 530; Leake, Contr. p. 344; Page, Contr. § 155; Hammon, Contr. § 99; Okill v. Whittaker, 1 De G. & S. 83, 63 Eng. Reprint, 981; Barr v. Gibson, 3 Mees. & W. 389, 150 Eng. Reprint, 1196, 7 L. J. Exch. N. S. 124, 24 Eng. Rul. Cas. 188; Kennedy v. Panama, N. Z. & A. Royal Mail Co. L. R. 2 Q. B. 580, 8 Best & S. 571, 36 L. J. Q. B. N. S. 260, 17 L. T. N. S. 62, 15 Week. Rep. 1039; Seddon v. Northeastern Salt Co. [1905] 1 Ch. 326, 74 L. J. Ch. N. S. 199, 53 Week. Rep. 232, 91 L. T. N. S. 798, 21 Times L. R. 118, 1 Ann. Cas. 514; Smith v. Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. N. S. 221, 25 L. T. N. S. 329, 19 Week. Rep. 1059; Dambmann v. Schulting, 75 N. Y. 55; Hecht v. Batcheller, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651; Alton v. First Nat. Bank, 157 Mass. 341, 18 L.R.A. 144, 34 Am. St. Rep. 285, 32 N. E. 228; Cavanagh v. Tyson, W. & M. Co. 227 Mass. 443, 116 N. E. 818; Otis v. Cullum, 92 U. S. 447, 23 L. ed. 496;

Grannis v. Quintard, 69 Fed. 206; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374; Bicknell v. Waterman, 5 R. I. 43; Burgess v. Chapin, 5 R. I. 225; Bayard v. Shunk, 1 Watts & S. 92, 37 Am. Dec. 441; Sankey v. First Nat. Bank, 78 Pa. 48; Smith v. Tewalt, 9 Ind. App. 646, 37 N. E. 294; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Sample v. Bridgforth, 72 Miss. 293, 16 So. 876; Dortch v. Dugas, 55 Ga. 484; Cole v. Hunter Tract Improv. Co. 61 Wash. 365, 32 L.R.A. (N.S.) 125, 112 Pac. 368, Ann. Cas. 1912C, 749; Laidlaw v. Organ, 2 Wheat. 178, 4 L. ed. 214; Moore v. Scott, 47 Neb. 346, 66 N. W. 441; Hunter v. Goudy, 1 Ohio, 449; Wood v. Boynton, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42.

Lees, C., filed the following opinion:

Appeal from order sustaining a demurrer to the complaint on the ground that it failed to state a cause of action. In substance the material allegations are as follows:

The Calhoun State Bank was a Minnesota banking corporation, having, according to its books, a paid-in capital of \$35,000, a surplus of \$5,250, and undivided profits of \$6,000. Respondents were stockholders. The par value of a share of stock was \$100. If the bank's capital was unimpaired, and it had the surplus and undivided profits shown by its books, a share of stock was worth at least \$136. Respondents sold ten shares of stock to appellant for \$1,360. At the time of the sale the parties to the transaction believed that the bank's capital had not been impaired, that its assets and liabilities were as set forth in its books, that it had the surplus and profits referred to; that its books were kept correctly, and that the book value of its stock was not less than \$136 per share. In fact, it had neither surplus nor undivided profits. Its employees had kept its books so as to conceal defalcations of which they were guilty, and its assets had been depleted until its stock was worth but \$60 per share. Such employees are insolvent, and there is no way of making good their defalcations. The parties to the sale were mutually mistaken as to the

assets of the bank, the actual value and the book value of its stock, and the amount of its surplus and undivided profits. Upon discovering the truth, appellant tendered the stock to respondents and demanded repayment of the purchase price, and, his demand being refused, sues for a rescission of the contract of sale.

The sole question presented is whether the mistake alleged is of such a character as to give rise to a right to rescind.

The subject-matter of the contract of sale was ten shares of the capital stock of the bank. There was no mistake as to its identity or existence. A mistake relating merely to the attributes, <sup>Contract—</sup>quality, or value of <sup>rescission—</sup>the subject of a sale <sup>mistake.</sup>

does not warrant a rescission. Neither does a mistake respecting something which was a matter of inducement to the making of the contract, where the means of information were open alike to both parties, and each was equally innocent, and there was no concealment of facts and no imposition. A leading case is Kennedy v. Panama, N. Z. & A. Royal Mail Co. L. R. 2 Q. B. 580, 8 Best & S. 571, 36 L. J. Q. B. N. S. 260, 17 L. T. N. S. 62, 15 Week. Rep. 1039. Like the one at bar, it involved a contract for the sale of corporate stock. The corporation owned and operated a line of steamships. Both parties bona fide believed that it had obtained a valuable contract to carry government mails, but it turned out that the contract was made without authority. The government refused to ratify it, and so the value of the stock was much less than the parties supposed. It was contended, as it is here, that there was a difference in substance between shares in a company with and shares in a company without such a contract, that this was a difference which went to the very root of the matter involved, and that, therefore, the purchaser was entitled to rescind. The contention did not meet with the court's approval, and it was held that the case was one of innocent misappre-

hension, that a rescission could not be had, and that there was not such a complete difference in substance between what was supposed to be and what was taken as would constitute a failure of consideration. The purchaser got the very shares

—mistake  
not affecting  
substance.  
he intended to buy  
and they were far  
from being of no

value. Such are the facts in the case at bar, for appellant got the shares he intended to buy. His complaint is that they are worth but \$60, instead of \$136, each. The Kennedy Case has been widely and approvingly cited by courts of last resort in this country. The principles it lays down are those which have been approved in the following, among many other, decisions: *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496; *Dambmann v. Schulting*, 75 N. Y. 55; *Hecht v. Batcheller*, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651; *Cavanagh v. Tyson*, W. & M. Co. 227 Mass. 437, 116 N. E. 818; *Sankey v. First Nat. Bank*, 78 Pa. 48; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Sample v. Bridgeforth*, 72 Miss. 293, 16 So. 876; *Smith v. Tewalt*, 9 Ind. App. 646, 37 N. E. 294; *Wood v. Boynton*, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441.

Appellant takes the position that there was a mistake as to the existence of the bank's supposed surplus and undivided profits. In this connection it is argued that since banks are under the supervision of public officials, whose duty it is to examine their books and obtain quarterly reports, which are published, he had the right to rely on such books and published reports, and that respondents are blamable because they are not correct. It is therefore asserted that the parties to a sale of bank stock do not stand on the same footing as the parties to a sale of stock in other corporations. There are a number of statutory provisions which lend support to appellant's position, but we are not convinced that a mere stockholder in

a bank is chargeable, as a matter of law, with responsibility for the manner in which its books are kept, or that greater reliance may be placed upon their accuracy than may be placed upon the accuracy of the books of any other corporation, by a purchaser of its stock.

Corporation—  
representation  
as to stock  
value—reliance.

*Thwing v. Hall & D. Lumber Co.* 40 Minn. 184, 41 N. W. 815, and *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364, are cited as cases committing this court to a doctrine at variance with that generally adopted in other jurisdictions. *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Sherwood v. Walker*, 66 Mich. 568, 11 Am. St. Rep. 531, 33 N. W. 919; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094, and cases of similar nature, are also cited, and Prof. Williston's language at § 656 of his treatise on the subject of Sales is quoted to sustain appellant's contention.

*Thwing v. Hall & D. Lumber Co.* supra, differs from the case at bar in that it was an action for the specific performance of an executory contract of sale, instead of one to rescind an executed contract, and especially in that there was a representation made by the seller to the buyer, relied on by the latter, as to a material fact which was untrue, although the seller believed it to be true.

In *Cobb v. Cole*, supra, the parties had been partners. There was a dissolution, and it was agreed that one of the partners who retired from the firm should receive from the others a sum equal to his interest in the firm "as the same then appeared upon the books." A statement was prepared from the books, which was erroneous in fact, although the parties believed it was correct. The retiring partner was allowed to recover the sum actually due him as shown by the books, after he had been paid the sum which appeared to be due him according to the erroneous statement.

We see nothing in either case in-

dicating that this state has departed from the generally accepted rules which we stated at the outset.

In *Chapman v. Cole*, supra, plaintiff gave defendant a gold piece, believing it was 50 cents, and was allowed to recover it back on the ground, as stated by the court, that there was a mistake as to the identity of the subject-matter of the transaction.

*Sherwood v. Walker and Hannah v. Steinman*, supra, fairly sustain appellant's contention. The former case was decided by a divided court, with a dissenting opinion by Sherwood, J. The effect of the decision was subsequently expressly limited to the peculiar facts of the case in *Nester v. Michigan Land & Iron Co.* 69 Mich. 290, 37 N. W. 278.

The views of Prof. Williston also favor the contention and are entitled to respect. His views do not appear to be shared by other authors. Leake, *Contr.* 6th ed. p. 229; 1 Story, *Eq. Jur.* § 160; Page, *Contr.* § 155; Hammon, *Contr.* § 99; Black, *Rescission & Cancellation*, § 141. The weight of authority is with the respondents, so far as the general principle under consideration is here involved.

If the question were one of first impression, we should not be inclined to open up a new field for litigation by adopting the rule that a contract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets or liabilities of the corporation, if the means of information are open alike to both and there is no concealment of facts or imposition. Upon the sale of a note both parties may be mistaken as to the solvency of the maker, or of an indorser or guarantor of payment, and may deal on the assumption that the paper is good when in fact the unknown insolvency of the parties liable for its payment makes it worthless.

In the absence of fraud or inequitable conduct on the part of the seller of property of that kind, we had supposed the buyer could not

have a rescission. He can always protect himself against possible loss by requiring the seller to guarantee or secure the payment of the paper. See *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225.

We think this should be the rule when stock in a corporation is the subject of a contract of sale, and <sup>—reliance on books—</sup> conclude that the <sup>rescission of sale.</sup> learned trial judge correctly disposed of the case, and the order sustaining the demurrer is affirmed.

Hallam, J., dissenting:

I dissent. In my opinion the following statement by Williston: "If parties enter into a bargain on the assumption that certain things are true it is inequitable to enforce the bargain, or to allow it to stand, if the mistake relates to a matter so fundamental that it must be assumed that the parties would not have entered into the transaction had they known the truth" (*Williston, Sales*, § 656); and the following statement by Benjamin: "When there has been a common mistake as to some essential fact forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable" (*Benjamin, Sales*, 7th ed. § 415),—are good law.

In *Thwing v. Hall & D. Lumber Co.* 40 Minn. 184, 41 N. W. 815, this court stated the same rule in this language: "The mistake we are now considering was occasioned by the ignorance of both parties of a fact under the influence of which they entered into a contract that would not have been executed had they possessed full knowledge of the situation. . . . It may also be stated, generally, that affirmative or defensive relief, such as is required by the circumstances, may be granted from the consequences of a mistake of any fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some

positive legal duty, if there be no adequate remedy at law."

In that case specific performance was asked by plaintiff. Rescission was asked by defendant. The court rescinded.

This court has repeatedly reaffirmed and applied the same principles. *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364; *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; *Beckhold v. King*, 134 Minn. 105, 158 N. W. 910. See also *Ketchum v. Catlin*, 21 Vt. 191; *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61, 17 Mor. Min. Rep.

105. I do not think we should depart from them. It cannot be said that no mistake as to either "attributes, quality, or value" gives grounds for rescission. In *Thwing v. Hall & D. Lumber Co.* supra, there was a mistake as to "attributes" of the property. I cannot distinguish this case from *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364. It seems to me there was a mutual mistake, not as to quality or value, but as to certain tangible facts so fundamental that it must be assumed that the parties would not have entered into the contract, had they known the truth.

Petition for rehearing denied.

### ANNOTATION.

#### Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books.

This note does not include cases of purchases of stock from a director who makes statements based upon incorrect books, as he may be held liable if he knew, or by the exercise of reasonable diligence could have known, that his representations as to the value of the stock were false, as was held, for example, in *Long v. Douthitt* (1911) 142 Ky. 427, 134 S. W. 453.

In the reported case (*COSTELLO v. SYKES*, ante, 250), it will be observed that it is held that it was no cause for a rescission of the contract of sale of corporate stock that the parties were mutually mistaken as to its value on account of the falsification of its books. The case seems to be decided upon the theory that there can be no rescission of a sale where the means of information are equally open to both parties, each is equally innocent, there is between them no concealment nor imposition, and there is after all a substantial value in the thing sold. In the next case, hereinafter cited, it will be noticed that there was a total failure of consideration.

In *Neale v. Wright* (1908) 130 Ky. 146, 112 S. W. 1115, where one director in a corporation sold land to another director for stock in the corporation, both parties being greatly deceived in

the value of the stock by the books, the deed for the land was ordered to be canceled. The court said: "Persons who deal in the stock of corporations necessarily enter into speculative contracts, and they will not be ordinarily released simply because the stock turns out to be worth less than it was supposed to be worth. But here the stock which Neale transferred to Wright for the land was of no value. As the fact proved, he received no consideration for his land. The parties were dealing upon the supposition that the corporation had about four times as much merchandise as it in fact had. Their trade was made upon the supposed condition of the corporation. There was a mutual mistake, induced by the statements of the condition of the corporation which had been promulgated. They were both deceived; but when the truth appears, and it is shown that there is a total failure of consideration for the deed, it will be canceled in equity."

The following cases, while not strictly within the scope of this note, may be here referred to:

Where a special committee of the directors of a corporation negotiated with the plaintiff and obtained from him an offer for 65 per cent of the

stock, which they recommended their stockholders to accept, and most of them did so, the basis of the negotiation was a certain monthly report made by the managers to the directors, which was grossly false. In an action to rescind the contract and retransfer the stock, brought against one of the stockholders, it was held that he was not responsible for any representations made by the committee, if any, and that the plaintiff could not recover. *L. D. Garrett Co. v. Clark* (1905) 102 App. Div. 611, 92 N. Y. Supp. 1132, affirmed in (1906) 184 N. Y. 557, 76 N. E. 1099. The same was held in an action against one of the directors not a member of the special committee. *L. D. Garrett Co. v. Appleton* (1905) 101 App. Div. 507, 92 N. Y. Supp. 136, affirmed in (1906) 184 N. Y. 557, 76 N. E. 1099.

Where the complainant and the defendant each owned one half of the stock of a corporation, and the complainant purchased the defendant's stock in reliance upon an auditor's report, based upon an inventory made up by the plaintiff, who had innocently made a mistake, in adding, of \$10,000, and it did not appear that the defendant knew of the error, the court refused to set aside the sale after it had been executed, although the transaction was greatly to the defendant's advantage. *Riviere v. Berla* (1918) — N. J. —, 106 Atl. 455.

In a suit by a stockholder against a

director for damages for breach of an agreement to buy all the stock of the stockholders, severally, the court said: "Defendant earnestly insists that in the light of the evidence that defendant's bid for the stock was double its actual value at the time, it is apparent he bid under a misapprehension in respect to the value of the assets of the corporation and that he was led into this error by the erroneous and misleading report of the financial condition of the corporation, made by Hutchinson to the stockholders. If this was a suit in equity, the appeal to us would not be in vain; but the action is at law, and no doubt the same appeal was made to the jury on the trial. The jury, it seems, was unmoved by the appeal. We are without authority to review the evidence or to correct or set aside the verdict, even though we may believe it is against the weight of the evidence, and is for the wrong party." *Dowling v. Wheeler* (1906) 117 Mo. App. 169, 93 S. W. 924.

It may be noted that, in a case where nothing was stated as to the corporation's books, it was held that where, in a division of an estate, one beneficiary took as her share some stock at a certain valuation agreed upon by the parties in mutual mistake, the stock being in fact worthless, equity would not interfere. *Smith v. Tewalt* (1893) 9 Ind. App. 646, 37 N. E. 294.

B. B. B.

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JAMES M. MILLETT, Appt.,

v.

C. A. PEARSON, Respt.

*Minnesota Supreme Court — June 27, 1919.*

(— Minn. —, 173 N. W. 411.)

**Homestead — imprisonment of occupant — effect.**

1. On March 16, 1916, O. was the owner of and occupied the premises in question with his wife, as their homestead. On that day he shot and killed his wife, and was immediately arrested and lodged in jail, where he remained until June, when he was convicted and sentenced to the state

Headnote 1 by QUINN, J.



prison for life. Held, that said premises continued to be his homestead until he conveyed the same to plaintiff in May, 1916.

[See note on this question beginning on page 259.]

**Domicil — acquisition by incompetent person.**

2. Persons under legal disability or restraint, or persons in want of freedom, are generally incapable of losing or gaining a residence by acts performed by them under the control of others.

[See 9 R. C. L. 552.]

**— effect of imprisonment.**

3. A person imprisoned under operation of law does not thereby change his residence.

[See 9 R. C. L. 552.]

**Homestead — what constitutes abandonment.**

4. To constitute an abandonment of a homestead there must be an actual removal from the premises.

[See 13 R. C. L. 647.]

**APPEAL** by plaintiff from an order of the District Court for Dakota County (Converse, J.) denying an alternative motion for an order amending the findings or for a new trial, in an action brought to restrain defendant from proceeding with the sale of certain premises under an execution on a judgment against plaintiff's grantor. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. M. Millett for appellant.

Mr. F. L. Bright, for respondent:

If a party leaves his homestead with the intention of never returning, his exemption right ceases at once, regardless of whether he had filed claim or not.

Clark v. Dewey, 71 Minn. 111, 73 N. W. 639; Kramer v. Lamb, 84 Minn. 470, 87 N. W. 1024.

The finding that the plaintiff's grantor had wholly abandoned the property was a finding upon the only ultimate question of fact put in issue by the pleadings, and was in no sense a conclusion of law.

Bjelos v. Cleveland Cliffs Iron Co. 109 Minn. 320, 123 N. W. 922; Fitchette v. Victoria Land Co. 93 Minn. 485, 101 N. W. 655; Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912; 1 R. C. L. §§ 7, 11; 1 Jones, Ev. §§ 138, 142; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 321, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570.

The word "abandonment" has the same meaning both in law and in ordinary parlance, and includes both "the intention to abandon and practical abandonment."

9 Am. & Eng. Enc. Law, 494; Leonard v. Ingraham, 58 Iowa, 406, 10 N. W. 804; Kramer v. Lamb, 84 Minn. 470, 87 N. W. 1024; Clark v. Dewey, supra; Williams v. Moody, 35 Minn. 282, 28 N. W. 510; Bishop v. Middleton, 43 Neb. 10, 26 L.R.A. 445, 61 N. W. 129.

5 A.L.R.—17.

Quinn, J., delivered the opinion of the court:

The plaintiff brings this action to restrain the defendant from proceeding with the sale of the premises in question under an execution on a judgment against plaintiff's grantor, John Ostapchuk. The trial court, after hearing the testimony, found for the defendant, and denied the injunction. From an order denying his alternative motion for an order amending the findings or for a new trial, plaintiff appeals.

In its decision the trial court found in substance that during the month of March, 1916, Ostapchuk was the owner in fee of the premises in question, and that on and prior to the 16th day of said month he occupied the same with his wife as their homestead; that on that day Ostapchuk shot and killed his wife; that he was immediately arrested and incarcerated in the county jail, and there kept until June 2, 1916, when he was tried, convicted of murder, and sentenced to imprisonment in the Minnesota state prison for the rest of his natural life, and has never since, in any way, occupied or resided upon the premises in question; that on March 23, 1916, the defendant recovered a judgment for \$64.87 against Ostapchuk, a trans-

cript of which was duly filed and docketed on March 28, 1916, in the office of the clerk of the district court of the county in which the premises were situated; that on May 5, 1916, Ostapchuk executed to the plaintiff a warranty deed of said property, which was duly recorded in the office of the register of deeds on June 3, 1916; that the defendant, claiming said judgment to be a lien upon the premises, caused an execution thereon to be issued and placed in the hands of the sheriff of the county; that the sheriff levied upon said premises under the execution, and was proceeding to sell the same, when the plaintiff brought this action to restrain him from so doing. Then followed ¶ 6 of the findings, which reads as follows: "That prior to the execution of said deed, and prior to the recording of the same, the said John Ostapchuk had wholly abandoned said property as his homestead, and said property had ceased to be his homestead, and all homestead rights therein had become devested."

It is the contention of the appellant that the trial court erred in denying his motion to strike out all of ¶ 6 of the findings of fact for the reason that such finding is a mere conclusion of law; that it is not a finding of any issuable fact, and is not supported by the evidence.

We do not think the conclusion arrived at and expressed in ¶ 6 of the trial court's findings is warranted either by the testimony or the specific facts found in the case. In ¶ 1 of its findings the court finds "that during the month of March, 1916, one John Ostapchuk was the owner in fee simple of the following described real estate, to wit: . . . And that prior to the 16th day of said month, the said premises were occupied by himself and wife as their homestead, and was in fact their homestead."

And in its memorandum attached to its decision it is stated: "The controlling question here is: Was the property in question the home-

stead of John Ostapchuk up to the time he conveyed it to the plaintiff in May, 1916, or had he previously abandoned it? It was his homestead at the time of his wife's death in March of that year."

Were the premises the home of John Ostapchuk on the 5th day of May, 1916, at the time he conveyed them to the plaintiff? If they were, the defendant's judgment did not become a lien thereon, and the plaintiff obtained title under the deed. The premises were his homestead on March 16th. On that day he was arrested and detained in the county jail until his conviction in June, when he was sentenced and taken to the state prison where he has since been confined.

As a general rule of law persons under legal disability or restraint, or persons in want of freedom, are incapable of losing or gaining a residence by acts performed by them

**Domicil—  
acquisition by  
incompetent  
person.**

under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves, in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence. *Freeport v. Stephenson County*, 41 Ill. 495; *Clark v. Robinson*, 88 Ill. 498; *Barton v. Barton*, 74 Ga. 761; *Grant v. Dalliber*, 11 Conn. 234.

**—effect of  
imprisonment.**

There was no proof of any act on the part of Ostapchuk, subsequent to the death of his wife, from which a presumption can be drawn that he intended an abandonment of his homestead. His absence therefrom while under detention in the county jail raises no such presumption. To constitute an abandonment there must be an actual removal from the premises. An intention to remove is insufficient. *Robertson v. Sullivan*, 31 Minn. 197, 17 N. W. 336. The premises in question were the homestead of

**Homestead—  
what constitutes  
abandonment.**

Ostapchuk at the time of his arrest, and remained his legal abode until he conveyed the same to the plaintiff, notwithstanding his detention in jail. In *Grant v. Dalliber*, supra, A was sentenced to the state prison for four years. During his detention in prison B attached his real estate, leaving copies at his dwelling house as his usual place of abode. B obtained judgment against A, and caused the real property attached to be sold upon execution. In an action of ejectment, afterwards brought by A against B for the premises, it was held that the usual place of abode

of A during his imprisonment was at such dwelling house; such usual place of abode not being changed or abandoned by a constrained removal.

In the present case it is conclusively established that Ostapchuk was occupying the premises with his wife as their homestead at the time of her death. Nothing having occurred thereafter to indicate a purpose on his part to abandon the homestead, it is held that the premises continued to be his homestead until the conveyance thereof to the plaintiff, and that defendant's judgment did not become a lien thereon. Reversed.

## ANNOTATION.

### Imprisonment as effecting abandonment of homestead.

While there are few cases directly in point, they are all in accord with the view that the imprisonment of a person does not constitute an abandonment of property rights which he has acquired under the Homestead Laws. *Withers v. Love* (1905) 72 Kan. 140, 3 L.R.A. (N.S.) 514, 83 Pac. 204; *Lindsey v. Holly* (1913) 105 Miss. 740, 63 So. 222; *Huffman v. Smyth* (1906) 47 Or. 573, 114 Am. St. Rep. 938, 84 Pac. 80, 8 Ann. Cas. 678; *Bryant v. Freeman* (1915) 134 Tenn. 169, 183 S. W. 158, Ann. Cas. 1917E, 111. And see the reported case (*MILLETT v. PEARSON*, ante, 256).

This rule is based on the sound reason that, to constitute an abandonment, there must be voluntary absence from the homestead, coupled with a conscious intent to abandon; and, since imprisonment is an involuntary absence, abandonment cannot be effected in this way. *Withers v. Love* (Kan.) and *Lindsey v. Holly* (Miss.) supra.

It was said in *Huffman v. Smyth* (1906) 47 Or. 573, 114 Am. St. Rep. 938, 84 Pac. 80, 8 Ann. Cas. 678: "For the reason for this . . . rule is doubtless twofold: First, that residence and abandonment are each determined in part by intention, and it cannot be said that the enforced ab-

sence of a settler by compulsion of the law from his established residence carries with it the intention to establish a home in the place of his confinement, or the intention to abandon that from which he has been unwillingly removed. Secondly, that abandonment is something more than the relinquishment of possession. It must be the voluntary relinquishment of possession, united with an intention to abandon."

In *Withers v. Love* (Kan.) supra, it appeared that a husband had acquired a homestead and lived thereon with his wife and children. The wife became insane and was committed to an asylum. Later, and during her confinement, the husband was convicted of crime and sentenced to a term in the penitentiary. At the expiration of his prison term he returned and claimed his homestead property. The court allowed his claim and, in holding that such an absence did not effect an abandonment, said: "That the land in controversy was originally the homestead of plaintiff and his family is not disputed. The insanity of the wife in 1879, and her confinement in the asylum, did not change its character as a homestead, for plaintiff continued to occupy it with his children. It was, then, the home-

stead upon the day he was sentenced. . . . His voluntary absence would not constitute an abandonment while the homestead continued to be occupied by the family, and his involuntary absence under sentence and confinement in prison should not be given that effect, and the beneficial object of the Homestead Law defeated upon grounds which so apparently were never contemplated by the framers of the Constitution. . . . The mother was insane, the father in the penitentiary, and the fact that under the enforced circumstances the home was unsuitable for their continued occupancy could not constitute an abandonment, if, as we have said, his absence under such circumstances was not sufficient."

So, in *Lindsey v. Holly* (1913) 105 Miss. 740, 63 So. 222, it appeared that the appellant owned the tract of land involved when he married. Shortly after his marriage and occupancy of the land as a homestead, he was arrested and taken to jail. The court held that such absence did not constitute an abandonment of the homestead, saying: "At the time of the execution of the deed, had the homestead been abandoned, so that it was not necessary for the wife to join in the deed thereto in order to make the conveyance valid? Section 2157 of the Code of 1906 reads: 'Ceasing to reside on homestead renders it liable. Whenever the debtor shall cease to reside on his homestead, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed.' W. N. Lindsey did not voluntarily leave his homestead. He was required to go because of his arrest and imprisonment. He ceased to reside on the homestead out of necessity, arising from his confinement in jail. So long as he was in prison and could not re-

side on his homestead, it cannot be said that he lost his right thereto by reason of his having abandoned it. Abandonment implies a voluntary act, and there could be no voluntary act by him, amounting to an abandonment, under the circumstances."

In *Huffman v. Smyth* (Or.) *supra*, it appeared that a qualified settler had established an actual residence on certain public lands with a view to obtaining title thereto under the Homestead Laws. Some time later he was convicted of a felony and confined to the penitentiary. In a subsequent controversy over the land, it was decided that his conviction and confinement did not constitute, as a matter of law, an abandonment of his rights to the land in controversy.

In *Bryant v. Freeman* (1915) 134 Tenn. 169, 183 S. W. 158, Ann. Cas. 1917E, 111, the court held that a man did not lose his status as head of a family within the Homestead Law by reason of his confinement in prison, the court adverting to the fact that he and his wife maintained a correspondence, and resumed their marital relations after his release.

In *Garner v. Freeman* (1907) 118 La. 184, 118 Am. St. Rep. 361, 42 So. 767, the plaintiff sought to enjoin the seizure and sale of certain personal property as exempt under the Homestead and Exemption Laws of the state of his residence. The answer averred that the plaintiff was in the penitentiary where he had begun to serve a sentence, and it was argued that, since he was not in actual possession of the property at the time of the seizure, he could not claim the benefit of the Homestead and Exemption Laws. The court held that since the plaintiff did not voluntarily abandon his possession his incarceration did not deprive him of any of his property rights, such rights being not only for the benefit of plaintiff himself, but for his wife and children.

R. M. F.

L. C. MONETTE, Impleaded, etc., Appt.,  
v.  
MRS. SARAH C. TONEY.

*Mississippi Supreme Court (Division A)—May 26, 1919.*

(119 Miss. 846, 81 So. 593.)

**Search — dwelling house — arrest — right of officer.**

1. In order to make the arrest of a person charged with crime, a police officer has the authority to enter and search any dwelling house, when he acts upon probable cause and reasonable belief that the person whom he seeks is then in such dwelling house.

[See note on this question beginning on page 263.]

**Officer — liability for wrongful search.**

2. A police officer having a warrant for the arrest of an alleged criminal is not liable for entering a private dwelling without search warrant, and against the will of its owner, to appre-

hend the criminal, if he acts upon probable cause and reasonable belief that the person whom he seeks is in the dwelling.

[See 2 R. C. L. 476.]

APPEAL by defendant Monette from a judgment of the Circuit Court for Lauderdale County (Heidelberg, J.) in favor of plaintiff in an action brought to recover damages for alleged unlawful search of her house and premises. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Amis & Dunn, for appellant:

Defendant, as chief of police, had the lawful right to search the house and premises of the plaintiff for the purpose of finding and arresting one for whose arrest he had a lawful warrant, after informing the plaintiff of his purpose in searching the house, no matter whether she consented to it or not.

State ex rel. Collins v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; McClurg v. Brenton, 123 Iowa, 368, 65 L.R.A. 519, 101 Am. St. Rep. 329, 98 N. W. 881; Smith v. Maryland, 18 How. 71, 15 L. ed. 269; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Eilenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Re Chapman, 166 U. S. 661, 41 L. ed. 1154,

17 Sup. Ct. Rep. 677; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Morris v. Hitchcock, 194 U. S. 384, 48 L. ed. 1030, 24 Sup. Ct. Rep. 712; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 28 Sup. Ct. Rep. 14; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Bagley v. General Fire Extinguishing Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Smithsonian Inst. v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601; Rhodus v. Manning, 217 U. S. 597, 54 L. ed. 896, 30 Sup. Ct. Rep. 696; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct.

Rep. 342, Ann. Cas. 1912B, 1312; American Lithographic Co. v. Werckmeister, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; United States v. Morgan, 222 U. S. 274, 56 L. ed. 198, 32 Sup. Ct. Rep. 81.

Mr. Thomas G. Fewell for appellee.

Holden, J., delivered the opinion of the court:

The appellee, Mrs. Sarah C. Toney, recovered judgment against the appellant and the surety company on his official bond, for damages for an unlawful search of her house and premises by the appellant Monette, chief of police of the city of Meridian, and from which judgment this appeal is prosecuted.

Here are the facts, briefly stated, upon which the judgment is founded. Mrs. Toney was a householder and head of a family, residing with her family in a house in the city of Meridian. Mr. Monette, as chief of police of the city, had in his possession a warrant for the arrest of one Gus Nelson to answer the state of Mississippi on a criminal charge. About 1 o'clock in the afternoon Mr. Monette was informed that said Gus Nelson was at the home of Mrs. Toney, his aunt, in Meridian. Upon receiving this information, Mr. Monette, as chief of police, took with him the warrant for the arrest of Nelson, and with two other policemen went to the home of Mrs. Toney, and after informing her of the object and purpose of his visit, searched the home and premises of Mrs. Toney for the purpose of finding and arresting the said Gus Nelson. Officer Monette had no search warrant. There is a conflict in the testimony as to whether or not the search was made without the consent of Mrs. Toney. There is also a dispute in the testimony as to the method and character of the search made by the appellant Monette.

The case was submitted to the jury for the plaintiff below upon the theory that the appellant Chief of Police Monette was liable for dam-

ages if he searched the house and premises without having first secured a search warrant, as provided by law, authorizing him to make such search, and also provided that the appellee, Mrs. Toney, did not consent that the search be made. The instructions granted the plaintiff below embodied this theory throughout the case; and the defendant asked for and was refused the following instruction: "The court charges the jury that if, from all the testimony in the case, they believe that the defendant, jointly with the sheriff of Lauderdale county, had been searching for Gus Nelson to arrest him on warrants previously issued for his arrest, and if they further believe that, on the occasion testified about, the defendant had information which caused him reasonably to believe that Gus Nelson was in plaintiff's house, and that defendant, in company with two other policemen, went to plaintiff's house for the purpose of finding and arresting Gus Nelson, and that plaintiff knew or was informed of the purpose of his visit, then defendant had the lawful right to search the house for the purpose of ascertaining whether or not Gus Nelson was in it, no matter whether plaintiff consented to such search or not; and if the jury further believe that the defendant exercised such right of search in a reasonable manner under all of the circumstances for the sole purpose of finding out whether Gus Nelson was in the house or not, then the jury should find for the defendant."

We fully appreciate the inhibition of the Constitution with reference to unreasonable search and seizure and fully realize that the protection afforded by the Constitution is to be respected and held sacred in all proper cases; but we do not think the constitutional prohibition can be successfully invoked in the case before us. The right to make arrests at any time or place exists by statute in this state. In order to make

the arrest of a person charged with crime, an officer search—dwelling house—right of officer. has authority to enter and search any dwelling house, when he acts upon probable cause and reasonable belief that the party whom he seeks to arrest is then in such dwelling house.

Such officer, in seeking to arrest one charged with crime, whose arrest he is legally authorized to make, may enter and search the dwelling house of the accused, or the dwelling house of any other person, when acting in good faith upon reasonable belief that the accused is in the house, and this is true whether the owner or possessor dwelling in the house consents or not; and when search by an officer is made in a reasonably necessary manner under these circumstances for the purpose only of apprehending the person whose arrest he seeks, the officer violates no right or law and is not liable for damages, and is not required to have

a search warrant under our statute. The constitutional provision against unreasonable seizure and search never intended that the execution of criminal process in the apprehension of persons convicted or charged with crime should be thereby delayed or hindered. Such reasonable search in the due enforcement of the criminal laws of the land is not an invasion of the personal security of the citizen.

Petty officers who commit acts in excess of their lawful authority are amenable to the law in such cases, but the arrest of harbored criminals is not to be hindered under the claim of personal security against unreasonable search. *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; 2 R. C. L. 475. The above instruction, refused by the lower court to the appellant *Monette*, we think, clearly sets forth the law governing this case, and it should have been granted. Therefore the judgment of the lower court is reversed on direct appeal, and the case remanded.

## ANNOTATION.

### Entry and search of premises for purpose of arresting one without search warrant.

#### I. Search for purpose of criminal arrest:

- a. Rule stated, 263.
- b. Application of rule:
  1. Search held justified, 265.
  2. Search held not justified, 269.

#### 1. Search for purpose of criminal arrest.

##### a. Rule stated.

It is well settled that a police officer or a private person may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony, or guilty of a breach of the peace or misdemeanor committed in his presence. But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched.

#### II. Search for purpose of civil arrest:

- a. Premises of party, 271.
- b. Premises of stranger, 273.

#### III. Search for purpose of rearrest of escaped prisoner, 273.

**United States.**—*United States v. Faw* (1808) 1 Cranch, C. C. 487, Fed. Cas. No. 15,079; *United States ex rel. Flynn v. Fuellhart* (1901) 106 Fed. 911.

**Connecticut.**—*Kelsy v. Wright* (1783) 1 Root, 83; *State v. Shaw* (1789) 1 Root, 134; *Read v. Case* (1822) 4 Conn. 166, 10 Am. Dec. 110.

**Delaware.**—*State v. Brown* (1853) 5 Harr. 505; *State v. Lafferty* (1854) 5 Harr. 491; *State v. Oliver* (1863) 2 Houst. 585; *State v. Mills* (1908) 6 Penn. 497, 69 Atl. 841.

**Hawaii.**—Hubertson v. Cole (1851) 1 Haw. 44.

**Illinois.**—Ryan v. Donnelly (1870) 71 Ill. 100.

**Kentucky.**—Hawkins v. Com. (1854) 14 B. Mon. 395, 61 Am. Dec. 147; American Cent. Ins. Co. v. Stearns Lumber Co. (1911) 145 Ky. 255, 36 L.R.A.(N.S.) 566, 140 S. W. 148, Ann. Cas. 1913B, 628.

**Louisiana.**—State v. Stouderman (1851) 6 La. Ann. 286.

**Massachusetts.**—Barnard v. Bartlett (1852) 10 Cush. 501, 57 Am. Dec. 123; Jacobs v. Measures (1859) 13 Gray, 74; McLennon v. Richardson (1860) 15 Gray, 74, 77 Am. Dec. 353; Com. v. Irwin (1861) 1 Allen, 587; Com. v. Tobin (1871) 108 Mass. 426, 11 Am. Rep. 375; Com. v. Reynolds (1876) 120 Mass. 190, 21 Am. Rep. 510; Ford v. Breen (1899) 173 Mass. 52, 53 N. E. 136; Com. v. Phelps (1911) 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566.

**Mississippi.**—See the reported case (MONETTE v. TONEY, ante, 261).

**New Hampshire.**—State v. Smith (1818) 1 N. H. 346.

**New York.**—Williams v. Spencer (1810) 5 Johns. 352; People v. Glennon (1902) 37 Misc. 1, 74 N. Y. Supp. 794; Devlin v. McAdoo (1905) 49 Misc. 57, 96 N. Y. Supp. 425.

**North Carolina.**—State v. Mooring (1894) 115 N. C. 709, 20 S. E. 182.

**Pennsylvania.**—See Com. v. Krubeck (1899) 8 Pa. Dist. R. 521.

**Wisconsin.**—Bailey v. Ragatz (1880) 50 Wis. 554, 36 Am. Rep. 862, 7 N. W. 564; Hawkins v. Lutton (1897) 95 Wis. 492, 60 Am. St. Rep. 131, 70 N. W. 483.

**England.**—Semayne's Case (1604) 5 Coke, 91, 77 Eng. Reprint, 194, 11 Eng. Rul. Cas. 629; Seyman v. Gresham (1688) Cro. Eliz. pt. 2, p. 908, 78 Eng. Reprint, 1131, F. Moore, 668, 72 Eng. Reprint, 828; Handcock v. Baker (1800) 2 Bos. & P. 260, 126 Eng. Reprint, 1270, 5 Revised Rep. 587; Burdett v. Colman (1811) 14 East, 163, 104 Eng. Reprint, 563, 12 Revised Rep. 478; Burdett v. Abbot (1811) 14 East, 1, 104 Eng. Reprint, 501, 12 Revised Rep. 450, affirmed in (1812) 4 Taunt. 410, 128 Eng. Reprint, 384, which is

affirmed in (1817) 5 Daw. P. C. 165, 3 Eng. Reprint, 1289; Davis v. Russell (1829) 5 Bing. 354, 130 Eng. Reprint, 1098, 2 Moore & P. 590, 7 L. J. Mag. Cas. 52, 30 Revised Rep. 637; Rex v. Smith (1833) 6 Car. & P. 136; Howard v. Gossett (1842) Car. & M. 380; Smith v. Shirley (1846) 3 C. B. 142, 136 Eng. Reprint, 58, 15 L. J. C. P. N. S. 230, 4 Bl. Com. 289; Harvey v. Harvey (1884) L. R. 26 Ch. Div. 644, 33 Week. Rep. 76, 48 J. P. 468.

**Canada.**—Van Tassel v. Trask (1894) 27 N. S. 329.

In Semayne's Case (Eng.) supra, the court laid down the basic principles concerning the right to search premises for the purpose of making an arrest, either civil or criminal, without a search warrant. The court held as follows: Firstly: "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors;" secondly: "For felony or suspicion of felony, the King's officer may break the house to apprehend the felon, and that for two reasons: (1) For the commonwealth, for it is for the commonwealth to apprehend felons. (2) In every felony the King has interest, and where the King has interest the writ is non omittas propter aliquam libertatem; and so the liberty or privilege of a house doth not hold against the King;" thirdly: "In all cases when the door is open the sheriff may enter the house, and do execution at the suit of any subject, either of the body, or of the goods;" and fourthly: "That the house of anyone is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin



there; and therefore, in such cases, after denial on request made, the sheriff may break the house." With slight variations, these rules of the common law have been followed throughout the subsequent decisions in England and America.

But in *People v. Glennon* (1902) 37 Misc. 1, 74 N. Y. Supp. 794, the court held, in an exhaustive opinion on the right to search and arrest without a warrant, that a policeman was not derelict in his duty by reason of failure to search a house of ill fame and arrest the keeper thereof on mere suspicion, and without either a warrant to arrest or a search warrant. The court, among other things, said: "The law does not tolerate the idea that anyone may be arrested by a police officer for an alleged criminal offense of the grade of misdemeanor only, except on a warrant duly obtained from a magistrate, unless the offense was committed in the view of the officer. If a police officer knows facts which show that a criminal offense of the grade of misdemeanor has been committed, but which he did not see committed, then there is only one course for him to pursue; i. e., his duty to go before a magistrate and make a written complaint under oath of such facts, and obtain a warrant, and then make the arrest with such warrant. If the officer does not know such facts, but some person who professes to know them tells him of them, the officer cannot obtain a warrant, much less make and arrest without warrant, on such hearsay. His duty is to send such person to a magistrate to make the necessary written complaint on oath to obtain a warrant, or, in some grave cases, it may be that he should accompany such person before the magistrate;" and "if it were so that we are all open to have our houses invaded, ransacked, and searched by policemen, on nothing except what they may choose to call their suspicions, and that we may be arrested in the same way, we would not be living under a free government, but under a most intolerable despotism, the like of which former generations struggled against until they obtained those guar-

anties of individual rights and liberties which made them free, the chief of which were that their houses should not be invaded and searched, and that they should not be seized except by due warrant and process of law. The far-reaching constitutional maxim that every man's house is his castle has a history and a literature all its own, and is still as expressive and pregnant of the individual rights and liberties of a free people as when it first emanated from what Coke called the unpolished genius of the people. It burst asunder the bonds of despotic power. It is as vital now as when Chatham said of it: 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement' (Cooley, Const. Lim. 364)."

#### *b. Application of rule.*

##### *1. Search held justified.*

In *Kelsy v. Wright* (1783) 1 Root (Conn.) 83, wherein it appeared that a constable, having demanded admittance and having been refused, broke the door and entered the house of an accused person for the purpose of making an arrest, the court held that he had a right to break the door and enter the house, having good reason to suppose the criminal was within.

In *Hawkins v. Com.* (1854) 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147, the court held that an officer executing criminal process may force an entrance to the dwelling house of the accused person, and make a search therein for him, saying: "The right to break open the outer door to make the entrance of course includes the right to break open the doors of the different rooms and chambers in the house to make a thorough search throughout the premises; and though the defendant in the process be not found or shown to be in the place of his dwelling at the time, yet such entrance and search of the officer, having valid criminal process in his hands,

would not, therefore, be unlawful, or make him a trespasser;" and also, "it is not necessary, for the sheriff's justification, that the dwelling house entered and searched should be the property of the defendant; it is sufficient if it be a house, though belonging to and inhabited by another, in which the accused party dwelt at the time."

In *State v. Stouderman* (1851) 6 La. Ann. 286, it was held that a police officer, without a warrant, may enter by force a dwelling and search therein, for the purpose of arresting one who has threatened to commit felony, the court saying: "It seems clear that if one menace another to kill him, upon complaint thereof to the constable, forthwith he may, to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace. If so, the law must certainly justify the means necessary to make the arrest, as the forcible entry of a dwelling house. Indeed, it was expressly held that anyone may justify the breaking and entering a party's house, and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. *Handcock v. Baker* (1800) 2 Bos. & P. 260, 126 Eng. Reprint, 1270, 5 Revised Rep. 587. This authority belongs to all peace officers, such as watchmen, patrols, beadles, constables, bailiffs, justices of the peace, sheriffs, and coroners, and is peculiarly intrusted by our statute and ordinances to watchmen in the night, because the danger is more imminent and the means of obtaining a warrant more difficult."

In *Read v. Case* (1822) 4 Conn. 166, 10 Am. Dec. 110, it appeared that a deputy sheriff gained entrance to the plaintiff's home by breaking open the outer door for the purpose of arresting the plaintiff. The court held, in trespass against the officer, that he was within his rights.

In *State v. Oliver* (1863) 2 Houst. (Del.) 585, the court held that peace officers, having legal warrants to arrest, might break open doors after due notice and demand of admittance, saying: "In criminal cases where a felony has been committed, or a dangerous wound has been inflicted, or

even where an officer of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him."

Where an officer, for the purpose of making an arrest, went to the house of the accused, and, having demanded admittance and been refused, broke down the outer door, the court held that he did not exceed his rights as an officer of the law. *State v. Shaw* (1789) 1 Root (Conn.) 134.

In *Jacobs v. Measures* (1859) 13 Gray (Mass.) 74, it appeared that a deputy sheriff with a valid criminal process went to the home of the accused, and, having demanded entrance and being refused, broke down the door and entered the house. The court held that the officer was justified in breaking the outer door and entering the premises of the accused, although he had no search warrant.

In *Barnard v. Bartlett* (1852) 10 Cush. (Mass.) 501, 57 Am. Dec. 123, wherein it appeared that a sheriff, having a warrant for the arrest of the accused, went to his home, and, after stating his purpose and demanding entrance, broke down the door of the house, the court held that he was justified in so doing, saying: "The maxim of law that every man's house is his castle is applicable to arrests in civil suits, and has not the effect to restrain an officer of the law from breaking and entering a dwelling house for the purpose of serving a criminal process upon the occupant. In such case, the house of the party is no sanctuary for him, and the same may be forcibly entered by such officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so."

In *Com. v. Phelps* (1911) 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566, it appeared that a sheriff, on being informed that a felony had been committed, went to the house of the accused without a warrant, and, after demanding admittance, entered the dwelling by force, and, while searching therein for the accused, was shot and killed by him. The court held that the homicide was not justified, as

the sheriff, having reason to believe a felony had been committed, was warranted in forcing an entrance to the home of the defendant, and searching therein for the purpose of arresting him.

And in *Ford v. Breen* (1899) 173 Mass. 52, 53 N. E. 136, the court held that police officers were justified in entering the open door of a dwelling house in which the occupants were creating a disturbance, and arresting them for the crime of drunkenness, although the officers had no warrant. The statute under which the decision was made provides as follows: "Whoever is found in a state of intoxication in a public place, or is found in any place in a state of intoxication committing a breach of the peace or disturbing others by noise, may be arrested without a warrant by a sheriff, deputy sheriff, constable, watchman, or police officer." Mass. Stat. 1891, chap. 427.

In *Com. v. Irwin* (1861) 1 Allen (Mass.) 587, a prosecution for assault and battery on the person of a police officer, it appeared that the officer, having a warrant for the arrest of a felon, and believing the accused to be in the home of the defendant, knocked at the door of the defendant's house, and, being admitted, stated his purpose and that he wished to search for the felon. The defendant thereupon stated that the person sought was not in the house, and, on the officer attempting to make the search, committed the alleged assault. The court held that, as the officer had a warrant for the arrest of the person for whom he searched in the defendant's house, he would have been justified in breaking open the door of the house, after demanding admittance and being refused, and in searching therein for the person named in the warrant, although he was not there. The court qualified the rule, however, by stating that the officer must have reasonable cause to believe that the person against whom he holds the warrant is in the house.

In *Com. v. Reynolds* (1876) 120 Mass. 190, 21 Am. Rep. 510, an action for assault with intent to kill on the person of a police officer, it appeared

that the officer, having a warrant for the arrest of a person accused of crime, and believing that he was in the home of the defendant, went to the defendant's house, and, being admitted, stated that he had a warrant to arrest a man, and that he intended to search the premises. The defendant refused permission to search his dwelling, and, upon the officer persisting to do so, shot him. The court held that the policeman was within the authority granted him by the common law to make an arrest of one charged with crime, saying: "An officer who is provided with a warrant to arrest one charged with a misdemeanor, and who has information which leads him reasonably to believe that the person sought is within the dwelling house of a third person, upon notice to such third person that he has a warrant against one who is in the house, and, upon demanding admission, such admission being refused, is entitled for the purpose of serving his warrant, to make forcible entrance through the outer door of the house; and . . . the officer cannot be treated when he has thus entered, by the owner of the house, as a trespasser therein, even if he has failed to notify the owner who the person sought to be arrested is (no inquiry having been made in relation thereto), and even if such person is not actually within the house. The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the King. It had no application, therefore, to the criminal process. Even in case of a misdemeanor, while it has been held in some cases that before breaking open the outer door the officer should demand admission, it is fully recognized in all the cases that after such demand and its refusal the officer may lawfully enter by force and serve his process, even if it be against the occupant of the house."

In *State v. Mooring* (1894) 115 N. C. 709, 20 S. E. 182, it appeared that an officer, in endeavoring to arrest a person under a criminal warrant, went

to the house of the defendant where he believed the accused person was, and, after demand of entry and refusal, broke open the door and proceeded to search for the criminal. The court held that he was justified in so doing; that when an officer "comes armed with process he may, after demand of admittance for the purpose of making the arrest and refusal of the occupant to allow him to enter," break in the doors to effect the arrest.

In *Hubertson v. Cole* (1851) 1 Haw. 44, the court held that an officer may, without a search warrant, after demand for entry and refusal, break open a door and search premises for the arrest of one committing a breach of the peace therein.

In *United States ex rel. Flynn v. Fuellhart* (1901) 106 Fed. 911, wherein it appeared that agents of the United States Secret Service entered without violence the home of a third person, to arrest an alleged counterfeiter, the court held that the officers did not exceed their duty, and that the entry without a search warrant was not illegal, saying: "It is a mistake to suppose that no search or arrest can be made without a warrant," since the constitutional provision is only against "unreasonable searches and seizures."

In *Williams v. Spencer* (1810) 5 Johns. (N. Y.) 352, the court held that no action would lie against a constable for entering the plaintiff's premises by forcing an inner door, for the purpose of arresting him under a warrant.

In *Hawkins v. Lutton* (1897) 95 Wis. 492, 60 Am. St. Rep. 131, 70 N. W. 483, it appeared that police officers, while standing outside the house of the plaintiff, heard loud and boisterous quarreling and indecent and profane language. On orders from the chief of the police, who was present at the time, they entered the house and arrested without a warrant, the plaintiff and other inmates of the place. The court held that the officers were justified in entering the house and arresting those found therein for a breach of the peace committed in their presence.

In *Burdett v. Colman* (1811) 14 East, 163, 104 Eng. Reprint, 563, 12

Revised Rep. 478, the court charged the jury that it was proper and justifiable for a sergeant at arms of the House of Commons to effect an arrest under a warrant issued by the House, by means of a forcible entry of the "messuage" or dwelling of the plaintiff, and a search made therein for the accused party.

In *Van Tassel v. Trask* (1894) 27 N. S. 329, it appeared that a police officer, having a warrant for the commitment of the plaintiff, went to the latter's home, and, after due demand for admittance and refusal, entered by breaking a panel in the outer door. The court held that he was justified in so doing, saying: "The right to break open the outer door to arrest plaintiff is not confined to cases of felony, but extends to misdemeanors, breaches of the peace, and other matters of general concern, in which the public at large have an interest, and to which the Queen is a party. In such cases, however, the party breaking must have in his possession a legal warrant, one not void upon its face, against the occupant, and must first signify the cause of his coming, and demand admission before breaking the outer door."

In *Davis v. Russell* (1829) 5 Bing. 354, 130 Eng. Reprint, 1098, 2 Moore & P. 590, 7 L. J. Mag. Cas. 52, 30 Revised Rep. 637, it was held that, on reasonable cause for suspecting one of having committed a felony, a constable was justified in entering the accused person's room at night in order to arrest her.

In *Harvey v. Harvey* (1884) L. R. 26 Ch. Div. (Eng.) 644, 33 Week. Rep. 76, 48 J. P. 468, an action against a sheriff for failure to arrest a party against whom he held a warrant of arrest for a contempt of court, the sheriff alleged justification in that the contempt was a civil proceeding, and therefore he had no right to break down the doors of the accused person's home and make a search therein for the purpose of arresting him. The court held that contempt of court was not civil in its nature, and the sheriff could break open the outer doors of the offender's residence, and search

for him therein for the purpose of effecting the arrest.

In *Howard v. Gossett* (1842) Car. & M. (Eng.) 380, it was held that officers of the House of Commons, by virtue of a warrant for arrest for contempt, had the right to enter the premises of the accused person, and make a search therein in order to apprehend him, but that they had no right to remain on the premises longer than the time necessary to make the search and arrest.

In *Seyman v. Gresham* (1688) Cro. Eliz. pt. 2, p. 908, 78 Eng. Reprint, 1131, F. Moore, 668, 72 Eng. Reprint, 828, the court held that a sheriff may not break open any man's house to make execution; but on a *capias utlagatum* "he may well enter a man's house to apprehend him; for no place ought to protect him against the Queen; and he, being out of the law, shall not have the protection of the law."

In *Com. v. Krubeck* (1899) 8 Pa. Dist. R. 521, there is dictum to the effect that a peace officer may enter any dwelling, tent, or inclosure for the purpose of arresting without warrant, one committing a breach of the peace within the hearing of the officer, and that no warrant to search is required.

In *State v. Mills* (1908) 6 Penn. (Del.) 497, 69 Atl. 841, it was held that a police officer had the right, and it was his duty, to enter a house for the purpose of arresting the inmates, the court saying: "If you find that the officer believed on reasonable grounds that there was a fight going on in this house, or disorderly conduct going on there, or any criminal offense,—that he saw it, or heard screams of terror, outcries, or other indications of its existence within that house, then he had the right, and it was his duty, to arrest within said house any and all the persons involved in such disorder or offense, whom he actually found there engaged in it at the time he came up, and take them before the proper tribunal, and, as we have said, without a warrant."

In *Rex v. Smith* (1833) 6 Car. & P. (Eng.) 136, it was held that a police officer had the right to enter a public house to quell a disturbance therein.

In *Com. v. Tobin* (1871) 108 Mass. 426, 11 Am. Rep. 375, it was held that a constable, by virtue of his office, had the right, without warrant, to enter any house, the door of which was unfastened and to arrest any person engaged in an affray therein, or committing a felony, or a breach of the peace.

In *State v. Brown* (1853) 5 Harr. (Del.) 505, the court held inferentially that a city watchman had the authority to enter the house of a third person without a warrant, to effect the arrest of a notorious criminal supposed to be hiding therein.

In *State v. Lafferty* (1854) 5 Harr. (Del.) 491, the court, among other things, charged the jury that a constable's action in entering a disorderly house for the purpose of suppressing disorder was commendable.

In *Handcock v. Baker* (1800) 2 Bos. & P. 260, 126 Eng. Reprint, 1270, 5 Revised Rep. 587, wherein it appeared that the defendants, being private persons, having reason to believe that the plaintiff was killing his wife, broke into his home and arrested him. The court held that they were justified in so doing; that a private person may break into a dwelling and arrest one who is about to commit, or is committing, a felony.

## 2. Search held not justified.

In *McLennon v. Richardson* (1860) 15 Gray (Mass.) 74, 77 Am. Dec. 353, it was held that the authority of a constable to break open the doors and search premises for the purpose of arrest, without a warrant, is confined to cases where treason or felony has been committed, or there is an affray or breach of the peace in his presence, and therefore the action of a constable in forcing an entrance into a shop for the purpose of arresting the occupant for selling spirituous liquors on Sunday was unwarranted and unjustified.

In *United States v. Faw* (1808) 1 Cranch, C. C. 487, Fed. Cas. No. 15,079, the court refused to instruct the jury that a constable has no right to break open the door of a house inhabited by a man, to arrest him on a warrant for assault and battery.

In *Devlin v. McAdoo* (1905) 49 Misc. 57, 96 N. Y. Supp. 425, reversed

on other grounds in (1906) 116 App. Div. 224, 101 N. Y. Supp. 546, the court held that mere suspicion that gambling was being carried on did not justify a forcible breaking into a club room and the destruction of the personal property found therein.

In *Com. ex rel. Volpe v. County Prison* (1896) 5 Pa. Dist. R. 635, it was held that police officers had no authority or right, under a warrant to arrest for a misdemeanor, to break open the door of a dwelling house at a late hour of the night, and search the premises.

In *Bailey v. Ragatz* (1880) 50 Wis. 554, 36 Am. Rep. 862, 7 N. W. 564, it appeared that a policeman, on being told that a certain lewd woman was in the plaintiff's house with a young boy, aroused the family of the plaintiff at a late hour of the night, and, without warrant, entered and searched the premises. The court held that the defendant had no right to search the dwelling of the plaintiff without a warrant or reasonable belief that a crime was being committed, saying: "We do not think that the law gives either an implied or express license to a policeman to demand an entrance, or to enter into the house of a respectable citizen at night, by way of the kitchen door, after the family have retired, for the purpose of making insulting inquiries as to the character of the house or its inmates; and especially when such policeman has no information, either by hearsay or otherwise, that the character of the house or its inmates is bad."

In *Burdett v. Abbot* (1811) 14 East, 1, 104 Eng. Reprint, 501, affirmed in (1812) 4 Taunt. 410, 128 Eng. Reprint, 384, which is affirmed in (1817) 5 Dow. 165, 3 Eng. Reprint, 1289, the court held that a man's home may be broken into and searched only where the King is a party, that is, in order to apprehend a criminal, saying: "The law, considering every man's house as his castle for his protection and defense, privileges it from being broken into for the purpose of executing any process, or making any arrest, except where the King is a party. That appears by the Year Book, 13 Edw. IV. 9a (a). So Lord Coke, in *Semayne's*

*Case* (1604) 5 Coke, 91b, 92a, 77 Eng. Reprint, 194, 11 Eng. Rul. Cas. 629, says that, where the King is a party, the writ of itself is a non omittas propter aliquam libertatem, though it be not so worded; and cites the same Year Book 'that for felony, or suspicion of felony, the King's officer may break the house to apprehend the felon; and that for two reasons: (1) for the commonwealth; for it is for the commonwealth to apprehend felons; (2) in every felony the King has interest; and where the King has interest, the writ is non omittas, etc.; and so the liberty or privilege of a house doth not hold against the King.' And there is much more to the like purpose, to show that outer doors cannot be broken open, even upon the King's writ, except it be for a crime; and not where it is in debt or trespass at the suit of a party. Lord Coke also appears (4 Co. Inst. 176) in his time to have considered that a justice of peace could not make a warrant upon a bare surmise, even of a crime, to break any man's house; as, to search for a felon or for stolen goods, without an indictment found. There is no case where it has been held lawful to break open the door, except for some crime, and upon process at the suit of the King for that crime; for the law gives the privilege of defense to every man's cattle, except against the King's process for crimes against the King's peace."

In *Ryan v. Donnelly* (1870) 71 Ill. 100, wherein it appeared that the defendant had made an unfounded charge of stealing against a young girl, and, in company with a police officer, entered her apartments at a late hour of the night and there arrested her, the court held that the search in the night, without a warrant, was in violation of law.

In *American Cent. Ins. Co. v. Stearns Lumber Co.* (1911) 145 Ky. 255, 36 L.R.A.(N.S.) 566, 140 S. W. 143, Ann. Cas. 1913B, 628, it appeared that a marshal burned a building in which, at the time, were several persons who were resisting arrest. The court held that the officer had exceeded his authority as prescribed by the statutes, which read as follows: "In

executing a writ of habeas corpus or any criminal or penal process requiring an actual arrest, the sheriff or other officer may break open the outer or any other door of the dwellings or other house of the defendant, or of any other person, if it be necessary to enable him to make the arrest. To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired."

In *Smith v. Shirley* (1846) 3 C. B. 142, 136 Eng. Reprint, 58, 15 L. J. C. P. N. S. 230; 4 Bl. Com. 289, it appeared that the defendant, together with a police officer, having suspicions that a certain person was guilty of a felony, went to the home of a third person and searched the same for the purpose of arresting the suspected person. The court held that a private individual, even on the strongest grounds of suspicion of felony, has no right to enter, without a search warrant, the dwelling house of a third person, unless he has reasonable ground to believe the guilty party is concealed there.

## II. Search for purpose of civil arrest.

### a. Premises of party.

The rule in cases of civil arrest is that an officer, having gained entrance to the premises of the person to be arrested, peaceably by the outer door, may, after demand for admission and refusal, break in an inner door without a search warrant, for the purpose of searching for and apprehending the occupant; but the outer door may not be forced open by virtue of a power to arrest, under civil process. *Hawkins v. Com.* (1854) 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; *Stedman v. Crane* (1846) 11 Met. (Mass.) 295; *Hubbard v. Mace* (1819) 17 Johns. (N. Y.) 127; *State v. Hooker* (1845) 17 Vt. 658; *Hooker v. Smith* (1847) 19 Vt. 151, 47 Am. Dec. 679; *Smith v. Butler* (1724) Comb. 326, 90 Eng. Reprint, 507; *Waterhouse v. Saltmarsh* (1724) Hobart, 263, 80 Eng. Reprint, 409; *Rex v. Backhouse* (1772) Lofft, 61, 98 Eng. Reprint, 533; *Lee v. Gansel* (1774)

Cowp. pt. 1, p. 1, Lofft, 374, 98 Eng. Reprint, 935, 700; *Cook's Case* (1792) Cro. Car. 537, 79 Eng. Reprint, 1063; *Ratcliffe v. Burton* (1802) 3 Bos. & P. 223, 127 Eng. Reprint, 123, 6 Revised Rep. 771; *Lloyd v. Sandilands* (1818) 8 Taunt. 250, 129 Eng. Reprint, 379; *Whalley v. Williamson* (1835) 7 Car. & P. (Eng.) 294; *Kerbey v. Denby* (1836) 1 Mees. & W. 336, 150 Eng. Reprint, 463, 2 Gale, 31, 1 Tyrw. & G. 688, 5 L. J. Exch. N. S. 162.

Thus, in *Lee v. Gansel* (1774) Cowp. pt. 1, p. 1, 98 Eng. Reprint, 935, the court held that an inner door could be broken open and a search made of the defendant's apartments in order to arrest him, under a civil process, but that this could be done only where the outer door had not been forced, for, under civil process, a man's outer door cannot be broken open in order to enter his dwelling for the purpose of arresting him.

Where, in arresting under civil process, a sheriff found the outer door of the defendant's house open, it was held that the officer was justified in entering and breaking down an inner door for the purpose of arrest, under the process; although he would not be justified in forcing an entrance by breaking the outer door. *Hubbard v. Mace* (1819) 17 Johns. (N. Y.) 127.

In *Stedman v. Crane* (1846) 11 Met. (Mass.) 295, it appeared that a sheriff, under civil process for the arrest of a party, went to his home, a building occupied by two families, and gaining entrance peaceably to the interior of the building, broke down the door of the plaintiff's apartments. The court charged the jury as follows: "If the house was so constructed as to be capable of being used as a double house, or a distinct residence for two separate families, each family having an outer door, and if the same was in fact actually thus used, then an entry into the other tenant's 'room, through his outer door, though peaceably,' and with his assent, 'would not authorize the breaking open of a door connecting the rooms of the two different tenants, but kept closed as to actual use and occupation by the parties; and that, if such was the state of things,

the defendant was a trespasser in entering the room of the plaintiff. But if the door through which the defendant entered the plaintiff's room was a door of common use and passage by the two families' passing from time to time, at the pleasure of the different residents, either to go out of the house through the outer door, . . . or as a passageway to the interior part of the house, then the door was not such a one as would be privileged as an outer door, and the officer, being peaceably in the room . . . adjacent to the plaintiff's room, after due notice of the purpose of his entry and refusal to admit him, would be justified in opening the plaintiff's room, and making the arrest." Hereupon the jury found a verdict for the defendant sheriff.

In *Hooker v. Smith* (1847) 19 Vt. 151, 47 Am. Dec. 679, it was held that a sheriff was not justified, in effecting an arrest under civil process, in forcing an entry into the plaintiff's dwelling by breaking down an outer door.

In *State v. Hooker* (1845) 17 Vt. 653, it appeared that a sheriff and another, for the purpose of effecting a civil arrest under execution, went to the home of the defendant, and, after demand for entrance and refusal, broke down the outer door and entered the house for the purpose of searching for and arresting the accused. While attempting to apprehend the defendant, the sheriff was struck with a club, and the accused was subdued only after a severe resistance on his part. On an indictment for assault, the court held that the defendant was justified in meeting force with force to defend himself from an illegal arrest, as the sheriff, by virtue of civil process, had no authority to enter forcibly the defendant's home by breaking the outer door.

In *Rex v. Backhouse* (1772) Lofft. 61, 98 Eng. Reprint, 533, wherein it appeared that an officer, in order to obtain entrance to a debtor's home for the purpose of arresting him under civil process, by means of a subterfuge induced the occupant of the house to open the door and let him in. After being admitted, he told the true purpose of his visit, and was immediately

put to rout by the defendant, who flourished a pistol. It was held that the officer's entrance on the premises was legal, and therefore that the defendant was guilty of an assault.

In *Kerbey v. Denby* (1836) 1 Mees. & W. 336, 150 Eng. Reprint, 463, 2 Gale, 31, 1 Tyrw. & G. 688, 5 L. J. Exch. N. S. 162, an action in trespass against a sheriff and those assisting him for breaking open the outer door of the plaintiff's dwelling, and entering for the purpose of arresting him by virtue of a civil warrant of arrest, the court held that the breaking of the outer door was unwarranted under power of a civil process.

In *Lloyd v. Sandilands* (1818) 8 Taunt. 250, 129 Eng. Reprint, 379, it was held that, in the execution of a civil warrant of arrest, a sheriff could break an inner door or a window and enter and search for his party, provided the outer door was open; but that under civil process the outer door could not be forced.

In *Waterhouse v. Saltmarsh* (1724) Hobart, 263, 80 Eng. Reprint, 409, it appeared that a sheriff and his party, having gained entrance to the home of the plaintiff by an open outer door, went to the chambers where he and his wife were sleeping, and, without demand for admission, broke down the door for the purpose of arresting the plaintiff under a civil warrant. The court held that the officers were liable for abuse of their authority, and for the unnecessary outrage and terror of the arrest, caused by not demanding an admission before forcing an entrance to the room.

In *Ratcliffe v. Burton* (1802) 3 Bos. & P. 223, 127 Eng. Reprint, 123, 6 Revised Rep. 771, the court said that, under civil process for the arrest of a person, a sheriff or other officer is justified in breaking open an inner door only after due demand for admission, and refusal or noncompliance; and in no case may an entrance be forced through an outer door under civil process, except where the party to be apprehended is hiding on the premises of another.

In *Smith v. Butler* (1724) Comb. 326, 90 Eng. Reprint, 507, it was held that, where officers making an arrest under



civil process find an outer door open, they may open by force an inner door to effect the arrest.

In *Cook's Case* (1792) Cro. Car. 537, 79 Eng. Reprint, 1063, wherein it appeared that a sheriff, while attempting to break into the house of the defendant for the purpose of arresting him under civil process, was shot and killed by the defendant, the court held that the accused was guilty of manslaughter only, as the officer had no right to break into the home of the defendant by virtue of a civil warrant of arrest.

In *Whalley v. Williamson* (1835) 7 Car. & P. (Eng.) 294, the court held that the forcible entry of police officers into the dwelling house of the plaintiff for the purpose of arresting him by virtue of civil process was unwarranted and a trespass.

In *Hawkins v. Com.* (1854) 14 B. Mon. (Ky.) 398, 61 Am. Dec. 147, it was said obiter that an officer, under authorization of civil process, attempting to arrest an individual, cannot break open the outer door of his dwelling, without first requesting the door to be opened and stating his purpose.

*b. Premises of stranger.*

In *Gordon v. Clifford* (1854) 28 N. H. 402, it appeared that a party subject to arrest under a civil process repaired to the home of a relative to escape the arrest, and that the defendant police officers, in this action brought against them in trespass, learning of her whereabouts, went to the house where the plaintiff was staying, and, after demanding admittance and being refused, broke open the outer door and entered to arrest the plaintiff. The court held that while, under civil process against the occupant of a house or his family, officers of the law may not break in the outer door to search therein for the party against whom the process was issued, this prohibition does not extend to a stranger whose ordinary residence is elsewhere.

So, in *Oystead v. Shed* (1816) 13 Mass. 520, 7 Am. Dec. 172, the court held that an officer, in attempting to make an arrest under a civil process,

5 A.L.R.—18.

has no right to force the doors or windows in the execution of process against the occupier or any of his family, including permanent boarders; but that the house cannot be made the sanctuary of strangers, saying: "So that if a stranger whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not his castle; and the officer may break open the doors or windows in order to execute his process; and if one, upon escape after arrest, flee into his own house, it shall not protect him."

In *Johnson v. Leigh* (1815) 6 Taunt. 246, 128 Eng. Reprint, 1029, 1 Marsh. 565, 16 Revised Rep. 614, the court held that a sheriff, acting under civil warrant for the arrest of a party, may not enter and search the dwelling house of a stranger against his will, on the mere suspicion that the party wanted under the warrant is hiding therein. There must be reasonable cause to believe that the party is on the premises.

Where a sheriff went to the home of a third person to arrest a debtor under a civil warrant, having reason to suspect that the party was there, the court held that he was not justified in so doing, having failed to find the debtor therein. *Morrish v. Murrey* (1844) 13 Mees. & W. 52, 153 Eng. Reprint, 22, 2 Dowl. & L. 199, 18 L. J. Exch. N. S. 261.

In *Park v. Evans* (1646) Hobart, 62, 80 Eng. Reprint, 211, the court held that the defendants, under sheriffs, were justly fined for breaking into the home of a third person for the purpose of arresting one under a civil process of arrest. But the court apparently decided the case on the theory that the officers had abused their power, for it appeared that on knocking at the door of the plaintiff's home his wife partly opened the door, whereupon the officers drew their swords and, knocking her down, entered the house and caused much damage in the course of their search.

*III. Search for purpose of rearrest of escaped prisoner.*

Where a prisoner under civil or criminal arrest escapes from the cus-

tody of the officer or person making the arrest, such officer or person may, on fresh pursuit, make a search without a warrant, of any premises in which he has reasonable ground to believe the prisoner is hiding, and for that purpose may, after due demand for admission and refusal, force an entry to the building or premises to be searched. *Cahill v. People* (1883) 106 Ill. 621; *Com. v. McGahey* (1858) 11 Gray (Mass.) 194; *Allen v. Martin* (1833) 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; *Harft v. McDonald* (1879) 1 City Ct. Rep. (N. Y.) 181; *McCaslin v. McCord* (1906) 116 Tenn. 690, 94 S. W. 79, 8 Ann. Cas. 245; *Anonymous* (1702) 7 Mod. 8, 87 Eng. Reprint, 1060; *Anonymous* (1774) Lofft, 390, 98 Eng. Reprint, 709; *Aga Kurboolie Mahomed v. Reg.* (1843) 4 Moore, P. C. C. 239, 13 Eng. Reprint, 293; *Sandon v. Jervis* (1858) 4 Jur. N. S. (Eng.) 737, 27 L. J. Q. B. N. S. 279, affirmed in (1858) 5 Jur. N. S. 860, El. Bl. & El. 935, 120 Eng. Reprint, 758, 28 L. J. Exch. N. S. 156, 7 Week. Rep. 290.

Thus, in *Cahill v. People* (1883) 106 Ill. 621, it appeared that a person was arrested by a police officer, but escaped and ran into his own home, where he locked the doors and refused to open them on demand by the officer. The court held that the officer might, if necessary, break down doors to re-arrest him.

In *Com. v. McGahey* (1858) 11 Gray (Mass.) 194, the court held that on the escape of a person under arrest a police officer is warranted, on fresh pursuit, in breaking open the doors and searching for him on premises wherein he has cause to believe the escaped prisoner is hiding, after demand and refusal of admittance.

In *Harft v. McDonald* (1879) 1 City Ct. Rep. (N. Y.) 181, it was held that a police officer was justified in forcing an entrance to a house in which an escaped prisoner, recently arrested by him, had taken refuge.

In *McCaslin v. McCord* (1906) 116 Tenn. 690, 94 S. W. 79, 8 Ann. Cas. 245, it appeared that a prisoner confined in a jail on a charge of felony escaped. In the course of several weeks the

sheriff of the county where he was originally arrested and confined broke into the home of a third person in another county, without a warrant of arrest or search, in the belief that the felon was concealed therein. The court held that as the sheriff was without his jurisdiction he must be considered as a private person, and as such his power was defined by a statute, which read, in part, as follows: "If a person arrested escape or be rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him, at any time and in any place within the state." Section 7006. "To retake the party escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open any outer or inner door or window of a dwelling house." Section 7007. Therefore, as the person he was seeking was never in his custody, and the pursuit was not made immediately after escape, the officer had no right to break into the home of a stranger without a warrant.

In *Aga Kurboolie Mahomed v. Reg.* (1843) 4 Moore, P. C. C. 239, 13 Eng. Reprint, 293, it appeared that a sheriff, having a civil warrant for the arrest of the plaintiff, went to his home and peaceably entered by the front door, which was open; but, after gaining entrance in this manner, was forcibly ejected from the house. He subsequently returned with help, and, breaking down the outer door, entered to make the arrest. The court held that he was justified in so doing; that while a man's house is his castle as against a breaking for the purpose of arrest under civil process, yet by the act of expelling the officer from the house he in fact committed an escape, and the officer was justified in the breaking and entry of the premises.

In *Anonymous* (1774) Lofft, 390, 98 Eng. Reprint, 709, the court said: "If a bailiff hath made a legal arrest in a street and the prisoner escapes, bailiff may justify, on a fresh pursuit, breaking open the house to retake the prisoner."

In *Allen v. Martin* (1833) 10 Wend. (N. Y.) 300, 25 Am. Dec. 564, the court

held that, having made an arrest and his prisoner having escaped, a constable had the right to break open the outer door of the prisoner's dwelling, after demand and refusal, and search therein for the purpose of apprehending him.

In *Anonymous* (1702) 7 Mod. 8, 87 Eng. Reprint, 1060, it was held that "if a window be open, and a bailiff put in his hand and touch one for whom he has a warrant, he is thereby his prisoner, and may break open the door to come at him," on the theory that the refusal of the prisoner to

come with the officer after the arrest was made constituted an escape."

So, in *Sandon v. Jervis* (1858) 4 Jur. N. S. (Eng.) 737, 27 L. J. Q. B. N. S. 279, affirmed in (1858) 5 Jur. N. S. 860, El. Bl. & El. 935, 120 Eng. Reprint, 758, 28 L. J. Exch. N. S. 156, 7 Week. Rep. 290, wherein it appeared that a sheriff with a warrant for the arrest of the plaintiff put his hand through an open casement and touched him, and proclaimed him under arrest, it was held that the officer was then justified in breaking in the outer door to take out his prisoner.  
W. J. K.

## HELEN GARLAND

v.

FURST STORE, Appt.

*New Jersey Court of Errors and Appeals—May 8, 1919.*

(— N. J. —, 107 Atl. 38.)

### Negligence — unsafe premises — fall — *res ipsa loquitur*.

1. A mere fall of a person on the premises of another, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner; and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.

[See note on this question beginning on page 282.]

### Evidence — burden of proof — notice.

2. Where liability is made to depend at all upon notice to a party, the adversary party must establish the notice before the other is called upon to contest it.

[See 20 R. C. L. 358.]

### View — effect to support verdict.

3. Whether a jury is ordered by the court to inspect or examine premises as an aid in ascertaining the truth of any matter in dispute between the parties to an action, under Evidence Act, § 30,

or to view any place to enable the jury better to understand the evidence given in the cause under Jury Act, §§ 31–35, the judgment rendered by the jury should nevertheless be reversed, if legally unsupportable in and by the record under review, as the questions presented to an appellate court should be decided upon what appears in the record brought up from the court below, notwithstanding a view was had by the jury which tried the cause.

[See 2 R. C. L. 136.]

Headnotes by WALKER, Ch.

(Minturn and Black, JJ., dissent.)

**APPEAL** by defendant from a judgment of the Supreme Court affirming a judgment of the Hudson Circuit Court (Cutler, J.) denying motions to nonsuit and direct a verdict for defendant, in an action brought to recover

damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Runyon & Autenrieth and Walter L. McDermott, for appellant:

There is no proof whatever that the floor was slippery, and there is no proof of any act or omission of defendant in connection with the alleged condition of slipperiness.

*Schnatterer v. Bamberger*, 81 N. J. L. 558, 34 L.R.A.(N.S.) 1077, 79 Atl. 1077, Ann. Cas. 1912D, 139, 1 N. C. C. A. 669; *Kipp v. F. W. Woolworth & Co.* 150 App. Div. 283, 134 N. Y. Supp. 646; *Spickernagle v. Woolworth*, 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1914A, 132; *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337, Ann. Cas. 1913A, 49; *Crocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656.

Defendant had no notice of the alleged slippery condition.

*Schnatterer v. Bamberger*, 81 N. J. L. 558, 34 L.R.A.(N.S.) 1077, 79 Atl. 324, Ann. Cas. 1912D, 139, 1 N. C. C. A. 669; *McDermott v. Sallaway*, 198 Mass. 517, 21 L.R.A.(N.S.) 456, 85 N. E. 422; *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563; *Reeves v. Fourteenth Street Store*, 110 App. Div. 735, 96 N. Y. Supp. 448; *Toland v. Paine Furniture Co.* 175 Mass. 476, 56 N. E. 608, 7 Am. Neg. Rep. 260.

The fact that a jury has viewed the scene of an accident is no reason for refusing to order a nonsuit or direct a verdict, or for refusing to review the judgment.

*Tully v. Fitchburg R. Co.* 134 Mass. 499.

If the reasoning of the supreme court's opinion is correct, no trial court has the right to nonsuit or direct a verdict in a case where the jury have been permitted to take a view.

*De Gray v. New York & N. J. Teleph. Co.* 68 N. J. L. 454, 53 Atl. 200; 38 Cyc. 1840-1842; *Wright v. Carpenter*, 49 Cal. 607.

The unknown element of proof introduced by the taking of a view does not differ from any other unknown element of proof introduced by the presentation of "real evidence" upon the trial.

*Grant v. State*, 50 N. J. L. 490, 14 Atl. 600, 8 Am. Crim. Rep. 297; *Thayer*, Ev. pp. 713 et seq.; *Brown v. Foster*, 113 Mass. 136, 18 Am. Dec. 463; *Davis v. Jenney*, 1 Met. 221; *Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043; 29 Cyc. 831, note 55.

Views are an ancient and a useful incident of legal procedure, and they should not be discouraged.

*Gentry v. McMinnis*, 3 Dana, 382; 1 Moore, Facts, § 159.

Messrs. Doherty & Kinkead and Richard Doherty for respondent.

*Walker, Ch.*, delivered the opinion of the court:

This is an action at law for alleged negligence resulting in personal injuries. It was tried before Judge Cutler and a jury in the Hudson circuit court, and upon the trial, on motion of the appellant, the jury were permitted to view the scene of the accident. Motions to nonsuit and to direct a verdict were denied, the jury rendered a verdict for the plaintiff, and upon appeal to the supreme court the judgment was affirmed. From the judgment entered upon that affirmation an appeal has been taken to this court.

The complaint alleges that the defendant, in conducting a department store, maintained a slippery tiled floor in the basement, which from its nature and from the negligent manner of its construction was dangerous to persons walking upon it, and that it was negligently permitted to become slippery. It appears that the plaintiff, on May 20, 1916, went to the store of the defendant, and into the shoe department in the basement. The floor, according to the plaintiff's testimony, was tile or marble, and in front of the benches where the shoes were sold were strips or runners of carpet. The plaintiff made a purchase, and then proceeded to walk across the floor to the stamp desk, and, using her own words: "I just walked along from where I got the package to the stamp desk, and as I got to the side, to go to hand my slip, my two feet was taken, and I had slipped down on my left hip."

The plaintiff testified that at the spot where she fell the floor was

clean. She said: "I noticed that it was clean; . . . nice and clean."

The plaintiff was accompanied at the time by her daughter. Just what caused the plaintiff to fall does not appear from the testimony; and it appears that no foreign substance, such as oil or grease, was on the floor when and where she fell. It did appear that the floor was such as may be found in bank buildings; it was made of solid concrete in 1912, and was smooth and in good order; that it had been traversed by thousands every week in the four years since its construction; and that no one had ever been known to slip on it before. It is true that plaintiff's daughter said the basement floor was very slippery, and that anybody could slide along it at the time her mother fell, not that it was more slippery where she fell. Floors are either smooth or rough, and smooth floors are not necessarily slippery ones.

The grounds of appeal are the refusal to nonsuit, the refusal to direct a verdict, and the affirmance of these refusals in the supreme court.

To sustain the judgment in this case counsel for the plaintiff respondent urges that the proof before the jury made the defendant prima facie liable under the doctrine of *Phillips v. Library Co.* 55 N. J. L. 307, 27 Atl. 478, and *Schnatterer v. Bamberger*, 81 N. J. L. 558, 34 L.R.A.(N.S.) 1077, 79 Atl. 324, Ann. Cas. 1912D, 139, 1 N. C. C. A. 669. In *Phillips v. Library Co.* it was held that the owner or occupier of lands, who by invitation, express or implied, induces persons to come upon premises, is under a duty to exercise ordinary care to render them reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or the use of the premises dangerous. Now, it will be noted that the premises in question in this case, upon which the plaintiff was invited to enter and where the accident happened, were the floor of the basement of defendant's department store. It was

made of solid concrete composition, such as are the floors of bank buildings, and it does not appear that the plaintiff slipped upon any foreign substance in the fall which she sustained, and which injured her. The floor was undoubtedly smooth, but, apparently, was not slippery, as it had been traversed by thousands of people every week the four years since its construction, and no one had ever been known to slip there before. It would thus appear that the premises were reasonably safe for the entry thereon of persons resorting to the store, and it is not shown that the defendant was guilty of any act which would make them dangerous. In fact, there is no contention to that effect.

In *Schnatterer v. Bamberger* the plaintiff, in going down steps leading to the basement of defendant's store, caught the heel of her shoe in a brass nosing (originally attached to the edge of the wooden step to prevent its wear), which was loose, causing her to trip and fall, and it was held that the evidence failed to show the storekeeper had not used reasonable care in keeping the stairway safe for use, for the reason that it had not appeared that the defect had been brought to the notice of the storekeeper, or had existed for such a length of time as to charge him with notice of its existence, and that in the absence of proof of one of those conditions a prima facie case of negligence was not established. For aught that appears in the case at bar, the defendant had no notice of the alleged slippery condition of the basement floor.

The supreme court in its opinion in this case remarked that the inquiry was whether there was any evidence of the existence of an unusually slippery condition; the notice thereof to the owner, if it existed, not being a contested point. This would appear to indicate that, in the opinion of the supreme court, notice to the defendant might be presumed, as it produced no evidence denying that it had received notice. So far as this observation

purports to state a principle of law, it is erroneous. It is directly contrary to the ruling in *Schnatterer v. Bamberger*. There it was held that in the absence of proof that the defect had been brought to the notice of the storekeeper, or had existed for such a length of time as to charge him with notice, a prima facie case of negligence was not made out. The rule is that, where liability is made to depend at all upon notice to the defendant, the plaintiff must establish the notice before the defendant is called upon to contest it; in other words, it is not to be presumed.

**Evidence—  
burden of  
proof—notice.**

It is not perceived that there is any difference in the law of negligence between a person slipping on a stairway or on a floor; and in *Schnatterer v. Bamberger Co.* supra, 81 N. J. L. at page 561, this court, referring to the earlier case of *De Mateo v. Perano*, 80 N. J. L. 437, 78 Atl. 162, observed that evidence of the previous knowledge of the landlord of the defective condition of a roof leader was deemed an element essential to carry the case to the jury, and this was laid hold of as a reason for deciding that notice of the defective step in the Bamberger store was requisite to be brought home to the defendant in order to create liability.

Nor does *res ipsa loquitur* apply. People frequently sustain falls when and where others do not. In *Paynter v. Bridgeton & M. Traction Co.* 67 N. J. L. 619, 52 Atl. 367, 12 Am. Neg. Rep. 533, it was held that a mere fall from a street car, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the operators of the car, and that the doctrine of *res ipsa loquitur* was applicable only when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident. In *Kingsley v. Delaware, L. & W. R. Co.* 81 N. J. L. 536, at page 541, 35 L.R.A. (N.S.) 338, 80 Atl. 327, Mr.

Justice Minturn, speaking for this court, remarked that out of a car filled with passengers none had been produced to testify to the inherent or obvious danger incident to alighting therefrom, or that any other accident took place at that time, or at any other period, in the attempt to use the step and platform, and that the argument of negligence by the defendant in that case must proceed upon *ad hominem* lines, and not upon notice to the defendant from the happening of a previous accident, or from the clear obviousness of danger incident to the maintenance of a dangerous condition, and it was held in the case that the mere happening of an accident, without some proof of facts from which a violation of a duty to the plaintiff by the defendant may be legitimately inferred, as a rule, will not constitute negligence. Now, in the case at bar, assuming that the floor was smooth, or even slippery, it is obvious that it was not so smooth or slippery as, for that reason, to cause falls, for, if it were, there would have been others besides that of the plaintiff, both at and before the time of her accident.

The mere fact that Mrs. Garland fell on the floor of the Furst store, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply. As the majority of this court said in *Cronecker v. Hall*, — N. J. —, 105 Atl. 213, at page 214, that there was no testimony worthy of the designation, from which it could be inferred that what the defendant's agent did was done in the scope of his master's business, so here it can as pertinently be remarked that there is no testimony worthy of the name, which shows that the defendant was negligent. In our opinion

**Negligence—  
unsafe premises—fall—res ipsa loquitur.**

a nonsuit, and, failing that, a direction of a verdict for the defendant, should have been ordered at the trial.

But the defendant respondent contends that, as there was a jury of view, the observations of the jurymen are evidence in the case, and, as a court of appeal cannot know what they saw, the verdict of the jury may not be set aside. The supreme court in its opinion stated that it was argued for appellant, and with much force, that the floor was of standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it; but the difficulty about adopting that line of reasoning was that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury; that the jury came back and returned a verdict for the plaintiff; that what they saw or felt, or both, did not appear in the printed case, and the court could not tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on the defendant's part.

This was in effect a ruling that what the jury saw amounted to mute evidence tending to establish defendant's negligence, and for that reason, in addition to the other one given, namely, that there was evidence of an unusually slippery floor, stated arguendo, the judgment was affirmed, apparently upon the theory that, because the extent to which the view afforded evidence could not be known, the verdict could not be overridden, even if the proofs to be found in the record were not, in and of themselves, sufficient to sustain the jury's finding. This we deem to be error. In our opinion, for reasons to be presently stated, a judgment should be reversed, if legally unsupportable in and by the record under review,

notwithstanding a view of the premises by the jury.

The respondent urges that the view by the jury was had under § 30 of the Evidence Act. Comp. Stat. p. 2229. It is true that § 30 provides that, in case it shall appear that an inspection or examination of any premises would aid in ascertaining the truth of any matter in dispute between the parties to an action, it shall be lawful for the court to order an inspection or examination of the premises by the jury, or the opposite party or parties, or such persons as shall be named as witnesses, which inspection or examination may be ordered either before or during the progress of the trial. This is not the Jury of View Statute, strictly so-called. That is to be found in the Jury Act. Comp. Stat. p. 2976, §§ 31-35.

The inspection or examination by the jury under § 30 of the Evidence Act is not accompanied with showers, as is the case under § 31 of the Jury Act. That act in § 35 provides that the court may, at any time after the jury is drawn, order that the jury shall view any place, if in the judgment of the court such view is necessary to enable the jury better to understand the evidence given in the cause, and such view shall thereupon be had in such manner as the court shall direct. The motion in this case was for the appointment of a jury of view, rather than one of inspection or examination, assuming there is any substantial difference between them. Counsel for the defendant appellant moved for permission to have the jury go and look at the floor, and the trial judge ruled that he would allow the jury to go under the care of an officer to view the premises, and that each side might select a man—a shower, of course, although that was not stated. Obviously, if the court ordered an inspection or examination by a party or witness under the Evidence Act, either could give testimony before the jury as to what they saw; but if the jury made the inspection or examination, what

they saw might aid in ascertaining the truth. That would be no more than enabling the jury better to understand the evidence by a view under the Jury Act. It is quite impossible to believe that the legislature intended to place upon the statute books two schemes with reference to views by juries, one in which what they saw should be substantive evidence, and the other not.

In the view we take of this question, it is unnecessary to decide to what extent an inspection or examination of premises under § 30 of the Evidence Act, or view of the premises under §§ 31-35 of the Jury Act, may or may not be evidential, for in no event could either be conclusive, and thus prevent the court from controlling the issue as matter of law.

The defendant appellant cites two cases in this state on the question of view: *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600, 8 Am. Crim. Rep. 297, and *De Gray v. New York & N. J. Teleph. Co.* 68 N. J. L. 455, 53 Atl. 200. *Gaunt v. State* is, if anything, against his position. It was there held that upon the trial of an indictment for fornication, where the bastard and the putative father were viewed by the jury, the jury might consider whether there was a resemblance or not between them, and that in such cases the proper instrument of proof is inspection by the jury, and not the testimony of witnesses; that is, resemblance between the child and the putative father. But this case is not an authority to the effect that a judgment may not be reversed, because there has been a view by the jury. Mr. Justice Garrison, who wrote the opinion, concludes with the assertion that the child was in court during the trial, and the attention of the jury was directed to it, that the defendant was a witness, and that in those circumstances it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all, and that, if they did consider it, it must

be from the testimony from the mouths of witnesses, and not from their own view. Thus it appears that the only question decided was that it was not error for the trial judge to refuse to charge that the jury must not consider the question of resemblance, and, if they did, it must be from the testimony of witnesses, and not from their own view. The case, therefore, is not an authority on the precise question under discussion in the case at bar.

Nor is *De Gray v. New York & N. J. Teleph. Co.* That was a trial of an appeal from an award of commissioners who assessed land in condemnation proceedings. The trial judge charged, among other things, that the jury might adopt the opinions of witnesses so far as reasonable, and had the right to take into consideration their own experience as to whether certain structures were detrimental to the market value of abutting property, and if, in their experience, they were, the jury would make the compensation accordingly, and if they were not, and the jury were not inclined to adopt the views that had been expressed to the contrary, their award would be proportionally less. This was held to be error for several reasons, among which was that, to avail a party of a fact known to a juror, he must be sworn and examined as any other witness, so that his evidence, like that of any other witness, may be first scrutinized as to its competence and bearing upon the issue, and for the further reason that the court and parties may know upon what evidence the verdict was rendered. Under this charge the jurors were permitted to arrive at a verdict upon their personal knowledge or experience, and to be, in effect, witnesses before their cojurors. This does not touch the question of the evidential effect of an inspection or view of given premises, or whether or not, in a case where an inspection or view is had, the verdict may not be set aside as against the weight of the evidence, or because there was



no legal evidence given on the trial which would support it.

The question being an open one in this state, we are at liberty to adopt that principle which we think more consonant with reason and better calculated to serve the ends of justice. In *Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043, Chief Justice Cartwright observed that it had never been held in Illinois that a jury might return a verdict upon their own knowledge, unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it; that a verdict, unsupported by sworn testimony upon disputed facts, has always been successfully challenged, whether there was a view or not, and if a jury had disregarded such evidence, or there was none which a reasonable person might believe and act upon, the verdict should be set aside; that in the very nature of things it is ordinarily impossible to put in the bill of exceptions persons, places, or things exhibited to a jury; that the sense in which a bill of exceptions is understood is that the bill contains all the evidence, if it contains that which was presented at the trial, although objects, persons, or scenes, of which the jury may have had a view, are not contained in it; that cases where a view has been permitted, which the jury might consider in arriving at their verdict, either as evidence or to enable them to construe and apply the testimony, stand on a somewhat different footing than where there has been no such view, and a verdict cannot be based alone upon seeing a rope, or a building, or the evidence of the senses.

In the case of *People v. Thorn*, 156 N. Y. 286, 42 L.R.A. 368, 50 N. E. 947, a criminal case, the New York court of appeals observed that if the view were a part of the trial, or was the taking of testimony upon

the trial, it may be that the view could not take place in the absence of the defendant; but they were not prepared to concede that the view was a part of the trial, or was the taking of evidence. The trial could not take place in the absence of the judge, jury, and defendant, and yet the provision of the Code did not require the judge to attend upon the jury during the time it was inspecting the premises; that it was doubtless true that jurors might draw inferences from the objects which came under their vision; that if viewing the locality during the trial were the taking of testimony, why was not the seeing of the locality before the trial the taking of testimony? that if seeing were the taking of evidence, it would follow in every case that a juror who had seen, and was familiar with, the locality, would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with whom he had never been confronted.

In that case the view was had under a provision in the New York Code of Criminal Procedure, which, however, contains no peculiar feature distinguishing the view in those cases from one had in a civil cause. The case is a particularly strong one against the theory that a view by a jury constitutes the taking of evidence, because in that, a murder case, the defendant and his counsel were absent. It is true that defendant's counsel requested the view and waived the right of the defendant and himself to be present; but, after conviction of murder in the first degree, it was contended on behalf of the defendant that the inspection was part of the trial and the taking of evidence, which could only be done in the presence of the defendant in a capital case, and that his waiver was void. It was held otherwise, on the ground that the view was not a part of the trial, and was not the taking of testimony.

It should be noted that the in-

spection or examination under § 30 of our Evidence Act is to be ordered when it shall appear that such a proceeding would aid in ascertaining the truth of any matter in dispute between the parties to an action, not that it should be conclusive of anything or even evidence in and of itself; and the same is to be remarked of a view under §§ 31-35 of the Jury Act where, by § 35, it is provided that the court may order that the jury shall view any place, if such view is necessary to

enable the jury better to understand the evidence given in the cause.

In our opinion the question presented to a court of review should be <sup>View—effect to support verdict.</sup> decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury.

The judgment of the Supreme Court must be reversed, to the end that a venire de novo may issue.

Minturn and Black, JJ., dissent.

## ANNOTATION.

### Applicability of *res ipsa loquitur* to fall of person.

- I. Introductory, 282.
- II. General rule, 282.
- III. Application of rule, 283.

#### *I. Introductory.*

This note is confined to cases where in the mere fact of a fall, without evidence of an apparent defect or obstruction which would cause it to happen, is presented as a reason for the application of the doctrine *res ipsa loquitur*.

The following classes of cases are not within the scope of this note: Falls into air shafts, elevator shafts, trapdoors, and other openings in buildings, falls into holes or excavations, falls caused by the giving way of scaffolds or planking, or the caving in of sidewalks, gratings, or manholes, falls caused by snow, ice, or other obstruction in the highway, and falls in getting on and off street cars and railroad trains.

#### *II. General rule.*

It is held in the few cases in which this point has been decided that the doctrine of *res ipsa loquitur* does not apply to the fall of a person, in the absence of any apparent cause therefor within the exclusive control and management of the owner of the premises where the fall occurred, which would show negligence on the part of the latter. *Pinney v. Hall* (1892) 156 Mass. 225, 30 N. E. 1016; *Hathaway v. Chandler & Co.* (1918) 229

*Mass.* 92, 118 N. E. 273; *Boyd v. United States Mortg. & T. Co.* (1904) 94 App. Div. 413, 88 N. Y. Supp. 289; *Belsky v. Fourteenth Street Store* (1910) 121 N. Y. Supp. 321; *Rosen-Steinsitz v. Wanamaker* (1915) 154 N. Y. Supp. 262; *Brace v. Kirby* (1910) 43 Pa. Super. Ct. 389; *Spickernagle v. Woolworth* (1912) 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1914A, 132. And see the reported case (*GARLAND v. FURST STORE*, ante, 275).

"The case is the naked case of a person tumbling downstairs, and, unless it can be said that *res ipsa loquitur*, the judge was right in his ruling. What is meant by *res ipsa loquitur* is that the jury are warranted in finding, from their knowledge as men of the world, that such accidents usually do not happen except through the defendant's fault, and therefore in inferring that this one happened through the defendant's fault, unless otherwise explained. . . . But that depends on the kind of accident. With regard to this kind, we are of opinion that a jury would not be warranted in laying down such a premise, or in drawing such an inference." *Pinney v. Hall* (1892) 156 Mass. 225, 30 N. E. 1016.

"That a woman, dressed and shod in the customary manner of females in these modern days, should suffer a fall while descending a stairway, is unfortunately not such a rare occurrence that in and of itself it should raise any presumption of negligence on the

part of the proprietor of the stairway. In other words, there is no room in this case for the application of the doctrine *res ipsa loquitur*." *Brace v. Kirby* (1910) 43 Pa. Super. Ct. 389.

### III. Application of rule.

In *Pinney v. Hall* (Mass.) *supra*, it appeared that the plaintiff fell downstairs in the defendant's office building as she was reaching for the stair rail to guide her down. There was no evidence that the stairs were of unusual construction, or that the plaintiff was not fully aware of the fact that she had reached the stairs. It was held that *res ipsa loquitur* did not apply, and that a verdict for the defendant should be affirmed.

In *Hathaway v. Chandler & Co.* (1918) 229 Mass. 92, 118 N. E. 273, it appeared that the plaintiff tripped over a strip of matting on the floor of the defendant's store. The store was well lighted, and there was no evidence that the matting was worn, defective, or curled up at the time the plaintiff fell. It was held that the fall of itself was not evidence of negligence and that, as there was no other evidence of negligence on the part of the defendant, a directed verdict for the defendant should not be set aside.

In *Boyd v. United States Mortg. & T. Co.* (1904) 94 App. Div. 413, 83 N. Y. Supp. 289, it appeared that the plaintiff, while inspecting an unfinished apartment building, in company with and acting under the direction of an agent of the defendant, walked into a dark room, and fell. It was not apparent how far the plaintiff fell, or what caused her to fall, whether the floor of the room was uncompleted, or whether she stepped into an open elevator shaft, or fell down a flight of stairs. It was held that the doctrine of *res ipsa loquitur* did not apply, as she might have fallen for some cause with which the defendants had nothing to do. It was held that the com-

plaint should have been dismissed for failure to show a cause of action.

In *Belsky v. Fourteenth Street Store* (1910) 121 N. Y. Supp. 321, it was held that the mere fact that the plaintiff fell downstairs in the defendant's store would not, as a matter of law, impute negligence to the defendant, in the absence of evidence that there was something faulty or dangerous in the condition of the stairway.

In *Rosen-Steinsitz v. Wanamaker* (1915) 154 N. Y. Supp. 262, it appeared that the plaintiff stepped on a rubber mat which lay unfastened on a marble floor. The mat slipped and she fell. It was held that there was no proof of any negligence on the part of the defendant, and the judgment was reversed.

In *Brace v. Kirby* (1910) 43 Pa. Super. Ct. 389, it appeared that the plaintiff fell downstairs in the defendant's department store. It was held that the doctrine of *res ipsa loquitur* did not apply to such a case.

In *Spickernagle v. Woolworth* (1912) 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1914A, 182, it appeared that the plaintiff slipped and fell on the floor of the defendant's store, and it was claimed that the fall was caused by reason of the floor having been oiled, and negligently allowed to remain in an unsafe condition. On the trial of the case, a compulsory nonsuit was granted on the ground that no negligence on the part of the defendant had been proved. It was held that the mere fact that the plaintiff was injured by falling while lawfully on the premises of the defendant did not raise a presumption of negligence on the part of the latter, and that as the plaintiff had failed to show that the floor was negligently or improperly oiled, and in fact had not shown any specific act of negligence on the part of the defendant, the nonsuit was properly granted. B. F. D.

J. R. REYNOLDS, Admr., etc., of James Scism, Deceased,  
v.

LLOYD COTTON MILLS, Appt.

*North Carolina Supreme Court — May 14, 1919.*

(— N. C. —, 99 S. E. 240.)

**Domicil — sending furniture to other county.**

1. Sending one's household furniture into the county in which he intends to establish his residence is not sufficient to establish his domicil there.

[See note on this question beginning on page 296.]

**Definition — domicil.**

2. Domicil is the residence of a person at a particular place with the intention to remain there permanently or for an indefinite length of time or until some unexpected event shall occur to induce him to leave the same.

[See 9 R. C. L. 538.]

**Domicil — what necessary.**

3. In order to constitute a domicil by choice, residence and intent to remain at the place for an indefinite time must concur.

[See 9 R. C. L. 538, 539.]

— what necessary to effect change.

4. Before there can be a change of domicil there must be not only an intent to acquire another home, but that intention must be fully executed by actual residence at the new place with the purpose of remaining there, and not returning to the former domicil.

[See 9 R. C. L. 542, 553.]

**Executor and administrator — jurisdiction — death while going from one domicil to another.**

5. In case one is accidentally killed while traveling from a domicil which he has abandoned to another which he intends to establish in another county, his domicil for the purpose of administration upon his estate remains at the place which he had left.

[See 9 R. C. L. 553; 11 R. C. L. 69.]

**Domicil — continuance — presumption.**

6. A domicil once acquired is presumed to continue until it is shown to have changed.

[See 9 R. C. L. 538, 539.]

— acquisition of new domicil.

7. Before one domicil is lost another must be acquired.

[See 9 R. C. L. 553.]

**Executor and administrator — presumption of jurisdiction.**

8. Jurisdiction is presumed where the contrary does not appear on the record.

[See 2 R. C. L. 222.]

— procedure to recall letters.

9. Where the record of appointment of an administrator recites that decedent was late of a certain county other than that where the petition for administration is filed, lack of jurisdiction is shown,—and a direct proceeding to recall the letters is the proper procedure.

[See 11 R. C. L. 84.]

— right to attack appointment.

10. One sought to be made liable for the negligent death of another may attack the authority of the court by which the administrator was appointed, for lack of jurisdiction, because decedent was not domiciled within the county.

[See 11 R. C. L. 59.]

**Judgment — void — right to attack.**

11. Any person interested or affected by a void judgment may attack it collaterally, in a proper case, or in a direct proceeding to have it stricken from the record as a nullity.

[See 15 R. C. L. 840.]

**Limitation of actions — admitting party after period has run.**

12. One taking letters of administration in the proper county upon the estate of one killed by negligence cannot be admitted as a party to an action brought for the negligent killing, under letters of administration taken out in another county, if the Statute of Limitations has run against the cause of action when his application to be admitted as a party is filed.

[See 11 R. C. L. 266.]

**APPEAL** by defendant from an order of the Superior Court for Lincoln County (Webb, J.) reversing an order of the clerk of the court revoking letters of administration and ordering plaintiff as administrator under grant of letters from another county to be a party to an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant's servant. *Error.*

Statement by Walker, J.:

The facts, as agreed upon, are that James Scism was, prior to June 3, 1917, domiciled in the county of Gaston, and on that date he, with his family, was riding in an automobile from said county to the county of Lincoln, in which latter place he intended to make his home, having previously contracted to work for the Lloyd Cotton Mills. He had sent his household and kitchen furniture forward before he started on his journey, and it had arrived in Lincoln county. While he was proceeding from his home in Gaston county to the county of Lincoln, the automobile in which he was riding was overturned before he reached the line dividing the two counties, and he was killed in Gaston county. The case does not show that he had selected a house or place of abode in Lincoln county, where he intended to live, but only that he left his domicile in Gaston county with the intention of residing thereafter in Lincoln county.

On application of J. R. Reynolds to the clerk of the superior court administration upon the estate of James Scism was granted to him, and letters accordingly issued, and he thereupon commenced an action in the superior court of Lincoln county to recover damages of the Lloyd Cotton Mills for alleged negligence of its servant in upsetting the automobile and killing his intestate.

The Lloyd Cotton Mills moved before the clerk to set aside the letters of administration, or withdraw them, upon the ground that they were improvidently issued, the court having no jurisdiction of the matter, as James Scism, at the time of his death, was domiciled in Gaston county, and not in Lincoln county, and that under our statute

the clerk of the superior court of Gaston county had sole and exclusive jurisdiction thereof. On hearing the motion the clerk held, upon the facts above stated, that he had no jurisdiction to issue the letters, and ordered the same to be revoked; whereupon the said J. R. Reynolds appealed, and the judge of the superior court reversed the decision of the clerk, and ordered the letters to be restored. The petitioner, Lloyd Cotton Mills, duly excepted to this order of the judge.

More than one year after the death of James Scism the said J. R. Reynolds applied to the clerk of the superior court of Gaston county for letters of administration upon the estate of James Scism, and they were granted to him, and the judge of the superior court of Lincoln county on application of J. R. Reynolds, as administrator under the letters issued by the clerk of Gaston superior court, ordered him to be made a party to the action against the Lloyd Cotton Mills, to which the defendant, Lloyd Cotton Mills, excepted, and, relying upon both exceptions, it appealed to this court.

Messrs. Mangum & Woltz, for appellant:

A new domicile is not acquired until the old is actually abandoned.

Horne v. Horne, 31 N. C. (9 Ired. L.) 99; Hicks v. Skinner, 72 N. C. 1; Plummer v. Brandon, 40 N. C. (5 Ired. Eq.) 190; Wheeler v. Cobb, 75 N. C. 21; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Barhydt v. Cross, 156 Iowa, 271, 40 L.R.A.(N.S.) 986, 136 N. W. 525, Ann. Cas. 1915C, 792.

Defendant had the right to move to have the letters of administration revoked in this proceeding.

Springer v. Shavender, 118 N. C. 35, 33 L.R.A. 775, 54 Am. St. Rep. 708, 23 S. E. 976; Collins v. Turner, 4 N. C. (Term Rep. 105); Johnson v. Corpen-

ning, 39 N. C. (4 Ired. Eq.) 216, 44 Am. Dec. 106.

Plaintiff cannot maintain the action as administrator

Hall v. Southern R. Co. 149 N. C. 108, 62 S. E. 899; Best v. Kinston, 106 N. C. 205, 10 S. E. 997; Taylor v. Cranberry Iron & Coal Co. 94 N. C. 526; Roberts v. Life Ins. Co. 118 N. C. 434, 24 S. E. 780; Tayloe v. Parker, 137 N. C. 418, 49 S. E. 921; Gullledge v. Seaboard Air Line R. Co. 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134; Hester v. Mullen, 107 N. C. 724, 12 S. E. 447.

Walker, J., delivered the opinion of the court:

We are of the opinion that the judge erred in reversing the order of the clerk and holding the letters of administration which had been issued by him to be valid. The statute provides, under the title, "Jurisdiction of Clerk of Superior Court," that he shall have jurisdiction, "within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration in cases of intestacy, in the following cases: Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened." Revisal of 1905, § 16. There are other subjects of his jurisdiction enumerated, but the provision stated by us is the only one pertinent to this case.

It will be seen, therefore, that the clerk of Lincoln superior court had no jurisdiction of authority to grant the letters of administration, unless James Scism was domiciled in Lincoln county, at the time of his death. The word "domicil" has been variously defined, but its meaning may be accurately expressed as the residence of a person at a particular place, with the intention to remain there permanently, or for an indefinite length of time, or until some un-

Executor and administrator—jurisdiction—death while going from one domicil to another.

Definition—domicil.

expected event shall occur to induce him to leave the same. Phillimore, Domicile, 13; Mitchell v. United States, 21 Wall. 350, 353, 22 L. ed. 584, 588; Morrill v. Morrissett, 76 Ala. 433, 437; Littlefield v. Brooks, 50 Me. 475, 477; Stout v. Leonard, 37 N. J. L. 492, 495; Re Steer, 3 Hurlst. & N. 594, 157 Eng. Reprint, 606, 28 L. J. Exch. N. S. 22; Black's Law Dict. "Domicile." In its ordinary acceptation, a person's domicil is the place where he lives or has his home. It is distinguished from "residence" or "inhabitaney," the three terms not being exactly convertible. Horne v. Horne, 31 N. C. (9 Ired. L.) 104. Domicil is of three sorts—domicil by birth or of origin, by choice, and by operation of law. The first is the common case of the place of birth, domicilium originis; the second is that which is voluntarily acquired by a party, proprio motu; the last is consequential, as that of the wife, arising from marriage. Story, Conf. Laws, § 46; Black's Law Dict. It is universally held, and clearly so by this court, that in order to constitute a domicil by choice two essential things must concur, which are "residence" and "intent" to remain at the place for an indefinite period. Horne v. Horne, supra; Plummer v. Brandon, 40 N. C. (5 Ired. Eq.) 190; 14 Cyc. 838, and note 22, where many cases are collected from nearly every state of the Union and from England and Canada.

In the Horne Case it was held that two facts must concur to establish a domicil: First, residence; and, secondly, the intention to make it a home (page 99 of 31 N. C. [9 Ired. L.]). We will refer to this case again, more at large, as it is decisive of this one.

The court, by Chief Justice Nash, said in Plummer v. Brandon, supra: "The acquisition of a new domicil does not depend simply upon the residence of the party; the fact of residence must be accompanied by an intention of permanently resid-

Domicil—what necessary.

(— N. O. —, 99 S. E. 240.)

ing in the new domicil, and of abandoning the former; in other words, the change of domicil must be made manifest, *animo et facto*, by the fact of residence and the intention to abandon. *De Bonneval v. De Bonneval*, 1 Curt. Eccl. Rep. 856; *Craigie v. Lewin*, 3 Curt. Eccl. Rep. 435, 7 Jur. 519. Sir Herbert Jerman Trest in the latter case says the result of all the cases is that there must be the *animus et factum*, and that the principle is that a domicil, once required, remains until another is acquired or the first abandoned, and that the length of residence is not important, provided the *animus* be there. If a person goes from one country to another with the intention of remaining, that is sufficient, and whatever time he may have lived there is not enough, unless there be an intention of remaining. . . . The presumption of law being that the domicil of origin subsists until a change of domicil is proved, the onus of proving the change is on the party alleging it, and the onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil."

It therefore is settled that, before there can be a change of domicil, there must be not only an intent to acquire another home, but

—what necessary to effect change.

that intention must be fully executed by actual residence in the new place with the purpose of remaining there and not returning to the former domicil. The party must have gone to the new home, or, in other words, he must have reached the place in his journey thither, with present settled intention of remaining in the chosen locality for an indefinite length of time. If he fails to reach his destination, or the requisite intent is lacking, there is no new domicil and the domicil of origin is not displaced. The length of residence, or the particular kind of place selected, is not material, but it

is absolutely essential that he should be at the chosen place for his new domicil before any change is effected. 14 Cyc. 840. It is said in *Ruling Case Law*, vol. 9, p. 542, § 6: "To effect a change of residence or domicil, there must be an actual abandonment of the first domicil, coupled with an intention not to return to it, and there must be a new domicil acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home."

Residence, combined with the intention to remain, is required to constitute domicil. *Id.* p. 543, § 6; *King v. King*, 74 N. J. Eq. 824, 135 Am. St. Rep. 731, 71 Atl. 687. And again, in the same volume, at page 553, § 18, it is said: "The well-established rule is that a domicil is not lost until a new one is acquired. This follows from the proposition that everyone must at all times have a domicil somewhere. A person *sui juris* may change his domicil as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicil is not essential. But there must be a voluntary change of residence; the residence at the place chosen for the domicil must be actual; and to the fact of residence there must be added the *animus manendi*."

The court in *Mitchell v. United States*, 21 Wall. 353, 22 L. ed. 588, said: "A domicil once acquired is presumed to continue until it is shown to have been changed. *Somerville v. Somerville*, 5 Ves. Jr. 787, 31 Eng. Reprint, 858, 9 Eng. Rul. Cas. 730; *Harvard College v. Gore*, 5 Pick. 370; *Whart. Confl. L.* § 55. Where a change of domicil is alleged the burden of proving it rests upon the person making the allegation. *Crookenden v. Fuller*, 1 Swabey & T. 441, 29 L. J. Prob. N. S. 1, 5 Jur. N. S. 1222, 1 L. T. N. S. 70, 8 Week. Rep. 49; *Hodgson v. De Beauchesne* (1858) 12 Moore, P. C. C. 288, 14 Eng. Reprint, 921, 7 Week. Rep. 397. To constitute the new domicil two things are in-

dispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. Whart. Conf. L. § 55, and the authorities there cited. These principles are axiomatic in the law upon the subject."

And so it has been held that where a man starts on an extended journey, intending never to return to the domicile he is leaving and to establish a new domicile elsewhere, he does not lose the one left until the new one has actually been established, and while in transit he retains the former domicile. *Barhydt v. Cross*, 40 L.R.A.(N.S.) 986, and note, 156 Iowa, 271, 136 N. W. 525, Ann. Cas. 1915C, 792; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424. In the *Borland* Case it appeared that one domiciled in Boston, Massachusetts, went to Europe in 1876 with his family, for an indefinite term of absence, and remained abroad until 1879. On leaving he had determined never to return to reside in Boston, and before May 1, 1877, he had decided to take up his residence on his return in Waterford, Connecticut, and on his return he went there to reside. It was held that his "domicil" was in Boston on the 1st of May, 1877. And in the *Barhydt* Case it was held that one does not lose his domicile by starting on an extended journey with the intention of establishing the domicile elsewhere, until he has actually established such domicile. To the same effect is *Plummer v. Brandon*, *supra*.

It was held in *Fulton v. Roberts*, 113 N. C. 426, 18 S. E. 510, that one, before he can acquire a domicile at a particular place, must have actually resided there with the intention of making it his home. In the case of *Grimestad v. Lofgren*, 105 Minn.

286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515, the facts show that Grimestad was on his way with himself and family and household stuff to the state of North Dakota for the purpose of taking up a permanent residence there, being at the time in the state of Minnesota, but before reaching the North Dakota line his personal property was levied upon. The question there was one of domicile under the exemption laws of the state of Minnesota, and the supreme court of Minnesota approved the following charge of the court, as will appear on page 289 of 105 Minn.: "He had all the rights of a citizen of Minnesota, not having departed from the state. His family were here, and had been here, and, until a party brings his family out of the state, as long as they are here, although he may start for that purpose, he is protected by the exemption laws of the state. Had they moved across the river, and he had come back here with his team, it would be another thing. He was either a resident here, or, according to the testimony, a resident of North Dakota. A man's residence does not cease in this state so long as it is his abiding place, and there is no evidence here that a change had taken place which would rob him of his right as a citizen of Minnesota. On that point I instruct you as a matter of law."

In *Somerville v. Somerville*, 5 Ves. Jr. 750, 31 Eng. Reprint, 839, 9 Eng. Rul. Cas. 730, the master of the rolls said: "The original domicile, or, as it is called, the forum originis, or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile."

It was held in *Lamar v. Mahony*, Dudley (Ga.) 92, that if a person intending to change his domicile has not fully effectuated his purpose, but is merely in itinere, having had no actual residence in the place



to which he intends to remove, but being merely in itinere, or, in other words, on his way, or in the prosecution of his journey, without reaching the place where he intends to make his home, or reaching a place without such intention, there has been no change of domicile. That every man is free to change his home, and if such choice be made, followed by his presence *there*, with the intention to remain, even if it be but for a very short time, and without regard to his manner of living there, whether as a boarder merely or an independent house-keeper, a change of domicile takes place; but that, in order for this to be the case, it depends altogether upon the concurrence of two things,—an actual residence in the new place, and the intention to adopt it as his home, or to remain there indefinitely. But a case of great weight, because the decision emanated from a court of the highest authority, and the opinion was delivered by a most eminent jurist, is *Otis v. Boston*, 12 Cush. 44. It is said by Chief Justice Shaw: "It is laid down as a fixed rule on this subject that every man must have a domicile; that he can have but one; and that, of course, a prior one will not cease until a new one is acquired. It is then asked, What is the condition of one who has purchased or hired a house, or otherwise fixed his place of abode in another place, left the town of his last abode, with all his property and furniture, and is on his way to his abode; is he an inhabitant of the place from which he has departed? If his removal were towards another town in this state, we think his place of being an inhabitant would not be changed. He would certainly continue to be an inhabitant of the state, and taxable in some town; and the only question would be, in which he was inhabitant on the first of May. Three might claim him: The one he has left, the one he is in, and the one to which he is proceeding. In such case we think the rule would apply, and his home would

not be changed, either to the place of his actual bodily presence, or of his destination, because in neither would the fact of actual presence and the intent to reside concur. Not the place where he was in itinere, for want of intent; nor of his destination, for want of his actual residence. If he had left the state and actually passed its limits on his way to a distant state, it would certainly be a question of more difficulty in its various aspects, as fixing his citizenship with a view to succession and the like."

The case of *Horne v. Horne*, 31 N. C. (9 Ired. L.) 99, is conclusive as an authority against the plaintiff, and entirely decisive of the question being discussed. The case is singularly like this one. There it appeared that shortly before his death Jack Horne had left South Carolina, and had come into this state, intending to make his home with William Horne, a kinsman, and there cultivate a farm with the help of William Horne, using his slaves as laborers. The evidence was not clear as to whether he had actually removed to the state, but the judge substantially told the jury that if he had come into Anson county with the intent to live there permanently or for an indefinite time, although by reason of his death so soon thereafter his purpose was not fully consummated, they would find that his domicile was here, and not in South Carolina, his domicile of origin; but in expressing this view he used the following language: "If the deceased had come to Anson county, in this state, for the purpose of settling there permanently or for an indefinite time, his domicile would be there, although prevented from doing so by death."

With reference to this instruction the court said, it being the language quoted above: "There is some confusion in the latter clause. It is obvious, however, from the context of the whole sentence, his Honor did not mean, if he had been prevented

by death from reaching this state, if he had died in transitu. In that case his domicil of origin would still have continued, for he would not have acquired a new one, and he had already told the jury that a domicil could not be lost until another was acquired. And in the same sentence he had stated to them, if the deceased had abandoned his home in South Carolina and had come to Anson, etc. We presume the intention of the charge in this part was to instruct the jury that the length of time during which the deceased enjoyed his new home was not material to the question of the new acquisition. In this view the charge was correct. Residence, for however long a time it may be continued, cannot constitute a domicil without the intention of permanently making it a home, nor can the shortness of time in which the new home is enjoyed defeat the acquisition when accompanied with the intention, for in the latter [case] there would be the *factum et animus*. These views are sustained by the cases of *De Bonneval v. De Bonneval*, 1 Curt. Eccl. Rep. 856; *Craigie v. Lewin*, 3 Curt. Eccl. Rep. 435, 7 Jur. 519; *Plummer v. Brandon*, 40 N. C. (5 Ired. Eq.) 190; and *Story*, Conf. L. chap. 3."

It will be observed that this is precisely our case, for this court explicitly said that if while in via, or in itinere, he had died, before reaching his destination, or coming into Anson county, he was not domiciled there at the time of his death. *Horne v. Horne*, supra, has since been frequently approved, and is regarded now as the accepted law relating to domicil. It therefore governs our case.

Residence at the place in question must be shown to have existed in order that the party's domicil may be deemed to have been established there. 14 Cyc. p. 839, and note citing many cases to support the text. This actual residence must be coupled with an intention to remain (*animus manendi*), as a prerequisite of domicil, or, in other

words, there must be the present intention of permanent or indefinite living in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or for an indefinite time. *Price v. Price*, 156 Pa. 617, 626, 27 Atl. 291. So insistent is the law upon residence as an essential element of domicil that the party who attempts to make a change of his domicil must actually have arrived at the new place before any such change takes place and another home is acquired. This settled rule was thus expressed in *Littlefield v. Brooks*, 50 Me. 475: "Every one at birth receives a domicil of origin, which adheres till another is acquired; and so throughout life, each successive domicil can only be lost by the acquisition of a new one." *Westlake's Private International Law*, 33. While in transitu the old one remains. It continues till a new one is acquired, *facto et animo*. The Roman Law was otherwise. . . . But such is not our law. The old domicil continues till the acquisition of the new one. *Story*, Conf. L. § 48. The plaintiff has a domicil somewhere. He is to be deemed an inhabitant of some place. He was in itinere. He was not an inhabitant of Oldtown, to which he was going, for the fact of personal presence was wanting. He was not an inhabitant of Bangor, for the intention to be one, which is an indispensable requirement, did not coexist with the fact of his personal presence. The old domicil was not lost, for the new one was not gained."

That case is typical of the very many upon this subject which have been decided in this country and elsewhere, and which will be found in 14 Cyc. 833, 842, and notes. It would be useless to cite all of them by name, as they all have the same general trend and agree invariably in the principle stated. The same result, of course, follows where, instead of the change of domicil being interrupted by death or other

accident, the intention is abandoned while on a journey to the new locality. The old domicil remains as it was before any change was attempted to be made. *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107; *Cross v. Black*, 9 Gill & J. 198; *Shaw v. Shaw*, 98 Mass. 158.

The validity of the letters of administration depends upon the domicil of James Scism being in Lincoln county at the time of his death. It is only in the absence of a domicil in this state that assets in the county will confer jurisdiction to grant letters. Revisal, § 16, subsec. 3. The fact that the furniture had been sent into Lincoln county has no significance, except as evidence of an intent to change the domicil. It did not confer jurisdiction, as we have seen, and surely it will not be contended that this

—sending  
furniture to  
other county.

single fact fixed the domicil in that county, for it clearly

did not, neither under the general law nor under our statute.

The question is such an important one in the law of administration that we think it justifies a more extensive reference to the authorities. The uniform current of decision upon this question, as we have stated it, is well illustrated by the following statements of the doctrine which we have culled from the authorities cited below. A domicil once acquired

—continuance  
—presumption.

is presumed to continue until it is

shown to have changed. *Mitchell v. United States*, 21 Wall. 350, 22 L. ed. 584; *Somerville v. Somerville*, 5 Ves. Jr. 787, 31 Eng. Reprint, 858, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730; *Harvard College v. Gore*, 5 Pick. 370; *Whart. Conf. L.* § 35. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. *Mitchell v. United States*, supra. To constitute a new domicil two things are indispensable: First, residence in the new location; second, the intention to remain there. Mere absence from a fixed home,

however long continued, cannot work the change. *Anderson v. Anderson*, 42 Vt. 352, 1 Am. Rep. 334; *Gardner v. Board of Education*, 5 Dak. 259, 38 N. W. 483. It is settled by many well-adjudged cases, especially by the case of *Cross v. Black*, 9 Gill & J. 198, supra, that if a citizen of one state may break up his establishment, and, with the avowed purpose of becoming a resident of another, may actually leave his place of former abode, yet if, before reaching the point of his intended destination, he changes his purpose, he does not thereby forfeit his residence or his rights as a citizen at the place of his first abode. The mere intention to acquire a new domicil without the fact of an actual removal avails nothing, neither does the fact of a removal without the intention. *Somerville v. Somerville*, 5 Ves. Jr. 787, 31 Eng. Reprint, 858, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730; *Harvard College v. Gore*, 5 Pick. 370; *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107. In the latest case on the subject in the House of Lords, decided in May, 1868, Lord Chancellor Cairns said that the law is beyond all doubt clear with regard to the domicil of birth; that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicil is acquired. *Bell v. Kennedy*, L. R. 1 H. L. Sc. App. Cas. 307, 9 Eng. Rul. Cas. 764. The former domicil remains until both the intent and fact of change of actual residence to another place have occurred to establish a new domicil there. *Shaw v. Shaw*, 98 Mass. 160. To effect a change of domicil, there must be an actual abandonment of the first domicil, coupled with an intention not to return to it, and there must be a new domicil acquired by actual residence within another jurisdiction, coupled with the intention of making the last-acquired residence a permanent home. The case of *Smith v. People*, 44 Ill. 16,

may be referred to in support of this doctrine, and other cases there cited. *Smith v. Croom*, 7 Fla. 200; *Shaw v. Shaw*, 98 Mass. 158. But the doctrine does not need the citation of authorities in its support. *Hayes v. Hayes*, 74 Ill. 312. A person sui juris may change his domicile as often as he pleases. There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added the animus manendi; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17. To acquire a "domicile of choice," there must concur two things,—an intention to change and a taking up of an actual abode at the place selected as a new domicile; and a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence, but also the carrying out of the intention by actual residence. *Boyd v. Com.* 149 Ky. 764, 42 L.R.A. (N.S.) 580, 149 S. W. 1022, Ann. Cas. 1914B, 481.

The general rule, and for practical purposes a fixed rule, is that a man must have a habitation somewhere; he can have but one and, therefore,

**Acquisition of new domicile.**

in order to lose one, he must acquire another. This is the test, and the practical test; and it is hardly necessary to say how important it is to have a practical rule and a general rule. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove without the intention of going back. The

question here is whether he can abandon one without acquiring another, and we think it has always been held that he cannot. *Bulkley v. Williamstown*, 3 Gray, 495. Those and the following cases emphasize sharply the necessity of actual presence and residence in the new location as an essential condition or prerequisite to a change of domicile. "Undoubtedly . . . residence is a question of intention. In cases involving it the inquiry is quo animo the party either moved to or from the state; and upon the solution of this question depends the fact whether the petitioner has gained or lost a residence. But before this question can arise an actual removal must have taken place. A mere intention to remove, not consummated, can neither forfeit the party's old domicile nor enable him to acquire a new one. Removal out of the state, without an intention permanently to reside elsewhere, will not lose residence, nor will a mere intention to remove permanently, not followed by actual removal, acquire it. *Casey's Case*, 1 Ashm. (Pa.) 126." *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698. "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." *Kellar v. Baird*, 5 Heisk. 39. "The civil law defines domicile to be the place where the domestic hearth has been established, from which the resident does not depart, except for a temporary purpose and animus revertendi." *Morgan v. Nunes*, 54 Miss. 308. "One cannot make a home in a place by merely intending to do so. Whensoever the intention is conceived, the home does not exist until the intention is executed by an actual concurring *bodily* presence." *Fayette v. Livermore*, 62 Me. 229. "In order to accomplish a change of residence, there must be not only

the intention to change, but the fact of removal. Neither is sufficient without the other. *Ballinger v. Lantier*, 15 Kan. 608." *Adams v. Evans*, 19 Kan. 174. See also note 70 to 14 Cyc. at pp. 852 and 853, and the following cases stating the same doctrine: *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107; *Cross v. Black*, 9 Gill & J. 198; *State v. Frest*, 4 Harr. 558; *Ennis v. Smith*, 14 How. 423, 14 L. ed. 482; *Munro v. Munro*, 7 Clark & F. 842, 7 Eng. Reprint, 1288; *Beecher v. Detroit*, 114 Mich. 228, 72 N. W. 206; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Concord v. Rumney*, 45 N. H. 423; *Merrill v. Morrissett*, 76 Ala. 433; *State ex rel. Ramey v. Dayton*, 77 Mo. 678; *Valentine v. Valentine*, 61 N. J. Eq. 400, 48 Atl. 593; *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Price v. Price*, 156 Pa. 617, 27 Atl. 291; *Lindsay v. Murphy*, 76 Va. 428; *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444; *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743; *Sommerville v. Sommerville*, 5 Ves. Jr. 750, 31 Eng. Reprint, 839, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730; *Roselle v. Com.* 110 Va. 235, 65 S. E. 526; *Re Titterington*, 130 Iowa, 356, 106 N. W. 761; *Reed's Will*, 48 Or. 500, 9 L.R.A.(N.S.) 1159, 87 Pac. 763; *Parsons v. Bangor*, 61 Me. 457; *Barhydt v. Cross*, Ann. Cas. 1915C, 792, and note (156 Iowa, 271, 40 L.R.A.(N.S.) 986, 136 N. W. 525); *Channel v. Capen*, 46 Ill. App. 234.

This brings us to the next question, as to the right of attacking the validity of the letters. This court has held that it can be done if there is a want of jurisdiction, as in the case where there is a lack of the requisite domicil, under our statute, which makes the fact of domicil a jurisdictional one by explicit language to that effect. *Collins v. Turner*, 4 N. C. (Term Rep. 105), Anno. ed. p. 541. Some cases hold that the attack upon the order or judgment of the court may be made collaterally, while others decide

that it should be by a direct proceeding. This, as we will see hereafter, may depend upon the form of the record in each particular case and the special question involved. In this instance the defendant moved in both ways, collaterally and directly, so that in one or the other method he has adopted the right procedure.

In *Fann v. North Carolina R. Co.* 155 N. C. 136, 71 S. E. 81, it was said by Justice Hoke that where the jurisdictional facts appear on the record, the attack must be by a direct proceeding to set aside the letters. In *Springer v. Shavender*, 118 N. C. 33, 33 L. R. A. 775, 54 Am. St. Rep. 708, 23 S. E. 976, Justice Avery said, in regard to a similar question: "This court, in *Collins v. Turner*, supra, sustained the principle upon which the decision in this case rests, by holding that the grant of letters of administration on the other hand in a county where the court had no jurisdiction of the subject-matter was utterly void, and might be attacked collaterally, thus marking the distinction between that and the case where, dealing by proper authority with the subject-matter, the court has inadvertently deprived the lawful claimant of the administration. In the early case of *French v. Frazier*, 7 J. J. Marsh. 425, the court, upon the principle that an administration upon the estate of a person then alive was void for all purposes and could be impeached collaterally, held, as did this court in *State v. White*, 29 N. C. (7 Ired. L.) 116, that a debtor of the alleged decedent could set up the plea that the plaintiff was not administrator.

The statement in the *Fann Case* would seem to accord with the general principle that where the record on its face, by presumption of law or a recital of facts, shows jurisdiction, a judgment cannot be assailed collaterally, but it must be done by a direct proceeding. If, though, the want of jurisdiction appears on the record, it can be collaterally attacked. *Doyle v. Brown*,

72 N. C. 393; Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975; McDonald v. Hoffman, 153 N. C. 254, 69 S. E. 49. Jurisdiction is presumed where the contrary does not appear on the record. Bernhardt v. Brown, 118 N. C. 701, 36 L.R.A. 402, 24 S. E. 527, 715; Brittain v. Mull, 99 N. C. 483, 6 S. E. 382; Brickhouse v. Sutton, 99 N. C. 103, 6 Am. St. Rep. 497, 5 S. E. 380; Morris v. Gentry, 89 N. C. 248; Henderson v. Moore, 125 N. C. 383, 34 S. E. 446; Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520. "Every court where the subject-matter is within its jurisdiction is presumed to have done all that is necessary to give force and effect to its proceedings, unless there be something on the face of the proceedings to show to the contrary. This must be the rule, unless we adopt the conclusion that the court is unfit for the business which by law is confided to it." Marshall v. Fisher, 46 N. C. (1 Jones, L.) 111, by Pearson, J., citing Beckwith v. Lamb, 35 N. C. (13 Ired. L.) 400. This court has held that the proper recital in a judgment makes it upon its face valid, but it is competent for a party to show the truth of the matter, if the recital be false; but this must be done directly, and not collaterally. Ricaud v. Alderman, 132 N. C. 62, at page 64, 43 S. E. 543. These principles easily reconcile the Shavender and the Fann Cases, even if they are apparently in conflict, which they are not, if correctly understood. The application for letters in this case recites "that James Scism, late of said county of Lincoln, is dead, intestate," etc. We must take this to mean that he was domiciled in Lincoln county, and thus construed it shows the proper domicile. The language used was not very apt, but is sufficient by fair construction to show domicile at least prima facie. We would "stick in the bark" if we held otherwise,

**Executor and administrator—presumption of jurisdiction.**

by adhering strictly to the letter. It results, therefore, that the direct proceeding to recall the letters was the proper one.

—procedure to recall letters.

But it is suggested, and was so held by the judge, that defendant has no interest in the matter concerning the validity of the appointment of plaintiff as administrator, and therefore could not move to vacate it. Why he has not we fail to see. It would appear that it is vitally interested in the question, and is about the only

party who is concerned. Plaintiff, as administrator, has brought this suit to recover large damages against the defendant, and the latter has the clear right to inquire if he is entitled to sue. Collins v. Turner, supra, held that letters of administration granted in a county not the place of decedent's domicile are void; citing Allison v. Dickenson, Hardr. 216, 145 Eng. Reprint, 460, and Toller, Exrs. & Admsrs. 90, where it was held: "If administration be granted by an incompetent authority, as by a bishop, when the intestate had not bona notabilia, or by an archbishop, of effects in another province, it is void." In that case, and Smith v. Munroe, 23 N. C. (1 Ired. L.) 345, the fact of nonresidence was admitted. Any party interested or affected by a void judgment may attack it collaterally, in a proper case, or by a direct proceeding to have it stricken from the record as a nullity. The court, by Rodman, J. (who was of most excellent learning in such matters), held in Hervey v. Edmunds, 68 N. C. 243, that an irregular judgment could be impeached only by some party to it; but a void judgment, as for instance when the court lacked jurisdiction, could be attacked collaterally, where the validity appeared on its face, or directly when it did not, and this could be done by any person interested in it or affected by it, whether a party to it or not. And

—right to attack appointment.

Judgment—void—right to attack.

it was intimated, if not held, that, where the judgment is void, it may be avoided or stricken from the record by the court *ex mero motu* or at the instance of any person not interested in having it done, and he added: "This was decided in Winslow v. Anderson, 20 N. C. 1 (3 Dev. & B. L. 9), 32 Am. Dec. 651, and we take it to be reasonable." To the same effect are Dobson v. Simonton, 86 N. C. 492; Walton v. McKesson, 101 N. C. 428, 442, 7 S. E. 566. In the Winslow Case, *supra*, Chief Justice Ruffin said that any person who is affected in interest by it may claim, for the purpose of justice (*ex debito justitiæ*), the exercise of the court's power to vacate a judgment which is void. So much for the right of the defendant in the action for damages to intervene. It would appear that the letters of administration were taken, or mainly so, for the purpose of bringing the action.

There is one question left for our consideration. The judge, on plaintiff's motion, allowed him to become a party to the action, under the new letters of administration issued by the clerk in Gaston county. Taking letters in that county, and requesting to be made a party thereunder, has somewhat the effect and force of an admission that the prior letters were void; but it is, of course, not conclusive, and we lay that feature out of the case. The judge erred in allowing the plaintiff to be

Limitation of  
actions—admit-  
ting party after  
period has run.

admitted as a party to the record, as the time for commencing the action had fully expired, if for no other valid reason. Bennett v. North Carolina R. Co. 159 N. C. 345, 74 S. E. 883. This is so under Hall v. Southern R. Co. 149 N. C. 108, 62 S. E. 899, a similar case, where we said: "Since the decision in the former appeal the plaintiff has qualified as administrator in this state, and has become a party to this action, and an amended complaint has been filed, stating the fact of his qualification, and further alleging that the

death of the intestate was caused by the defendant's negligence, the allegations, in this respect, being similar to those of the first complaint. As the plaintiff did not qualify as administrator of the intestate in this state until after the commencement of this suit and the expiration of one year from the death of his intestate, he cannot maintain this action as such administrator. This is settled by the recent decision of the court in Gullledge v. Seaboard Air Line R. Co. 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134; approving Best v. Kinston, 106 N. C. 205, 10 S. E. 997; Taylor v. Cranberry Iron & Coal Co. 94 N. C. 526; Roberts v. Life Ins. Co. 118 N. C. 434, 24 S. E. 780; and Tayloe v. Parker, 137 N. C. 418, 49 S. E. 921. See also Gullledge v. Sea Board Air Line R. Co. (on rehearing) 148 N. C. 567, 62 S. E. 732, where the question is fully considered by Justice Brown, with a full citation of the authorities. The action by the plaintiff as administrator, qualified in this state, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint;" citing Hester v. Mullen, 107 N. C. 724, 12 S. E. 447.

The Hall Case was approved in Bennett v. North Carolina R. Co. *supra*, where the court, after quoting from the case, also said, concerning the introduction of a new party: "While courts are liberal in permitting amendments such as are germane to a cause of action, it has frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. . . . The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment, but to substitute a new action for the one pending;" citing State ex rel. Clen-

denin v. Turner, 96 N. C. 416, 2 S. E. 51; Merrill v. Merrill, 92 N. C. 657; Best v. Kinston, 106 N. C. 205, 10 S. E. 997.

A careful review of the record and the several questions raised in the appeal satisfies us that there was error in the rulings of the

court. The clerk's order should have been affirmed, and the action for damages dismissed, unless the plaintiff can show better reason than now appears for further prosecuting it, which would seem to be improbable.

Error.

## ANNOTATION.

### Domicil while in itinere from old to new home.

I. General rule, 296.

II. Under special statutes, 299.

III. Exception as to domicil of origin, 299.

IV. Miscellaneous, 303.

#### I. General rule.

It is not intended in general to include cases where it does not appear that the person removing had a definite idea of where he would settle, nor cases where there had been at the time in question a removal of a man, but not of his family.

It is a general rule that the domicil of one who is in itinere from an old to a new home continues to be the old domicil till the new is reached.

**Alabama.**—State v. Hallett (1845) 8 Ala. 159 (obiter); Talmadge v. Talmadge (1880) 66 Ala. 199.

**Georgia.**—Lamar v. Mahony (1832) Dudley, 92.

**Iowa.**—Church v. Crossman (1878) 49 Iowa, 444.

**Kentucky.**—Boyd v. Com. (1912) 149 Ky. 764, 42 L.R.A. (N.S.) 580, 149 S. W. 1022, Ann. Cas. 1914B, 481.

**Maine.**—Littlefield v. Brooks (1862) 50 Me. 475; Fayette v. Livermore (1873) 62 Me. 229.

**Maryland.**—Cross v. Black (1837) 9 Gill & J. 198.

**Massachusetts.**—Bulkley v. Williamstown (1855) 3 Gray, 493; Shaw v. Shaw (1867) 98 Mass. 158.

**New York.**—Graham v. Public Administrator (1856) 4 Bradf. 127; Plant v. Harrison (1902) 36 Misc. 649, 74 N. Y. Supp. 411 (obiter).

**North Carolina.**—REYNOLDS v. LLOYD COTTON MILLS (reported herewith) ante, 284.

**Ohio.**—Gorman v. Baltimore & O. & C. R. Co. (1892) 11 Ohio Dec. Reprint, 649.

**Pennsylvania.**—Price v. Price (1893) 156 Pa. 617, 27 Atl. 291.

This has been held where one proceeding from one country to another was in an intervening country (Graham v. Public Administrator (N. Y.) supra); where one proceeding from one state of the Union to another was in an intervening state (Boyd v. Com. (Ky.) supra); or in the original state (Talmadge v. Talmadge (1880) 66 Ala. 199); and where he has on such a journey reached another county of the original state, his domicil remains in the original county (Church v. Crossman (Iowa) and Gorman v. Baltimore & O. & C. R. Co. (Ohio) supra). So, where, in proceeding from one county to settle in another he has not reached the boundary of the original county (REYNOLDS v. LLOYD COTTON MILLS (reported herewith), ante, 284), or has reached an intervening county (Lamar v. Mahony (Ga.) supra). So, where, in proceeding from one town to settle in another he has reached an intervening town (Littlefield v. Brooks (Me.) supra).

In Smith v. Croom (1857) 7 Fla. 81, where death had taken place in itinere, but the court did not consider that there had been an intent to abandon the domicil of origin, the court referred to "the admitted doctrine that where a party abandons the domicil of origin in fact, and with a present intention to acquire a new one, if he dies in itinere and before he has consummated that intention by an actual residence, the domicil of origin ipso facto and eo instanti reverts and re-attaches to the party."

The same rule has been applied where, while proceeding from one



state of the Union to settle in another state, there has been a change of mind in an intervening state. *Cross v. Black* (Md.) and *Shaw v. Shaw* (Mass.) supra; *Les Trois Freres* (1803) *Stewart*, Vice-Adm. Rep. (N. S.) 1, infra, III.

So it has been held where one in itinere from the foreign country of his domicil of choice to his domicil of origin, with intent to resume it, changes his mind and starts to return to his domicil of choice that he regains at once his domicil of choice. *Les Trois Freres* (N. S.) supra.

Thus, a citizen of Maryland, intending to break up his establishment, and leaving that state with the avowed design of becoming a resident of Missouri, and who while on his way, in Ohio, changed his purpose and returned into Maryland with his slaves, who had accompanied him, did not violate the statute prohibiting the bringing of slaves into the state. The court said: "The numerous mischiefs suggested in argument would inevitably result if the master could be considered as having lost his claim to be considered a citizen of Maryland before he had become a resident of another place, placing him at the mercy of all who might officiously or malevolently oppose his just claims to the quiet enjoyment of his property, and denying him the character of a citizen of any one of the states, in which character alone he could invoke the aid of the laws and legal tribunals of that government, which is common to all the states." *Cross v. Black* (Md.) supra.

In *Shaw v. Shaw* (Mass.) supra, a married pair, domiciled in Massachusetts, left that state to remove to Colorado, and, while temporarily detained in Philadelphia on the way, the husband treated the wife so cruelly that she returned to Massachusetts and applied for a divorce there on account of the acts committed in Pennsylvania, and it was held that the legal domicil of the pair was in Massachusetts. The court said: "There is no authority for saying that a former domicil can be lost while one is in transitu and before he has arrived at

another place in which he intends to establish himself."

There are two cases which might be interpreted as opposed to the rule.

In *State v. Barrow* (1855) 14 Tex. 179, 65 Am. Dec. 109, where husband and wife left their residence in Mississippi to move to Texas, and on the way made a visit to the wife's parents in Tennessee, and on their leaving there for Texas her father presented the wife with a slave. It was held that the ownership of the slave would be governed by the law of Texas. It is not clear, however, that the court meant to rest its conclusion upon the ground that Texas was the technical domicil.

In *Burnett v. Meadows* (1847) 7 B. Mon. (Ky.) 277, 46 Am. Dec. 517, it was held that the county court of Nelson county, Kentucky, had jurisdiction to grant administration of the estate of a man who, being a resident of Essex county, Virginia, contemplating a removal to the said county of Nelson, died on the way before he had left the county of Essex, but after he had, with his family and property, commenced his intended removal; after his death, his family continued their journey, bringing with them the property, and settled and resided for some years in Nelson county; no part of his property was actually in Kentucky at the time of his death. The court said: "The succession to his slaves and personal estate should no doubt be regulated by the laws of the country where he resided when he died. And had he been domiciled in the state of Virginia at the time of his death, and his property afterwards been brought into this state, no administration on it could have been granted here. . . . Inasmuch, however, as this property was in transitu when he died, and afterwards reached its destination, and as many inconveniences would necessarily result from the absence of power in our county courts to regulate its administration, it should be regarded as being, at the time of his death, constructively in this state, under the circumstances here presented, solely, however, for the purpose of enabling a county court in this state to grant an

administration thereon." (It should be stated, however, that all it was necessary to hold in the case was that another county court in Kentucky had no jurisdiction to grant letters of administration de bonis non on the estate.)

A person removing into a state with the intention of making his home there obtains his domicile in that state, although he has not settled in a permanent home there. *Winans v. Winans* (1910) 205 Mass. 388, 28 L.R.A. (N.S.) 992, 91 N. E. 394; *Ætna Nat. Bank v. Kramer* (1911) 142 App. Div. 444, 126 N. Y. Supp. 970; *Re Wise* (1914) 165 App. Div. 420, 150 N. Y. Supp. 782.

Compare dictum in *Briggs v. Rochester* (1860) 16 Gray (Mass.) 337, *infra*, II.

Thus, it was held that the defendant was a resident of the state of New York on April 7th for the purpose of the attachment laws, where, on the 3d of April, she left her domicile in New Jersey with the intention of abandoning it, and went to Brooklyn, New York, with the intention of acquiring a domicile there, and while the house in which she expected to live was being furnished, she remained temporarily in another house in the vicinity, and on the 10th of April removed to the house in question, part of her furniture having been moved there on April 6th. *Ætna Nat. Bank v. Kramer* (1911) 142 App. Div. 444, 126 N. Y. Supp. 970, *supra*.

So it was held that a decedent had established his residence in Long Branch, New Jersey, at the time of his death in September, 1911, where, having been a resident of New York city, he bought land at Long Branch in 1910, and in April, 1911, went there, intending to establish a residence, going to the house of his son and there remaining until his death, when his own house on his land was nearing completion. *Re Wise* (1914) 165 App. Div. 420, 150 N. Y. Supp. 782.

A husband and wife lived together in the state within the meaning of a statute making that fact a prerequisite to jurisdiction of the state courts over a divorce proceeding, where they came

into the state with the intention of making their home there, and after remaining a few days looking for apartments selected one and sent their belongings there, although, before taking up a residence in the apartment, the husband left the state on business and never returned. *Winans v. Winans* (1910) 205 Mass. 388, 28 L.R.A. (N.S.) 992, 91 N. E. 394. The court said: "Parties who have come into this commonwealth for the purpose of residing here permanently, without any intention to return to their former places of abode, and who are looking around to find a suitable place in which to live, cannot be said to be in itinere. Nor can their former domicile be said to adhere to them until they have fixed upon a place of abode in this commonwealth."

In this connection it may be stated that it was held that the head of a family, who removes to a state with them for the purpose of residing there, and is staying temporarily at the house of his father-in-law, is a resident of the state within the exemption laws. *Chesney v. Francisco* (1882) 12 Neb. 626, 12 N. W. 94.

But it has been held that a person removing into a state en route to a particular locality therein will not obtain a domicile in that particular locality until he has reached it. Thus, in *Rudolph v. Wetherington* (1918) 180 Ky. 271, 202 S. W. 652, a woman with her belongings, having left her former home in Arkansas on November 20th, reached Paducah county, Kentucky, on November 24th, and died there November 26th, while en route to Ballard county, Kentucky, to which she intended to remove, but where she had no property. It was held she was not a resident of Ballard county at the time of her death, the court not deciding where her domicile was.

In *Price v. Price* (1893) 156 Pa. 617, 27 Atl. 291, where a resident of Brooklyn, New York, while ill, was taken to his domicile of origin at West Chester, Pennsylvania, where he died several weeks later, it was held that the trial court correctly charged the jury that they were to say whether or not he "had changed his residence, prior to

his death, from the city of Brooklyn to the borough of West Chester. He did not change it to any other place. You cannot go astray on that point, for he never went any other place, no matter what his intention may have been. His intention may have been to go to Birchrunville or Philadelphia, but an intention not carried out, not consummated by actual removal, amounts to nothing. It does not change his residence. His residence could remain where it was previous to any such thought or the existence of any such intention."

## II. Under special statutes.

Some of the cases rest so particularly upon special statutes that they are of limited application.

Thus, it is generally held under attachment or exemption laws that one removing or about to remove from a state is not a nonresident so long as he has not left the state. *Ballinger v. Lantier* (1875) 15 Kan. 608; *Grimestead v. Lofgren* (1908) 105 Minn. 286, 17 L.R.A. (N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; *Kugler v. Shreve* (1859) 28 N. J. L. 129 (while still in the original city); *Lyle v. Foreman* (1789; Pa. C. P.) 1 Dall. 480, 1 L. ed. 232.

The contrary has been held in Virginia. Thus, where a foreign attachment was sued out while the debtor was on his way from the old domicile in Virginia to the new domicile at Philadelphia, before he had reached the Virginia border, it was held that he was then not a resident of Virginia within the attachment laws. *Clark v. Ward* (1855) 12 Gratt. (Va.) 440.

In *State use of Burt v. Allen* (1900) 48 W. Va. 154, 50 L.R.A. 284, 86 Am. St. Rep. 29, 85 S. E. 990, where it seems probable that the attachment had issued after the debtor had left the state, it was held that if a resident of the state, with fixed, set intention to remove to a certain place in another state and there reside, in pursuance of such intention goes out of the state, he is, within the meaning of the attachment law, a nonresident of the state directly he begins the removal of his person from the place of his residence, even before he gets outside the

state, and, to constitute him a nonresident, he need not acquire either a domicile or residence in another state.

In *Briggs v. Rochester* (1860) 16 Gray (Mass.) 337, where the plaintiff left R., Massachusetts, his domicile of origin, in April, intending to remove to M. in the state of New York, and went to the city of New York, where he remained until after May 1, and then removed to M., it was held that he was not on May 1 an inhabitant of R. for the purposes of taxation, the court observing, however, that he had not on that day lost his domicile in R.

It was similarly held in *Colton v. Longmeadow* (1866) 12 Allen (Mass.) 598, that the plaintiff was not taxable in Massachusetts on May 1, he having left that state, his domicile of origin, on April 28th to remove to Pennsylvania; and on April 30th reached Hartford, Connecticut, where he was detained some days by lameness, after which he went to Philadelphia, where he took up his residence.

(But the theory that "inhabitant" did not mean the same thing as "one domiciled in" was disapproved in *Borland v. Boston* (1882) 132 Mass. 89, 42 Am. Rep. 424.)

In *Farrow v. Barker* (1842) 3 B. Mon. (Ky.) 217, it was held that it was sufficient to justify an attachment against the defendant as a nonresident of Kentucky that he had stated that he had purchased land in Missouri and intended to go there and live, that he persuaded another to go with him and settle in his neighborhood, and that he did go away and was absent when the suit was begun against him as a nonresident, and did not return until the following month.

Cases are not included as to what is "starting to leave the state" under statutes; see, for example, *Graw v. Manning* (1880) 54 Iowa, 719, 7 N. W. 150; *Tubbs v. Garrison* (1885) 68 Iowa, 44, 25 N. W. 921.

## III. Exception as to domicile of origin.

It is stated by Justice Story in his *Conflict of Laws*, §§ 47, 48: "If a man has acquired a new domicile, different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reac-

quired even while he is on his way, in itinere, for it reverts from the moment the other is given up. . . . The moment a foreign domicil is abandoned, the native domicil is reacquired. But a mere return to his native country, without an intent to abandon his foreign domicil, does not work any change of his domicil."

It has been held that one who leaves a foreign country in which he had acquired a domicil of choice, with intent to resume his domicil of origin, at once in itinere regains his domicil of origin. *The Indian Chief* (1801) 3 C. Rob. (Eng.) 12; *Bianchi's Goods* (1862) 3 Swabey & T. (Eng.) 16, 8 L. T. N. S. 171, 11 Week. Rep. 240.

The same has been held in case of a departure from one American state, the domicil of choice, with intent to return to another American state, the domicil of origin. *Re Walker* (1868) 1 Low. Dec. 237, Fed. Cas. No. 17,061; *Allen v. Thomason* (1851) 11 Humph. (Tenn.) 536, 54 Am. Dec. 55.

An American resident in England who sets sail from there with intent to resume his American domicil regains his American domicil on leaving England. *The Indian Chief* (Eng.) supra.

A Genoese domiciled in Brazil left there with his family to take up his permanent residence in Genoa, but died on the voyage at Tenerife. It was held that as he had finally abandoned the acquired domicil by setting off on his journey to return to his domicil of origin, the latter revived. *Bianchi's Goods* (Eng.) supra, where, however, the decision was in accord with an agreement between the Italian and Brazilian governments.

A native resident of Boston became domiciled in California, and left there intending to resume his Boston home; he returned to Boston via Europe after spending eleven months in France. It was held his Boston domicil reverted the day he sailed from California. *Re Walker* (Fed.) supra.

In *Allen v. Thomason* (Tenn.) supra, the court, while deciding the case in the main on another ground, was of the opinion that where the domicil of origin had been Tennessee, and the

person had afterwards gone to Arkansas and lived there, and then left Arkansas with the intention of returning to Tennessee, while on the way in another state the domicil would be Tennessee, quoting *Story*, Conf. L. § 47.

In *Les Trois Freres* (1803) Stewart, Vice-Adm. Rep. (N. S.) 1, where a Frenchman naturalized in America sailed for home with the intent of giving up his American domicil, the court stated that on boarding the vessel he became a French citizen. But while at sea, hearing that there was a war, he changed his course to Boston, and was captured while still at sea. It was held, on his stating that he had intended, when steering for Boston, to abandon his plan of going to France during the continuance of the war, and designed to return to his domicil in the United States, that he had become reinvested with his former American character.

There is considerable dicta to the effect that the domicil of origin instantly reattaches on leaving the foreign country of the domicil of choice with intent to resume the domicil of origin; see, for example, *The Venus* (1814) 8 Cranch (U. S.) 253, 3 L. ed. 553, per Washington, J.; *The Francis* (1813) 1 Gall. 614, Fed. Cas. No. 5,034, per Story, J.; *State v. Hallett* (1845) 8 Ala. 159; *First Nat. Bank v. Balcom* (1868) 35 Conn. 351.

Generally, in the American cases on domicil, little is said about domicil of origin. (Only four of the cases cited in I. supra, give the domicil of the person concerned; to wit, *Smith v. Croom* (1857) 7 Fla. 81; *Graham v. Public Administrator* (1856) 4 Bradf. (N. Y.) 127; *Price v. Price* (1893) 156 Pa. 617, 27 Atl. 291, and *Les Trois Freres* (N. S.) supra.) And there is considerable doubt whether in America the theory of the domicil of origin is limited to cases where the two domicils are in different countries, if indeed it continues to obtain at all. It has been seen that there are, at least, two cases sustaining it as between two states of the Union. While a full discussion of this subject would exceed the scope of this note, a few cases be-

yond its scope may be here referred to.

Story, J., in *Catlin v. Gladding* (1826) 4 Mason, 308, Fed. Cas. No. 2,520, seems to consider American states as mutually foreign, so far as relates to the domicil of origin and that of choice. So also in *Sheldon v. Forsman* (1899) 17 Lanc. L. Rev. (Pa.) 85, the suggestion that the domicil of birth reverts as soon as one departs from the domicil of choice with the intent to resume his native domicil seems to be made as applying to different states of the Union.

In *Denny v. Sumner County* (1915) 134 Tenn. 468, L.R.A.1917A, 285, 184 S. W. 14, the court said: "Reference may be made parenthetically to an exception recognized in this state to the rule that a domicil once fixed remains until another is actually acquired, arising in event of a change from a domicil of choice to that of origin. Then, if the removal be with the intention to resume his domicil of origin, the latter is reacquired before it is reached, or even while the person is in itinere, for it reverts from the moment the other is given up."

. . . The doctrine touching this exception is confined, however, to changes from one country to another, or from one state of the Union to another."

In *First Nat. Bank v. Balcom* (1868) 35 Conn. 351, the court said: "The principle that a native domicil easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicil by residence without renouncing his original allegiance. In such cases his native domicil reverts as soon as he begins to execute an intention of returning; that is, from the time that he puts himself in motion bona fide to quit the country sine animo revertendi, because the foreign domicil was merely adventitious, and de facto, and prevails only while actual and complete."

. . . This principle has reference to a national domicil in its enlarged sense, and grows out of native allegiance or citizenship. It has no application when the question is between

a native and acquired domicil, where both are under the same national jurisdiction."

In *Steers's Succession* (1895) 47 La. Ann. 1551, 18 So. 503, where the question was as to domicil in one of two American states, it was said that the theory of the domicil of birth as recognized in England depended upon different ideas from those obtaining in America; there the idea being to keep the family together; here there was often a great change of locality in families and individuals. The court said: "We conclude that it will require the same facts only to show a change of domicil from the domicil of birth that it would require to show a change from one selected domicil to another. The revival of the intention to return to the domicil of birth does not apply when the domicil of origin and of selection are both domestic."

In *Plant v. Harrison* (1902) 36 Misc. 649, 74 N. Y. Supp. 411, Leventritt, J., said: "The English rule that the domicil of origin reverts at once upon the abandonment of the domicil of choice (*Udny v. Udny* (1869) L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782) has not been followed in this country, where the rule seems to be that a domicil once acquired continues not only until it is abandoned, but until another is acquired. *Jacobs, Domicil*, § 114."

In *Re Grant* (1913) 83 Misc. 257, 144 N. Y. Supp. 567, Fowler, Surrogate, in an opinion not free from novelty, says: "In a case where a person abandons his former domicil of choice, and, with intent to take up a new domicil of choice, starts toward such new domicil of choice and dies in itinere, I do not understand that the American private courts intend to deny the truth of the accepted doctrine of the publicists of the world and hold that the new domicil of choice to which the man is journeying is not complete the moment he so puts himself in motion. Nor do I understand that our private courts deny that this rule would be entirely different if the domicil so left had been a domicil of origin, for in such a state of fact it is conceded that arrival at the new domicil of

choice must be established, or the domicile of origin still prevails. . . . I am aware that it is sometimes said that the courts of this country do not recognize the English rules governing domicile on some points. *Plant v. Harrison* (1902) 36 Misc. 656, 74 N. Y. Supp. 411, quoting *Jacobs, Domicil*, § 114 . . . Notwithstanding such statements of our American courts, I am not persuaded that there is in this country any deliberate policy or intention to repudiate generally established rules of private international dealing on any point. . . . If we examine the American cases apparently deviating from accepted doctrines of private international law, we shall find they relate to domestic matters within the separate spheres of the various states of the United States. . . . A domicile of choice may cease, although no new domicile of choice is acquired. This is an accepted principle of private international law."

It is considered in England not only that the domicile of origin reattaches at once on leaving the country of the domicile of choice, but also that such reattachment will take place if the departure from the domicile of choice is *animo non revertendi*, although there is no intent to resume the domicile of choice. Thus, in *Udny v. Udny* (Eng.) *supra*, a case not arising in *itinere*, *Hatherley*, Lord Chancellor, said, referring to the opinion of *Leach*, Vice Chancellor, in *Munroe v. Douglas* (1820) 5 Madd. Ch. 379, 56 Eng. Reprint, 940: "It is said by Sir John Leach that the change of the newly acquired domicile can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying in *itinere* when about to settle himself elsewhere. But the dying in *itinere* to a wholly new domicile would not, I apprehend, change a domicile of origin if the intended new domicile were never reached. So that at once a distinction is admitted between what is necessary to reacquire the original domicile and the acquiring of a third domicile. . . . Story, in his *Conflict of Laws*, § 47 (at the end), says: 'If a man has acquired a new

domicil different from that of his birth, and he removes from it with intention to resume his native domicile, the latter is reacquired, even while he is on his way, for it reverts from the moment the other is given up.' The qualification that he must abandon the new domicile with the special intent to resume that of origin is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonment of the new domicile is complete *animo et facto*, because the *factum* is the abandonment, the *animus* is that of never returning." *Chelmsford, L. J.*, expressed himself similarly.

See also, as holding that on proving abandonment of a domicile of choice the domicile of origin is shown, *King v. Foxwell* (1876) L. R. 3 Ch. Div. (Eng.) 518, 45 L. J. Ch. N. S. 693, 24 Week. Rep. 629.

There is perhaps an obiter approval of that doctrine in *Re Wrigley* (1831) 8 Wend. (N. Y.) 134, when, though the time as of which the question was to be determined was subsequent to the journey to the native country, the chancellor said: "Although the plaintiff in error was an inhabitant of New York while he was actually located there and doing business as a commission merchant, yet the moment he broke up his residence and sailed for his native land, *sine animo revertendi*, he was no longer an inhabitant of New York, but he resumed his domicile of origin. *Les Trois Freres* (1803) Stewart, Vice-Adm. Rep. (N. S.) 6."

But such doctrine was not approved in *Mills v. Alexander* (1858) 21 Tex. 154, where a native of the United States having a domicile of choice in Texas died in 1833 in Louisiana in *itinere* from Texas to Arkansas. It was held that it would not be presumed that he had abandoned his domicile of choice unless it was shown that he left with the intention of such abandonment.

*Dicey on International Law*, 2d ed. 123, asserts that one leaving a domicile of choice for a new domicile of choice

has in itinere the domicil of origin. But this would seem hardly in accord with the doctrine of *Les Trois Freres* (1803) Stewart, Vice-Adm. Rep. (N. S.) 1, *supra*.

#### IV. Miscellaneous.

Where the question was whether a man was a housekeeper while he was packing up to remove to another state, the court said: "An avowed intention on his part to remove, and a packing up for that purpose, did not deprive him of the character of housekeeper; nor would he cease to be such while in transitu from one place to another any more than an intention to remove would deprive a man of his residence or domicil." *Anthony v. Wade* (1866) 1 Bush (Ky.) 110.

In *Kilburn v. Bennett* (1841) 3 Met. (Mass.) 199, where the question was whether the defendant was, for purposes of taxation, an inhabitant of G. on May 1st, it was considered a matter of domicil. There the defendant, about to move to Illinois, sold his farm in the town of G. and early in April with his family removed to another house in G. On April 27th, they went to the house of his brother in the town of T., where they remained for several days after May 1st, and left there May 27th for Illinois, but were in G. part of the time in May. It was held to be error to refuse to permit

the defendant to prove that three weeks before April 27th he told the person in whose house he then was that he would leave G. before May 1st and remove to T. to reside at his brother's until he should go to Illinois.

A railroad brakeman resident in M. county, Kentucky, having left his employment, shipped his goods to B. county for the purpose of taking up his residence there; his family went to J. county on a visit, and while they were there he entered the employ of another railroad and was killed in N. county. It was held that he was no longer a resident of M. county, and that if he was not a resident of B. county then he had no known place of residence in the state within the administration statutes. *Louisville & N. R. Co. v. Schumaker* (1899) 112 Ky. 431, 53 S. W. 12, reargument denied in (1900) 108 Ky. 263, 56 S. W. 155.

In *Reed's Appeal* (1872) 71 Pa. 378, the reporter's statement of facts shows a case within the scope of this note, but the facts as stated in the court's opinion do not do so.

In *Ringgold v. Barley* (1853) 5 Md. 186, 59 Am. Dec. 107, cited in the reported case (*REYNOLDS v. LLOYD COTTON MILLS*, ante, 284), the destination was reached, and it was held that a new domicil had been acquired.

B. B. B.

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P. D. EWELL, Admr., etc., of Mary H. Ewell, Deceased,

v.

MARY A. SNEED et al.

*Tennessee Supreme Court — April Term, 1917.*

(136 Tenn. 602, 191 S. W. 181.)

#### Charities — absence of trustee — effect.

1. A bequest to educate young ministers for a religious denomination cannot, where no trustee is appointed, be enforced in a state where the prerogative power as *parens patriæ* does not exist, and it is immaterial that authority is given by the will to an unincorporated body of such denomination to appoint a trustee.

[See note on this question beginning on page 314.]

—power of attorney general.

2. A statute authorizing the bringing of an action to bring trustees of a fund given for charity to account does not confer power upon the attorney general to appear for the establishment of an invalid charitable trust. [See 2 R. C. L. 923; 5 R. C. L. 360.]

Judgment — stare decisis.

3. Decisions which have become rules of property must be respected. [See 7 R. C. L. 1000 et seq.]

Will — codicil — revocation.

4. A codicil will not be deemed a revocation of the will unless such an intention is expressed or is necessarily implied.

—conditional revocation.

5. A will will not be revoked by a codicil which fails, even though a revocation was intended, if the intention was to revoke only in favor of the objects mentioned in the codicil.

CERTIORARI to the Court of Civil Appeals to review a decree reversing a decree of the Chancery Court for Fayette County (McKinney, Ch.) construing the will of Mary H. Ewell, deceased, and directing that the estate be turned over to the trustees for the purposes indicated by the will. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Tim E. Cooper, H. C. Moorman, Riddick & Riddick, and Frank M. Thompson, Attorney General, for petitioners:

Beneficiaries in a charitable trust need not be certain and definite, and, on the contrary, if the beneficiaries are certain and definite, this is not a charitable trust, but a private trust.

Dickson v. Montgomery, 1 Swan, 370; Johnson v. Johnson, 92 Tenn. 564, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114; 5 R. C. L. 309; Grant v. Saunders, 121 Iowa, 80, 100 Am. St. Rep. 310, 95 N. W. 411; Thompson v. Brown, 116 Ky. 62, 62 L.R.A. 398, 105 Am. St. Rep. 194, 75 S. W. 210; Russell v. Allen, 107 U. S. 166, 27 L. ed. 398, 2 Sup. Ct. Rep. 327; Harrington v. Pier, 105 Wis. 514, 50 L.R.A. 308, 76 Am. St. Rep. 922, 82 N. W. 345; Hadley v. Forsee, 203 Mo. 418, 14 L.R.A.(N.S.) 49, 101 S. W. 59; Michigan Trust Co. v. McNamara, 165 Mich. 200, 37 L.R.A.(N.S.) 986, 130 N. W. 653.

Equity will not allow any trust to fail for want of a trustee. This rule applies with even stronger force to a charitable trust than to a private trust.

1 Perry, Trusts, § 38, p. 27; 2 Perry, Trusts, § 731, p. 1210; 2 Story, Eq. Jur. § 976; 5 R. C. L. 359; 6 Cyc. 939; Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825; Hood v. Dorer, 107 Wis. 149, 82 N. W. 547; Hitchcock v. Board of Home Missions, 259 Ill. 298, 102 N. E. 741, Ann. Cas. 1915B, 1; Green v. Fidelity Trust Co. 134 Ky. 311, 120 S. W. 283, 20 Ann. Cas. 861; Hadley v. Forsee, 14 L.R.A.(N.S.) 109, note.

A bequest for the education of young ministers of any special church is sufficiently definite and valid.

Dickson v. Montgomery, 1 Swan, 370; Daniel v. Fain, 5 Lea, 324.

Messrs. R. M. Barton, W. H. Borsje, and Luke E. Wright, for respondents Sneed et al.:

A will and codicil shall be declared and construed together as parts of one and the same instrument, and a codicil is no more effective for the revocation of a will than is plainly expressed; and when a devise has once been made, intention to revoke the same must be clear, and it must be accompanied by some effective act for that purpose.

Ford v. Ford, 1 Swan, 431; Pritchard, Wills, § 266; Billington v. Jones, 108 Tenn. 238, 56 L.R.A. 654, 91 Am. St. Rep. 751, 66 S. W. 1127; Ward v. Saunders, 2 Swan, 174; Stover v. Kendall, 1 Coldw. 557; Armstrong v. Douglass, 89 Tenn. 219, 10 L.R.A. 85, 14 S. W. 604; Hornberger v. Hornberger, 12 Heisk. 635; Reagan v. Stanley, 11 Lea, 316; Greer v. McCrackin, Peck. (Tenn.) 301, 14 Am. Dec. 755.

Where a will has once been made and properly executed, and a subsequent will is made which is inoperative for any reason, the legal effect is to revive the prior will.

Allen v. Jeter, 6 Lea, 672; Brown v. Cannon, 3 Head, 357; Rodgers v. Rodgers, 6 Heisk. 493; Gass v. Gass, 3 Humph. 286; Stover v. Kendall, 1 Coldw. 557; Smith v. Puryear, 3 Heisk. 706; Cowan v. Walker, 117 Tenn. 135, 96 S. W. 967.

Testatrix intended Robert H. Shepherd to be the principal object of her



bounty. She did not intend to revoke her will by executing a codicil.

Pritchard, Wills, § 266; Doe ex dem. Murch v. Marchant, 7 Scott, N. R. 644, 6 Man. & G. 813, 134 Eng. Reprint, 1120, 13 L. J. C. P. N. S. 59, 8 Jur. 21; Williams, Exrs. 4th Am. ed. p. 132; Jarman, Wills, 6th ed. p. 174; Wetmore v. Parker, 52 N. Y. 450; 40 Cyc. 1182; Cleoburey v. Beckett, 14 Beav. 585, 51 Eng. Reprint, 409; Lee v. Lee, 45 Ind. App. 645, 91 N. E. 507; Ex parte Ilchester, 7 Ves. Jr. 373; 32 Eng. Reprint, 151, 6 Revised Rep. 138; Re Tyler, 128 N. Y. Supp. 733; Viele v. Keeler, 129 N. Y. 199, 29 N. E. 78; Williams v. Miles, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 710, 96 N. W. 151, 4 Ann. Cas. 306; Russell v. Hartley, 83 Conn 654, 78 Atl. 323; Eyer v. Williamson, 256 Ill. 540, 100 N. E. 188; Cowan v. Walker, 117 Tenn. 141, 96 S. W. 967; Austin v. Oakes, 117 N. Y. 577, 23 N. E. 193; United States Fidelity & G. Co. v. Douglas, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993.

Mr. McKetchum for general heirs at law and distributees of deceased.

Mr. Roane Waring for plaintiff.

Mr. Justice Green delivered the opinion of the court:

This case involves primarily the validity of a provision of the will of Mary H. Ewell, deceased, for the education of young ministers of the Presbyterian Church.

Mary H. Ewell was a resident of Fayette county, Tennessee, and died testate March 11, 1912. Her will consisted of an original testament and codicil thereto. The provisions of the body of the will are not material in this connection. With the exception of certain small legacies, Miss Ewell devised and bequeathed her property to her uncle, Robert H. Shepherd. He was also named as residuary legatee. This will was dated June 22, 1885. On June 3, 1907, she added a codicil in the following language: "In the name of God Almighty, amen. I, Mary H. Ewell, being of sound mind, do this day, June 3, 1907, will and bequeath all of my property, both real and personal, to my beloved uncle, Robert H. Shepherd, during his life-

time. At his death all real estate to be sold and all money collected and held by two trustees to be appointed by the synod of Memphis, and the said money to be used in educating young ministers of the Presbyterian Church. I desire all of my household goods and jewelry to be given to my namesake, Mary H. Ewell."

After the death of the testatrix, the will and codicil were duly probated. Mr. Shepherd qualified as executor and, later, died.

Miss Ewell was a member of the Presbyterian Church at La Grange, Tennessee. La Grange church was within the bounds of what was known as the "synod of Memphis," formerly. Prior to the death of Miss Ewell the synod of Memphis was abolished, and the Presbyterian Church in the United States placed the churches belonging to that synod in the synod of Tennessee. The synod is a voluntary, unincorporated religious association—a sort of intermediate church court, without legal entity.

The synod of Tennessee elected two trustees, C. W. Heiskell and G. W. McRae, to administer the trust attempted to be created by Miss Ewell's will.

The personal representative of Miss Ewell filed this bill against the aforesaid trustees and against the heirs and distributees of Miss Ewell, and the heirs and distributees of R. H. Shepherd, seeking a construction of the will and directions from the court as to the proper disposition to be made of the estate in his hands.

The trustees appointed by the synod of Tennessee answered and filed a cross bill, to which they made the attorney general of Tennessee a party, as well as the heirs and representatives of the testatrix, and of R. H. Shepherd, and it was insisted by the trustees that the provision of Miss Ewell's will for the education of young ministers of the Presbyterian Church was valid, and should be upheld. The attorney

general concurred in this contention in the answer to the cross bill filed by him. All the heirs and representatives assailed the validity of said provisions of the codicil, and, by appropriate pleadings, they presented the question as to which set of them should take the estate in the event the court held the attempted charitable trust invalid. This controversy between the heirs and representatives will be noticed later.

The chancellor decreed in favor of the codicil, and himself appointed or ratified the appointment of the two trustees who had been nominated by the synod of Memphis, and directed that the estate be turned over to said trustees for the purposes indicated by the will.

The court of civil appeals reversed this decree of the chancellor, and concluded that the testatrix had failed in her effort to establish a valid charitable trust, and that court held the heirs and representatives of Mr. Shepherd to be entitled to the estate.

The case is before us on a petition for certiorari filed by the trustees, and upon petition for certiorari of the heirs and representatives of the testatrix.

As indicated heretofore, the first question in the case is upon the validity of the provision for the education of young ministers of the Presbyterian Church.

In the consideration of this question the court feels obliged for the most part to confine the discussion of authorities to the decisions of this state. We have so many cases involving charitable trusts and the leading principles of law on this subject have been so well settled in Tennessee, that we cannot be governed by decisions from other courts. We will, therefore, only look to other cases in so far as it becomes necessary to vindicate the soundness of certain former rulings of this tribunal that are assailed herein.

The first case arising in Tennessee upon the question of charities

was that of *Green v. Allen*, 5 *Humph.* 170. The opinion in this case was delivered by Judge Turley. It has long been regarded by the profession as a classic in the law, and the fundamental rules there laid down have never been modified or consciously departed from by this court.

It is shown in *Green v. Allen* that the court of chancery in Tennessee possesses only that jurisdiction formerly exercised by the chancellors of England, known as the "extraordinary jurisdiction," as distinguished from prerogative and other jurisdiction, and Judge Turley then says: "I therefore think that we may safely assume that the power of the chancellor to decree an execution of a trust for charitable purposes, so far as it arises out of his extraordinary jurisdiction, rests upon the same principles as trusts of every other kind and description, and that there must be either a cestui que trust, having sufficient legal capacity to take as devisee, or donee, or that there must be a feoffee, or trustee, charged with a specific and legal trust, before the jurisdiction can be exercised."

Again the learned judge says: "If the charity be created either by devise or deed, it must be in favor of a person having sufficient capacity to take as devisee or donee, or, if it be not to such person, it must be definite in its object, and lawful in its creation, and to be executed and regulated by trustees, before the court of chancery can, by virtue of its extraordinary jurisdiction, interfere in its execution." *Green v. Allen*, *supra*.

These conclusions, thus expressed, have been approved or applied by this court in the following reported cases: *Oakley v. Long*, 10 *Humph.* 254; *Dickson v. Montgomery*, 1 *Swan*, 348; *Franklin v. Armfield*, 2 *Sneed*, 305; *Gass v. Ross*, 3 *Sneed*, 211; *Frierson v. General Assembly*, 7 *Heisk.* 683; *White v. Hale*, 2 *Coldw.* 77; *Cobb v. Denton*, 6

Bart. 235; Daniel v. Fain, 5 Lea, 319; Reeves v. Reeves, 5 Lea, 644; State v. Smith, 16 Lea, 662; Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590; Johnson v. Johnson, 92 Tenn. 559, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114; Carson v. Carson, 115 Tenn. 37, 88 S. W. 175; Jones v. Green, — Tenn. —, 36 S. W. 729.

Besides the propositions above quoted from Green v. Allen, certain other conclusions reached in that case have been approved and applied from time to time in the subsequent cases cited above.

One of these is that the functions of the King as *parens patriæ*, with respect to the administration of charities, have not been devolved upon any officer or department of government in Tennessee. Another rule laid down in Green v. Allen, and followed in White v. Hale, Daniel v. Fain, and Reeves v. Reeves, is that a charity must stand or fall as it was at the death of the testator, and cannot be validated by any subsequent action.

Likewise, wherever reference is made to these matters in our cases the doctrine of *cy près* has been repudiated, and the Statute of 43 Elizabeth, chap. 4, declared not to be in force in Tennessee.

In a number of our cases charitable bequests have been upheld, because they were definite in their objects and were supported by trustees. Such cases are Dickson v. Montgomery, Franklin v. Armfield, Cobb v. Denton, Frierson v. General Assembly, Heiskell v. Chickasaw Lodge, and State v. Smith, and perhaps others unreported.

In some of our cases charitable bequests have been held invalid because their purposes were not sufficiently definite to be ascertained and effectuated by a court of chancery. Such particularly are the cases of Rhodes v. Rhodes, Johnson v. Johnson, and Jones v. Green.

In Green v. Allen, the court held

the bequest invalid, both because it was not sustained by trustees, and because indefinite.

In White v. Hale, Daniel v. Fain, and Reeves v. Reeves, charitable bequests were held invalid for the reason that they were not supported by trustees, and apparently for that reason alone.

In the case before us, no trustees were appointed by the will, but it was the expressed intention of the testatrix that trustees should be appointed by the synod to take the property and administer the trust.

It is insisted that a court of equity never allows a trust to fail for want of a trustee, and it is urged that this maxim applies as well to charitable trusts as to other trusts. Such, indeed, is the general rule, and this rule is applied to charitable trusts in many jurisdictions. The rule has no application, however, to charitable trusts in Tennessee. We cannot agree with learned counsel that this question is undecided in this state.

In White v. Hale, the testator devised certain property to his wife for life, and after her death to the Nolachucky Association, "to be appropriated to the support of old Baptist ministers of the Gospel of Jesus Christ, who have maintained a good character, and of the same faith and order of the Nolachucky Association." The will then continued: "I devise and direct that my land be never sold; but that the said association appoint and empower some discreet member of their own body, who shall be authorized to rent and receive rents, and apply the same for the above purposes, as directed, forever; and such agent, when appointed, whenever found incapable, from want of ability or otherwise, to manage as above directed, the said association shall supply the vacancy by appointing another, which power I give into the hands of said association, forever."

In Daniel v. Fain, the testator's

will provided that a fund "be put into the hands of a trustee who is to be selected by the Union Presbytery or whatever presbytery may embrace Jefferson county, to be employed by said trustee to assist some indigent young man in a preparatory course for the sacred ministry."

In both of these cases, almost identical with the present case, the provisions referred to were held ineffectual. Following *Green v. Allen*, it was held that a charity must stand or fall as it was found to exist at the death of the testator, and that a provision for the appointment by voluntary unincorporated associations of trustees to manage property for charitable purposes would not validate such devises, and remedy the failure of the will to provide trustees capable of taking.

In *Reeves v. Reeves*, there was a devise of a certain dwelling house and lot in Johnson City to testator's wife for life, and at her death "to descend to the Christian Church, as a parsonage or ministerial house for said denomination of Christians." — The Christian Church was not incorporated, and this devise was held invalid, because no trustee was interposed. The court quoted the rules laid down in *Green v. Allen* to the effect that the devise must be in favor of a person having sufficient capacity to take, or definite in its object, and to be executed by trustees, and added: "In other words, it must have all the elements of a valid gift of the title either directly to the beneficiary, or to a trustee with the trust definitely settled, so that they can be fairly executed by the court, by compelling the trustee to perform them."

In *Reeves v. Reeves*, the argument was made, as it is here, that the court would not suffer a valid trust to fail for want of a trustee, but this court said that rule had no application to a case like the one under consideration. Referring to the rule invoked, Judge Freeman observed: "Its usual if not universal applica-

tion is to cases where a trustee is designated, who fails from any cause to act. Be this as it may, however, it is not in this case the failure of a validly created trust for want of a trustee, but the failure is to create the trust at all, or the failure of the gift entirely, because of want of capacity of the donee to receive, and no conveyance to anyone in trust for such party, with the objects of such trust defined.

It is impossible to believe that the court did not consider the propriety of the appointment of trustees in *Daniel v. Fain* and *Reeves v. Reeves*. The purpose of the charities sought to be created in these cases had been expressly approved by the court in *Dickson v. Montgomery*—the relief of indigent ministers. Likewise, the purpose was definite enough, had trustees been interposed. If it had been possible to carry out the intention of the testator in either of these two cases by the appointment of trustees, it would no doubt have been done. Both wills, however, were held ineffective in the particulars mentioned, merely because the charitable provisions were not supported by trustees.

In addition to what was said by the court in *Reeves v. Reeves*, there is another reason why such a charitable bequest, lacking a trustee, cannot be saved in Tennessee. This reason is clearly brought out in *Green v. Allen*, but has been sometimes overlooked.

In England, the King, as *parens patriæ*, was the constitutional trustee of all gifts to charity. Prior to the Statute of 43 Elizabeth, as well as thereafter, where a bequest for charity was general and indefinite in its terms, and not to trustees, the title to the property vested in the King as father of his people, and by sign manual he provided or gave directions to the chancellor as to its proper execution. If the bequest was to trustees with general objects, or some objects pointed out, the charity was enforced by informa-

tion of the attorney general, who came into court representing the King, the constitutional trustee, and, upon this information of the attorney general, the chancellor referred the matter to a master to devise a scheme for carrying out the charity.

In the case of *Moggridge v. Thackwell*, 7 Ves. Jr. 36, 32 Eng. Reprint, 15, Lord Eldon made an exhaustive review of cases involving charitable trusts, and concluded: It is "established that where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as *parens patriæ*, is the constitutional trustee; . . . where there is a general indefinite purpose" of charity "not fixing itself upon any object, . . . the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, then the court will take the administration of the trust."

These conclusions of Lord Eldon were noted in *Green v. Allen*, and this court said: "All charities, not supported by trustees (unless in favor of an individual or a corporation, having power to implead and be impleaded), if of a general indefinite purpose, are administered by the chancellor under the sign manual of the King. All charities supported by trustees, with general objects, or some particular object pointed out, are administered by the chancellor by original bill, upon information of the attorney general, who acts for and in behalf of the King, and is a party thereto, and the jurisdiction in the two latter classes of cases arises out of delegated prerogative."

This court again said, in *Green v. Allen*: "We have no *parens patriæ*. We have no attorney general representing the executive, who can, as such, give information by bill, for the establishing and enforcing of trusts for charitable purposes. And the necessary consequence is, that the superstructure must fall with the basis upon which it rested."

In *Oakley v. Long*, the court said: "We have no king, whose duty, and prerogative it is, as *parens patriæ* to take care of persons who have lost their intellects. Nor is there any department of our government which has the right to exercise the duties and powers which belong, in England, to the prerogatives of the Crown, unless those duties and powers have been conferred by statute."

Where the beneficiaries of a charitable bequest are uncertain, as the poor of a particular parish, or young ministers of the Presbyterian Church, there is no one who has a right to bring suit respecting such a bequest as representative of such beneficiaries; no one has sufficient interest therein, except some such authority as *parens patriæ*. This seems definitely settled by the English decisions reviewed in *Green v. Allen*, and others we will notice.

One reason, therefore, that a trustee cannot be appointed to save a charitable trust in Tennessee, where none is named, is that there has been cast upon no official or department of government in this state the authority and duties of *parens patriæ*, and there is no one to represent the beneficiaries who can come into court, and ask that such a trust in favor of persons incapable of suing be established and a trustee appointed.

Mr. Daniell says: "If suit is instituted on behalf of the Crown, or of those who partake of its prerogative, or whose rights are under its particular protection, such as objects of a public charity, the matter of complaint is offered to the court, not by way of petition, but of information by the proper officer of the rights which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. This proceeding is then styled an information." 1 Dan. Ch. Pr. 1.

"The attorney general may exhibit informations on behalf of individuals who are considered to be

under the protection of the Crown, *parens patriæ*, such as the objects of general charities, idiots, and lunatics." 1 Dan. Ch. Pr. 8.

"These suits are, of course, brought by the attorney general as a Queen's officer, to protect the rights of those who partake of her prerogatives." 1 Dan. Ch. Pr. 8.

Sir. Joseph Jekyl said: "In the case of charity, the King, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the Statute of Elizabeth relating to charitable uses, and antecedent to it as well as since, it has been every day's practice to file informations in chancery in the attorney general's name for the establishment of charities." *Eyre v. Shaftsbury*, 2 P. Wms. 119, 24 Eng. Reprint, 664.

See also 3 Lewin, Trusts, \*927; 2 Perry, Trusts, § 732.

There are a number of English cases in which the chancellor declined to proceed, where the application was for the establishment of charities by the appointment of trustees, or in other respects, until the attorney general was made a party. The attorney general is an indispensable party.

Lord Redesdale said: "The right which the attorney general has to file an information is a right of prerogative; the King, as *parens patriæ*, has a right by his proper officer to call upon the several courts of justice according to the nature of their several jurisdictions, to see that right is done to his subjects, who are incompetent to act for themselves, as in the case of charities and other cases; the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic; and where he may grant the custody to a person, who, as a committee, may proceed on behalf of the lunatic; or, where there is no such grant, the attorney general may proceed by his information." *Atty. Gen. v. Dublin*, 1 Bligh, N. R. 312, 4 Eng. Reprint, 888.

In the case of *Monil v. Lawson*, there was a bill filed respecting a charity, and it was objected to the prosecution of that suit that the attorney general was not a party. The court held that the attorney general was not a necessary party, because trustees had been appointed who were entitled to receive the fund and sue for it. The Lord Chancellor said, however, that, where a bill is brought to establish a charity, it must be brought in the name of the attorney general *ex necessitate rei*, because there are no certain persons entitled to it who can sue in their own names. *Monil v. Lawson*, 4 Vin. Abr. 501.

In the case of *Atty. Gen. v. Vivian*, 1 Russ. Ch. 226, 38 Eng. Reprint, 88, an information and a bill were both filed in respect to the charity. The master of rolls dismissed the bill, because complainant failed to show an interest, but retained the information.

In *Cooke v. Duckenfield*, which was a suit between some trustees and executors of the heirs, several matters were involved, but a general charity for widows and orphans was in question, and the court ordered the attorney general to be made a party to represent them. The court said, at the outset of the opinion: "The bill must be amended, and the attorney general, in behalf of the charity to widows and orphans of dissenters and to testator's poor relations, must be made a party." *Cooke v. Duckenfield*, 2 Atk. 564, 26 Eng. Reprint, 738.

In the case of *Baylis v. Atty. Gen.* there was a charity devised in favor of "Bread street ward" of a city. The bill was brought by the aldermen and inhabitants of the ward for the application of the charity, and the attorney general was made a defendant. The court said: "Though the aldermen and inhabitants of a ward are not in point of law a corporation, yet as they have made the attorney general a party in order to support and sustain the charity, I can make a decree." *Baylis v. At-*

ty. Gen. 2 Atk. 239, 26 Eng. Reprint, 548.

An illustration of the proper way to establish a charity, where the trustee dies, disclaims, or fails, is the Downing College Case. The testator there left property to trustees to establish Downing College at Cambridge. Before the college was established the trustees died. An information was then filed by the attorney general upon the relation of Cambridge University, for the setting up of this charity, which was decreed. *Atty. Gen. ex rel. University of Cambridge v. Downing*, 2 Ambl. 550, 571, 27 Eng. Reprint, 353.

Other cases from England in accord with the foregoing are: *Atty. Gen. v. Herrick*, 2 Ambl. 712, 27 Eng. Reprint, 461; *Da Costa v. Da Pas. and Atty. Gen. v. Peacock*, cited in 27 Eng. Reprint, 462; *Mills v. Farmer*, 1 Meriv. 55, 35 Eng. Reprint, 597, 19 Ves. Jr. 483, 34 Eng. Reprint, 595, 13 Revised Rep. 247; *Reeve v. Atty. Gen.* 3 Hare, 191, 67 Eng. Reprint, 351, 7 Jur. 1168. And see cases reviewed in *Green v. Allen*, 5 Humph. 170.

In those American cases which have considered this question, it is likewise declared that a charity not supported by trustees can only be established in proceedings to which the attorney general of the state is a party.

In the *Encyclopædia of Pleading* we find the following: "Where the trust is for a public charity, there being no certain persons who are entitled to it, so as to be able to sue in their own names, as *cestuis que trustent*, a suit for the purpose of having the charity duly administered must be brought in the name of the state, or attorney general, and it seems that in all cases the attorney general may maintain the suit without a relator." 22 Enc. Pl. & Pr. 205.

Judge Selden of New York made an exhaustive examination of this question, and said: "It is equally

plain that, where no beneficiary competent to sue was named, as where the trust was created in general terms, as to establish or found a public school, an asylum for the poor, or the like, without designating any particular persons or body of persons to be benefited, there were no legal means whatever, prior to the Statutes of Elizabeth and to the use of informations in the name of the attorney general, of enforcing the execution of the use."

Informations in the name of the attorney general bring the King, in his character of *parens patriæ*, before the court, through his legal representative. The remedy is based on the ordinary judicial power of the court, combined with the prerogative right of the Crown as *parens patriæ* to sue. *Owens v. Missionary Soc.* 14 N. Y. 380, 67 Am. Dec. 160.

The reason why such an action respecting charitable trusts must be brought in the name of the state or attorney general is thus stated by the supreme court of California: "The state, as *parens patriæ*, superintends the management of all public charities or trusts, and, in these matters, acts through her attorney general." *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270.

The supreme court of Connecticut said, in a case where a fund was bequeathed to the city of New Haven in trust for its poor, and the city refused the trust, that it was proper for the state's attorney to apply for appointment of trustees to administer it, "in analogy to the English practice." *Dailey v. New Haven*, 60 Conn. 314, 14 L.R.A. 69, 22 Atl. 945.

Confirming the proposition that the chancery court can interfere only in those jurisdictions where the government is held to succeed to the prerogative of the Crown, and where, as *parens patriæ*, it invokes the court's aid, the supreme court of the United States said in the *Mormon Church Case*: "The true

ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the state. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application, or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the state; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed, or that have been set aside, and will give directions for the further management and administration of the property." *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 59, 34 L. ed. 496, 10 Sup. Ct. Rep. 808.

There are cases in this country in which it has been stated broadly that a charitable trust will never be allowed to fail for want of a trustee, and in which trustees have been appointed, and other orders made, without reference to the attorney general, or without making the state, or the representative of the state, a party. We can only say of these cases that, in our judgment, they are not fully considered.

We have four cases in Tennessee holding it absolutely necessary that all the beneficiaries of a trust be represented in any proceedings in which a trustee is appointed. In two of these cases it is said that the appointment of a trustee in *ex parte* proceedings, where all those interested have not had notice, is absolutely void. *Watkins v. Specht*, 7 Coldw. 585; *Williams v. Neil*, 4 Heisk. 279; *Taylor v. Chapman*, 10 Heisk. 46; *Vincent v. Hall*, 1 Shannon, Cas. 597.

In *Bransford Realty Co. v. Andrews*, 128 Tenn. 725, 164 S. W.

1175, the court thought perhaps these cases had gone too far, and pointed out that the jurisdiction of a court of equity over a trust was a jurisdiction quasi in rem, and the court had some discretion as to parties. We there held valid the appointment of a trustee in proceedings to which remote contingent remaindermen were not parties. The immediate beneficiary of the trust was a party, however, and it was never intended to be intimated in *Bransford Realty Co. v. Andrews* that the appointment of a trustee would be proper without any representation of the *cestuis que trustent*.

Certain deductions seem inevitable from the foregoing authorities.

There can be no valid appointment of a trustee without notice to some, at least, of the beneficiaries of the trust, or some representation of them before the court.

Where the beneficiaries of a charitable trust are not named, are at large, or are uncertain individuals of an unascertained class, no one of them has a right to sue or be sued respecting the trust, and no one is entitled to appear for them except *parens patriæ*, or some official to whom that prerogative has been delegated.

In Tennessee, no functionary has been intrusted with the authority and duties of *parens patriæ* respecting charitable trusts. This power still inheres in the sovereign people.

It follows that a case like the one before us cannot be presented to the chancellor in such a way as to permit him to appoint trustees and set up the charity undertaken by the will. Such a decree cannot be made, because it is impossible to get the necessary parties before the court.

Learned counsel for the trustees have no doubt been impressed with this difficulty, and, endeavoring to escape it, have made the attorney general of Tennessee a party to this

Charities—  
absence of  
trustee—effect.



suit, referring to Shannon's Code, § 5166, as authority for this procedure. That section is as follows: "The action also lies to bring the directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of property intrusted to their care; to remove such officers or trustees on proof of misconduct; to prevent malversation, speculation, and waste; to set aside and restrain improper alienations of such property or funds, and to secure them for the benefit of those interested; and generally to compel faithful performance of duty."

The action referred to is one in the name of the state.

This section of the Code presupposes the appointment of trustees, and was passed to secure their performance of duty. It conferred no power upon the attorney general to act as *parens patriæ*, and intervene or appear for the establishment of

-power of  
attorney gen-  
eral.

an invalid charitable trust. It did not make the attorney

general a royal trustee of charities. Said section of the Code was taken from the Acts of 1845-46, and has never been supposed to do more than provide a method of enforcing the due administration of charitable trusts lawfully created. The statute confers no more authority upon the attorney general to set up and superintend the organization of a charitable trust than it does to organize a corporation. It provides a method for calling to account the trustees of one, and the directors, managers, and officers of the other. It should be observed in this connection that it is upon the district attorneys general, not upon the attorney general for the state, that the principal authority is conferred by this statute.

We reserve the question of what may be done under this statute in a case where a charitable trust is law-

fully created, and title to the property has once vested in trustees named. It may be, in such a case, that the attorney general can intervene if the trustees named die, or refuse to act, and have others appointed in their stead.

We cannot, for the sake of harmonizing our cases with what counsel conceives to be the majority rule, overturn all our decisions and uphold charitable devices such as this, regardless of the interposition of trustees. These decisions have become rules of property in Tennessee, and, as such, must be respected, if for no other reason.

Judgment—  
stare decisis.

We have assumed in this discussion that the charitable trust undertaken herein was sufficiently definite, had it been supported by a trustee. What we have said makes it unnecessary to consider this question.

There are some expressions in *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825, and *Johnson v. Johnson*, 92 Tenn. 559, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114, not altogether in harmony with what we have said in this opinion. The expressions, however, are pure dicta, and were not necessary to the decision of the questions before the court in those cases. In *Heiskell v. Chickasaw Lodge* there was a trustee, and the trust was definite. In *Johnson v. Johnson* the trust was too indefinite to be saved at all, and it was so held by the court.

Having concluded that the charitable trust attempted by the codicil to the will was invalid, and that the court cannot save it by the appointment of trustees, the question then arises as to the proper disposition of the estate.

There is a contest between the heirs and distributees of Robert H. Shepherd and those of the testatrix, as before stated.

It is insisted in behalf of the heirs and distributees of the testatrix that the codicil was a revocation of

the will; that, accordingly, Mary H. Ewell died intestate and her estate passed to them.

On the other hand, it is said for the heirs and distributees of Mr. Shepherd that the codicil was not a revocation of the will; that, when the codicil failed, the property passed to him under the residuary clause in the body of the will.

The court of civil appeals sustained the latter contention, and, we think, reached the correct result.

Ordinarily, a will and a codicil are construed together, and a codicil

will not be deemed  
 Will—codicil  
 —revocation. a revocation of the  
 will unless such an

intention is expressed or is necessarily implied. *Ford v. Ford*, 1 Swan, 431; *Ward v. Saunders*, 2 Swan, 174; *Hornberger v. Hornberger*, 12 Heisk. 635; *Reagan v. Stanley*, 11 Lea, 316; *Armstrong v. Douglass*, 89 Tenn. 219, 10 L.R.A. 85, 14 S. W. 604; *Billington v. Jones*, 108 Tenn. 238, 56 L.R.A. 654, 91 Am. St. Rep. 751, 66 S. W. 1127.

If, however, it be conceded that this codicil was intended as a revocation of the will, nevertheless such revocation was conditional, and the case is controlled by *Stover v. Kendall*, 1 Coldw. 561, and *Cowan v. Walker*, 117 Tenn. 135, 96 S. W. 967.

In *Stover v. Kendall* it was said that, "obliterations and interlineations are inoperative to change a will, if made with a view of making a different disposition, which is not effectually carried out. So, if such change of purpose is not carried out, because of sudden death, or any other cause, or the attempted disposition is invalid, the canceling of the first, being dependent thereon, is null (and void), and does not effect the revocation of the original will, but it will stand as it was before the cancelation."

In *Cowan v. Walker*, the court approved this language from *Jarman on Wills*, vol. 1, p. 294: "And it may be observed that, where the act of cancelation or destruction is con-

nected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and, therefore, if the will intended to be submitted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force."

Mr. Pritchard takes the same view in his work on *Wills & Administration*, § 272.

It appears in this case that Miss Ewell was more devoted to her uncle, Robert H. Shepherd, than to anyone else. She acknowledged and referred to her obligation to him in the will itself. The two sisters mentioned in the will died before the execution of the codicil. The majority of the heirs and distributees of Miss Ewell lived in remote sections of the country, and she had little acquaintance with them.

It is obvious, therefore, that she would not have revoked her will in favor of her uncle, had she not supposed that the codicil in favor of young ministers was valid. The revocation of the original will depended upon the efficacy of the codicil, as is clearly apparent from this record. The testatrix did not intend to deprive her uncle of anything or cut down the estate given him in favor of her heirs and distributees. Under our cases, we are accordingly satisfied that this codicil does not operate as a revocation of the will.

The will, therefore, not having been revoked by the codicil, and the codicil failing, the estate passed under the residuary clause of the will. *Reeves v. Reeves*, 5 Lea, 644; *Bradford v. Leake*, 124 Tenn. 313, 137 S. W. 96, Ann. Cas. 1912D, 1140.

There is no error in the opinion of the Court of Civil Appeals, and it will be affirmed.

Petition for rehearing denied.

—conditional  
 revocation.

## ANNOTATION.

## Want of trustee as invalidating charitable trust.

I. Introductory, 315.

II. General rule, 316.

III. Application of rule:

a. Failure to appoint trustee, 325.

b. Failure to provide for successor, 326.

c. Trustee named not in existence, 326.

## I. Introductory.

Charitable trusts have been considered as the objects of special favor of the courts of equity, the courts acting under their inherent jurisdiction, or under 43 Eliz. chap. 4, known as the Statute of Uses, or, in England, under the King's prerogative. The Statute of Uses has been adopted, and is in force in some of the states in the United States, but not in others. Where it is in force, the courts of equity have held, under this statute, that a charitable trust will not fail for the want of a trustee; and in the other states the same doctrine obtains, regardless of the statute, the doctrine being based on public policy. Thus, in *Re Upham* (1899) 127 Cal. 90, 59 Pac. 315, where it appeared that one Upham gave and bequeathed the residue and remainder of his estate "to the legally qualified and constituted trustees or managers of the Good Templars' Orphans' Home of Valejo, said county of Solano, in trust for the use and benefit of the orphan children of said institution," it was held that the trust would not fail because the testator did not appoint definite trustees and successors to carry out his intentions. The court said: "It must be remembered that charities—both as to the trustees and the beneficiaries—are more liberally construed than are gifts to individuals. . . . A court will not allow a charitable trust to fail for want of a legal trustee. Of course, in this country, courts of equity will not go so far in executing indefinite charities as the courts of equity went in England, under the Statute of 43 Elizabeth; for if it could be discovered from a deed or will that anything in the nature of a charity

III.—continued.

d. Trustee appointed unable to accept trust, 330.

e. Trustee appointed refusing to act, 337.

IV. Limitations on rule:

a. Trustee invested with discretion, 339.

b. Objects of trust uncertain, 342.

was intended, however vague or indefinite, the chancellor would devote it to some sort of a charity. But in this country, courts have been extremely liberal in construing charities, and, under principles analogous to the doctrine of *cy pres*, have enforced trusts far more indefinite and inexact than the one here involved. The rule upon this subject is very fully laid down by the Supreme Court of the United States in *Russell v. Allen* (1883) 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, . . . [see *infra*]. In *Schmidt v. Hess* (1875) 60 Mo. 591, a gift had been made to the 'Lutheran Church,' which was unincorporated, and, in a suit brought by the trustees of the church, they were permitted to show to what church the gift applied; and the court, among other things, said: 'No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. 2 Story, Eq. Jur. § 1164, and cases cited. And although, in consequence of the nonincorporation of the church for whose benefit the grant was made, there was no one in esse at the time of making the donation, capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant, on that account, to fail, but will see to its effectuation,'—citing cases. See also *Lilly v. Tobbein* (1890) 103 Mo. 477, 23 Am. St. Rep. 887, 15 S. W. 618. And in § 730 of 2 Perry on Trusts, a number of instances are given of charities held to be good, which illustrate the principles which sustain the

gift to the orphans' home here involved. The following is the language there used, to which we refer: 'It is well settled that the devise of a charitable use to church wardens, although not a corporation capable in law of holding and transmitting property, will be sustained; so, to an institution neither established nor incorporated in the life of the donor; and so, a devise to certain officers, or their successors in office, or, if they are incapable of executing the trust, then to a corporation to be formed for the purpose, was held by the Supreme Court of the United States to be a good devise, and capable of being carried into effect. A gift to a corporation by a misnomer is good for a charitable purpose, if the corporation can be identified; gifts in trust to voluntary associations for charitable purposes have been held good; and so, of gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations. These bodies, or quasi corporations, have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach.'

To the same effect, in *Clayton v. Hallett* (1902) 30 Colo. 231, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429, the court said: "It seems that at the common law a bequest or devise to charity is peculiarly favored. It is not affected by the law applicable to perpetuities or the accumulation of income. It is to be given the most liberal construction, to the end that the wishes of the donor be enforced. A devise to charity is, therefore, not rendered invalid because trustees are not named, nor because a trustee incapable of taking is named. The court, in the exercise of its judicial functions, will never permit a trust to fail for the want of a trustee."

In *Russell v. Allen* (1883) 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, the court, speaking through Justice Gray, said: "By the law of England from before the Statute of 43 Eliz. chap. 4, and by the law of this country at the present day (except in those states in which it has been restricted

by statute or judicial decision, as in Virginia, Maryland, and, more recently, in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of public interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

## II. General rule.

Equity jurisprudence at an early date, regardless of 43 Elizabeth, chap. 4, known as the Statute of Uses, or of the King's prerogative, established a general rule that a charitable trust, which is certain and specific as to its object or objects, shall not fail for the want of a trustee; and that rule has been uniformly followed, both under statutes, and independently of statutes.

*United States.*—*Beatty v. Kurtz* (1829) 2 Pet. 566, 7 L. ed. 521; *Vidal v. Philadelphia* (1844) 2 How. 127, 11 L. ed. 205; *Jones v. Habersham* (1883) 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336, affirming (1879) 3 Woods, 443, Fed. Cas. No. 7,465; *Church of Jesus Christ of L. D. S. v. United States* (1890) 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; *Hopkins v. Grimshaw* (1897) 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; *John v. Smith* (1900) 42 C. C. A. 275, 102 Fed.

218; *Speer v. Colbert* (1906) 200 U. S. 4 Iowa, 180; *Grant v. Saunders* (1903) 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 201, 121 Iowa, 80, 100 Am. St. Rep. 310, 95 affirming (1904) 24 App. D. C. 187; N. W. 411; *Klumpert v. Vrieland* (1909) 142 Iowa, 434, 121 N. W. 34; *Laswell v. Hungate* (1918) — C. C. A. 415, 125 N. W. 324; *Re Crawford* (1910) 148 Iowa, 60, 126 N. W. 774, —, 256 Fed. 635. Ann. Cas. 1912B, 992. See also *Beidler v. Dehner* (1917) 178 Iowa, 1338, 161 N. W. 32.

**Alabama.**—*Williams v. Pearson* (1862) 38 Ala. 299; *Woodroof v. Hundley* (1905) 147 Ala. 287, 39 So. 907.

**California.**—*Carpenteria School Dist. v. Heath* (1880) 56 Cal. 478; *Re Upham* (1899) 127 Cal. 90, 59 Pac. 315; *Re Winchester* (1901) 133 Cal. 271, 54 L.R.A. 281, 65 Pac. 475; *Fay v. Howe* (1902) 136 Cal. 599, 69 Pac. 423; see also *Re Gay* (1903) 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. 707.

**Colorado.**—*Haggin v. International Trust Co.* (1917) — Colo. —, L.R.A. 1918B, 710, 169 Pac. 138. See also *Clayton v. Hallett* (1902) 30 Colo. 281, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429.

**Connecticut.**—*Chatham v. Brainerd* (1835) 11 Conn. 60; *American Bible Soc. v. Wetmore* (1845) 17 Conn. 181; *Treat's Appeal* (1861) 80 Conn. 113; *Storrs Agri. School v. Whitney* (1886) 54 Conn. 342, 8 Atl. 141; *Dailey v. New Haven* (1891) 60 Conn. 314, 14 L.R.A. 69, 22 Atl. 945; *Conklin v. Davis* (1893) 63 Conn. 377, 28 Atl. 537; *Eliot's Appeal* (1902) 74 Conn. 586, 51 Atl. 558.

**Delaware.**—*State v. Griffith* (1861) 2 Del. Ch. 392.

**District of Columbia.**—*Smith v. Gardiner* (1911) 36 App. D. C. 485.

**Georgia.**—*Beall v. Fox* (1848) 4 Ga. 404; *Thompson v. Hale* (1905) 123 Ga. 305, 51 S. E. 383.

**Illinois.**—*Heuser v. Harris* (1867) 42 Ill. 425; *Hoeffer v. Clogon* (1898) 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; *Burke v. Burke* (1913) 259 Ill. 262, 102 N. E. 293; *Hitchcock v. Board of Home Missions* (1913) 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1. See also *Grand Prairie Seminary v. Morgan* (1898) 171 Ill. 444, 49 N. E. 516, affirming (1897) 70 Ill. App. 575.

**Indiana.**—*Richmond v. State* (1854) 5 Ind. 334; *Dykeman v. Jenkins* (1913) 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011.

**Iowa.**—*Miller v. Chittenden* (1856) 2 Iowa, 315; *Johnson v. Mayne* (1856)

*Kentucky.*—*Moore v. Moore* (1836) 4 Dana, 354, 29 Am. Dec. 417. See also *Baptist Church v. Presbyterian Church* (1857) 18 B. Mon. 635; *Penick v. Thom* (1890) 90 Ky. 665, 14 S. W. 830.

**Maine.**—*Tappan v. Deblois* (1858) 45 Me. 122; *Preachers' Aid Soc. v. Rich* (1858) 45 Me. 552; *Howard v. American Peace Soc.* (1860) 49 Me. 288; *Swasey v. American Bible Soc.* (1869) 57 Me. 523.

**Maryland.**—*Book Depository v. Church Rooms Fund* (1911) 117 Md. 86, 83 Atl. 50.

**Massachusetts.**—*Burbank v. Whitney* (1839) 24 Pick. 146, 35 Am. Dec. 312; *Bartlett v. Nye* (1842) 4 Met. 378; *Winslow v. Cummings* (1849) 3 Cush. 358; *First Universalist Soc. v. Fitch* (1857) 8 Gray, 421; *Bliss v. American Bible Soc.* (1861) 2 Allen, 334; *Odell v. Odell* (1865) 10 Allen, 1; *Atty. Gen. v. Garrison* (1869) 101 Mass. 223; *Fellows v. Miner* (1876) 119 Mass. 541; *Sohier v. Burr* (1879) 127 Mass. 221; *Missionary Soc. v. Chapman* (1880) 128 Mass. 265; *Re Schouler* (1883) 134 Mass. 426; *Darcy v. Kelley* (1891) 153 Mass. 433, 26 N. E. 1110; *Sears v. Chapman* (1893) 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604; *Atty. Gen. v. Goodell* (1902) 180 Mass. 538, 62 N. E. 962; *Hubbard v. Worcester Art Museum* (1907) 194 Mass. 280, 9 L.R.A. (N.S.) 689, 80 N. E. 490, 10 Ann. Cas. 1025; *Chase v. Dickey* (1912) 212 Mass. 555, 99 N. E. 410; *Richards v. Church Home* (1913) 213 Mass. 502, 100 N. E. 631; *Atty. Gen. v. Armstrong* (1918) 231 Mass. 196, 120 N. E. 678. See also *Sanderson v. White* (1836) 18 Pick. 328, 29 Am. Dec. 591; *Brown v. Kelsey* (1848) 2 Cush. 243.

**Michigan.**—*Cook v. Universalist General Convention* (1904) 138 Mich. 157, 101 N. W. 217.

**Mississippi.**—See *Wade v. American*

Colonization Soc. (1846) 7 Smedes & M. 663, 45 Am. Dec. 324.

Missouri.—Missouri Historical Soc. v. Academy of Science (1887) 94 Mo. 459, 8 S. W. 346; Buckley v. Monck (1916) — Mo. —, 187 S. W. 31; Robinson v. Crutcher (1919) — Mo. —, 209 S. W. 104.

Nebraska.—Re Douglass (1913) 94 Neb. 280, 143 N. W. 299, Ann. Cas. 1914D, 447; Gould v. Board of Home Missions (1918) 102 Neb. 526, 167 N. W. 776.

New Hampshire.—Chapin v. School Dist. (1857) 35 N. H. 445; Campbell v. Clough (1901) 71 N. H. 181, 51 Atl. 668; Glover v. Baker (1912) 76 N. H. 393, 83 Atl. 916; Smart v. Durham (1913) 77 N. H. 56, 86 Atl. 821; Winslow v. Stark (1916) — N. H. —, 97 Atl. 979.

New Jersey.—McBride v. Elmer (1847) 6 N. J. Eq. 107; Mason v. Methodist Episcopal Church (1876) 27 N. J. Eq. 47; Goodell v. Union Asso. (1878) 29 N. J. Eq. 32; Green v. Blackwell (1896) — N. J. Eq. —, 35 Atl. 375; Jones v. Watford (1901) 62 N. J. Eq. 339, 50 Atl. 180; Bruere v. Cook (1902) 63 N. J. Eq. 624, 52 Atl. 1001, affirmed in (1903) 67 N. J. Eq. 724, 63 Atl. 1118; While v. Newark (1918) — N. J. Eq. —, 103 Atl. 1042.

New York.—Williams v. Williams (1853) 8 N. Y. 525; Allen v. Stevens (1899) 161 N. Y. 122, 55 N. E. 568; Bowman v. Domestic & F. Missionary Soc. (1905) 182 N. Y. 494, 75 N. E. 535, modifying (1904) 100 App. Div. 29, 90 N. Y. Supp. 898; Mount v. Tuttle (1906) 183 N. Y. 358, 2 L.R.A. (N.S.) 428, 76 N. E. 873; M'Cartee v. Orphan Asylum Soc. (1827) 9 Cow. 437, 18 Am. Dec. 516; Shotwell v. Mott (1844) 2 Sandf. Ch. 46; Sheldon v. Chappell (1888) 47 Hun. 59; Kingsbury v. Brandegee (1906) 113 App. Div. 606, 100 N. Y. Supp. 353; Re Deming (1908) 112 N. Y. Supp. 170; Re Powell (1910) 136 App. Div. 830, 121 N. Y. Supp. 779; Re Miller (1912) 149 App. Div. 113, 133 N. Y. Supp. 828. See also Cross v. United States Trust Co. (1892) 131 N. Y. 330, 15 L.R.A. 606, 27 Am. St. Rep. 597, 30 N. E. 125; and Potter v. Chapin (1837) 6 Paige, 639.

North Carolina.—Spring Green Church v. Thornton (1912) 153 N. C. 119, 73 S. E. 810.

North Dakota.—Hagen v. Sacrisson (1909) 19 N. D. 160, 26 L.R.A. (N.S.) 724, 123 N. W. 518.

Ohio.—Landis v. Wooden (1852) 1 Ohio St. 160, 59 Am. Dec. 615; Hunt v. Edgerton (1906) 29 Ohio C. C. 377, affirmed in (1906) 75 Ohio St. 594, 80 N. E. 1126.

Oregon.—Re John (1896) 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, 50 Pac. 226.

Rhode Island.—Potter v. Thornton (1862) 7 R. I. 252; Meeting Street Baptist Soc. v. Hail (1865) 8 R. I. 234; St. Peter's Church v. Brown (1899) 21 R. I. 367, 43 Atl. 642; Wood v. Fourth Baptist Church (1905) 26 R. I. 594, 61 Atl. 279; Guild v. Allen (1907) 28 R. I. 430, 67 Atl. 855.

South Carolina.—Gibson v. M'Call (1841) 30 S. C. L. (1 Rich.) 174; Calhoun v. Furgeson (1848) 24 S. C. Eq. (3 Rich.) 160.

Texas.—Gidley v. Lovenberg (1904) 35 Tex. Civ. App. 203, 79 S. W. 831; Inglish v. Johnson (1906) 42 Tex. Civ. App. 118, 95 S. W. 558; Lightfoot v. Poindexter (1917) — Tex. Civ. App. —, 199 S. W. 1152.

Vermont.—Burr v. Smith (1835) 7 Vt. 241, 29 Am. Dec. 154; McAllister v. McAllister (1873) 46 Vt. 272.

Wisconsin.—Dodge v. Williams (1879) 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Harrington v. Pier (1900) 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 922, 82 N. W. 345; Hood v. Dorer (1900) 107 Wis. 149, 82 N. W. 546; Kavanaugh's Will (1910) 143 Wis. 90, 28 L.R.A. (N.S.) 470, 126 N. W. 672.

England.—Hayter v. Trego (1828) 5 Russ. Ch. 113, 38 Eng. Reprint, 970, 29 Revised Rep. 13; Denyer v. Druce (1829) Tamlyn, 32, 48 Eng. Reprint, 14; Reeve v. Atty. Gen. (1843) 3 Hare, 191, 67 Eng. Reprint, 351, 7 Jur. 1168.

In Buckley v. Monck (1916) — Mo. —, 187 S. W. 31, it appeared that a testator provided in his will that, after his widow died, the interest of the estate should be applied to the use "of worn-out preachers in M. E. Church in North Mo. Conference." The testator named no one to execute the trust. It was held that the trust would not fail for the want of a trustee. The court said: "The general rule which, independently of statutory changes, is applied by courts of equity in most

common-law jurisdictions, is that 'if the object of a charitable trust is lawful, and sufficiently specific and definite to enable the court to execute it, it will not be permitted to fail for want of a trustee competent to take; but a court of equity, by its general inherent jurisdiction over charitable trusts, will appoint one.' 5 R. C. L. 315, and cases cited. And in *Schmidt v. Hess* (1875) 60 Mo. 595, it is said that, 'although . . . there was no one in esse at the time of making the donation, capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant, on that account, to fail, but will see to its effectuation.' As we said in *Hadley v. Forsee* (1907) 203 Mo. 427, 14 L.R.A.(N.S.) 49, 101 S. W. 59, gifts to charitable uses have always received favorable consideration in this court. In pursuance of this policy, where no trustee capable of taking is appointed in a charitable devise or bequest, the principle so often invoked by courts of equity in the exercise of their jurisdiction over trusts and equitable uses is brought to its aid, and the heir at law, or executor, as the case may be, holds the legal title to the property subject to the use; and a trustee may be appointed by the court. . . . In their desire to preserve these public benefactions, the courts have uniformly held that, although they be ever so general in their nature, if a trustee is appointed on whom the donor confers his right to select from them the real objects of his bounty, the trust will be upheld. Although no trustee be appointed, if the use is so expressed that the court may judge of the motive which actuated the donor so as to give specific effect to his general directions, a trustee will be appointed, and the trust administered by the court." To the same effect, in *Hagen v. Sacrison* (1909) 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518, the court said: "Charitable trusts do not fail for want of trustees. The legal estate in such a case is regarded in abeyance, or as vested in the heirs or executors of the donor for the use of the beneficiaries, or the

court will appoint a trustee to carry out the charitable purposes of the testator. 5 Am. & Eng. Enc. Law, 920, and vol. 1, Supplement thereto, 959, and cases cited."

In the case of *Re John* (1896) 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, it appeared that one James John left a will by which, among other things, he devised certain property to his executors to use in the erection and maintenance of public schools in St. Johns, Multnomah county, Oregon. He further provided that fifteen years after his death three trustees should be appointed to carry out his trust, their appointment to be made in the following manner: "One by the judge of the circuit court of the state of Oregon, in whose judicial district the town of St. Johns may be in; one by the person who shall be district judge of the United States, in whose judicial district the town of St. Johns may be in; and the third shall be appointed by the two persons acting as such judges." The testator also stated his intention to be to establish a permanent and perpetual educational fund, to be forever used in promoting education. The testator's heirs contended that the charitable trust was invalid because the former did not provide for the successors in office to the first trustees. The court reached the conclusion, after a very exhaustive examination of the authorities, that the trust was valid, as a court of equity would appoint a trustee whenever a vacancy occurred. Said the court: "We will now consider the nature and capacity of the trustee which the testator has attempted to create and clothe with perpetuity or longevity coequal in point of existence with the charity he has endeavored to establish. We can best reach a satisfactory result by a view of the authorities, and then apply the deductions to the facts of the case. There is a class of cases of which *Inglis v. Sailors' Snug Harbor* (1830) 3 Pet. (U. S.) 99, 7 L. ed. 617, is perhaps the leading one, the facts for an understanding of which have been heretofore sufficiently stated. It seems to have been intimidated by the justice who wrote the prevailing opin-

ion that if the devise had been to the officers named in the will in their official capacity and their successors, to execute the trust, without the contingent provision for the creation of the incorporation, the case would have fallen within the principle of *Philadelphia Baptist Asso. v. Hart* (1819) 4 Wheat. (U. S.) 1, 4 L. ed. 499. Whether this was a method of passing the point simply, and resting the case upon a more satisfactory basis, or whether the Baptist Association Case was taken as decisive of the question, it is difficult to tell from the opinion. At any rate, it was finally determined that the will could be sustained as an executory devise to a corporation to be created in the future, the devise to take effect upon the contingency of the creation of the corporation, and that the contingency was not too remote. Mr. Justice Story was of the opinion that the officers named took in their official capacity, and that the devolution of the property was to their successors, and so on in perpetual succession, and that it was perfectly competent for them to take and hold as trustees in such a capacity. In this connection, it may be said that the Philadelphia Baptist Asso. Case involved a devise to a voluntary unincorporated association, and to take in trust and manage as a perpetual fund, and it was held, Chief Justice Marshall announcing the opinion of the court, that the devise did not create a valid trust to charity, upon the ground that the association was incapable of taking. It was further decided that the devise was not to the individuals composing the association, as nothing was intended to pass to them but the trust, and they were not authorized to execute as individuals. It was thought, also, that a subsequent incorporation of the society would not cure the defect. *Ould v. Washington Hospital* (1877) 95 U. S. 303, 24 L. ed. 450, is so nearly like the Sailors' Snug Harbor Case that Mr. Justice Swayne remarked the analogy between the two. It being held that the officers in the Snug Harbor Case took as individuals, it would seem that the analogy was perfect as it respects the preliminary pro-

visions for the trust. In the Washington Hospital Case the devise was to individuals and their heirs, executors, assigns, etc. Although the Sailors' Snug Harbor Case was treated as if the devise to the officers named was not contained in the testament, and the will was sustained as an executory devise to a corporation to come into being, without a particular estate to support it, it is not clear why it should not have been upheld as an executory devise as well, under the rule that the deviser had parted with his whole estate to the officers named, they taking as individuals, but upon a contingency that qualified the disposition of it, and limited the estate upon the contingency (4 Kent, Com. \*268); or, perhaps, speaking more accurately, why it might not have been treated as a conditional limitation of the estate vested in the trustees, as Mr. Justice Swayne characterized the Washington Hospital Case. In the latter case the gift was declared to have been immediate and absolute; and, if such was the case here, it is difficult to see why it was not so in *Inglis v. Sailors' Snug Harbor*, upon the theory that the officers took as individuals. If the doctrine in the Washington Hospital Case is right, and it is believed to be the better exposition, then the gift to charity in either case did not depend for its validity or establishment upon the contingency of the creation of the corporation provided for, and hence was immediate and absolute. In *Russell v. Allen* (1883) 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, lands and personalty were granted 'for the purpose of founding an institution for the education of youth in St. Louis, Missouri,' to one Horner and his successors in trust 'for the use and benefit of the Russell Institute of St. Louis, Missouri,' with directions to the grantee to sell them, and to account for and pay over the proceeds 'to Thomas Allen, president of the board of trustees of the said Russell Institute,' and it was held that the gift was valid as a charity, against the donor's heirs and next of kin, although the institute was neither established nor incorporated in the lifetime of the



donor, or of Allen, the reputed president of the board of trustees. In conformity with the trust, Horner paid and conveyed to Allen a large amount of money and lands, and the money and lands in the hands of Allen and his executors were considered to have been charged with the same charitable trust to which they were subject in the hands of Horner." After showing how the doctrine herein discussed has been applied to various classes of cases, the court proceeds to say: "The citation of these authorities from those states, such as Oregon, which recognize the distinction between charitable and ordinary trusts, is sufficient to demonstrate beyond cavil that it is the policy of the law to uphold and give effect to donations to charity whenever it can be done under any reasonable construction of the instrument by which the charity is attempted to be established. Charity is still, as under the English chancery practice, a favorite of equity, and, while in this country there has been much modification of the rule governing charitable donations, and perhaps a radical narrowing of the jurisdiction (see Perry, Tr. §§ 729, 731), the conscience of the court is always exercised to see that the charity is administered, if it can be done within the rules of the established law of the forum. The general rule everywhere is, whether speaking with reference to ordinary or charitable trusts, that the valid trust will never be permitted to fail for want of a trustee."

In *Williams v. Pearson* (1862) 38 Ala. 299, it appeared that a testator bequeathed one half of a fund to a certain association, to be received by said association, and loaned out by commissioners appointed by the donee, at 8 per centum per annum. The interest was to be yearly divided equally between the ministers having charge of the churches belonging to said association. The other half of the fund the testator bequeathed to another society, which fund was also to be loaned out at 8 per centum yearly, by three commissioners, to be elected by the society. The interest thus derived was to be used for "the education and

tuition of all the pauper and poor children of said beats (the society's jurisdiction) whose parents are not able to support them." In construing these bequests, it was held that the trusts created were valid, although the testator left the appointment of the trustees to other persons. The court said: "Our investigation of the cases has satisfied us that the current of American authorities is in favor of the doctrine that trusts for charitable uses are favored by courts of equity, and that, independent of the Statute of Elizabeth, and of the prerogative power, there is an original and inherent jurisdiction in those courts to sustain, on account of their charitable purposes, trusts which, but for the charitable feature, would be held void.

. . . Without intimating, therefore, what our opinion would be if uncontrolled by any former adjudication, we content ourselves with saying that it must be regarded as the settled law of this state that charitable donations are so far exempted from the rules applicable to other trusts that it is not necessary to their validity that there should be a grantee or devisee capable of taking or holding by law, or that there should be a cestui que trust so definitely described as to enable a court of equity to execute the trust upon its ordinary principles. . . . Accordingly, when an ascertainable object, recognized as charity, is designated by the donor in general or collective terms,—as the poor of a given county or parish, or the clergyman of a particular denomination having charge of churches within a specified district,—the gift or legacy will be upheld by a court of equity. Nor is it any objection to the validity of such a gift that the donor has appointed no trustee, nor that the trustee appointed is incapable of taking the legal interest. If the object of a charitable donation can be ascertained, the want of a trustee will be supplied by appointment by a court of equity."

In *Heuser v. Harris* (1867) 42 Ill. 425, wherein it appeared that a testator provided that the trustee to carry out a trust should be elected by the people residing within the school dis-

trict, the court said: "It is well settled in the English chancery courts that, where money is given to a charity generally and indefinitely, without trustees or objects selected, the King, as trustee or *parens patriæ*, will direct a scheme; and, where trustees are appointed, the chancellor will direct a scheme for the charity, he having jurisdiction over the trust (Boyle, *Charities*, 238, 239), and this when neither the trustee nor objects are selected. In this case both the object and the trustee are pointed out, the only real difficulty being the election of the trustee in the mode specified, which, by the argument of appellants, is so utterly impracticable as to defeat the appointment, and leave the fund without any person to control it. Surely, the powers of a court of chancery should extend so far as to supply a trustee to manage a testamentary bequest, and, if it be admitted one could not be elected under this will, a court of chancery, to carry out the intention of the testator, would, by a liberal intendment, appoint one. Every reasonable act will be done, and the most liberal construction of the will had, by a court of chancery, to aid the beneficiaries, when the intention is plain and undeniable."

In *Sanderson v. White* (1836) 18 Pick. (Mass.) 328, 29 Am. Dec. 591, the court said by way of dictum: "Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish and carry into effect the intent and purpose of the donor; and trusts which cannot be supported in ordinary cases, for various reasons, will be established and carried into effect, where the trust is raised in support of a gift to a charitable use. If no executor or trustee is named, in ordinary cases the gift would fail; but in cases of charity the want will be supplied by appointment by a court of equity."

In New York, by an early statute, charitable uses and trusts were abolished. But the Laws of 1893, chap. 701, as amended by chapter 291, Laws of 1901 (49 McKinney, *Consol. Laws*, p. 158), restored charitable trusts, and provided that, in the absence of a

trustee for a charitable trust, the supreme court is vested with the legal title. It would seem that this latter statute is merely declaratory of the equitable doctrine that a court will not suffer a charitable trust to fail for the want of a trustee. Thus, in *Bowman v. Domestic & F. Missionary Soc.* (1905) 182 N. Y. 494, 75 N. E. 535, it was held that a bequest to the "Indian Missions and Domestic Missions of the United States," in trust for missionary purposes, was not invalid by reason of the fact that no such institution as was named by the testatrix existed. The court appointed a trustee capable of taking the legal title, saying: "But we are also of the opinion that the bequest did not fail and that it can be supported as a trust for charitable purposes under the provisions of chapter 701 of the Laws of 1893, as amended by chapter 291 of the Laws of 1901. Section 1 of that act, which was not changed by the amendment of 1901, reads as follows: 'No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee, then the title to such lands or property shall vest in the supreme court.' The effect of this statute, as demonstrated in the case of *Allen v. Stevens* (1899) 161 N. Y. 122, 55 N. E. 568, was to restore the ancient doctrine of charitable uses and trusts as a part of the law of this state, and the statute was designed to cover just such a case as the one at bar. The obvious purpose of the testatrix was to have this fund distributed for the benefit of domestic and Indian missions. She was a regular member, attendant, and communicant of the Prot-

estant Episcopal Church, and actively engaged in the charitable work carried on through its instrumentality. The defendant is the organized medium through which the Protestant Episcopal Church of America carries on its missionary operations, which include work in the western states and territories, among the Indians, negroes, and white people, and in the prosecution of which large sums are disbursed every year. The ninth clause, supplemented by the evidence, sufficiently indicates the charitable purposes to which the testatrix desired to apply her bequest, to enable the supreme court, under the power derived from the statute, to administer this as a trust in which the beneficiary or trustee is not named or designated with absolute certainty or correctness. This it can do through the instrumentality of a trustee appointed by it. If that course is deemed wise, the court will doubtless be influenced in the choice of a trustee by the nature of the charity to be administered, and may appoint the defendant as the medium best adapted to accomplish the end sought."

In *Allen v. Stevens* (N. Y.) *supra*, the court said: "Reading the statute in the light of the events to which reference has been made, it seems to me very clear that the legislature intended to restore the law of charitable trusts as declared in the *Williams Case*; that having discovered that legislative enactment had operated to take away the power of the courts of equity to administer trusts that were indefinite as to the beneficiaries, and had declared a permanent charity void unless the devise in trust was to a corporation already formed, or to one to be created, it sought to restore that which had been taken away through another enactment. This is markedly indicated, not only by the absence of details in the statute, which is broadly entitled, 'An Act to Regulate Gifts for Charitable Purposes,' but also in the brevity of the statute, which confers all power over such trusts and trustees on the supreme court, and directs the attorney general to represent the beneficiaries in cases within the pur-

view of the statute, as was the practice in England. . . . The statute provides that, if there is a trustee named to execute the trust, the legal title to the property shall vest in such trustee, and, further, that if no person be named as trustee the title shall vest in the supreme court. That there might be no opportunity for questioning the authority of the supreme court in such matters, the second section provides that the supreme court shall have control over all gifts, grants, bequests, and devises in all cases provided by § 1 of this act. Under the provisions of the act the testator may name a corporation as trustee, or provide that a corporation to be founded shall act as trustee, or the trustee named may be an individual; but if he name none of these, the statute provides in effect that the trust shall not fail, but the title to the property devised or bequeathed in trust shall vest in the supreme court, which shall have control over gifts, grants, bequests, and devises provided for by the act. If the contention be well founded that it was not the intention of the legislature to revive the ancient law as to the administration of such trusts by the supreme court, and to do away with the rule requiring the formation of a corporation for such purpose, then no permanent charity can be administered by the supreme court, notwithstanding the title to the trust property is, by the command of the statute, vested in the supreme court, when no trustee is named by the testator."

In Virginia, by statute, a trust for literary purposes, or for the education of white persons within that state (but not one for a theological seminary), will not fail for the want of a trustee. *Kinnaird v. Miller* (1874) 25 Gratt. (Va.) 107.

In Pennsylvania, the equitable doctrine that a charitable trust shall not fail for the want of a trustee, which has been part of the common law of that state from an early period, has been embodied in a declaratory statute. The Act of April 26, 1855 (P. L. 331), as amended by the Act of May 23, 1895 (P. L. 114), reads as follows:

"That no disposition of property, heretofore or hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity or in excess of the annual value heretofore limited; but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and, by its decrees, to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity, for which purpose the proceedings shall be instituted by leave of the attorney general of the commonwealth, on the relation of any institution, association, corporation not for profit, or individual, desirous of carrying such disposition into effect and willing to become responsible for the costs thereof, etc." It will be noticed, however, that this statute enlarges on the common-law rule, since under the act a charitable trust will not fail for the want of a trustee, that is, by the refusal to act or the death of the trustee appointed by a testator, though such a trustee is vested with discretionary powers in the execution of the trust, or though the objects of the trust are uncertain. Thus, in *De Silver's Estate* (1905) 211 Pa. 459, 60 Atl. 1048, it appeared that one De Silver directed the executors of his estate to give \$25,000 out of the same to "such charitable institutions or associations, excepting all missionary societies, as they, my said executors, may select as suitable recipients of the same; and it is my desire that the same shall be divided between as large a number of said associations as my said executors may think best calculated to secure the greatest amount of good from this donation." It further appeared that all the executors died without having carried out the trust. It was held that the trust would not fail, notwithstanding the fact that the executors had been invested with discretionary powers in its execution. The statute previously cited was also

applied in the following cases: *Re Murphy* (1898) 184 Pa. 310, 60 Am. St. Rep. 802, 39 Atl. 70; *Frazier v. St. Luke's Church* (1892) 147 Pa. 256, 23 Atl. 442; *Stevens's Estate* (1901) 200 Pa. 318, 49 Atl. 985. See also *Sellers Chapel M. E. Church's Petition* (1891) 139 Pa. 61, 11 L.R.A. 282, 21 Atl. 145; *Pepper's Estate* (1892) 1 Pa. Dist. R. 148; *Hutchinson's Estate* (1908) 17 Pa. Dist. R. 248. In *Re Murphey* (1898) 184 Pa. 310, 63 Am. St. Rep. 802, it was held that a charitable trust was not void because one of the two trustees appointed by the donor died. In *Frazier v. St. Luke's Church* (1892) 147 Pa. 256, 23 Atl. 442 (trustee incapable of accepting trust) the court said: "This case presents a question which would be interesting to discuss, were not the law controlling it already authoritatively settled. It is whether a bequest or devise for a charitable use is void, because given to a person or corporation incapable of taking or holding the legal title. The 10th section of the Act of April 26, 1855, P. L. 331, provides 'that no disposition of property hereafter made for any religious, charitable, literary or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity, or in excess of the annual value hereinbefore limited; but it shall be the duty of the orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law and equity,' etc. This statute was merely declaratory of the law as it had existed and been enforced by the courts of chancery in England for hundreds of years. It is true, there was a time in this country when the judicial mind was clouded upon this question, and a different rule prevailed, notably in the courts of last resort in Virginia, Maryland, and in the Supreme Court of the United States. But the time came when the scales fell from the judicial eye,

and the sublime doctrine of Scripture that 'charity never faileth' at length prevailed." In *Hutchinson's Estate* (1908) 17 Pa. Dist. R. 248, it appeared that one Hutchinson, by will, bequeathed certain funds for the "civilization and education of the Indians," and also "to promote the education of the freed men and women lately held in bondage in the southern states." The testator appointed one Paxon trustee to execute the trust in his discretion. Paxon died after commencing the execution of the trust. It was held that the trust would not fail because of Paxon's death, as the court could appoint another trustee. The following cases were decided prior to the enactment of the statute and under the equitable doctrine: *M'Girr v. Aaron* (1829) 1 Penr. & W. (Pa.) 49, 21 Am. Dec. 361; *Franklin v. Philadelphia* (1893) 13 Pa. Co. Ct. 241.

### III. Application of rule.

#### a. Failure to appoint trustee.

It has been held that a charitable trust, otherwise legal, will not be declared to be invalid simply because the creator of the trust failed to name or appoint a trustee.

**Colorado.**—*Haggin v. International Trust Co.* (1917) — Colo. —, L.R.A. 1918B, 710, 169 Pac. 138.

**Illinois.**—*Grand Prairie Seminary v. Morgan* (1898) 171 Ill. 444, 49 N. E. 516, affirming (1897) 70 Ill. App. 575; *Hitchcock v. Board of Home Missions* (1913) 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1.

**Iowa.**—*Chapman v. Newell*, 146 Iowa, 415, 125 N. W. 324.

**Massachusetts.**—*First Universalist Soc. v. Fitch* (1857) 8 Gray, 421; *Missionary Soc. v. Chapman* (1880) 128 Mass. 265; *Sears v. Chapman* (1893) 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604.

**Missouri.**—*Buckley v. Monck* (1916) — Mo. —, 187 S. W. 31.

**New Jersey.**—*Mason v. Methodist Episcopal Church* (1876) 27 N. J. Eq. 47; *Bruere v. Cook* (1902) 63 N. J. Eq. 624, 52 Atl. 1001, affirmed in (1903) 67 N. J. Eq. 724, 63 Atl. 1118; *Case v. Hasse* (1914) 83 N. J. Eq. 170, 93 Atl.

728; *While v. Newark* (1918) — N. J. Eq. —, 103 Atl. 1042.

**New York.**—*Sawyer v. Dearstyne* (1912) 139 N. Y. Supp. 955; *Re Welch* (1918) 105 Misc. 27, 172 N. Y. Supp. 349.

See also *Kemmerer v. Kemmerer* (1908) 233 Ill. 327, 122 Am. St. Rep. 169, 84 N. E. 256.

In *Hitchcock v. Board of Home Missions* (1913) 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1, it appeared that a testatrix provided in her will, among other things, that a part of her estate should be divided equally between two charitable institutions for the education of poor children; but named no trustee. After her death, two of her heirs contended that the bequest to the charitable societies was invalid for the want of a trustee. But the court held otherwise, and said: "The bequest for the education of poor children is a gift for charitable uses and purposes, with the subject and object of the trust designated, but no trustee appointed to carry out the trust, and no provision made by the will for the appointment of one. Appellants contend that as the gift is not limited in locality, no trustee named with power to select the beneficiaries, no scheme presented by the will for administering the trust, and no power expressly given for the appointment of a trustee, it is invalid. Counsel have, in their brief, presented an able and interesting discussion of the subject of gifts to charity generally, without naming the object of the charity or designating a trustee with power to select, and the origin of the application in England of the doctrine of *cy pres* in such cases; but as, in our view of this case, that doctrine is not applicable, and in view of the further fact that the subject has so fully received the consideration of this court in previous decisions that we could add nothing enlightening upon the question, we will not enter upon a general discussion of that subject. It is sufficient to say that to sustain this gift does not require the exercise of any prerogative power of a nature sometimes exercised in England, but requires only the exercise of the ordinary jurisdiction of a court of equity. The bequest for the

education of poor children is a gift for charitable uses within the letter and spirit of 43 Eliz. (chap. 4) known as the Statute of Charitable Uses, and which has been adopted in this state. In states where that statute is in force, a gift to charity, the object being definite, will not be allowed to fail for want of a trustee named to execute the trust. It would be unwarranted to assume that, because no trustee was appointed, and no scheme provided for by the will for the administration of the trust, the testatrix intended the gift to fail. Her intention was, we are bound to assume, that the fund be used for the education of poor children. It was impressed by her with that trust, and it is a familiar rule that equity will not allow a trust to fail for want of a trustee, but will itself administer the trust or appoint a trustee to administer it. Cases have arisen where a trustee had been appointed to administer a charitable trust, but where no scheme for carrying it out was provided by the will, and cases where a scheme for administering the trust has been provided by will, but no trustee designated to execute it; and courts of equity have supplied the trustee in the one case, and the mode or scheme in the other."

In *Kemmerer v. Kemmerer* (Ill.) supra, it appeared that a testator left, by will, certain property for the benefit of an orphanage. He did not appoint a trustee, but named his widow as executrix of his will. It was held that she could act as trustee, and the court further stated that if she declined to act as trustee, or died, the trust would not fail, as the court would appoint another trustee.

In *Sears v. Chapman* (1893) 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604, the court said: "It is settled by a line of decisions in this commonwealth that a gift like the present, for a specified charitable purpose, will not fail for want of a trustee. The doubts which have been expressed on this point (*Jackson v. Phillips* (1867) 14 Allen (Mass.) 576, and *Minot v. Baker* (1888) 147 Mass. 353, 9 Am. St. Rep. 713, 17 N. E. 839) must be confined to 'gifts to charity generally, with

no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it.'"

*b. Failure to provide for successor.*

Where the creator of a charitable trust fails to provide for the filling of a vacancy in the trusteeship caused by death, resignation, or otherwise, the trust will not fail, but a court of equity will fill the vacancy by appointing a new trustee. *Duggan v. Slocum* (1897) 83 Fed. 244, affirmed in (1899) 34 C. C. A. 676, 92 Fed. 806; *Thompson v. Hale* (1905) 123 Ga. 305, 51 S. E. 383; *Mason v. Bloomington Library Asso.* (1908) 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603; *Grant v. Saunders* (1903) 121 Iowa, 80, 100 Am. St. Rep. 310, 95 N. W. 411; *Re Schouler* (1883) 134 Mass. 426; *Boston v. Doyle* (1904) 184 Mass. 373, 68 N. E. 851; *Williams v. Williams* (1853) 8 N. Y. 525; *Hunt v. Edgerton* (1906) 29 Ohio C. C. 377, affirmed in (1906) 75 Ohio St. 594, 80 N. E. 1126. See also *Skinner v. Northern Trust Co.* (1919) 288 Ill. 229, 123 N. E. 289, wherein it was said that the fact that the corporate trustee named might cease to exist did not invalidate a charitable trust.

In *Williams v. Williams* (N. Y.) supra, a charitable trust was held to be valid, notwithstanding the fact that the donor failed to provide for a successor to the trustee he had appointed. The court said: "There is here a good trustee to take the funds, in the first instance; and a succession of trustees may be provided by the court, by new appointment, as often as circumstances may require. The trust is for the education of the children of the poor, at a particular institution of learning, which I presume to be an incorporated academy; and a rule of ready application is given for selecting the objects of the testator's bounty."

*c. Trustee named not in existence.*

A charitable trust will not be declared to be void because the trustee named by the donor is not in existence, or does not come into being until aft-

er the latter's death, nor where the trustee ceases to exist after accepting the trust. *Chatham v. Brainerd* (1835) 11 Conn. 60; *American Bible Soc. v. Wetmore* (1845) 17 Conn. 181; *Miller v. Chittenden* (1856) 2 Iowa, 315; *Winslow v. Cummings* (1849) 3 Cush. (Mass.) 358; *Bliss v. American Bible Soc.* (1861) 2 Allen (Mass.) 334; *Darcy v. Kelley* (1891) 153 Mass. 433, 26 N. E. 1110; *Green v. Blackwell* (1896) — N. J. Eq. —, 35 Atl. 375; *Bruere v. Cook* (1902) 63 N. J. Eq. 624, 52 Atl. 1001, affirmed in (1903) 67 N. J. Eq. 724, 63 Atl. 1118; *Kingsbury v. Brandegee* (1906) 113 App. Div. 606, 100 N. Y. Supp. 353; *Re Deming* (1908) 112 N. Y. Supp. 170. Compare *Spencer v. De Witt C. Hay Library Asso.* (1901) 36 Misc. 393, 73 N. Y. Supp. 712.

In *American Bible Soc. v. Wetmore* (1845) 17 Conn. 181, it appeared that a testatrix on the 7th day of June, 1793, made her will in which, among other things, she provided as follows: "The rest and remainder of my estate, both real and personal, that I may be in possession of at my decease, I will and dispose of as follows: The one half I will and bequeath to the Bible Society for Foreign Distribution; and the other half I will and determine to be divided equally between the Foreign Mission Society and the Tract Society." It further appeared that the two societies mentioned were not incorporated until 1841; one a short time before the death of the testatrix; the other about a month after her death. It was held, however, that the trust created by the testatrix would not fail because of the fact that two of the trustees named by her came into existence after she executed her will. The court said: "The technical rules of the common law, statutes of mortmain, and other restraining English statutes operated very effectually to defeat the benevolent intentions of testators, and of grantors to public and private charities. To remedy what were supposed to be some of the evils of the former laws on this subject, the Statute 43 Eliz. chap. 4, was enacted. By this statute, and by the agency of the court of chancery under

its provisions, many devises to charitable uses were rendered good and effectual. The spirit of this statute has not only been extending itself in the English courts, but into the legislation and the courts of this country. By a provision of the statute law, enacted as early as 1702, it was declared 'that all gifts and grants, whether made by the legislature, towns, or individuals, for the maintenance of the ministry of the gospel, or schools of learning, or for the relief of the poor, or for any other public and charitable uses, should forever remain and be continued to the uses, etc., according to the true intent and meaning of the grantor.' We think the obvious effect of this enactment would protect the devises in question, without resort to the additional authority of adjudged cases. But we believe it is a doctrine now universally admitted by the equity courts of this country that a devise for a public charitable purpose shall not fail of effect for want of a devisee then capable of taking the legal estate; and that, to protect and perpetuate such charity, the legal estate will be considered either as remaining in abeyance or vesting in the heirs of the testator, as trustees for the persons beneficially interested."

In *Winslow v. Cummings* (1849) 3 Cush. (Mass.) 358, it appeared that a bequest of \$1,000 was made to the "Boston Young Men's Marine Bible Society." It further appeared that, prior to the execution of the will, there was a voluntary association in Boston bearing the name of "The Boston Young Men's Bible Society." This society became extinct before the testator's death. It was held, however, that the trust would not fail, as the court could appoint a trustee. The court said: "It is objected that no such society as the Boston Young Men's Marine Bible Society existed at the time of making the will, and it is said to be an insuperable objection to giving effect to this legacy that this society, although it had previously existed under the form of a voluntary association, had failed to continue its annual meetings and organization, by the choice of officers down to the peri-

od of the making of this will. If, by this objection, it is intended to suggest that there was no association in existence competent in law to take a legacy, the objection would equally have existed if the organization of the society had been kept up, and it had continued to the present day to hold meetings, and to be actively engaged in the work of distributing Bibles, inasmuch as it was at all times an unincorporated society. The real ground for objection is not, therefore, that this legacy must fail by reason of a want of capacity in the society to take a bequest, but from the want of any certain, clear, and definite description of a person or association, to indicate the legatee of the charity, and the objects to which the legacy is to be applied. As to the want of capacity to take a legacy, by reason of having no legal existence as a corporation, that can be readily supplied by the appointment of a trustee, if the object of the legacy and the particular charitable use to which the testator appropriated it can be ascertained. It seems to us that these may be ascertained, and that, although this society had ceased to continue its regular organization, yet its previous existence, its well-defined objects of charity, and mode of distribution of its funds may be resorted to, in order to determine the purpose of this legacy, and what disposition of it will effectuate the intention of the testator. This society had a written constitution, in which the purpose of its organization was defined to be 'to circulate Bibles among destitute seamen.' This object is a definite one, and the purpose of the testator may be certainly and easily carried into effect by a trustee appointed by the court. Nothing more is necessary to be done in order to give effect to the legacy than would be required if the society had fully retained its organization, it being an unincorporated society. The court, in such cases, appoints a trustee, who is to apply the avails of the legacy to the objects and in the manner that the society designated dispensed its charity. So, here, the trustee to be appointed will apply the avails of this

legacy to the same objects, and as near as may be in the usual manner adopted and practised by the Young Men's Marine Bible Society. We may thus give effect to the legacy, as a charity to be applied in the manner indicated by the constitution and by-laws of this society as it existed when known to the testator, and as he supposed the society to be at the time of executing the will. The trusts are, therefore, well described by such reference to a society which had existed under a written constitution, clearly stating the purposes of its organization and the objects of its charity. The objection, therefore, is not well founded, that the legacy is not given to a well-defined charity. As authorities for the positions thus stated, it is only necessary to refer to a few cases. The general principle that this court will sustain a legacy to an unincorporated society, and appoint a trustee to carry into effect the general purpose of the testator, is well settled by the cases of *Burbank v. Whitney* (1839) 24 Pick. (Mass.) 146, 50 Am. Dec. 312; *Bartlett v. Nye* (1842) 4 Met. (Mass.) 378; *Washburn v. Sewall* (1845) 9 Met. (Mass.) 280. In the case last cited, it was said: 'In case of charitable gifts, it is no objection to their validity that no person is named, capable of taking the legal interest. If the object can be ascertained, the want of a trustee will be supplied by appointment by a court of equity.' In 2 Story's Commentaries on Equity, § 1166, he says, in case of a legacy given to trustees to distribute in charity, and they all die in the lifetime of the testator, yet it will be enforced in equity. In § 1169, it is said: 'If the bequest be for charity, it matters not how uncertain the persons or objects may be, or whether the persons who are to take are in esse or not, for, in all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles.' We perceive, therefore, no difficulty in giving effect to this legacy, and in carrying out substantially the original purpose of the testator."

In *Bruere v. Cook* (1902) 63 N. J. Eq. 624, 52 Atl. 1001, it appeared that



a testator bequeathed the residue of his estate to the "Board of Missions of the Baptist Church of New Jersey." He provided that one third of this estate should be used for home missions, and the other two thirds for foreign missions. It further appeared that at no time was there in existence in New Jersey an institution as named by the testator. However, there were several Baptist societies engaged in mission work. It was held that the trust would not fail because of the nonexistence of the trustee named by the donor. The court said: "It is undisputed that there is no such body or corporation as 'the Board of Missions of the Baptist Church of New Jersey,' the primary legatee named in the will. The words of the gift show that the testator intended to give the property in question to some board or association of persons of the Baptist Church of New Jersey, which was engaged in the conduct of home and foreign mission work. In making this gift he indicates in the clearest possible way that he did not intend that the board which might be the recipient of the title should use the fund for any general purposes of church work. He meant to give the title of the gift to a board, but this board should use and apply the gift, one-third part thereof for home missions, and two-thirds parts thereof for foreign missions of the Baptist Church. The title was intended to be given to one, for the use and benefit of further beneficiaries or objects. In short, without so naming it in words, he created a trust. It must, of course, appear that in 1899, when the testator died and his will spoke, the objects which he intended should ultimately receive the benefits of his bounty were sufficiently defined by him to enable the fund to be devoted to those objects. The misnomer of the legatee who should, in the first place, receive and apply the fund, or the selection of one who does not have the power or equipment to carry the testator's intention into effect, or even the entire omission in any way to indicate a person or corporation to whom payment of the fund could primarily be made, will not defeat such a

gift, if the testator's ultimate object is lawful and is definitely indicated. Equity will not permit a lawful trust to be defeated for want of an efficient trustee. . . . The true interpretation of the intent of this will is that the testator clearly expressed the final purpose he had in view, and believed he had indicated a primary legatee to carry his final purpose into effect. His nomination of the primary legatee or trustee is a failure, because he has not, in the will, sufficiently identified the party intended. It is, however, such a trust as that this court will aid by the appointment of a trustee to execute the testator's purpose. This course may be taken when there is no such person or body as the one named by the testator, or when he selects a person or corporation which is unable to carry into effect the trust he created. In either case, the result is the same. The ultimate bequest is indicated with sufficient certainty on the face of this will, but the selection of a person who shall carry into effect is a failure. The complainant should be advised that the residuary gift is a valid bequest in favor of the home missions of the Baptist Church to the extent of one-third part thereof, and in favor of the foreign missions of the Baptist Church to the extent of the remaining two thirds, and that no efficient trustee is indicated by the testator's will to whom the complainant can presently pay the funds in his hands; and that it is his duty to apply to some competent court for the appointment of trustee to receive this legacy and execute the trust."

In *Green v. Blackwell* (1896) — N. J. Eq. —, 35 Atl. 375, it was held that, where the trustee, a district school, terminated its existence and abandoned the trust, the same would not fail, as the court could appoint another trustee.

In *Chatham v. Brainerd* (1835) 11 Conn. 59, a grant of land for a burying place to the inhabitants of a certain town district was held to be valid, notwithstanding the fact that such inhabitants, who had organized themselves into a voluntary religious society, did not incorporate said society

until two years after the making of the conveyance.

In *Miller v. Chittenden* (1856) 2 Iowa, 315, the court held that a conveyance to certain persons as trustees of a church, which was not organized until seven years after the grantor's death, was valid.

In *Kingsbury v. Brandegee* (1906) 113 App. Div. 606, 100 N. Y. Supp. 353, it was held that a bequest to the "Diocese of Central New York" was not void, though it appeared that no such institution ever existed; but the court appointed another charitable corporation to carry out the object of the bequest.

In *Darcy v. Kelley* (1891) 153 Mass. 433, 26 N. E. 1110, it appeared that the donor of a charitable trust provided in his will that, on the decease or remarriage of his widow, all his estate should go "to the parish priest who may then be in charge of the Catholic Church in Fall River (now St. Mary's) in trust to be disposed of as follows, to wit: The said parish priest shall put the said property and estate, or the proceeds thereof, into the hands of the Sisters of Charity, for the purpose of a relief fund for the poor." It further appeared that no such institution as the "Sisters of Charity," or any similar institution, ever existed in Fall River, Massachusetts. It was held, nevertheless, that the trust would not fail. The court said: "It is alleged and admitted that there was no such organization as the Sisters of Charity, and there is no one else designated in the will to exercise discretion in the administration of the trust, or to determine the mode of its administration. But it has been decided in this commonwealth that a devise of this kind is a good charitable trust, and that the court will not permit it to fail for want of a trustee, but will take upon itself its administration, by devising a scheme and appointing instrumentalities for its management."

A bequest to a charitable organization which became defunct by dissolution fifteen years before the testator made his will was held valid, in *Bliss v. American Bible Soc.* (1861) 2 Allen (Mass.) 334, and the court appointed

another institution to carry out the trust.

A similar ruling was made in *Re Deming* (1908) 112 N. Y. Supp. 170, wherein it appeared that the trustee, a charitable corporation, appointed by the donor of a charitable trust, dissolved its existence before the former's death.

Compare *Spencer v. De Witt C. Hay Library Asso.* (1901) 36 Misc. 393, 73 N. Y. Supp. 712, wherein it appeared that a testatrix bequeathed a part of her residuary estate directly to the "Pickering White Library and Chime Tower and Bells at Sacket Harbor, New York." It also appeared that no such person, individual or corporate, was in existence at the time of the probate of the will, or at any other time. The court held the bequest to be void.

*d. Trustee appointed unable to accept trust.*

A charitable trust will not be invalidated because the trustee appointed by the donor of the trust cannot accept, or is incapable of executing the same.

**United States.**—*Handley v. Palmer* (1899) 91 Fed. 948, affirmed in (1900) 43 C. C. A. 100, 103 Fed. 39; *Wood v. Paine* (1895) 66 Fed. 807; *Laswell v. Hungate* (1918) — C. C. A. —, 256 Fed. 635; Compare *Philadelphia Baptist Asso. v. Hart* (1819) 4 Wheat. 1, 4 L. ed. 499.

**Colorado.**—*Haggin v. International Trust Co.* (1917) — Colo. —, L.R.A. 1918B, 710, 169 Pac. 138.

**Connecticut.**—*Eliot's Appeal* (1902) 74 Conn. 586, 51 Atl. 558; *Eccles v. Rhode Island Hospital Trust Co.* (1916) 90 Conn. 592, 98 Atl. 129.

**District of Columbia.**—*Smith v. Gardiner* (1911) 36 App. D. C. 485.

**Illinois.**—*Burke v. Burke* (1913) 259 Ill. 262, 102 N. E. 293.

**Indiana.**—*Dykeman v. Jenkins* (1913) 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; *M'Cord v. Ochiltree* (1846) 8 Blackf. 16.

**Iowa.**—*Johnson v. Mayne* (1856) 4 Iowa, 180; *Byers v. McCartney* (1883) 62 Iowa, 339, 17 N. W. 571.

**Massachusetts.**—*Bliss v. American Bible Soc.* (1861) 2 Allen, 334; *Fel-*

*lows v. Miner* (1876) 119 Mass. 541; *Hubbard v. Worcester Art Museum* (1907) 194 Mass. 280, 9 L.R.A. (N.S.) 639, 80 N. E. 490, 10 Ann. Cas. 1025; *Chase v. Dicky* (1912) 212 Mass. 555, 99 N. E. 410. See also *Baker v. Clarke Institute* (1872) 110 Mass. 88.

**Missouri.**—*Robinson v. Crutcher* (1919) — Mo. —, 209 S. W. 104.

**Nebraska.**—*Gould v. Board of Home Missions* (1918) 102 Neb. 526, 167 N. W. 776.

**New Hampshire.**—*Chapin v. School Dist.* (1857) 35 N. H. 445.

**New Jersey.**—*Mason v. Methodist Episcopal Church* (1876) 27 N. J. Eq. 47; *Jones v. Watford* (1901) 62 N. J. Eq. 339, 50 Atl. 180, modified in (1902) 64 N. J. Eq. 785, 53 Atl. 397.

**New York.**—*Re Powell* (1910) 136 App. Div. 830, 121 N. Y. Supp. 779; *Sheldon v. Chappell* (1888) 47 Hun, 59. Compare *Owens v. Missionary Soc.* (1856) 14 N. Y. 380, 67 Am. Dec. 160.

**Rhode Island.**—*St. Peter's Church v. Brown* (1899) 21 R. I. 367, 43 Atl. 642; *Wood v. Fourth Baptist Church* (1905) 26 R. I. 594, 61 Atl. 279; *Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855.

**Texas.** — *Lightfoot v. Poindexter* (1918) — Tex. Civ. App. —, 199 S. W. 1152.

**Vermont.**—*Stone v. Griffin* (1831) 3 Vt. 400.

Thus, in *Burke v. Burke* (1913) 259 Ill. 262, 102 N. E. 293, it was held that a charitable trust was not invalidated by reason of the fact that the creator of the trust named an unincorporated religious society as trustee. The court said: "The testator and his wife were members of Saint Mary's Catholic Parish in Sterling, Illinois, which is an unincorporated religious society, and a duly established parish of the diocese of Rockford of the Roman Catholic Church, having about a thousand members who were subject to constant change by reason of deaths, births, and removals. The parish has no property in its own name, but its property is all held in the name of the bishop, and cannot be diverted from the use of the parish. A parish school is an integral part of every parish of the Roman Catholic

Church, and it is the duty of Saint Mary's parish, under the rules of the Church, to maintain such a school. The rules of the Church provide what branches shall be taught in such school, and how it shall be conducted. That the founding and maintenance of a school under the control of a church, though the instruction may not be gratuitous and the branches to be taught not specified, is a public charity, is held in *Andrews v. Andrews* (1884) 110 Ill. 223. The saying of five masses annually for the souls of the testator, his wife and son, which is made a condition of the bequest, is a charitable purpose. *Hoeffler v. Cloggan* (1898) 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527. It is contended that the parish is an unincorporated association which cannot be a grantee, or act as trustee, and that the bequest cannot, under such circumstances, be sustained as a charity. In support of this proposition, reliance is placed upon *Philadelphia Baptist Asso. v. Hart* (1819) 4 Wheat. (U. S.) 1, 4 L. ed. 499, which sustains it. This decision was based upon the two propositions that the Statute of Charitable Uses (43 Eliz. chap. 4) was repealed by the legislature of Virginia, and that charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity independent of 43 Elizabeth. The first proposition is not true in this state, and as to the second the decision has been expressly overruled in *Kain v. Gibboney* (1879) 101 U. S. 362, 25 L. ed. 813. The original and inherent jurisdiction of courts of equity over charities, independent of the statute, is now recognized in most of the states. Virginia, Maryland, and North Carolina are exceptions. In this state, deeds made to the rector, churchwardens, and vestrymen of an unincorporated church, for church purposes, and to pay the salary of the rector, were held not void for want of a grantee capable of taking the deed. *Alden v. St. Peter's Parish* (1895) 158 Ill. 631, 30 L.R.A. 232, 42

N. E. 392. Where a gift is made to a charitable use and no donee is named, or the donee named is incapable of taking the property, the gift will not fail, but a court of equity may appoint a trustee to carry out the charitable purposes."

Similar holdings were made in the following cases, in each of which it appeared that the trustee appointed by the donor was an unincorporated association: *Eccles v. United States Hospital Trust Co.* (1916) 90 Conn. 592, 98 Atl. 129; *Illinois Classes v. Holben* (1919) 286 Ill. 473, 122 N. E. 46; *McCord v. Ochiltree* (1846) 8 Blackf. (Ind.) 16; *Johnson v. Mayne* (1856) 4 Iowa, 180; *Byers v. McCartney* (1883) 62 Iowa, 339, 17 N. W. 571; *Board of Foreign Missions v. Shoemaker* (1919) — Md. —, 105 Atl. 748; *Re Powell* (1910) 136 App. Div. 830, 121 N. Y. Supp. 779; *St. Peter's Church v. Brown* (1899) 21 R. I. 367, 43 Atl. 642; *Wood v. Fourth Baptist Church* (1905) 26 R. I. 594, 61 Atl. 279; *Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855; *Stone v. Griffin* (1831) 3 Vt. 400. Compare *Owens v. Missionary Soc.* (1856) 14 N. Y. 380, 67 Am. Dec. 160, wherein it was held that a bequest to an unincorporated association in trust for a charitable purpose was invalid, notwithstanding the fact that, in the interim between the making of the gift by will and the death of the testator, the donee became incorporated. That case was decided prior to the enactment of New York Laws of 1893, chap. 701, § 1, which vests the title to property devised or bequeathed for charitable uses in the supreme court of New York, whenever the donor of the trust has failed to appoint a competent trustee. In *Philadelphia Baptist Asso. v. Hart* (1819) 4 Wheat. (U. S.) 1, 4 L. ed. 499, it was held that a bequest to an unincorporated association in trust "for the education of poor youths to the Baptist Ministry" was void, as the association could not legally accept the trust. This decision was based on the fact that the Statute of Uses, or 43 Elizabeth, chap. 4, had been repealed in Virginia, where the trust was created. But it seems that the United States Supreme

Court has repudiated this holding in *Inglis v. Sailor's Snug Harbor* (1830) 3 Pet. (U. S.) 113, 7 L. ed. 622, and by other cases decided later, which are cited *supra*, II.

In *Chase v. Dickey* (1912) 212 Mass. 555, 99 N. E. 410, it appeared that Mrs. Eddy, the founder of Christian Science, left a will by which she devised the bulk of her estate in trust to the Northern Church of Boston, the income to be used for the promotion and extension of Christian Science. It further appeared that under a statute of Massachusetts the donee was limited as to the amount of bequests which it could take. The income derived from Mrs. Eddy's property exceeded the amount of that limitation. Her heirs contended that, inasmuch as the Northern Church could not accept the trust, the same was void. But the court held otherwise, saying: "The facts disclosed on the record and appearing in the will do not lead to the conclusion that the intent of the testatrix was fixed on the donee named so profoundly that, if the donee fails, the gift fails. The purpose of the gift and the trustee are not so inextricably combined that they must stand or fall together. The support of a branch of the Christian religion being the declared purpose of the trust, and this being a public charity, the gift will stand unless it appears that the discretion of the particular trustee named is of its essence. There is disclosed no exceptional reliance upon the particular corporation named, beyond that which appears commonly. The establishment of the trust does not seem to depend upon the particular instrument for execution nominated in the will. It is not the unusual case of a plain charitable intent where the legatee is incapable of taking, and the trust is not permitted to fail for lack of a trustee. . . . It does not fall within the class of cases where the administration of the trust is of its essence, and where it cannot be administered in any other way than that pointed out in the will."

In *Chapin v. School Dist.* (1857) 35 N. H. 445, the action was by the heirs of a testator, to declare a charitable

gift "unto that part of the inhabitants of Winchester and their successors" void, on the ground that said inhabitants could not act as trustees of a district school. The court held that the inhabitants could accept the trust in their corporate capacity, and stated, further, that even if the inhabitants of said Winchester district could not accept the trust, the same would not fail, saying on that point: "It is said that the deeds are void for want of a grantee, and that there is no party described competent to take the land. We have already expressed the opinion that it was the intention of the grantor to convey these lands in trust, for the benefit of the district; the first grant being to aid and foster the schools of the district, and the second for the support of the ministry. Both grants were for charitable purposes, and the law as applicable to charities may be applied to both. In *Hadley v. Hopkins Academy* (1832) 14 Pick. (Mass.) 253, Shaw, Ch. J., says that it is a settled rule in equity that a gift of real or personal estate to promote education is a charity. It is also considered as a settled rule that such a gift to a charitable use is to receive a most liberal construction, and if the trustees pervert the fund to other uses, or even if they refuse to accept or execute the trusts, the charity itself shall not fail, nor will the property revert to the donor; but it will be competent for a court of chancery to direct, in the former case, that the trusts shall be executed, and, in the latter, that new trustees shall be appointed, in whom the legal title shall vest, to be held in trust for the purposes of the charity. That it is quite clear that, if there is no party to take the legal estate, no forfeiture and no reversionary interest can be claimed by the donor or his heirs. A corporation may be a trustee; and, where it has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may. If, however, the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may fur-

nish a ground why it may not be compelled to execute it. But that will be no more reason to declare the trust itself void, if otherwise unexceptionable, but will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction to enforce and perfect the objects of the trust."

In *Sheldon v. Chappell* (1888) 47 Hun (N. Y.) 59, it appeared that a testator left \$1,000 to the "Board of Foreign Missions of the Presbyterian Churches in the United States of America, incorporated by the legislature of the state of New York, in trust to be appropriated and applied for the use and benefit of the Woman's Foreign Missionary Society of the Presbyterian Church, located in the city of Philadelphia, Pennsylvania." The testator's heir, the plaintiff, contended that the gift was void, for the reason that one charitable corporation could not act as trustee for the benefit of another charitable corporation. But the court held otherwise, and also stated that, even if the corporation appointed as trustee could not act as such, the trust would not be declared invalid. The court said: "It is a general rule that a court of equity never suffers an express trust to fail from the want of a trustee, whether the same arises from the fact that no trustee was named, or that the one named is disqualified from acting, or from a trustee's refusal to act, or from other causes, for the court will appoint a trustee to execute the trust or treat the person in whom the legal title is vested as the trustee. Where a corporation is named as trustee, it is true that, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may be a good ground why it may not be compelled to execute the trust; but it is no good ground for declaring the trust itself void, if otherwise unexceptionable, and would present a case which requires a new trustee to be substituted by the proper court, possessing equity jurisdiction to enforce and perfect the objects of the trust."

In *Handley v. Palmer* (1899) 91 Fed.

948, affirmed in (1900) 43 C. C. A. 100, 103 Fed. 39, it appeared that a testator gave the entire residue of his estate "to the city of Winchester, Virginia, to be accumulated by said city for the period of twenty years; the income arising from said residue estate to be expended and laid out in said city by the erection of schoolhouses for the education of the poor." The testator was a resident of Pennsylvania, and made the will there. The city of Winchester was, by its charter, limited in its power to take and hold property. The action being by the testator's heirs, to declare the gift void, it was held that, under the law of Pennsylvania, the trust would not fail because of the incapacity of the city of Winchester to accept and administer the trust. The court said: "If . . . for any reason, the city of Winchester were incompetent to execute the trust, the law of the testator's domicile would not suffer his charitable intentions to be thereby defeated, but would supply a trustee. Both by the common law and the statute law of Pennsylvania, a charitable gift is not to fail because given to a person or corporation incapable of taking it and administering the trust; but a competent trustee for the purpose will be appointed by the court."

In *Haggin v. International Trust Co.* (1917) — Colo. —, L.R.A.1918B, 710, 169 Pac. 138, it appeared that a testator appointed, by his will, the city of Denver to act as trustee of a charitable trust. The city could not, under its charter, act as trustee. It was held that the trust would not fail, but that the court would appoint another trustee.

In *Wood v. Paine* (1895) 66 Fed. 807, a charitable trust for the support of the poor of a certain town was held to be valid, notwithstanding the fact that the trustee appointed by the donor was a town council in Rhode Island, in which state town councils were unincorporated associations, and, therefore, incapable of accepting a trust. In that case the court appointed another trustee.

A joint charitable bequest to two townships, which were not authorized

to act as trustees of charities, has been held to be valid, since the court could appoint another trustee. *Mason v. Methodist Episcopal Church* (1876) 27 N. J. Eq. 47.

In *Eliot's Appeal* (1902) 74 Conn. 586, 51 Atl. 558, it appeared that a testatrix by her will left \$150,000 to "The Ladies' Seamen's Friend Society of New Haven, for the aiding of destitute seamen." The testatrix died in 1888. "The Ladies' Seamen's Friend Society of New Haven" was incorporated in 1860, and, under its charter, could not take and hold property exceeding \$15,000 in value. In 1895, the charter of this society was changed, and, among other things, the new charter provided that "said corporation shall at no time hold real or personal estate the annual income of which shall exceed \$10,000." In construing the two charters of the society, the court held that the former could take of the legacy at least so much as did not exceed \$15,000, and added, regarding the capacity of the trustee to take: "If, then, it were legally incompetent to receive so large a legacy, the case would be simply one of the failure of a trustee. This in equity never involves a failure of the trust. When the difficulty arises from a refusal by the trustee appointed to act, it is necessary to have another one formally appointed by a court of equity, or a court of probate. *Dailey v. New Haven* (1891) 60 Conn. 314, 322, 14 L.R.A. 69, 22 Atl. 945."

In *Baker v. Clarke Institute* (1872) 110 Mass. 88, the salient facts were similar to those in *Eliot's Appeal* (Conn.) *supra*. The Clarke Institute, the trustee named, was incorporated in 1867, with power to take and hold property not exceeding \$200,000 in value. The testator made a gift of \$50,000 to this institution soon after its incorporation, which sum remained undiminished at the time of his death. He died in 1869, and left a will by which he bequeathed to said institute the residue of his estate, "in trust for the benefit of the Clarke Institute." It further appeared that the estate could not be settled in less than two years from the testator's death, at the

end of which time the residue of the estate amounted to \$223,500, of which the executor paid to Clarke Institute \$200,000 in gold. It was further shown that, if the estate could have been settled immediately after the testator's death, the residuary estate would have been worth \$140,000 in gold, and if the estate could have been settled at the end of one year from the probate of the will (the will was probated and letters testamentary were issued August 3, 1869) the residue would have been worth \$204,000 in gold. In the interim between the testator's death and the final settlement of the estate, the state of Massachusetts, by statute, authorized Clarke's Institute to take and hold property up to \$200,000 in value, in addition to such property as it then held. It was held that the bequest was valid.

A bequest to "James Gibbons, Cardinal, and Archbishop of Baltimore City, Maryland, for the use and benefit of the Roman Catholic Church in his archbishopric," and another bequest "to said Cardinal Gibbons for the use and benefit of St. Charles College in said (Baltimore) Maryland," and a third gift "to said Cardinal Gibbons, as archbishop, for the use and benefit of the Roman Catholic Trinity Church in said Georgetown," were all held, in *Smith v. Gardiner* (1911) 36 App. D. C. 485, to be valid charitable trusts. In that case the testatrix's heirs contended, among other things, that the trusts were void, because Cardinal Gibbons was not properly described, and, therefore, he could not accept the trusts. But the court held otherwise, and said, further: "Indeed, in gifts of this nature, where the personal action of a particular trustee is not essential, it is immaterial that the trustee is uncertain or incapable of taking, 'for it is a settled principle in courts of equity that a trust shall never fail for want of a proper trustee.'"

In *Dykeman v. Jenkins* (1913) 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011, it appeared that one David D. Dykeman provided in his will that his executor should expend about \$50,000, but not to exceed \$100,000, for the erection of a hospital in

the city of Logansport, Indiana, which hospital building was to have inscribed over its main entrance door, the name, "Mary Dykeman Hospital." The testator further provided that when the building was completed his executor should convey the same, with the lot on which it stood, to the city of Logansport in trust to hold the same forever for the purposes intended, and for no others. He also provided that, before such conveyance should be made, the common council of the city of Logansport should enter on record a formal acceptance of the trust, with an irrevocable stipulation and agreement on the part of said city that said hospital should forever be named and designated the "Mary Dykeman Hospital;" that said hospital should be conducted in the manner and for the purposes designated by the testator; that the board of hospital managers, which should control and manage the business of said hospital, should be composed of three members, two of whom should be respectable physicians of Cass county, Indiana, and the other a woman of judgment and discretion, to be selected and appointed by the common council of Logansport. The testator then provided that the conveyance to the city should be conditional upon the observance and performance by the latter of the terms of said agreement, and by his will he directed his executor to turn over, on the final settlement of the estate, all the residue of his estate to the city of Logansport, to be held by the latter in trust forever as a fund for the maintenance and support of the "Mary Dykeman Hospital." The testator's heirs contended that the city of Logansport, through its officials, had no power to enter on record such an agreement and stipulation as the testator required, and that for this reason the city could not accept the trust. They contended that by a statute (Acts 1905, p. 219, §§ 213, 214) the management and control of city hospitals is vested in the city boards of health, and for this reason the city of Logansport could not agree to the appointment of the board of managers for "Mary Dykeman Hos-

pital," according to the directions of the testator. The court, without conceding that the city of Logansport could not accept the trust, stated that even if it could not carry out the trust the same would not fail, saying: "Furthermore, where there is a devise or a bequest for a definite charitable purpose to a designated trustee capable of taking the legal estate, and the named trustee is unwilling or has not the power to carry out the trust, a court of equity will appoint a new trustee to administer the trust in the manner appointed by the testator."

In *Fellows v. Miner* (1876) 119 Mass. 541, it appeared that a resident of Massachusetts, having property in that state, made a bequest "to the town of Kinderhook, New York, in its corporate capacity," in trust for certain charitable uses. At the time the testator made his will, charitable uses were not legal in New York, having been previously abolished by statute. In an action by the testator's executors to have the bequest to the town of Kinderhook declared invalid, the court held that, if the state of New York did not authorize the town to accept the trust, the same would not fail, as the state of Massachusetts, owing to the fact that the testator was a resident of and kept his property in that state, had the right and power to appoint another trustee. The court said: "The court will not allow a valid charitable trust to fail for want of a trustee; and, if the trust is to be executed out of the commonwealth, the court may appoint a trustee here to receive the bequest, or may order the fund, or the income thereof from time to time, to be paid to a trustee in the place where the trust is to be executed, as may be consistent with its own jurisdiction and practice, and best carry out the intention of the testator." But it further appeared that by a special statute passed in 1876, and after the rendition of this decision, the state of New York authorized the town of Kinderhook to accept the trust.

In *Hubbard v. Worcester Art Museum* (1907) 194 Mass. 280, 9 L.R.A. (N.S.) 689, 80 N. E. 490, 10 Ann. Cas.

1025, the action was in the nature of a quo warranto brought by the heirs of a testator, who left to the defendant property worth from two to three and a half million dollars. At the time of the testator's death, the defendant could not, under a statute (Mass. Rev. Laws, chap. 125, § 8) take and hold property exceeding in value \$1,500,000. But, after the will was proved, the Massachusetts legislature authorized the defendant to take and hold property in value up to \$5,000,000. The court held that while at the instance of the state of Massachusetts the bequest might be declared void, the same was valid as far as anybody else was concerned, and said, further, that even if the defendant was, at the time of the probate of the will, incapable of taking the property and carrying out the testator's charitable intent, the trust would not fail, as the court would appoint another trustee.

In *Bliss v. American Bible Soc.* (1861) 2 Allen (Mass.) 334, it appeared that the testator left \$1,000 in trust to the "Bible Society of the Methodist Episcopal Church." It further appeared that the society named had dissolved prior to the making of the will. But after its dissolution the Geneva Conference of the Methodist Episcopal Church recommended to the Methodist Episcopal Churches to unite with the American Bible Society, a separate and distinct association from the one above mentioned. The court held that, under the will, the Bible Society could not accept the trust, but further held that the trust did not fail because the testator did not properly designate the trustee, but that the court would appoint the American Bible Society to carry out the testator's intent.

In *Gould v. Board of Home Mission* (1918) 102 Neb. 526, 167 N. W. 776, it appeared that a testatrix devised real estate to a foreign corporation in trust for the benefit of the "Women's Board of Home Missions of the Presbyterian Church in the United States of America." The trustee was incapable of taking the property, owing to a statute (Neb. Rev. Stat. 1913, § 6275) which prohibited a foreign corporation



from taking and holding real estate in Nebraska. It was held that the trust would not fail, but that the court would appoint another trustee.

In *Jones v. Watford* (1901) 62 N. J. Eq. 339, 50 Atl. 180, it was held that a charitable trust will not fail because the donor of the trust appointed his executor to carry out the trust, which in its nature was perpetual, and which the executor could not, by any physical possibility, carry out. The court said: "Where the testator has, by neglect or mistake, failed to name one capable of executing the trust, a court of equity will carry it into effect by appointing an efficient trustee."

In *Lightfoot v. Poindexter* (1918) — Tex. Civ. App. —, 199 S. W. 1152, the action was by an executor. The testatrix, it appeared, made a specific bequest of \$25,000 to \$35,000 to "Daniel Baker College of Brownwood, Texas," to be used for certain religious services. She also devised and bequeathed the residue of her estate to the said Daniel Baker College, to be used for the education of the youth of Brown county, Texas. It further appeared that at various times, by substantially the same promoters, four institutions were incorporated under the name, "Daniel Baker College of Brownwood, Texas." The object of these, or each of these, institutions, was, as stated in their respective charters, to promote the education of youths in all branches of knowledge. The plaintiff contended that the specific bequest of \$25,000 to \$35,000 was void for the reason that Daniel Baker College could not, under its charter, act as trustee of a religious trust. He also contended that the devise and bequest of the testatrix's residue estate was void, as it could not be ascertained to which of the four Daniel Baker Colleges the devise and bequest was intended to be made. The court, without granting that the plaintiff was right in point of fact as to either contention, stated that, even if the trustee named by the testatrix could not accept and carry out the respective trusts, the same would not fail, but the court would appoint a trustee to carry them out, saying: "But at last it could profit the appel-

5 A.L.R.—22.

lants in the case nothing, and they would not be heard to complain, if it should be held that the gift to Daniel Baker College is void for any reason, because the gift in the will is a charity, for the reason that it is made for the purpose of giving education to the youth of Brown county, and the manner in which this purpose shall be carried out is specifically stated in the will, and Daniel Baker College is merely the medium, under the provisions of the will, by which the charity is to be dispensed, or, in other words, Daniel Baker College is merely the trustee, and the youths of Brown county are the beneficiaries. Therefore, the will creates a charitable trust, and, if for any reason Daniel Baker College cannot take as trustee, the trust will not fail, because equity will not suffer it to fail for want of a trustee. Under the universal rule in this country and in England, when a charitable trust has been created and there is a failure of the trustee for any reason, a court of equity, having jurisdiction, will take charge of the trust and administer the same under a trustee appointed by it."

*e. Trustees appointed refusing to act.*

Where the trustee named or appointed by a donor of a charitable trust refuses to accept the trust, the same will not fail, since a court of equity has power to appoint another trustee.

**California.**—*Fay v. Howe* (1902) 186 Cal. 599, 69 Pac. 423.

**Delaware.**—*Doe v. Roe* (1909) 1 Boyce, 216, 75 Atl. 704; *Griffith v. State* (1847) 2 Del. Ch. 421.

**Georgia.**—*Thompson v. Hale* (1905) 123 Ga. 305, 51 S. E. 383; *Lloyd v. Webster* (1903) 117 Ga. 775, 45 S. E. 77.

**Illinois.**—*Garrison v. Little* (1898) 75 Ill. App. 402.

**Massachusetts.**—*Richards v. Church Home* (1913) 213 Mass. 502, 100 N. E. 631; *Cranford v. Nies* (1916) 224 Mass. 474, 113 N. E. 408.

**New Hampshire.**—*Winslow v. Stark* (1916) 78 N. H. 135, 97 Atl. 979; *Campbell v. Clough* (1901) 71 N. H. 181, 51 Atl. 668.

**Rhode Island.**—*Meeting Street Baptist Soc. v. Hail* (1865) 8 R. I. 234.

**Tennessee.**—*State v. Ausmus*, — Tenn. —, 35 S. W. 1021.

**Texas.**—*Tunstall v. Wormley* (1881) 54 Tex. 476.

**Wisconsin.**—*Sawtelle v. Witham* (1896) 94 Wis. 412, 69 N. W. 72.

**England.**—*Denyer v. Druce* (1829) Tamlyn, 32, 48 Eng. Reprint, 14; *Reeve v. Atty. Gen.* (1843) 3 Hare, 191, 67 Eng. Reprint, 351, 7 Jur. 1168.

Thus, in *State v. Griffith* (1847) 2 Del. Ch. 392, it appeared that a testator devised a large part of his estate to three persons in trust, the income thereof to be applied to the support, maintenance, and education of the poor white citizens of a certain district. The testator further provided that the income should be distributed "by agents to be appointed by the orphans' court or the levy court of Kent county." It further appeared that the trustees appointed by the testator refused to accept the trust. It was held, however, that the trust would not fail, as the court could appoint another or other trustees. The court of errors and appeals ((1848) 2 Del. Ch. 421) in affirming the chancellor's decision, said: "Assuming the fact, which is conceded in the argument, that the testator designed by this devise to create a trust for charitable uses and purposes, and that he employed proper and suitable language to convey the legal estate to the trustees, we proceed to the consideration of the respective questions presented by the case stated and the argument in the cause. It can scarcely be necessary to do more than merely glance at the objections made to the validity of this devise on the ground that there are no trustees to execute the trust. The trustees designated and appointed by the testator may, it is true, decline and refuse to execute the trust; but we are at a loss to conceive on what principle such refusal can divert the fund from the legitimate objects of the trust, and thus defeat both the will and the testator and the charity. It is a principle too well settled to require the aid of reasoning or argument at the present day that a valid trust shall never fail for want of a proper trustee. 2 Sug-

den, Powers, 174; *Asby v. Doyl* (1637) 1 Ch. Cas. 180, 22 Eng. Reprint, 761; 2 Co. Litt. 190b, § 4. It is a general principle of equity that wherever may be the legal estate, if the trust is valid, it will be protected and enforced in a court of equity. It is also a general rule that a legacy given in trust does not lapse by the death of the trustee in the testator's lifetime, but survives for the benefit of the cestui que trust. The substance of the charity remains, notwithstanding the death of the trustee in the testator's lifetime, although at law the legacy lapses. *Shelford, Mortmain*, 367. It is sufficient that the trust appears; and if the party creating it does not appoint a trustee to execute it a court of equity will follow the legal estate, and decree the person in whom it is vested a trustee to execute the trust. *Ambler's R.* 571; 1 Bro. Ch. Rep. 81. Lord Coke says it is a rule of equity which admits of no exception that a valid trust shall not fail for want of a trustee to execute it; but a court of equity will execute the office. Coke, Litt. 113 a, note. Trusts are often created by will without the designation of any trustee to execute them; or it may be matter of doubt, upon the terms of the will, who is the proper party. But a court of equity will not hesitate, where doubts exist as to the party, to declare who is the proper person to execute the trust; and where no trustee is designated, it will proceed to execute the trust by its own authority."

In *Richards v. Church Home* (1913) 213 Mass. 502, 100 N. E. 631, it appeared that a testatrix gave part of her estate to the Massachusetts Hospital Life Insurance Company in trust for the free treatment of the insane in the asylum of the corporation. The hospital refused to accept the trust. However, the court sustained the trust by appointing another trustee. In this case it was said: "We have then a bequest made to a designated trustee for a definite charitable purpose; but the trustee declines to accept the bequest or carry out the trust, and indeed has not, by its charter, the power to do so. The trust can, however, as well be administered by any other trustees as

by the one whom the testatrix selected. In such a case the charitable purpose should not be defeated by the failure or inability of the trustee to act, but a new trustee should be appointed to administer the trust in the manner appointed by the testatrix. It is not like the cases relied on by her next of kin, in which the charitable purposes cannot be carried out, and must be either abandoned or administered on the *cy près* doctrine; and those decisions are not applicable here. It is merely necessary to appoint a new trustee. The case at bar resembles more nearly *Richardson v. Mullery* (1908) 200 Mass. 247, 86 N. E. 319, than *Bowden v. Brown* (1908) 200 Mass. 269, 128 Am. St. Rep. 419, 86 N. E. 351, though it differs from both of them in the fact that here the charitable purpose of the testatrix can be fully and exactly carried out by another trustee than the one nominated in the will. Under these circumstances it is eminently fitting that the legal title should be taken and the trust administered by the Massachusetts General Hospital, the owner and maintainer of the asylum in question."

#### IV. *Limitations on rule.*

##### a. *Trustee invested with discretion.*

It has been held that where the trustee or trustees appointed to execute a charitable trust are invested with personal discretionary powers as to its execution, and they die or refuse to accept the trust, the same will fail. *Down v. Worrall* (1833) 1 Myl. & K. 561, 39 Eng. Reprint, 793; *Fontain v. Ravenel* (1855) 17 How. (U. S.) 369, 15 L. ed. 80; *Colbert v. Speer* (1904) 24 App. D. C. 187, affirmed in (1906) 200 U. S. 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 201; *Hadley v. Hadley* (1897) 147 Ind. 423, 46 N. E. 823; *Beekman v. Bonsor* (1861) 23 N. Y. 298, 80 Am. Dec. 269.

In *Hadley v. Hadley* (1897) 147 Ind. 423, 46 N. E. 823, it appeared that three persons were appointed trustees to execute a charitable trust. The testator provided that, if they thought it practicable, they were to erect and maintain an "institution for the education of poor, virtuous, and aspiring

children and young persons." It further appeared that one of the named trustees died soon after the testator did. It was held that, as the testator reposed a special confidence in the trustees, the death of one of them invalidated the trust. The court said: "If the authority be committed to trustees, the presumption is that, as the power was coupled with an interest, it was meant to survive. If a power be a joint one, coupled with an interest, it will survive if one of the donees of the power die. But where it is a mere naked authority it will not survive. So, if the authority be to two or more in an official capacity, *ratione officii*, it will survive if one die. But if it be to them, *nominatim*, if they are clothed with a special confidence of a personal nature, it will not survive. . . . For if the act to be done requires an exercise of the judgment and discretion of the several persons named as trustees, it can only be exercised by them all. . . . Where the power is given to several donees, *nominatim*, it indicates the repose of a personal discretion in each, and the power will not survive the death of one of them. . . . And if the power be accompanied by a personal confidence and trust in the donee or donees, he or they alone can execute it; nor can it pass to others; it must be executed by the persons named, unless authority to substitute another is expressly given. . . . If the power of sale, or any other power, is given to two or more persons by name, with no words of survivorship, and one dies or refuses to act, the others cannot execute the power. . . . The power here given by the will, not being coupled with the interest, accompanied by no words of survivorship, and no authority given to any number of the trustees less than the whole, and *Mordecai Hadley*, one of the trustees, having died before the will creating the trust took effect, the trust is wholly inoperative and void for want of authority on the part of the surviving trustees to act."

In *Beekman v. Bonsor* (N. Y.) *supra*, it appeared that a will, among other things, provided as follows: "After

the expiration of ten years or sooner, if my executors find there will be sufficient funds, I would wish a public dispensary, as in New York, on a similar plan for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and also daily at the dispensary; my executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses; and, should there be any overplus, my executors within fifteen years may give it to any other charitable society or societies for relieving the comfortless and indigent they shall select. I say within fifteen years from my death. I say it is my will that my executors have a discretionary power, or a majority of them, within fifteen years after my decease, to pay over what remains after all legacies are paid, the residue and remainder of moneys arising from my worldly goods and effects, to such charitable societies for indigent and respectable persons, especially females and orphans, as they in their discretion shall think of." The final residuary clause is as follows: "And in the second place, after satisfying the provisions in my will in regard to the dispensary mentioned in my will, or in the first codicil thereto, I give and bequeath all my estate then remaining, if any there shall be, to my executors in trust, that they shall and may pay and apply the same in such sums, and at such time and times as in their discretion they shall think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies; hereby intended to give to my executors full discretionary power as to the disposition of the same, but so as that the same shall be applied to objects of charity." It further appeared that the executors named refused to accept the trust. It was held that, inasmuch as they were invested with discretionary powers in the execution of the trust, their refusal to act invalidated the trust, since

the court could not appoint other trustees. The court said: "It will be convenient to consider first that part of the will which related to the establishment of a dispensary for indigent sick and lame persons. By that provision the testator declared that he 'would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own houses, and also daily at the dispensary. My executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses.' According to one construction of this clause—a construction certainly plausible—a discretion was reposed in the executors to determine the location of the proposed establishment, its extent and particular characteristics, and the amount of funds to be devoted to the object. The actual exercise of that discretion by those in whom it was confided might, by rendering uncertainty certain, relieve the bequest from the objections arising out of its vague and indefinite character. The will of a testator may be ascertained by the acts of those to whom he has intrusted discretion and power. Such acts may be justly regarded as the definite expression of his own purpose. But, in this view of the present question, the objections encountered are that the discretion was personal to the individuals appointed to be executors, and that they renounced the trust. That the discretion was personal, and not official, it hardly needs argument to prove. The duties to be performed were of a responsible and delicate character; and they were certainly distinct from those which are usually devolved on the office of executor. For the performance of these duties, the testator selected the persons in whose integrity and fitness he was willing to confide; and he made no provision for a devolution of the trust upon anyone else in any event whatever. The plaintiff is the administrator with the will annexed; but he cannot, in that character, execute powers and trusts which were personal to the executors

who have renounced. . . . The written renunciation of the executors, filed in the office of the surrogate, was in terms of their office as such. That renunciation has been followed by twenty years of noninterference with the estate of the decedent, in any character whatsoever. They have never taken any step in the direction of giving effect to the charities confided to their judgment and discretion. In behalf of these charities, it has been argued that, although the assets of the deceased passed into the hands of the administrator, yet the personal trust reposed in the executors still lives, and is capable of execution. But their renunciation of the executorial office, followed by this long period of inactivity, can mean no less than an absolute and final abdication of the trusts contained in the will. They had a right to take that course. Conceding that they might, if they had chosen so to do, devise a plan for a dispensary, appoint the place of its location, and designate the necessary amount of funds, so that a court of equity might compel the administrator to appropriate the sum required, yet they were under no legal obligation to perform these acts. Having refused to qualify as executors, they never became accountable for any portion of the estate, to be applied in charity or otherwise. Rejecting, then, the estate and the executorial duties which the testator wished to cast upon them, they certainly were not bound to accept any peculiar and still more confidential relations which the will proposed. A testamentary direction, requiring some portion of an estate to be applied by the executor to a charitable object—the plan of the charity and the sum necessary for its execution to be designated by some person not the executor—might perhaps be enforced, if the person named elected to accept the personal trust and make the designation or appointment. But it is extremely plain that such acceptance must be voluntary. The right of renouncing a trust which has no necessary connection with the office of executor is no less clear than the right of renouncing the office itself; and, in

either instance, the right rests upon the very simple and elementary proposition that no man can be compelled, against his own will, to execute the testamentary wishes of another. . . . The argument, therefore, for sustaining the provision of the will, founded on a supposed discretion in the executor the exercise of which might render the testator's wishes definite and certain, must fall to the ground. Upon all the facts before us, their renunciation of all right or intention to act must be deemed final, and the discretion extinct and gone. Intestacy as to any portion of the estate designed for the dispensary is the necessary result; because, in this view of the subject, the testator has failed to speak. *Fountain v. Ravenel* (1855) 17 How. (U. S.) 369, 15 L. ed. 80.

In *Down v. Worrall* (1833) 1 Myl. & K. 561, 39 Eng. Reprint, 793, it appeared that the testator gave and bequeathed the residue of his personal estate to his executors and trustees, in trust for them to use for "charitable or pious purposes, at their discretion, or otherwise for the separate use of my sister, independent of her husband, and all or any of her children, in such manner as my said trustees shall think fit." After the testator died, the trustees used part of the trust funds for the benefit of the testator's sister and her children, and part for charitable purposes. Thereafter the trustees themselves died, leaving £500 of trust funds. It was held that this amount should go to the next of kin of the testator, since the court could not appoint a trustee to apply the same for charitable uses, inasmuch as the testator relied on the personal discretion of the trustees he had appointed. The court said: "Where a disposition is made in favor of charity, and the trustee fails, the court will interfere and execute the trust; but here no disposition is made in favor of charity as to the unappointed part. The trustees had a personal discretion as to the application of the fund; and, as they have died without exercising that discretion, this part of the property is undisposed of by the

testator, and belongs to the next of kin."

In *Fontain v. Ravenel* (U. S.) *supra*, it appeared that a will provided, among other things, that the executors or their survivors should dispose of his residuary estate, "for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of said states of Pennsylvania and South Carolina shall partake of the benefits thereof." The testator appointed four executors, among whom was his widow. He also provided that the executors should execute the trust after his widow's decease. But it appeared that the other three executors died before the widow did, and without having made any appointment as to the manner in which the charitable trust should be executed. It was held that the charitable trust must fail, as the testator had invested the trustees he had appointed with discretionary powers in appointing and executing the charities.

In *Colbert v. Speer* (1904) 24 App. D. C. 187, it appeared that a testator, among other things, provided that \$5,000 should be applied, "as I may hereafter verbally indicate to my trustees, or, if I fail, as my trustees, with the advice of proper persons, may decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown, in the District of Columbia." The testator never, during his lifetime, verbally directed the trustees how to execute the trust. It was held that this bequest must fail, as the court could not say who were "proper persons" to advise the trustees.

Compare the Pennsylvania statute quoted, *supra*, II.

*b. Objects of trust uncertain.*

Where the want of a trustee of a charitable trust is coupled with the fact that the trust is uncertain in respect to its objects, a court of equity will not appoint a trustee, and the trust will, therefore, fail. *Robbins v. Boulder County* (1911) 50 Colo. 610,

115 Pac. 526; *Grimes v. Harmon* (1871) 35 Ind. 198, 9 Am. Rep. 690; *Dodge v. Pond* (1861) 23 N. Y. 69; *Beekman v. Bonsor* (1861) 23 N. Y. 298, 80 Am. Dec. 269; *Bascom v. Albertson* (1866) 34 N. Y. 584. See also dictum in *While v. Newark* (1918) — N. J. Eq. —, 103 Atl. 1042. And see the reported case (*EWELL v. SNEED*, ante, 303).

In *Grimes v. Harmon* (1871) 35 Ind. 198, 9 Am. Rep. 690, it appeared that property was left in trust to "the Orthodox Protestant Clergymen of Delphi," Carrol county, Indiana, for the use and benefit of the "colored children and colored race." It further appeared that neither at the time the testator made his will, nor at any time after his death, was there in existence any organized corporation known as "the Orthodox Protestant Clergymen of Delphi." It was held that as there was a want of a competent trustee, and as the beneficiaries were indefinite, the trust failed.

In *Robbins v. Boulder County* (1911) 50 Colo. 610, 115 Pac. 526, it appeared that a testator bequeathed the sum of \$50,000 for the building of a hospital for "the comfort of poor widows and orphan children, while sick and unable to care for themselves." The testator appointed no one as trustee. The court held that while the beneficiaries, as a general class, were sufficiently designated by the testator, the particular individuals of the general class for which provision was made were indefinite and uncertain. The court stated, by way of dictum, that this fact alone would not be enough to render the bequest invalid, but held that the fact that the trust was indefinite and uncertain as to its objects, coupled with the further fact that the testator did not appoint a trustee to carry out the trust, rendered it invalid. The court said: "While this court is disposed to favor a bequest for charitable uses, and will strive, whenever it can be done consistently with the established pertinent principles of equity, to uphold and enforce them, it has not the power, like the court of chancery in England, to make a will for a testator which he himself has tried, but

failed to make. The *cy près doctrine* which, in one aspect, is but that of approximation, is applied in many of our states. But the prerogative of the King, as *parens patriæ*, under the sign manual, does not belong to the equity courts of this country in construing wills, though it is conferred upon, and is exercised by, the chancellor in England, as the agent or personal representative of the Crown. While the Statute of 43d Elizabeth is, according to the decisions in *Clayton v. Hallett* (1902) 30 Colo. 231, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429, a part of the law of this state, yet it is not the origin of the doctrine of charitable trusts which the equity courts of England, both before and after its adoption, were wont to enforce. Applying what we consider well-established principles in the law of charitable trusts, it is apparent that this bequest must be held void. The will contains no plan for executing the trust. It is entirely silent on that subject. The testator has entirely failed himself to appoint a trustee, or by any provision of his will to clothe his executors or trustees, to be later appointed by the court, with the power to determine who shall be the individual beneficiaries. Courts of equity may, in certain cases, appoint trustees of a charitable trust where the testator himself has failed to name them; but no well-considered case in this country has been called to our attention, except where the broad English chancery doctrine is enforced, which holds, where a will is thus silent, that the court may appoint a trustee and invest him with power which only can be given by the testator himself, unless the testator in his will makes provision for such appointment by the court, or otherwise delegates such power of appointment, or has provided in detail how the trust may be executed."

A bequest "for the support of indigent and respectable females" was held, in *Beekman v. Bonsor* (1861) 23 N. Y. 298, 80 Am. Dec. 269, to be void, the trustee appointed by the donor renouncing the trust.

A devise of "the residue of my estate, to be kept in reserve for further

consideration in the way of charitable purposes, in a liberal way, not to any particular creed or sect of religion," was held, in *Norcross v. Murphy* (1888) 44 N. J. Eq. 522, 14 Atl. 903, to be void, it appearing that the testatrix appointed no one to execute the trust. The court said: "If the concession were made that the testatrix has in fact devoted this fund to charitable purposes, still the bequest is void, as the gift is general, and there is no testamentary designation of a person to select the objects of the benefaction. The legal rule that avoids a bequest of this general character, under the conditions mentioned, is too well established to admit of discussion. It is stated in all the textbooks. Thus Jarman formulates it: 'To constitute a charitable use there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. In case of a grant or demise, when there is no party or parties designated who can take the property, or where they are so uncertain that the court cannot direct intelligently the execution of the trust, the property remains undisposed of and falls to the heir or next of kin.' In the present will, if there be a gift, it is 'in the way of charitable purposes, in a liberal way;' and, therefore, unless we can say that some person has been indicated to make selection of the unnamed beneficiaries, the gift cannot be put in effect."

In *Dodge v. Pond* (1861) 23 N. Y. 69, it appeared that one Phelps left \$50,000 to his executor to establish a college in Liberia, Africa, provided an additional \$100,000 could be raised in the United States for this purpose. The testator made no provision as to the object or objects for which the college was to be established, and made no provision for the successor or successors to his executor, as trustee. It was held that the trust must fail.

In the reported case (*EWELL v. SNEED*, ante, 303), it is held that a fund for "educating young ministers of the Presbyterian Church" failed as a charitable trust, because the donor of the fund named an unincorporated society as the appointor of the two

persons who were to act as the trustees of the fund.

In *Bascom v. Albertson* (1866) 34 N. Y. 584, it appeared that a will provided as follows: "All the rest, residue, and remainder of my property and estate, of whatsoever kind, and wherever situated, and whencesoever derived, I give, devise, and bequeath unto the five persons who shall be named and appointed trustees, by the supreme court of the state of Vermont, to found and establish an institution for the education of females, to be located in Middlebury aforesaid, and of which mention is hereinbefore made. . . . The sum of \$25,000, parcel thereof, to be paid over to such five persons, residents of the county of Addison in the state of Vermont, as shall be named and appointed by the judges of the supreme court of the state of Vermont, to be trustees, to found, establish, and manage an institution for the education of females, to be located in the town of Middlebury, in said state of Vermont," etc. It further appeared that after the testator's death the judges of the supreme court of Vermont appointed one Bascomb and four other persons to act as trustees for the charitable trust created by Nichols. The trustees brought an action to recover the sums bequeathed, but the trial court held that the charitable trust was invalid, as the donor did not appoint trustees himself. On appeal, the judgment was affirmed. The court said: "We cannot reverse the judgment rendered by the supreme court in favor of the respondents, unless we are prepared to affirm it to be the law of this state: (1) That any citizen can create a valid and effectual trust, existing *proprio vigore*, with neither trustee nor *cestui que trust*. (2) That any testator can make a gift of his estate, designating no donees, either of the legal title or of the equitable interest, which shall yet be effectual to withdraw his property from the operation of the Statutes of Descent and Distribution. (3) That any citizen may lawfully ordain by will that his property shall vest, at his death, in no human being and no corporate body, and the

absolute ownership and power of alienation shall be suspended for an indefinite period thereafter, not measured by lives in being. (4) That the *cy près* doctrine of the English courts of chancery exists in this state, and that the supreme court, in a case like this, is clothed with the power and charged with the duty of devising a scheme of charity, and decreeing its execution, though none was framed by the testator. No sanction for these propositions can be found in the laws of this state. Our own decisions lie in the path between us and such a judgment. We could only reach such a result by overruling six deliberate adjudications of this court, all subsequent to *Williams v. Williams* (1853) 8 N. Y. 525. . . . The proposition that a trust for undefined beneficiaries is void under the law, in the absence of a trustee to take the legal title, in the first instance, was reaffirmed in the subsequent cases of *Dodge v. Pond* (1861) 23 N. Y. 77, and *Beekman v. Bonsor* (1861) 23 N. Y. 311, 80 Am. Dec. 269. It does not follow from this proposition that, where there is a valid trust for ascertained beneficiaries, it will be permitted to fail for want of an original trustee; for, in such case, chancery will supply the defect, in the exercise of its ordinary jurisdiction over trusts in general. Neither does it follow that a trust for undefined beneficiaries, void in itself for uncertainty, is rendered valid, under our law, by the designation of a trustee in the first instance, to receive the nominal legal title; though there is a dictum to that effect in *Owens v. Missionary Soc.* (1856) 14 N. Y. 406, 67 Am. Dec. 160, which is repeated in the *Beekman Case* (1861) 23 N. Y. 310, 80 Am. Dec. 269, and *Downing v. Marshall* (1861) 23 N. Y. 382, 80 Am. Dec. 290. In neither was it the point in judgment, and in both the suggestion was made in deference to views expressed in the *Williams Case*, which the court was reluctant to overrule. It is quite true that, in the English court of chancery, such a trust would have been supported, under the Statute of Elizabeth; and we are convinced by the able and lucid demonstration of



Professor Dwight that it might have been sustained in that court, prior to and irrespective of the statute; but we think it would have been in the exercise of its jurisdiction, as enlarged and aided by the royal prerogative and the *cy près* power, which do not appertain to our judicial tribunals, in the absence of a special grant from the legislative department of the government. *Fontain v. Ravenel* (1855) 17 How. (U. S.) 392, 393, 15 L. ed. 89, 90. The trust which the testator in this instance attempted to create was singularly vague and indefinite. He not only designated no donees of the legal title, and no beneficiaries in the equitable interest, but he indicated no specific and ascertainable class of females as the objects of his bounty, and gave no directions for the foundation of the proposed institution 'capable of being executed by judicial decree'—a condition essential to the validity of the bequest, as conceded even in the *Williams Case* (1853) 8 N. Y. 548. The gift in question could not be sustained, under the authority of that decision; and certainly not, within the limitations of its doctrine in subsequent cases. If a testator desires for his private behoof, to found a charity in his own name, and to endow his trustees with corporate attributes, free from corporate responsibility, he must, at least, project his own scheme, declare his own will, and not cast upon the courts the burden of completing a work which he has left undone. It is not the province of the judges to project schemes of charity for insertion in dead men's wills, by way of supplement to partial declarations of trust, void on their face for uncertainty."

To the same effect, in *Downing v. Marshall* (1861) 23 N. Y. 366, 80 Am. Dec. 290, the court said: "And, first, we think that the residuary devise and bequest were void as to the unincorporated Home Missionary Society. That society is composed of a fluctuating and unascertained class of persons, having no legal capacity to take

the gift. The beneficiaries are the entire community within the influence of the society. There is no trustee competent to take the fund so as to secure its appropriation to the benevolent purpose intended. That such a gift is void according to legal rules, it needs no argument to prove. There is no trustee, and there are no beneficiaries ascertained, either as individuals or as a class of persons. These objections are fatal. It is said that a trust shall never fail for want of a trustee, because a court of equity will supply the defect. But this is true only of a valid trust, and, in order to be valid, it must be so constituted that a title can vest in some person, natural or artificial, by force of the gift itself. The principles on which this question depends have heretofore been fully examined by this court. A charitable donation, precise and indefinite in its purpose, void at law because the beneficiaries are unascertained, may be maintained if there be a competent trustee to take the fund and effectuate the charity. If there be no such trustee, it fails, and the heir or next of kin is entitled. . . . It is true in the present case that, according to the dispositions made by the testator, the executors were appointed the devisees and legatees in trust; but they were not constituted trustees of the charity. The objects of the charity were mankind in general, or that portion of mankind within the sphere of the missionary labor carried on by the society. It had no trustees except the unincorporated persons forming the society itself. The duty of the executors would be fully performed by paying over the income, and ultimately the principal, of the fund to any agent of those persons. Those persons were a fluctuating body unknown to the law, irresponsible to the courts, and incapable of receiving a gift, even for a purpose which the law may denominate charitable."

Compare the Pennsylvania statute quoted *supra*, II. C. M.

WILEY P. MANGUM, Plff. in Err.,  
v.  
NORFOLK & WESTERN RAILWAY COMPANY.

*Virginia Supreme Court of Appeals—June 12, 1919.*

(— Va. —, 99 S. E. 686.)

**Carrier — right to re-enter train after ejection.**

1. A passenger once lawfully ejected for nonpayment of fare, at a point where the train would not otherwise have stopped, has no right to re-enter the train upon tender of fare; nor has he a right to continue his journey by tender of fare after the signal for stopping the train has been given.

[See note on this question beginning on page 352.]

**— illegal ejection of passenger — rights.**

2. One illegally ejected from a railroad train may re-enter it and continue his journey thereon.

[See 5 R. C. L. 119, 121.]

**— right to eject passenger**

3. A conductor, who, upon being tendered an invalid ticket, informs the passenger that he must either pay fare or get off, cannot eject the passenger if he tenders the fare before the signal has been given to stop the train, although at first he signifies his election to be ejected.

[See 5 R. C. L. 119.]

**Evidence — demurrer — inferences.**

4. Upon demurrer to the evidence, if several inferences may be drawn from the evidence differing in degrees of probability, the court must adopt those most favorable to the demurree, provided they are not forced, strained, or manifestly repugnant to reason.

**Carrier — time allowed passenger to determine course of action.**

5. A passenger, who, acting in good

faith, tenders a void ticket which he believes to be valid, is entitled to a reasonable time to determine his course of action after being informed of the invalidity of the ticket, before he can be ejected from the car.

[See 5 R. C. L. 117.]

**— judge as to validity of ticket.**

6. As between passenger and conductor, the conductor is the sole judge as to the validity of a ticket tendered for fare.

**— liability for wrongful arrest.**

7. A railroad company is liable for arrest and imprisonment of a passenger who re-enters its train after having been unlawfully ejected because of an altercation as to payment of fare.

[See 4 R. C. L. 1173.]

**Damages — illegal arrest — excess.**

8. Two thousand dollars is not excessive to award a passenger illegally arrested for nonpayment of fare, who is taken from the train to the police station in the patrol wagon, and locked up with common criminals for several hours.

**ERROR** to the Circuit Court for Prince George County to review a judgment in favor of defendant in an action brought to recover damages for alleged wrongful ejection from its train. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Richard H. Mann and Bernard Mann, for plaintiff in error:

If several inferences may be drawn from the evidence, differing in degrees of probability, the court must adopt those most favorable to the demurree, provided they be not forced, strained, or manifestly repugnant to reason.

*Horner v. Speed*, 2 Patton & H. (Va.) 616; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97.

The conductor had no right to eject the plaintiff under the circumstances of this case.

3 Moore, Carr. 2d ed. 1914, p. 1181; *O'Brien v. New York C. & H. R. Co.* 80 N. Y. 236; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Louisville & N. R. Co. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556, 8 Am. Neg. Cas. 556;

2 Hutchinson, Carr. 3d ed. § 1085; 4 Elliott, Railroads, § 1637; 5 R. C. L. § 749; Gates v. Quincy, O. & K. C. R. Co. 125 Mo. App. 334, 102 S. W. 50; 5 Am. & Eng. Enc. Law, 597; Holt v. Hannibal & St. J. R. Co. 174 Mo. 524, 74 S. W. 631; Kansas City, P. & G. R. Co. v. Golden, 66 Ark. 602, 53 S. W. 45; Beck v. Quincy, O. & K. C. R. Co. 129 Mo. App. 7, 108 S. W. 132; Gulf, C. & S. F. R. Co. v. Bunn, 41 Tex. Civ. App. 503, 95 S. W. 640; Curl v. Chicago, R. I. & P. R. Co. 63 Iowa, 417, 16 N. W. 69, 19 N. W. 308; Clark v. Wilmington & W. R. Co. 91 N. C. 506, 49 Am. Rep. 647; Louisville & N. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640; Texas & P. R. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532.

The conductor had no right to refuse to allow the plaintiff to get back on the train as a passenger.

5 R. C. L. § 749; Stone v. Chicago & N. W. R. Co. 29 Am. Rep. 458, and note, 47 Iowa, 82; Swan v. Manchester & L. R. Co. 132 Mass. 116, 42 Am. Rep. 432; Davis v. Kansas City, St. J. & C. B. R. Co. 53 Mo. 317, 14 Am. Rep. 457; Manning v. Louisville & N. R. Co. 16 L.R.A. 55, and 36 Am. St. Rep. 227, notes; Kirk v. Seattle Electric Co. 31 L.R.A.(N.S.) 995, note; 5 Am. & Eng. Enc. Law, 597; Moore, Carr. 2d ed. p. 1396; O'Brien v. New York C. & H. R. R. Co. 80 N. Y. 236; Nelson v. Long Island R. Co. 7 Hun, 140.

The company was responsible for the plaintiff's arrest.

6 Enc. L. & P. 541; 4 R. C. L. § 488; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Krulevitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613; King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42; Moore v. Metropolitan R. Co. L. R. 8 Q. B. 36, 42 L. J. Q. B. N. S. 23, 27 L. T. N. S. 579, 21 Week. Rep. 145; Hutchinson, Carr. New ed. § 110; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; Gulf, C. & S. F. R. Co. v. Conder, 23 Tex. Civ. App. 488, 58 S. W. 58; Schmidt v. New Orleans R. Co. 116 La. 311, 7 L.R.A.(N.S.) 162, 40 So. 714; McKain v. Baltimore & O. R. Co. 65 W. Va. 233, 23 L.R.A.(N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634; Tucker v. Erie R. Co. 69 N. J. L. 19, 54 Atl. 557; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479; Norfolk & W. R. Co. v. Perdue, 117 Va. 111, 83 S. E.

1058; Southern R. Co. v. Grubbs, 115 Va. 876, 80 S. E. 749.

The damages allowed by the jury were not excessive.

Burton v. Mill, 78 Va. 481; Ruffner v. Williams, 3 W. Va. 243; Bolton v. Vellines, 94 Va. 393, 64 Am. St. Rep. 737, 26 S. E. 847; Forbes v. Hagman, 75 Va. 168.

Messrs. Theodore W. Reath, William B. McIlwaine, and J. M. Townsend, for defendant in error:

A ticket is conclusive evidence to the conductor of the passenger's right to transportation; the conductor, acting in good faith, must be the sole judge of the validity of the ticket.

Virginia & S. W. R. Co. v. Hill, 105 Va. 729, 6 L.R.A.(N.S.) 899, 54 S. E. 872; Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342, 26 Am. Rep. 531, 8 Am. Neg. Cas. 425; Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; Louisville & N. R. Co. v. Riely, 121 Va. 469, L.R.A.1918A, 775, 93 S. E. 574; Poulin v. Canadian P. R. Co. 17 L.R.A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Murdock v. Boston & A. R. Co. 187 Mass. 293, 50 Am. Rep. 307.

After steps have been taken by the conductor to eject a person who fails to tender a valid ticket or to pay his fare, such person cannot immediately thereafter demand transportation as a passenger upon tender of fare.

Hutchison v. Southern R. Co. 109 S. C. 90, 95 S. E. 181.

The arrest of Mangum for re-entering the train after ejection was lawful.

Virginia R. & Power Co. v. O'Flaherty, 118 Va. 749, 88 S. E. 312, Ann. Cas. 1918D, 471.

Burks, J., delivered the opinion of the court:

This was an action of trespass on the case, brought by Wiley P. Mangum against the Norfolk & Western Railway Company. After all the evidence on both sides had been introduced, the defendant demurred to the plaintiff's evidence. The case will be stated, therefore, under the rule obtaining on a demurrer to the evidence, which is too familiar to occupy space in restating it.

In 1916, there was in operation at Hopewell what is generally known as the Dupont Munition Works, em-

ploying many thousand operatives. Hopewell is 9 miles from Petersburg, and large numbers of these operatives lodged in Petersburg. These operatives worked in shifts, so that many of them had to be transferred from one city to the other at least twice a day. During this period, the Norfolk & Western Railway Company operated between the two cities a number of trains daily. These trains were composed of fifteen or sixteen coaches each, and were generally crowded even on the platforms. Some, if not all, of these trains carried three conductors to collect fares, and, as the distance between the cities was so short, it took practically all of their time to collect the fares. There were no regular stops between the two cities, but there were several flag stations where passengers would be taken on or put off upon signal to the engineer. No tickets were required to entitle a passenger to ride, but the rate was the same whether paid in money or by the use of a ticket. The railroad company, however, sold two kinds of round-trip tickets good for two days only, including the date of issue, one known as a "reel" ticket, the other as a "card" ticket. The date of the sale was printed on the face of the reel tickets and stamped on the back of the card tickets. The railroad company sold several thousand of these tickets daily. The character of the employees of the munition works who were transported by the railway company daily between the two cities is described by one witness as "the worst people on earth, just the scrapings or scrubs of the earth, they came from all parts of the world," and by another as being "about as rough as they could get." The straight fare was only 25 cents, but they resorted to all sorts of expedients to avoid its payment. One of the witnesses says: "I have known them to band together in order to beat the conductor and to give him trouble, and one would make the conductor stop the train and put him off, and five or six others would

drop off the train and run around where the conductor had been already, in order to get down free."

Again: "You could come along with your punch and a man would have a round-trip ticket, and when you would punch it he would hold his hat there and catch the punch part, and after you went past he would get that punch part and put it back and pass it to-morrow morning; he would give you that same ticket to punch again."

Owing to conditions on the road, the company had special police agents on all of these trains to preserve order and to assist the conductors in enforcing the rules of the company. The ejection of passengers was of almost daily occurrence.

The plaintiff, Mangum, testifies that on March 10, 1916, he purchased a round-trip reel ticket about 3 o'clock P. M., rode from Petersburg to Hopewell on it, and came back on the street car, and put it into his vest pocket and kept it there until "it had gotten out of date."

In answer to further interrogatories, he testified as follows:

Q. Now, please explain to the jury what ticket you had on the 14th of March, 1916, where you got it, and how you came to get it?

A. Well, this ticket dated for the 10th I had left over in my vest pocket, and the ticket which was dated the 13th which I was using on the morning of the 14th, as I was coming out from the plant after 7 o'clock to get on the morning train from Hopewell that leaves there at 7:30, as I was coming out of the subway a young man hollered, "Ticket for sale," and me knowing that I did not have any ticket, I asked him, I said, "What is the price of the ticket?" and he said, "Ten cents," and I gave him 10 cents, and turned the ticket over and looked at it and just merely saw that it was dated for the 13th. That is all the inspection I gave the ticket whatever, and I put it in my pocket and went and got on the train. The conductor came through taking up the tickets, and I ran my hand in

my pocket and got the ticket. I got this one dated the 10th, this reel ticket, and the conductor took the ticket and made a space or two ahead, and came back and said, "This ticket is no good," and I seen right away what I did, so I put my hand in my pocket and got the second ticket, which was dated the 13th, and which was apparently a good ticket. I thought it was then, and I think yet it is a good ticket, and I tendered the ticket to the conductor, and he made a space or two ahead the second time, and came back, and said: "This ticket is no good. You will have to pay your fare or get off." And my thinking it was a good ticket, and I yet believe it is a good ticket, I said to him, "Well, pull it down." He pulled the cord, and as I did so I realized where I was at, and I was worn out from twelve hours' work, and traveling back and forth, and I decided that I would pay him rather than be put off there like I would have been, so I proceeded to get up as he was pulling the cord the first time, to give the engineer the signal to stop, and I brought some money from my pocket. I couldn't say just the amount, but I had some change. I do not think I had a quarter then, but I had a quarter in my pocket, and I offered to pay the conductor, and he said, "No, it is too late now, you will have to get off." . . .

Q. When you told the conductor, "Well, pull her down," or something like that, did you think he was going to pull it down?

A. No, sir; I had no idea he would stop the train and put me off, because I thought I had a good ticket all the time.

Q. And when you saw, or as soon as you saw, that he was going to put you off, then you made a tender of your fare, and he told you it was too late?

A. Yes, sir; I tendered the fare before he got through pulling the first time on the cord, which was the signal to stop the train. . . .

Q. Now, just tell the jury, Mr. Mangum, what happened after the

train started, after you were put off?

A. After I was put off the train, of course, the train started up, and I let the coach pass me that I had just gotten off, and there was a young gentleman on there, and he held up his hand and called out to me, and he said: "Come and get on. I have some money to pay your fare." And I said, "No, I have got the money myself." So I decided that I had a right to ride that train on in, I had not done anything, and I got on the step to the second car; in other words, I got off the front end of one car and got on the front of the next, and got up on the steps and was standing there with one foot on the platform, and one on the step, and this young gentleman came back, and seen me and then got a detective.

The signal to stop a train is two pulls on the cord. A single pull means nothing. After Mangum was put off, the train started, and he got on the coach next to the one from which he was ejected. The conductor saw him and had him arrested by the special police officer on the train, who detained him in the baggage coach until they arrived at Petersburg. He testified: "I offered to pay my fare the second time when I got back on the train, and they refused it."

At Petersburg he asked the police officer to permit him to walk up to the police station, but the offer was declined, and the patrol wagon was called up over the phone, and Mangum was put in the "cage" of the wagon, and taken to the police station. Here he was searched and then placed in the "lockup" among "negroes and negro women, and a low-down class of white women and all kinds of men," and kept there about two hours. He was then brought before the police justice, who dismissed the case for want of jurisdiction, as the alleged trespass, if any, did not occur within his jurisdiction. When the card ticket (the second one presented) was presented to the conductor, the con-

ductor said it was "no good," and that Mangum must pay his fare or get off. He did not assign any reason, at that time, why it was "no good;" nor did Mangum ask any, but simply said, "Well, pull it down." But before this suggestion was acted on, and while the conductor was "pulling the cord the first time to give the engineer the signal to stop," Mangum testified that he changed his mind and offered to pay his fare; but the conductor said: "No, it is too late now; you will have to get off." Mangum further testified that he thought at that time, and still thought at the time of the trial, that the ticket was "a good ticket." The company claimed that the date stamped on the back of the ticket had been changed and that it was out of date, and, further, that an inspection of the ticket would disclose the fact that the original date had been erased and another stamped in its place. When Mangum was asked if he could see where the ticket had been tampered with, he replied: "Not to detect it with my natural eye, to know positively it had, I could not." The original ticket was presented in the trial court and also in this court. It is said to have been handled a great deal during the trials, and not now to present the same appearance as when tendered, and it bears the appearance of having been much handled, but at present the erasure, if any, is not apparent.

If Mangum was illegally ejected from the train in the first instance, he never lost his rights as a passenger, and had the

**Carriers—  
illegal ejection  
of passenger—  
rights.**

right to re-enter it, though not put off at a regular station, and to continue his journey, upon tender of the regular fare from Hopewell to Petersburg, and, if the tender was refused, the subsequent acts of the servants of the company, hereinbefore detailed, were illegal, and he had the right to recover damages therefor.

The circumstances surrounding the conductor were very trying. He

had a very short run to make and many tickets to take up. The company was issuing several thousand round-trip tickets a day containing a two-days' limit, and he had to inspect the dates carefully to see that the tickets were valid. He had very little time to parley on the subject, and he was handling a class of passengers whom he knew were endeavoring to defraud the company of its fare to such an extent that ejections of passengers were of almost daily occurrence. It was his duty to see that each passenger paid his fare, and in this case the passenger had tendered him a second ticket that was out of date. The passenger gave no explanation of his conduct, and the conductor was not chargeable with knowledge of his thoughts. When told that his second ticket was "no good," and he must pay his fare or get off, his reply was, "Well, pull it down," thereby refusing to pay his fare, and accepting the alternative presented to him. If the conductor had then "pulled it down" and put him off, he would have been without fault. But before he could do so, the passenger recanted and offered to pay his fare. It is true that the conductor had to act promptly, but not instantaneously, for there were several flag stops on the route at which stops were made on request, and the time taken by the passenger to recant was much less than would have been required to make one of these stops. Aggravating as the situation was, the conductor should have accepted the fare when tendered, and not have put the passenger off. There was some evidence on behalf of the plaintiff tending to show that the passenger did not make his tender of payment till after the conductor had "pulled it down" and the train was slowing up; but Mangum testifies distinctly to the contrary, and his statement must be accepted as true, because, on a demurrer to the evidence, "if several inferences may be drawn from

**—right to eject  
passenger.**

**Evidence—  
demurrer—  
inferences.**

the evidence, differing in degrees of probability, the court must adopt those most favorable to the demurree, providing they be not forced, strained, or manifestly repugnant to reason." *Horner v. Speed*, 2 Pat-ton & H. (Va.) 616.

After Mangum was arrested and carried into the baggage car, it was explained to him that the serial number of his ticket and the space between the figures of the date stamped on it, as well as the erasure, showed the invalidity of his ticket, and he again offered to pay his fare, but it was refused. It required but a little time to give this explanation, and doubtless if it had been given in the first instance the fare would have been paid, but it was not given. If Mangum was acting in good faith, and honestly believed that his ticket was good and entitled him to passage, he was entitled to a reasonable parley with the conductor, or reasonable time in which to determine upon his course of action. There was evidence in the case from which the jury might have found

that Mangum was acting in good faith and honestly believed that his ticket was good, and that the conductor did not give him a reasonable time within which to determine upon his course of action, and consequently we must so hold.

The decided cases on the right of the carrier to eject a passenger for refusal to pay his fare are very numerous, and not altogether in harmony. It will not be necessary to discuss the nice distinctions drawn in some of them; but, confining ourselves to the facts of the case in judgment, the following propositions of law applicable thereto seem to be well sustained by the authorities: As between the passenger and

the conductor, the conductor is the sole judge of the validity of the ticket tendered in payment of the fare. If he decides that the ticket is invalid, he has the right, upon so notifying the passenger, to

require the passenger to pay his fare, and, if he refuses to do so, to eject him from the train. If the passenger is acting in good faith and honestly believes his ticket is good and that he is entitled to ride thereon, he is entitled to a reasonable time and a fair opportunity to decide whether or not he will pay his fare. After he has had such time and opportunity, if he refuses to pay his fare, the conductor may eject him, and, when once lawfully ejected at a point at which that train would not otherwise have stopped, he has no right to re-enter that train upon tender of fare.

—right to re-enter train after ejection.

The passenger's right to tender his fare and continue his journey, after having refused payment, continues until the conductor has rightfully given the engineer the signal to stop the train,—no longer. A tender after the signal to stop has been rightfully given comes too late to revive the right of the passenger, which he lost by refusal to pay his fare. He may not thus interfere with the proper conduct of the carrier's business, and the convenience and safety of the traveling public. *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118, 18 N. W. 580, 8 Am. Neg. Cas. 430; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531, 8 Am. Neg. Cas. 425; *Virginia & S. W. R. Co. v. Hill*, 105 Va. 729, 6 L.R.A. (N.S.) 899, 54 S. E. 872; *Pease v. Delaware, L. & W. R. Co.* 101 N. Y. 367, 54 Am. Rep. 699, 5 N. E. 37; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556, 8 Am. Neg. Cas. 556; *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668; *Texas & P. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532; *Missouri, K. & T. R. Co. v. Smith*, 81 C. C. A. 598, 152 Fed. 608, 10 Ann. Cas. 939; *Hoffbauer v. Delhi & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; *Kirk v. Seattle Electric Co.* 31 L.R.A. (N.S.) 991, and note, 58 Wash. 283, 108 Pac. 604; *Georgia Southern & F. R. Co. v. Asmore*, 88 Ga. 529, 16 L.R.A.

53, 15 S. E. 13; 2 Hutchinson, Carr. 3d ed. § 1085; 5 R. C. L. p. 119, § 749.

Upon the defendant's demurrer to the evidence, we must hold that the plaintiff in error acted in good faith, and honestly believed that his ticket was good and entitled him to passage; that the plaintiff in error offered to pay his fare while the conductor was pulling the bell cord for the first time, and before the stop signal had been completed; that the signal could easily have been stopped at this time, without inconvenience to anyone; and that the conductor wrongfully refused to accept the fare when so tendered, and wrongfully ejected the plaintiff in error from the train.

The ejection of the plaintiff in error being wrongful, all of the subsequent acts of the conductor and other employees of the company hereinbefore detailed were likewise wrongful, and for these wrongs the defendant com-

pany is liable. *Norfolk & W. R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058; *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; *Gulf, C. & S. F. R. Co. v. Conder*, 23 Tex. Civ. App. 488, 58 S. W. 58.

The verdict of the jury was not excessive. The plaintiff was unlawfully subjected to such humiliation, discomfort, and disgrace as entitled him to recover substantial damages. *Bolton v. Vel-lines*, 94 Va. 393, 64 Am. St. Rep. 737, 26 S. E. 847.

The judgment of the Circuit Court will be reversed, and this court will enter such judgment as the said Circuit Court ought to have entered, overruling the demurrer to the evidence and giving judgment in favor of the plaintiff for the sum of \$2,000, with legal interest thereon from June 1, 1917, until payment, and for the costs.

## ANNOTATION.

### Right of passenger who has been ejected to re-enter car or train.

- I. Introductory, 352.
- II. General rule, 352.
- III. Exceptions to rule:
  - a. Ejection at place other than station, 353.
  - b. Wilful refusal to pay fare, 355.
  - c. Misconduct of passenger, 356.

#### I. Introductory.

While the cases involving the right of a passenger to remain on a train after an ejection is commenced, but not actually completed, by making a belated offer to comply with regulations, are numerous and somewhat analogous, this note is confined to the cases wherein there was an actual, completed ejection of the passenger.

#### II. General rule.

The general rule established by the cases is that a passenger ejected from a train for the nonpayment of fare may, by an offer to pay the fare made before the train starts again, gain the

#### IV. Payment of back fare:

- a. General rule, 356.
- b. Special tickets, 357.
- c. Knowledge of invalidity of original ticket, 358.

right to continue his journey on the same train, provided the stop was made at a regular station, and not for the sole purpose of ejecting the passenger. *Chicago, B. & Q. R. Co. v. Bryan* (1878) 90 Ill. 126; *Louisville & N. R. Co. v. Breckinridge* (1896) 99 Ky. 1, 34 S. W. 702; *O'Brien v. Boston & W. R. Co.* (1860) 15 Gray (Mass.) 20, 77 Am. Dec. 347; *Nelson v. Long Island R. Co.* (1876) 7 Hun (N. Y.) 140; *Choctaw, O. & G. R. Co. v. Hill* (1903) 110 Tenn. 396, 75 S. W. 963; *Gulf, C. & S. F. R. Co. v. Bunn* (1906) 41 Tex. Civ. App. 503, 95 S. W. 640.

A passenger who is ejected for nonpayment of fare at a regular station



may, by obtaining a ticket or tendering the amount of fare in cash, gain the right to re-enter the train. *Nelson v. Long Island R. Co.* (1876) 7 Hun (N. Y.) 140.

A passenger who is peacefully ejected at a station because it is the proper transfer point to take a train for his destination, if he desires to transfer at another point, has the right to re-enter the train and continue to such latter point, on a tender of the fare. He is entitled to the same rights and privileges as any other person desiring to travel between the two points. *Louisville & N. R. Co. v. Breckinridge* (1896) 99 Ky. 1, 34 S. W. 702.

In *Chicago, B. & Q. R. Co. v. Bryan* (Ill.) *supra*, it was held that a passenger who refuses to pay amount demanded for passage to his destination, and who is rejected, the fare to the point of ejection being paid, has the right, on payment or offer of payment of fare from the point of ejection to his destination, to re-enter the train. His right to passage on that train is not forfeited by his original refusal to pay. The court said that the company has no power to adopt rules and regulations prohibiting decently behaved persons who will pay their fare and conform to all reasonable regulations for the safety and comfort of passengers, from traveling on the road, and that if the company could, for the reason alleged, debar appellee from traveling on that trip, for the same reason it might on the next or any subsequent trip.

In a case where a news agent, who, under contract between the railroad company and the employers of the agent, is treated in respect to railroad regulations as an employee of the railroad company, was discharged for a violation of regulations and ejected from the train at a regular station, it was held that he had the right to re-enter and continue on the train to a place where he decided to go, by payment of fare to that point. The court said that the train was at a regular stop, so that there was no delay or danger incurred by other passengers by his original expulsion. The agent was not in the position of one who

had forfeited his rights under a contract implied between himself and the company when he entered the train, by a refusal to pay his fare, thereby placing himself in the position of one who is endeavoring to make a new contract after being expelled for a breach of the old. He had, on the contrary, been traveling as an employee of the company, without the payment of any fare. *Choctaw, O. & G. R. Co. v. Hill* (1903) 110 Tenn. 396, 75 S. W. 963.

As to the right of passenger to return to train to get fare, it was held in *Gulf, C. & S. F. R. Co. v. Bunn* (1906) 41 Tex. Civ. App. 503, 95 S. W. 640, that where a passenger is ejected for nonpayment of fare at a regular stopping place, and he then states that if the conductor will allow him to return to the train he will borrow the money for the fare, which it was possible for him to do, he has the right to re-enter the train and continue his journey.

### III. Exceptions to rule.

#### a. Ejection at place other than station.

Where a passenger is ejected from a train at a special stop made for the purpose, he cannot, by a tender of fare, gain the right to continue his trip on the same train. *O'Brien v. Boston & W. R. Co.* (1860) 15 Gray (Mass.) 20, 77 Am. Dec. 347; *Nelson v. Long Island R. Co.* (1876) 7 Hun (N. Y.) 140; *Pickens v. Richmond & D. R. Co.* (1889) 104 N. C. 312, 10 S. E. 556, 8 Am. Neg. Cas. 556; *Norman v. East Carolina R. Co.* (1913) 161 N. C. 330, 77 S. E. 345, Ann. Cas. 1914D, 917. See also *Bland v. Southern P. R. Co.* (1880) 55 Cal. 570, 36 Am. Rep. 50, and *Pease v. Delaware, L. & W. R. Co.* (1883) 11 Daly (N. Y.) 350. Compare *South Carolina R. Co. v. Nix* (1882) 68 Ga. 572, 8 Am. Neg. Cas. 118.

Where a passenger is ejected for nonpayment of fare at a stop made for that purpose, then the conductor is under no duty to accept a tender of cash fare. *Norman v. East Carolina R. Co.* (1913) 161 N. C. 330, 77 S. E. 345, Ann. Cas. 1914D, 917.

Where a special stop is made for the purpose of ejecting a passenger for nonpayment of fare, he cannot, by a

tender of the entire amount of the fare in cash from his starting point to his destination, re-enter the train; he has forfeited his right to the completion of his journey on that train. *Pickens v. Richmond & D. R. Co.* (1889) 104 N. C. 312, 10 S. E. 556, 8 Am. Neg. Cas. 556.

The reason for the rule was given in *Nelson v. Long Island R. Co.* (1876) 7 Hun (N. Y.) 140, wherein it was held that a passenger who presents an expired ticket for payment of fare, and is ejected from the train at a place not a regular stopping station, cannot re-enter the same train. The court said that such delays to the train are dangerous to the lives of other passengers as well as injurious to the railroad's conduct of its business. Such stoppages are due only to the caprice of the passenger ejected, as he has a better and more normal way to test his rights to remain on the train. His right of re-entry must be contested by itself, and not as a part of the action for the original ejection.

In *Pickens v. Richmond & D. R. Co.* (N. C.) *supra*, it was said that if persons were allowed out of mere wantonness or mischief, or in order to test a legal question, to decline to pay fare until a train was stopped to eject them, and then, at the moment of expulsion or immediately after, to re-instate themselves in all their original rights as passengers by a tender of the usual fare, it would often subject the public to inconvenience, travelers to dangers of accident, and corporations to useless risks, simply to gratify caprice, or malice, or a propensity for speculation. It is a well-settled principle, the court said, in which nearly all of the authorities in this country concur, that where the reculant passenger forces the company to put him off at a point other than a regular station, or at which there would have been no delay but for the necessity of ejecting him, the conductor may refuse his tender of fare after he is put off, and, even if during the delay he gets on the train again to make the tender, may expel him a second time, if he chooses to do so.

In another case it was said that a

carrier is not bound to accept performance after a breach. The right to demand the complete execution of the contract by the railroad is defeated by the refusal of the passenger to do that which is either a condition precedent or a concurrent consideration on his part, and the nonperformance of which absolves the railroad from all obligation to fulfil the contract. After being rightfully expelled from the train, he may not again enter the same cars and require the railroad to perform the contract which he had previously broken. The right to refuse to transport the passenger farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if a person who had hitherto refused to perform the contract by paying his fare when duly demanded could immediately re-enter the cars, and claim the fulfilment of the original contract by the railroad. Besides, the court said, the railroad was not bound to receive passengers at any point on their route, but only at the regular stations or appointed places on the line of the road, established by them at reasonable distances for the proper accommodation of the public. The plaintiff had, therefore, no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; a fortiori, the plaintiff could not. *O'Brien v. Boston & W. R. Co.* (Mass.) *supra*.

In the reported case, a distinction is drawn between cases where the ejection is lawful and those where it is unlawful. In the first circumstance it is held that the passenger may return to the train, though at a special stop, while in the second he cannot. This distinction is not made in other cases. The fact that such ejection was legal; or otherwise, is sometimes stated in the opinion, but the decisions are not based on that ground. They hold that, although he has a right to remain on the train in the first instance given above, the proper way to protect that right is not by a refusal to pay, causing the train to stop, the running of

the train to be made irregular, and the lives of other passengers to be endangered. And that when he does do so, and is ejected, then these acts have forfeited his right to return. He has a means provided by law to protect his rights, therefore the rights of the company and of other passengers are superior to his; he has violated those rights and has lost his right to continue on that train. See cases cited above. The reason assigned for not allowing a re-entry in case of a legal ejection, given in the reported case, are the same assigned by the cases to support the general rule of not allowing re-entry in case of an ejection at a special stop. See the cases heretofore cited; also the case of *South Carolina R. Co. v. Nix* (1832) 68 Ga. 572, 8 Am. Neg. Cas. 118, wherein it was held that a passenger ejected at a special stop could by a tender of fare, made before, but not after, the train started, gain the right to re-enter the train. The law was so stated without comment. The fact that it was a special stop, made for the purpose of ejecting the passenger, was not raised. This holding is contrary to the weight of authority.

*b. Wilful refusal to pay fare.*

It is universally held that, where a passenger is ejected for wilful refusal to pay fare, he cannot by a tender of the fare gain the right to re-enter the train.

*Georgia.*—See *Coyle v. Southern R. Co.* (1900) 112 Ga. 121, 37 S. E. 163.

*Kansas.*—*Atchison, T. & S. F. R. Co. v. Dwelle* (1890) 44 Kan. 394, 24 Pac. 500.

*New Jersey.*—*State v. Campbell* (1867) 32 N. J. L. 309.

*New York.*—*Pease v. Delaware, L. & W. R. Co.* (1883) 11 Daly, 350.

*South Carolina.*—*Phillips v. Atlantic Coast Line R. Co.* (1911) 90 S. C. 187, 38 L.R.A. (N.S.) 1151, 73 S. E. 75, Ann. Cas. 1913C, 1244.

*Tennessee.*—*Louisville, N. & G. S. R. Co. v. Harris* (1882) 9 Lea, 180, 42 Am. Rep. 668.

*Texas.*—*Fleck v. Missouri, K. & T. R. Co.* (1916) — Tex. Civ. App. —, 191 S. W. 386

Where a passenger is ejected from

a train for wilful nonpayment of fare, he is not entitled, on a tender of the full cash fare for the trip from the place where he originally entered the train to his destination, to resume his journey on the same train, although he was ejected at a regular stopping place. *Phillips v. Atlantic Coast Line R. Co.* (S. C.) *supra*.

Where a passenger pays his fare on the train in cash, and on demand refuses to pay the extra fare due in such cases, and is ejected for such nonpayment, and where he knew or ought to have known that such fare was justly due, he cannot gain the right to re-enter the train by a tender of fare. *Atchison, T. & S. F. R. Co. v. Dwelle* (Kan.) *supra*.

Where a passenger is ejected for a wilful nonpayment of fare at a special stop made for the purpose, he does not gain the right to re-enter the train by a tender of fare. The fact that the train has traveled but a short distance, and is still within the limits of the station, is immaterial. *Pease v. Delaware, L. & W. R. Co.* (N. Y.) *supra*.

The reason for the rule was given in *Phillips v. Atlantic Coast Line R. Co.* (S. C.) *supra*, wherein it was held that a passenger who is ejected for wilfully refusing to pay his fare cannot gain the right to re-enter the train by a belated tender, made after ejection. Such a passenger, the court said, is smarting under the humiliation of his ejection, and there is reason to believe that if he is allowed to re-enter the train he will again refuse to pay his fare, when again in the presence of those who saw him ejected.

In *State v. Campbell* (N. J.) *supra*, wherein it appeared that a passenger had a valid ticket concealed on his person at the time he offered an invalid one, it was said that such a transaction, if permitted and often repeated, would deprive railroad travel of some security, and of much of its comfort. A passenger, it was said, takes a ticket subject to the reasonable regulations of the company, and it is an implied condition of his contract that he will submit to such reg-

ulations; and if he wilfully refuses to be bound by them, by so doing he repudiates his contract, and after such repudiation cannot claim any right under it. The fact that the passenger had, besides his regular ticket, the worthless ticket, did not change the situation, and he was on the same footing as if he had not had that ticket. Under any different rule, the court said, passengers would have the right to violate knowingly the rules and regulations of the company, and to resist ejection for such breach, hold the train to the loss of the company and to the danger of other passengers, create disorder and tumult in the car, and then to present the concealed ticket and re-enter the train with the possibility of a repetition of his previous acts.

In *Louisville, N. & G. S. R. Co. v. Harris* (1882) 9 Lea (Tenn.) 180, 42 Am. Rep. 668, wherein it was held that, where a passenger refuses to pay his fare and is ejected, he cannot gain the right to re-enter the train by then tendering his fare, especially where the refusal is wilful, was given the further ground that the right to eject a passenger for nonpayment of fare would be an idle and useless one if he could, after refusing to perform his contract in the first instance, re-enter the train and claim its fulfilment.

As to the effect of a reasonable time being given to pay before ejection, it was held in *Fleck v. Missouri, K. & T. R. Co.* (1916) — Tex. Civ. App. —, 191 S. W. 386, that where a passenger is ejected from a train for nonpayment of fare, after having been given an opportunity to obtain his fare from someone on the train before ejection, he has no right to re-enter the train for the purpose of securing money to pay fare. This case is distinguished from the case of *Gulf, C. & S. F. R. Co. v. Bunn* (1906) 41 Tex. Civ. App. 503, 95 S. W. 640, by the fact that in the latter case the passenger was given no opportunity to secure fare before ejection.

#### *c. Misconduct of passenger.*

A passenger otherwise entitled to re-enter the train may forfeit his right of re-entry by acts of miscon-

duct. Thus, where a passenger is wrongfully ejected from a train, and then is invited to return to the train by the conductor, he loses the right to return by refusing to do so unless the train is backed up to where he is standing. *Louisville & N. R. Co. v. Hine* (1898) 121 Ala. 239, 25 So. 857.

Where a passenger is ejected from a train and is then given permission to return, he loses his right to return if he has only a \$20 gold piece to tender for a fare of \$1.20. *Fulton v. Grand Trunk R. Co.* (1858) 17 U. C. Q. B. 428.

#### *IV. Payment of back fare.*

##### *a. General rule.*

Where a passenger is ejected for nonpayment of fare, he cannot continue on the same train without paying fare from the point of entry to the point of ejection, as well as fare from the point of ejection to his destination. *Chicago, R. I. & P. R. Co. v. Watkins* (1915) 117 Ark. 488, L.R.A.1915E, 311, 175 S. W. 1157; *Swan v. Manchester & L. R. Co.* (1882) 132 Mass. 116, 42 Am. Rep. 432. See also the following subdivisions of this note.

A passenger who has been ejected for nonpayment of fare is not in the same position as an ordinary traveler going from the point of the former's ejection to the same destination. The ejected passenger has already been carried from his point of entry to the point of ejection. He cannot renew the contract he has already broken by the payment for the distance yet to be traveled, and at the same time leave the part already traveled unpaid for. While the journey which he has begun, and which he has contracted to pay for, continues, he cannot at his pleasure break it into two separate transactions. The new contract which he seeks to make is included in the original contract, and the railroad company is not obliged to admit him to the same train from which he has been properly expelled, so long, at least, as he persists in his violation of the contract he has originally made. *Swan v. Manchester & L. R. Co.* (Mass.) *supra*. In that case it appeared that a regulation of the car-

rier permitted passengers buying tickets at the ticket office to travel at a less rate than passengers who paid their fare on the train. The passenger refused to pay the fare required on the train, claiming the right to pay same fare as those who purchased tickets at station, for which refusal he was ejected. He then attempted to travel by payment of fare from the point of ejection to his destination, and it was held that he was not entitled to do so.

In *Chicago, R. I. & P. R. Co. v. Watkins* (1915) 117 Ark. 488, L.R.A.1915E, 311, 175 S. W. 1157, it appeared that a brakeman, who during his employment was entitled to travel on a pass, was discharged. He could have obtained a pass to go from point of discharge to his destination, but he boarded a train without a pass, and was ejected for refusal to pay fare. He purchased a ticket at the point of ejection, to his destination, but it was held that he could not travel on the same train without paying back fare.

#### *b. Special tickets.*

Where a passenger traveling on a special ticket is ejected because of the invalidity of that ticket, it is generally held that he cannot continue his journey on the same train without paying his fare for the distance already traveled from the point of entry to the point of ejection. *Manning v. Louisville & N. R. Co.* (1892) 95 Ala. 392, 16 L.R.A. 55, 36 Am. St. Rep. 225, 11 So. 8, 8 Am. Neg. Cas. 26; *Coyle v. Southern R. Co.* (1900) 112 Ga. 121, 37 S. E. 163; *Stone v. Chicago & N. W. R. Co.* (1877) 47 Iowa, 82, 29 Am. Rep. 458; *Pennington v. Philadelphia, W. & B. R. Co.* (1883) 62 Md. 95; *Gulf, C. & S. F. R. Co. v. Riney* (1906) 41 Tex. Civ. App. 398, 92 S. W. 54. Compare *Georgia S. & F. R. Co. v. Asmore* (1891) 88 Ga. 529, 16 L.R.A. 53, 15 S. E. 13.

A passenger traveling on a round-trip ticket sold at reduced rates, who offers the ticket in payment of fare for the return trip after the time limit of the ticket has expired, and is ejected from the train, cannot re-enter the train on an offer to pay fare from point of ejection to his destination. *Pennington v. Philadelphia, W. & B. R. Co.* (1883) 62 Md. 95.

In *Coyle v. Southern R. Co.* (1900) 112 Ga. 121, 37 S. E. 163, it appeared that a man bought a ticket issued to a woman, which ticket, by a special contract, was good only when used by herself, and such ticket was refused by the conductor, and the passenger ejected. It was held that he could not continue his journey without the payment of the fare from his original starting point.

A passenger traveling on a special return-trip ticket, who has forfeited his rights under such ticket, and is ejected, must, in order to continue his trip on the same train, pay his fare for the part of the journey that has already elapsed, as well as for that part of it yet to be traveled. *Stone v. Chicago & N. W. R. Co.* (1877) 47 Iowa, 82, 29 Am. Rep. 458.

In *Manning v. Louisville & N. R. Co.* (Ala.) supra, the rule is stated to be that, where the passenger is ejected for traveling on a ticket which is forfeited for noncompliance with conditions stamped thereon, in order to complete his journey fare must be paid for the distance already traveled, as well as for the part of the journey yet to be traveled, for the reason that if the part were forgiven, and a payment required only for the remainder of the trip, a premium would be placed on attempts to defraud the railroad company.

In cases where the ejected passenger has purchased a ticket from point of ejection to destination the rule is the same. The purchase of a ticket from the ticket agent gives no greater right than where cash fare is offered to the conductor. For under such a ticket he is claiming the same rights, under the same state of facts, to which he is not entitled if he deals with the conductor. The fact that he makes use of an agent of the company other than the conductor cannot enlarge his rights or change the legal aspect of the case. *Stone v. Chicago & N. W. R. Co.* (Iowa) and *Manning v. Louisville & N. R. Co.* (Ala.) supra.

So in *Gulf, C. & S. F. R. Co. v. Riney* (1906) 41 Tex. Civ. App. 398, 92 S. W. 54, it was said that the immediate re-entrance of an ejected passenger to

the train from which he has been ejected for nonpayment of fare, with a ticket from that point to his destination, does not constitute an independent undertaking to go from point of ejection to destination. It constitutes, at most, a mere interruption of a continuous trip, and therefore the conductor is justified in again ejecting him if he refuses to pay fare between point of entry and point of ejection.

*c. Knowledge of invalidity of original ticket.*

Knowledge or lack of knowledge of invalidity of original ticket has been held the basis for determining the necessity of payment of back fare in order to re-enter train. Thus, in a New Hampshire case, it was held that if a passenger offers a ticket, the time limit on which has expired, and the conductor refuses to receive it, demands fare, and ejects the passenger for a refusal to pay it, the right of the passenger to continue on the same train on a ticket between the point of ejection and his destination, without paying fare for the distance already traveled, depends on his knowledge and intention. If he honestly believed that his original ticket was valid, then he has a right to continue on the same train on a ticket purchased at the point of ejection. If, on the other hand, he knew or ought to have known that the original ticket was void, then he cannot proceed on his journey on a ticket purchased at point of ejection, but must, in addition, pay the fare for the distance already traveled. White-

more v. Boston & M. R. Co. (1912) 76 N. H. 388, 83 Atl. 125.

So, in Ward v. New York C. & H. R. Co. (1890) 56 Hun (N. Y.) 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377, it appeared that a passenger bought an ordinary standard ticket, not limited as to time or train. He left the train at point A, and then took a later train from that point. The conductor demanded fare between A and B, because the ticket was wrongfully punched to indicate that it was already used that far, and told the passenger he would put him off at C if he did not pay the fare. The passenger, to avoid trouble, left the train at C, and bought a ticket between C and B. It was held that the ticket was a valid one, and the passenger had a right to ride on it without paying fare between A and C. The decision was based on the ground that he had tendered a ticket for passage in good faith, and he had committed no breach of the peace, but had left the train quietly. He had in fact paid his fare between A and B.

It was held in Gulf, C. & S. F. R. Co. v. Riney (1906) 41 Tex. Civ. App. 398, 92 S. W. 54, that where a passenger attempted to ride on a ticket, the invalidity of which was apparent on its face, and was ejected, he could not re-enter the train and continue his journey without paying the fare from the point of entry to the point of ejection, the court saying that he was charged with notice of the invalidity, and that mere good faith would not relieve him from the duty of paying the back fare. R. R. R.

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CARL A. WHITEHEAD, Appt.,

v.

JOHN STRINGER, Sheriff of King County, et al., Respts.

*Washington Supreme Court (Dept. No. 2)—April 16, 1919.*

(— Wash. —, 180 Pac. 486.)

**Sheriff — liability for property lost through wrongful arrest.**

1. A sheriff making an unlawful arrest is liable for loss of property of the person arrested, which, to his knowledge, is left in an exposed posi-

tion, and which he refuses either to permit the person arrested to take care of or to care for himself.

[See note on this question beginning on page 362.]

**Appeal — from order dismissing one cause of action.**

2. Appeal lies from an order sustaining a demurrer to one of several causes of action and dismissing it with prejudice, although final judgment has not been rendered in the case.

[See 2 R. C. L. 43.]

**Proximate cause — loss of property — wrongful arrest.**

3. Wrongful arrest of the owner of property left in an exposed position, and refusal to permit the property to be cared for, are the proximate cause of its loss through theft.

[See 22 R. C. L. 132; see annotation 1 A.L.R. 737.]

**APPEAL** by plaintiff from an order of the Superior Court for King County (Gilliam, J.) sustaining a demurrer to and dismissing one of two causes of action in an action brought to recover damages for alleged unlawful arrest. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Elias A. Wright and Sam A. Wright, for appellant:

The question of what is proximate cause is a question of fact to be decided by a jury.

23 Am. & Eng. Enc. Law, 2d ed. 583.

An independent act of a third party will not excuse the primary negligence of the wrongdoer.

1 Sutherland, Damages, 4th ed. §§ 40-42; Southwestern Portland Cement Co. v. Reitzer, — Tex. Civ. App. —, 135 S. W. 237; Scott v. Shepherd, 2 W. Pl. 892, 96 Eng. Reprint, 525, 3 Wills, 403, 95 Eng. Reprint, 1124.

Messrs. Walter S. Fulton and C. B. White, for respondents:

An appeal will not lie from an order sustaining a demurrer when there is no judgment dismissing the action.

Schutzler v. Times Pub. Co. 88 Wash. 236, 152 Pac. 1018; Vaktaren Pub. Co. v. Pacific Tribune Pub. Co. 41 Wash. 355, 83 Pac. 426; Virtue v. Stanley, 79 Wash. 87, 139 Pac. 764.

Plaintiff's claim that the question involved was one for the determination of the jury is not well founded.

Rhad v. Duquesne Light Co. 255 Pa. 409, L.R.A.1917D, 864, 100 Atl. 263; West Mahoney Twp. v. Watson, 116 Pa. 344, 2 Am. St. Rep. 604, 9 Atl. 430.

The act alleged in the complaint did not state a cause of action against defendant.

22 R. C. L. 137; Southwestern Portland Cement Co. v. Reitzer, — Tex. Civ. App. —, 135 S. W. 237; Carini v. Roman Catholic Bishop, 219 Mass. 117, L.R.A.1915B, 825, 106 N. E. 589; Horan v. Watertown, 217 Mass. 185, 104 N. E. 464; Andrews v. Kinsel, 114 Ga. 390,

88 Am. St. Rep. 25, 40 S. E. 300; Crain v. Petrie, 6 Hill, 524, 41 Am. Dec. 765.

The second cause of action is defective because it fails to allege whether the theft was committed while the plaintiff was in the custody of the deputy sheriff, or while confined by the sheriff in the jail.

Garrett v. Louisville & N. R. Co. 196 Ala. 52, 71 So. 687, 13 N. C. C. A. 663; Tobler v. Pioneer Min. & Mfg. Co. 166 Ala. 509, 52 So. 86.

Mount, J., delivered the opinion of the court:

Plaintiff brought this action to recover damages for an alleged unlawful arrest. The complaint stated two separate causes of action. Defendants filed separate demurrers to these two causes of action. The trial court overruled the demurrer to the first cause and sustained the demurrer to the second cause of action. Plaintiff elected to stand upon the allegations thereof, and the court entered an order dismissing with prejudice the second cause of action. Plaintiff has appealed from the order dismissing the second cause of action.

Respondents move to dismiss the appeal for the reason that the order sustaining the demurrer to the second cause of action is not appealable because it is not a final order, but an interlocutory one. It is first contended upon the motion that the appeal will not lie from an order sustaining a demurrer when there is no

judgment dismissing the action. As sustaining this position counsel cites *Schutzler v. Times Pub. Co.* 88 Wash. 236, 152 Pac. 1018. That rule is not applicable to this case,

**Appeal—from order dismissing one cause of action.** because here there was a final order dismissing the second cause of action

with prejudice. Respondents also cite *Vaktaren Pub. Co. v. Pacific Tribune Pub. Co.* 41 Wash. 355, 83 Pac. 426, where we held that an order before final judgment, to be appealable under the statute, must in effect determine the action and prevent a final judgment, or it must discontinue the action. The order in this case upon the second cause of action discontinues and determines that action, so that case does not apply. Respondents further cite the case of *Virtue v. Stanley*, 79 Wash. 87, 139 Pac. 764, where we said: ". . . We have frequently held that appeals cannot be prosecuted to this court from interlocutory orders, but that such orders will be reviewed upon the final judgment entered in the case, and not otherwise."

The order in this case is not an interlocutory order in so far as the second cause of action is concerned. It is a final judgment upon that cause of action. In the case of *Oliver v. Polson*, — Wash. —, 177 Pac. 678, where two causes of action were stated and the plaintiff was required to elect upon which cause of action he would proceed, we said: "If, after making an election, a judgment of dismissal should be entered by the trial court, as to the cause of action upon which the appellants did not elect to proceed to trial, an appeal could be prosecuted from that judgment."

That rule governs this appeal; for here the trial court sustained a demurrer to the second cause of action and dismissed it with prejudice. This was a final judgment from which there is a right of appeal. The motion to dismiss must therefore be denied.

The second cause of action, as

stated in the complaint, is to the following effect: That the defendant John Stringer is the duly elected, qualified, and acting sheriff of King county; that Scott Malone is his duly appointed, qualified, and acting deputy; that the National Surety Company is surety upon the official bond of the sheriff; that the defendant, Scott Malone, as deputy sheriff, at about 12 o'clock, noon, on November 28, 1917, wrongfully and unlawfully, and without a warrant, arrested plaintiff and imprisoned him in the county jail of King county in charge of the sheriff without any warrant for his arrest, and without any complaint of any kind being filed against him; that on November 30, 1917, the plaintiff was required to and did procure his release from said jail, wherein he was wrongfully and unlawfully imprisoned; that the plaintiff had not committed any crime of any kind; and that the defendants Stringer and Malone had no reasonable ground to believe the plaintiff had committed any crime. The complaint then alleges as follows: "Plaintiff further says that at the time of his unlawful arrest and imprisonment, as set forth heretofore, he was engaged in the automobile express business, and had his automobile truck standing near the Colman dock in the city of Seattle, which is a public dock along the water front in the said city. That the defendant Scott Malone, as deputy sheriff, over the remonstrance of this plaintiff at the time of his arrest, refused to permit the plaintiff to remove the said automobile truck to a safe place, although the said deputy sheriff well knew, or in the exercise of ordinary care should have known, that the said truck was left in a dangerous place, where its parts could be easily stolen, and would be stolen, and the machine damaged by reason of its being left standing in front of the said dock. That the said deputy sheriff, Scott Malone, and the said sheriff, John Stringer, over the remonstrance of this plaintiff, kept him incarcerated in the said King



county jail as aforementioned, and refused to permit him to have the said automobile truck removed to a safe place, and they themselves, and each of them, refused to take any steps to preserve or look after the said plaintiff's automobile truck, and over the remonstrance of this plaintiff it was permitted to remain on the public thoroughfare of the city of Seattle, near the Colman dock, and the defendants well knowing, or in the exercise of ordinary care should have known, that the said automobile truck would be stripped of its fittings and damaged from the time of the plaintiff's arrest until some time in the afternoon of November 29, 1917, and the defendants, and each of them, further well knowing that the said automobile truck and its furnishings and fittings were the property of this plaintiff."

The complaint then alleges that while the truck was permitted to remain as aforesaid it was by parties unknown to plaintiff stripped of a number of fittings and furnishings which are itemized to the value of \$101.20. The complaint further alleges that in addition the transmission of the truck was attempted to be removed by parties unknown to the plaintiff and was damaged in the sum of \$112.50. The plaintiff prayed for judgment upon this cause of action for \$213.70.

The respondents argue that, since the complaint shows the automobile truck was damaged by an independent intervening criminal act of third persons, which act the sheriff was not bound to anticipate, therefore the act of arresting the appellant was not the primary cause of loss. They rely upon the rule as stated in 22 R. C. L., at page 137, as follows: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual. The rule applies a fortiori to crim-

inal acts. Thus negligence on the part of the maker of an obligation is not the proximate cause of loss through theft or forgery, since such criminal conduct could not reasonably be anticipated."

That rule is well supported by the authorities cited in a footnote to the text and by authorities which are cited in respondents' brief; but we think it does not control this case. The rule is also stated in the same volume of R. C. L., at page 132, as follows: "Whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause."

We think the controlling question here is whether the complaint is sufficient to show that the sheriff knew or had reasonable cause to believe that the automobile was in an unsafe place and would likely be molested at the place where it was left. The complaint upon its face shows in the allegation hereinbefore quoted that the deputy sheriff, over the remonstrance of the appellant, refused to permit the appellant to remove the truck to a safe place; that the deputy sheriff well knew, or in the exercise of ordinary care should have known, that the truck was left in a dangerous place, where its parts could be easily stolen and would be stolen; and that the sheriff and the deputy sheriff refused to permit the appellant to have the automobile removed to a safe place, and they themselves refused to take any steps to preserve or look after the automobile truck. But for these allegations, we have no doubt the rule relied upon by the respondents would apply, and the sheriff could not be held to anticipate that a third party would intervene and molest the automobile. But when it is al-

leged, as it is here, that the deputy was informed of the fact that the automobile was in a dangerous place, where its parts could easily be stolen, and where the sheriff or his deputy refused to permit the automobile to be placed in a safe place, where they refused to take care of it themselves, we are of the opinion that under these circumstances they

**Sheriff—  
liability for  
property lost  
through wrong-  
ful arrest.**

are liable for the injury which occurred to the automobile truck in such place.

In the case of *Horan v. Watertown*, 217 Mass. 185, 104 N. E. 464, it was said: "Where, as here, the original negligence of the defendant is followed by the independent act of third persons, which directly results in injurious consequences to the plaintiff, the defendant's earlier negligence may be found to be the direct and proximate cause of those injurious consequences, if according to human experience and in the natural and ordinary course of events the de-

fendant ought to have seen that the intervening act was likely to happen."

We think it is unnecessary to cite other cases to this point. According to the allegation of the complaint the deputy sheriff's attention was called to the fact that this was a dangerous place to leave the automobile. The deputy sheriff refused to take care of the automobile, and refused to permit the appellant to take care of it. Under these circumstances we are satisfied that the arrest and the refusal of the sheriff to take care of the automobile truck was the proximate cause of the loss.

**Proximate  
cause—loss of  
property—  
wrongful arrest.**

We are of the opinion, therefore, that the demurrer to the second cause of action should have been overruled.

The judgment appealed from is therefore reversed, and the cause remanded for further proceedings.

Chadwick, Ch. J., and Fullerton, Parker, and Tolman, JJ., concur.

## ANNOTATION.

### **Liability for loss of property left unprotected when owner was wrongfully arrested.**

There would seem to be no question of the soundness of the decision in the reported case (*WHITEHEAD v. STRINGER*, ante, 358), that the plaintiff in an action for unlawful arrest properly included in his elements of damage the loss of fittings stolen from his automobile truck, where, at the time of his arrest, in spite of his protests, the arresting officer refused to permit him to remove the truck to a place of security, the officer himself having failed to do anything for its protection; the court holding that the arrest and the refusal of the officer to take care of the truck were the proximate cause of the loss.

In *Jay v. Almy* (1846) 1 Woodb. & M. 262, Fed. Cas. No. 7,236, a sailor put under arrest by his captain, and delivered over to a foreign fort, brought a libel for compensation for the imprisonment, damages to his per-

son, loss of his property, etc., and was allowed as part of his recovery for the loss of clothing, medicine, tobacco, and other articles which he had on board the vessel, and which the captain failed to deliver to him or send on shore with him when he was removed from the vessel. The court said: "My own view of this part of the case is, that when taking Jay on shore, he should have taken with him and delivered to him his clothes and other property, and that not doing this, when the articles were in his charge, and Jay imprisoned so as to be unable to look after them himself, was a conversion of them, and the captain ought to respond for their value, and the more especially so, as it is probable he sold a portion of them."

In *Cincinnati, N. O. & T. P. R. Co. v. Cecil* (1915) 164 Ky. 377, 175 S. W. 654, the plaintiff sued the railroad

company for false arrest and malicious prosecution, and alleged that in being removed from the train he was compelled to leave thereon and in the possession of the company two suit cases and their contents, which were never returned, and were lost to him. The court, in sending the case back for a new trial, stated that it would be proper to instruct the jury on a new trial that they might find for the plaintiff the reasonable value of the suit cases and their contents, not exceeding the amount claimed for them, if they believed from the evidence that they were lost and the plaintiff deprived of them by reason of the conduct of the defendant company complained of, and not by any fault of the plaintiff.

In *Glover v. London & S. W. R. Co.* (1867) L. R. 3 Q. B. (Eng.) 25, the plaintiff, being accused of traveling on a railroad without a ticket, was forcibly removed from the carriage, and sued the company for assault, and claimed that in the scuffle he lost a pair of race glasses. It appeared that he was erroneously accused, as he had procured a ticket, but that he was trying to swindle the company by endeavoring to enable another person also to travel on the same ticket. The court charged the jury that the plaintiff could not recover for the glasses unless it appeared that the defendants' servants came into possession of them. The jury returned a nominal verdict for the plaintiff. On motion to increase the verdict by the value of the glasses, it was said: "The glasses

were simply left behind in the carriage. The case would be very different, in my judgment, if the glasses had fallen from the plaintiff's person as the immediate result of any violence offered to him. But the jury must be taken to have negatived—and rightly, as it seemed to me—any violence beyond that necessary to remove the plaintiff from the carriage. So that it was not the case of a man being dragged out of a carriage under circumstances which rendered it impossible for him to take the property with him, which he had under his own personal protection. The plaintiff, being called upon to leave the carriage, refused, and he was forced by the defendant's servants to leave, but not with the excessive violence he alleged, for the jury believed, as I did, the defendants' witnesses. No doubt if he had applied to be allowed to get the glasses, or asked one of the passengers to hand them to him, this would have been done. He has, therefore, only himself to blame that the glasses were left in the carriage; and the loss, therefore, was not the necessary consequence of the defendants' act, but owing to the plaintiff's own negligence or carelessness. This head of damage, therefore, is too remote, and the plaintiff cannot recover it." This was a hard case, and the plaintiff was entitled to no sympathy, but yet the result seems to have been more satisfactory on the facts than on the law.

B. B. B.

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F. A. BEELER et al., Respts.,

v.

STANDARD INVESTMENT COMPANY et al., Appts.

*Washington Supreme Court (Dept. No. 2)—June 30, 1910.*

(— Wash. —, 181 Pac. 896.)

**Receiver — solvent concern — dissatisfied minority.**

1. A statute permitting the appointment of a receiver for a corporation when the court deems it necessary to secure ample justice to the parties does not authorize the appointment of a receiver for a solvent, going concern, merely because the minority stockholders are dissatisfied

with the way the majority are conducting its affairs, when the majority are acting in good faith and exercising their best judgment.

[See note on this question beginning on page 368.]

**—for farm — right of minority stockholders.**

2. A receiver for a corporation operating a farm cannot be appointed at the suit of minority stockholders because the directors employ a youth to manage the farm, if he is competent, nor because he has given the secretary of the corporation, who serves without pay, a small amount of produce from the farm without accounting for it.

[See 23 R. C. L. 20.]

**Corporation — right of minority stockholders to complain.**

3. The president and trustees of a corporation, elected by a majority of the stockholders, are authorized to control the affairs of the corporation according to their best judgment, and the minority stockholders cannot complain

merely because they do not agree with the policy of the trustees.

[See 7 R. C. L. 307.]

**—right to control discretion of directors.**

4. Minority stockholders of a corporation cannot control the exercise of discretion by the directors to pay the corporate debts rather than declare dividends or improve the property of the corporation.

[See 7 R. C. L. 294.]

**—right to monthly statements.**

5. Minority stockholders of a corporation engaged in operating a farm cannot require monthly statements of the affairs of the corporation, if the secretary and treasurer is serving without compensation, and such statement would require much labor, while the books and affairs of the corporation are open to inspection at any time.

**APPEAL** by defendants from a judgment of the Superior Court for King County (Smith, J.) in favor of plaintiffs in an action brought for the appointment of a receiver and for the dissolution of the defendant corporation. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. H. Beatty and James B. Murphy, for appellants:

The court erred in appointing a receiver.

Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

There is no legal obligation on the part of the trustees to endeavor to perfect an exchange of stock or a sale of stock between stockholders of the company, and even if all the stockholders other than plaintiffs were trustees, yet they were under no legal obligation to either buy or sell.

Curtiss v. Dean & Curtiss, 85 Wash. 435, 148 Pac. 581.

Messrs. George B. Cole and John Wesley Dolby, for respondents:

The court is authorized to appoint a receiver when, in its discretion, it may be necessary to secure ample justice to the parties.

Boothe v. Summit Coal Min. Co. 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255; Cook, Corp. 6th ed. § 746; Brent v. B. E. Brister Sawmill Co. 103 Miss. 876, 43 L.R.A. (N.S.) 720, 60 So. 1018, Ann. Cas. 1915B, 576; Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46;

Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499; Exchange Bank v. Bailey, 29 Okla. 246, 39 L.R.A. (N.S.) 1032, 116 Pac. 812; Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218.

Mount, J., delivered the opinion of the court:

This action was brought by a minority of the stockholders of the Standard Investment Company, a corporation, for the appointment of a receiver, for an accounting by the trustees, and to wind up the affairs of the corporation and distribute the property among the stockholders.

Generally and briefly stated, the complaint charged that the board of trustees was dominated by James Campbell, the president of the corporation; that Lee Oien, the manager of the business of the corporation, was inefficient, extravagant, and incompetent; that the property was not properly managed, and was permitted to deteriorate; that the

manager had not accounted for all the proceeds of sales, had made unreasonably poor sales of property, and had refused to give the minority stockholders a statement of the affairs of the corporation, and alleged that, unless a receiver was appointed, the property would be wasted and irreparable injury done to the plaintiffs. The answer denied generally all the allegations of the complaint. The case was tried to the court without a jury, and resulted in a judgment appointing a receiver to take charge of the property of the corporation and to sell the same and divide the proceeds among the stockholders according to their respective interests. The defendants have appealed from that judgment.

The appellants make three contentions in this court: First, that the court erred in appointing a receiver, because all the stockholders were not made parties to the action; second, that the court arbitrarily refused to receive certain evidence offered by the appellants; and, third, that there was no cause for the appointment of a receiver. There is merit in all three of these contentions, but, in view of our conclusion that there was no real cause for the appointment of a receiver, the first two points will not be considered.

It appears that, several years prior to the time of the institution of this suit, the Standard Investment Company was organized as a corporation, with a capital stock of \$10,000, divided into 1,000 shares of \$10 each. The principal property owned by the corporation is a dairy farm located near Thomas, in King county. This farm consists of about 500 acres of land. It is stocked with a herd of dairy cattle and other farm stock, tools and equipment. At the time of the trial the farm was worth more than \$200,000. It was subject to a mortgage indebtedness of \$50,000 and some other minor indebtedness. At the trial of the case the principal points contended for by the respondents to show that a receiver should be appointed were

that Lee Oien, the business manager of the corporation, in charge of the dairy farm, was incompetent; that he had failed to keep a proper system of accounts, sold property of the farm without accounting therefor, mismanaged the farm by letting it grow to weeds, and neglected to keep up the fences and make proper drainage; that the trustees had refused to furnish a monthly statement to each of the stockholders; had refused to discharge the manager when requested to do so; and that by reason of extravagant management the trustees had declared no dividends.

At the conclusion of the trial the court made no findings of fact, but filed a written opinion, in which he found that the manager in charge of the farm, on account of his youth, was not qualified to manage the farm, and that he had not kept proper accounts, that the minority stockholders had not been treated fairly, and that a division of the farm and the property belonging thereto was necessary to secure ample justice to all the parties, and apparently for that reason appointed a receiver. The evidence is very voluminous. The abstract of the record alone comprises more than 400 pages. The writer of this opinion has carefully examined the abstract of the evidence, and the court is satisfied therefrom that whatever evidence the respondents offered in support of their general allegations was entirely overcome by the testimony on behalf of the appellants. The manager of the farm selected by the majority stockholders was a young man twenty years of age. That fact seemed to control the lower court.

Receiver—for  
farm—right of  
minority  
stockholders.

The evidence shows conclusively that, while Mr. Lee Oien, the manager, was a young man, he had lived on this particular farm from his early life, when his father was manager thereof, and that he was thoroughly qualified to take care of the farm, and had conducted it in a businesslike manner. The evidence

is conclusive that, under his management, the profits of the farm for the year prior to the trial amounted to \$19,000, or \$9,000 more than for any previous year. The evidence also conclusively shows that his system of accounts was amply sufficient; that the farm was kept up, on an average, as good as or better than the majority of the farms in that neighborhood. The effort to show that he had not been honest in his accounts was entirely overcome. There was an endeavor on the part of the respondents to show that the milk and the cows were kept in a filthy condition, but that evidence was entirely overcome by the evidence on the part of the defense. We find no justification in the record for any finding that the management of the farm by Lee Oien was detrimental to any of the stockholders. It is true upon several occasions he had furnished milk and some vegetables of no special importance to one or two of the stockholders. One of these stockholders was the secretary and treasurer of the corporation, who had served for years without pay; and when he had driven from Seattle down to the farm he had, upon several occasions, obtained some of the produce of the farm which was not accounted for. But this clearly could not be regarded as mismanagement or incompetency on the part of the manager. It was contended by the respondents that the trustees were dominated by the president of the corporation. If this is so, there was no evidence of a wrongful domination. He and the other trustees were elected by a vote of a majority of the stock, and were thereby authorized to control the affairs of the corporation according to their best judgment; and when they do this

**Corporation—  
right of  
minority stock-  
holders to  
complain.**

they do their full duty, notwithstanding the fact that the minority stockholders do not agree to

their policy. There was no evidence of fraud or unfair treatment of the minority stockholders. Much evi-

dence was introduced upon the trial to the effect that the fences were not properly kept up, and that a drainage system should be installed; but we think, when the appellants' testimony was considered, it is plain that no criticism should be made against the trustees or the manager on account of the fences. It was shown that a drainage system upon this farm would be expensive. Some of the witnesses testified that it would cost about \$30 per acre, and the evidence on the part of the appellants shows that an effort had been made to establish a drainage district in that section of the country so as to include other farms beside this, and, this being so, it was a question of policy with the trustees whether they should put in an independent expensive drainage system or not. The evidence shows that it was the desire of the governing trustees, who were all stockholders, that the debt should be paid rather than that dividends be declared or extensive improvements made upon the farm. This was a question of policy which was within the discretion of the governing trustees, and we are satisfied no serious criticism could be offered because an expensive drainage system was not installed. There was some evidence on the part of the respondents to the effect that the ditches and drains on the place were allowed to become stopped up and clogged. The evidence on the part of the appellants shows that these ditches and drains were cared for each year properly; and we are satisfied that no criticism should be made by the minority stockholders upon this account.

The respondents argue that under § 741, Rem. Code, relating to the appointment of receivers, the court is authorized to appoint a receiver "when, in the discretion of the court, it may be necessary to secure ample justice to the parties. . . ." This section gives to the court wide discretion in matters of that kind, but it was clearly never intended that,

where a corporation is a solvent, going concern, a minority of the stockholders may have the corporation dissolved and its affairs wound up simply because they are not satisfied with the way the majority are conducting the corporation, especially when the majority are acting in good faith and exercising their best judgment. No contention is made in this case that the corporation is insolvent. It is plain from the evidence that, when the corporation was formed, the value of the property was \$10,000, the par value of the stock. It is now worth at least, according to the testimony, \$200,000, encumbered by a mortgage of \$50,000. So, it is apparent that the stock which a few years ago was worth but \$10 a share is now,—if the figures given upon the trial are correct,—worth \$100 or \$150 a share. The net profits of the corporation for the last year were more than \$19,000; so that there can be no reasonable claim that the corporation is insolvent, or liable to become so. We said in *Secord v. Wheeler Gold Min. Co.* 53 Wash. 620, at page 625, 102 Pac. 656, 17 Ann. Cas. 914: "The policy of the corporation, if honestly conducted, must be controlled by the majority of the stockholders. Mistakes, inadvertence, or bad policy, if honestly pursued, will not warrant the appointment of a receiver."

That must rule this case. The respondents rely upon the case of *Boothe v. Summit Coal Min. Co.* 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255. That was a case where the stock in a corporation was held equally by two persons who could neither agree nor elect officers. One set of officers, by reason of a failure of election, claimed to hold over. These officers were not honestly conducting the corporation, because of extravagant management and increased salaries paid to one of the stockholders. In that case we said, at page 177 of 55 Wash.: "After a

most diligent research we have been unable to find any case similar to this. It is *sui generis*."

Upon the facts in that case we concluded that it was within the discretion of the court whether a receiver should be appointed, and that a receiver was necessary to secure ample justice to the parties; but that case is far different from this. In this case two thirds of the stockholders are satisfied with the management of the farm. So far as the record shows, they are conducting the farm at a profit. They are exercising their honest judgment in the management of the affairs of the corporation; and it is apparent, therefore, that no receiver should be appointed. The respondents insisted in the trial below that a monthly statement should be furnished to each of the stockholders, and that this had been refused by the trustees. It was shown that this monthly statement

—right to  
monthly  
statements.

would entail upon the manager of the farm and upon the secretary of the corporation much labor, that the secretary of the corporation was acting, as were the other trustees except the manager, without salary, and that they had devoted their time to the affairs of the company without remuneration. The evidence on the part of the appellants showed also that the books of the corporation were open at all times to the minority stockholders; that they were at liberty, not only to inquire of the secretary and treasurer what the books showed, but they were at liberty to inquire of the manager at any time the condition of the accounts or the business of the farm; that for the year prior to the trial the manager of the farm had kept a diary of everything upon the farm; that the pay rolls and everything of that nature were open to inspection of the minority stockholders.

From every angle of the case we are satisfied that the trial court was not authorized under the facts to ap-

point a receiver or to wind up the affairs of this solvent, going company. therefore reversed, and the cause ordered dismissed.

The judgment appealed from is Holcomb, Ch. J., and Fullerton and Parker, JJ., concur.

### ANNOTATION.

**Appointment of receiver for solvent corporation at instance of minority stockholders under statute permitting appointment of receiver when the court deems it necessary to secure ample justice to the parties.**

It will be seen that it is held in the reported case (*BEELER v. STANDARD INVEST. Co.* ante, 363), under a statute permitting appointment of a receiver when the court deems it necessary to secure ample justice to the parties, that the court will not appoint a receiver of a corporation on the complaint of minority stockholders simply on account of dissensions in management.

In *Bergman Clay Mfg. Co. v. Bergman* (1913) 73 Wash. 144, 131 Pac. 485, the court reversed an order appointing a receiver, on the ground that no controlling equity was shown.

But in *Boothe v. Summit Coal Min. Co.* (1909) 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255, a temporary receiver was appointed, where the stock was controlled by two parties and one party was in control of the management and could not be ousted at the stockholders' meeting on account of the even votes on both sides, although the business of the company apparently continued to be carried on. The court said, after quoting the statute: "Courts of chancery are organized for the purpose of doing justice and affording equitable relief whenever, in good conscience, it should be awarded. Would a court of equity, in the furtherance of justice and in the exercise of its sound discretion, be justified in directing the appointment of a receiver over the respondent corporation, or should the appellant be turned out of court without other relief than a temporary accounting, with the certainty that, while present conditions continue, he will be compelled to return and incur the expense of repeatedly seeking the aid of the chancellor to secure further accountings

and protection of his rights as a stockholder?"

Under a statute providing that a receiver might be appointed when, in the discretion of the court or the judge thereof in vacation, it might be necessary to secure ample justice to the parties, it was held that a receiver was properly appointed where the stockholders and directors of a corporation were three: A, whose administrator brought the action, owning 249 shares; B, owning 250 shares; and C, owning one share; and after the death of A, who had been president of the company, the parties were unable to agree upon the election of another director or officer, and it was alleged that B was managing the corporation, that its property was in danger of becoming dissipated, and that it was in danger of becoming insolvent. *Sheridan Brick Works v. Marion Trust Co.* (1901) 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666. The court, after quoting the statute in question, said: "In *Mead v. Burk* (1901) 156 Ind. 577, 60 N. E. 338, in considering the force and effect of this last clause of the above section, we said: 'Under its authority a receiver may be appointed in any case in which, according to the established rules of equity, the appointment may be necessary 'to secure ample justice to the parties,' without regard to the form or character of the principal action.'

In *Wayne Pike Co. v. Hammons* (1891) 129 Ind. 368, 27 N. E. 487, the court appointed a receiver for a turnpike road on the complaint of a minority stockholder, alleging neglect to repair, fraud, and conspiracy; and said, after referring to the above statute: "Indeed, it was a case eminently prop-



er for the exercise of such power. Those who owned the majority of the stock in the corporation, and were able by reason of that fact to control the road, seem to have been derelict in the matter of repairs, thus endangering the rights of the other interested parties, and rendering the property nonproductive. Under these circumstances it was the duty of the court, when asked to do so, to take such steps as would secure to the minority stockholders their rights in the property, and we know of no means by which this could be accomplished except by the appointment of a receiver."

It may be noted that in *Wallace v. Pierce-Wallace Pub. Co.* (1897) 101 Iowa, 313, 38 L.R.A. 122, 63 Am. St. Rep. 389, 70 N. W. 216, there was a statute providing: "On the petition of either party to a civil action or proceeding, wherein he shows he has a probable right to or interest in any property which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or materially injured or impaired, . . . the court, . . . if satisfied that the interests of one or both parties will be thereby promoted and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action and may order and coerce the delivery of it to him." It was held that a receiver of that part of the property of a corporation which consists of shares of stock in another corporation cannot be appointed on account of a disagreement respecting the management and control of the latter corporation, between two persons who are the officers of the former corporation, and own all its stock in equal shares. The court stated that the only claim which

had any merit was that there were dissensions among the stockholders and directors which rendered it impossible for the corporation to carry on its business; that the relief asked in the case was the dissolution of the corporation, or that its management should be taken out of the hands of the officers who had been conducting its business, and placed in the hands of an officer of the court for some indefinite period; that a court of equity had no power to make the two owners agree; that it was not likely that the appointment of a receiver would bring about a reconciliation; that it might be unfortunate that the only relief was that one of the parties should sell his stock, but that the court could not help that situation.

But it was held under this statute that a receiver of a bank was properly appointed, on the petition of a stockholder showing, in substance, that said bank was heavily indebted and so involved that it was impossible for it to meet the claims due and to become due upon it; that its assets were scattered, and of a kind that it was impossible to realize on at once without great sacrifice; that the bank was running its business at a large daily expense, and constantly losing money; that it had not exceeding \$200 in cash, which was not sufficient to meet its daily checks, and that its business was decreasing; that its creditors were pressing payment, which it would be impossible for the bank to make, and that there was danger that some creditor would commence suit, by attachment or otherwise, and involve the bank in disastrous and costly litigation, and compel the assets to be sacrificed by creating a run. *Dickerson v. Cass County Bank* (1895) 95 Iowa, 392, 64 N. W. 395. B. B. B.

ISABELLE FEDER et al., Plffs. in Err.,  
v.

UNITED STATES OF AMERICA.

*United States Circuit Court of Appeals, Second Circuit — April 16, 1916.*

(257 Fed. 694.)

**Conspiracy — effect of death of one conspirator.**

1. One of two conspirators may be convicted after the death of his co-conspirator.

[See note on this question beginning on page 373.]

**Evidence — admissions of conspirator — past transactions.**

2. Admissions by way of narrative of past facts by one conspirator after the conspiracy has come to an end are not admissible in evidence against the others.

[See 1 R. C. L. 520.]

**— competency against witness.**

3. Whatever testimony is extracted from a conspirator offered as a witness upon prosecution for conspiracy is competent, relevant, and material against him.

**Conspiracy — conviction after acquittal of one.**

4. One conspirator may be convicted of the offense after acquittal of the other, provided the acquittal does not remove the basis of the charge.

[See 5 R. C. L. 1078.]

**New trial — to one conspirator — effect on others.**

5. The granting of a new trial to one of two conspirators requires like action for the other if the conspiracy, if any exists, was confined to those two.

**ERROR** to the District Court of the United States for the Eastern District of New York to review a judgment convicting defendants of conspiring to defraud the United States. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Hough, and Manton, Circuit Judges.

Messrs. Max D. Stener and Theodore Megaarden for plaintiff in error Feder.

Messrs. Robert H. Elder and Otho S. Bowling for plaintiff in error Polsky.

Messrs. Melvin J. Franee, James D. Bell, and Charles J. Buchner for the United States.

Hough, Circuit Judge, delivered the opinion of the court:

Although plaintiffs in error were brought to trial under two indictments, they were convicted and sentenced under one only.

They were in common form accused of conspiring to defraud the United States by procuring, or endeavoring to procure, the acceptance by the War Department of, and payment by the United States for, a large number of "barrack bags" which were improperly made,

defective, and "useless to the United States for the purpose for which they were manufactured." The overt act relied upon and pleaded consisted in giving to certain representatives of the War Department of the United States money for the purpose of corrupting them and so procuring the acceptance of the aforesaid defective articles of manufacture. Criminal Code (Act March 4, 1909, Chap. 321), §§ 37, 39, 35 Stat. at L. 1096, chap. 321 (Comp. Stat. §§ 10,201, 10,203, 7 Fed. Stat. Anno. 2d ed. pp. 534, 602). The defendants were convicted and took out several writs of error.

The record shows that ample evidence was offered by the prosecution tending to show that defendant Feder formed and endeavored to carry out the plan of corruptly influencing those representatives of the United States whose business it

was to see that the barrack bags in question were good bags, and thus to procure their acceptance, although they did not comply with the specifications under which they were manufactured. But as the indictment was for conspiracy the crucial question was whether the two defendants had corruptly agreed to endeavor to bring about this result, no matter what may have been the purposes of the defendant Feder.

The indictment charges these two defendants only; it contains no allegation that they were but part of a larger body of conspirators, nor the usual averment that they conspired and agreed not only with themselves, but with "other persons to the grand jury unknown." Neither is there any evidence that any person or persons were engaged or concerned in or about said conspiracy except Feder and Polsky.

In order to sustain this accusation the prosecutor demanded of defendant Feder (who took the witness stand) whether or not she had made certain admissions or volunteered certain statements to a representative of the United States, which admissions or declarations, if made, strongly tended to prove the existence of the conspiracy. Defendant Feder denied having made some of the suggested and material statements, admissions, or declarations, whereupon the prosecution produced a stenographic transcript of the conversations at which the statements in question had been made, and the same was admitted in evidence against both defendants.

The person to whom these statements or admissions had been made was a representative of the Department of Justice, and it is beyond all question from the record that at the time Feder was produced before said representative the conspiracy (assuming that it existed) had ended, and ended in failure. Thereupon counsel for Polsky (who did not testify) requested the court to

instruct the jury that "none of these statements . . . made by the defendant Feder . . . is any evidence against the defendant Polsky, and they must not consider such statements or any part of them as being evidence against Polsky."

This request the court denied. At the close of the evidence and after the court's colloquial charge, counsel for Polsky again requested the court to charge the jury that "in determining the question of Polsky's guilt the jury cannot consider as evidence against him any statement or statements which tended to implicate him and were made by the defendant Feder as set forth in the stenographic record."

And this request the court refused.

It is true that the established rule of *Logan v. United States*, 144 U. S. 309, 36 L. ed. 445, 12 Sup. Ct. Rep. 617 (recently reiterated by this court in *Erber v. United States*, 148 C. C. A. 123, 234 Fed. 228), was not specifically brought to the attention of the trial judge when these requests were proffered. But that rule, to the effect that only those acts and declarations of a co-conspirator are admissible against his fellows "which are done and made while the conspiracy is pending and in furtherance of its object," was plainly violated in a way as plainly prejudicial to Polsky. This conspiracy had come to an end, and when that occurred, "whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others."

Since defendant Feder was proffered as a witness, whatever was extracted from her on the witness stand was competent, relevant, and material against her; but the refusal to charge that the said statements made out of court were not competent as against Polsky was prejudicial error.

Evidence—  
admissions of  
conspirator—  
past  
transactions.

—competency  
against witness.

The question remaining is: What disposition must be made of these writs under the circumstances shown? If defendant Feder had been tried alone, the record would have exhibited no error. Although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after

**Conspiracy—  
effect of death  
of one  
conspirator.**

the other accused is dead before conviction. Per Kent, J., *People v. Olcott*, 2 Johns. Cas. at 310, 1 Am. Dec. 168. Yet not only if one of two conspirators be acquitted must the other also be acquitted, but, even if the prosecutor enter a nolle prosequi as to one, the other must be acquitted. *State v. Jackson*, 7 S. C. 283, 24 Am. Rep. 476, 3 Am. Crim. Rep. 50; *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064. And even where evidence tended to show that three defendants had conspired, and the jury declared that A. had conspired with one of the other two, but they could not tell which one, it was held by Lord Campbell, Ch. J.: I think under these circumstances the verdict against A cannot be supported. It is conceded that, if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. I cannot draw a distinction between the cases of two or three persons, if one only is found guilty. If three are indicted and two found not guilty the third must also be acquitted. *Reg. v. Thompson*, 16 Q. B. 832, 117 Eng. Reprint, 1100.

The rule as to convictions in conspiracy may be summed up by saying that, provided the acquittal or death of co-conspirators does not remove the basis of the charge, one defendant may be convicted of the offense. Cf. *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Richards*, 67 Cal. 412, 56 Am. Rep. 716, 6 Am.

Crim. Rep. 112, 7 Pac. 828, and cases supra.

In the cause at bar Polsky is plainly entitled to a new trial, but unless he is guilty there can be no conspiracy. The basis of the charge is swept away if in point of fact there was no union of minds between Polsky and Feder, no matter what Feder's intent, purpose, or effort may have been. While even in conspiracy a new trial has been granted to one of numerous defendants without disturbing the verdict against others (*Rex v. Mawbey*, 6 T. R. 619, 101 Eng. Reprint, 736, 3 Revised Rep. 282), the rule was formerly general that, if a new trial be given to one after a conviction for conspiracy, it is given to all who were found guilty. In *Reg. v. Gompertz*, 9 Q. B. 824, 115 Eng. Reprint, 149, Denman, Ch. J., said: "We cannot grant a new trial to one conspirator without granting it to all who are convicted; as we cannot separate the defendants, there must be a new trial as to all."

This remark must be taken with the limitation above indicated, and indeed commented upon by Lord Denman's colleagues by referring to *Rex v. Mawbey*, supra. The rule is founded upon much reason, as was remarked in *Com. v. McGowan*, 2 Pars. Sel. Eq. Cas. 341, a case which followed the Gompertz decision, soon after the latter was rendered. It has been accepted by writers of authority. Vide Whart. Crim. Law, 10th ed. § 1395; Bishop, New Crim. Proc. 4th ed. § 1038.

The reason for the rule is in our opinion the indivisibility of the crime for which a plurality of defendants are tried. This perhaps is best illustrated by the application of it made in *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612, where, because of error in respect of one of several defendants accused of tumultuous and unlawful assembling, a new trial was granted to all.

The matter has received some consideration in this court. *United States v. Cohn* (C. C.) 128 Fed. 615, was an indictment for con-

spiracy against three men in respect of an agreement to defraud the United States, made by them and "others to the jurors unknown." Two only of the defendants were brought to trial. The trial judge gave a new trial to one of them and denied it as to the other, who thereupon took a writ of error, reported as *Browne v. United States*, 76 C. C. A. 31, 145 Fed. 1 (certiorari refused in 200 U. S. 618, 50 L. ed. 623, 26 Sup. Ct. Rep. 755). This point is considered at page 43, and holds in substance that the jury might well have convicted the one person ultimately held guilty, for conspiring, not with the defendant to whom a new trial was awarded, but with the absent defendant named, and

the "persons to the jurors unknown."

But where, as here, it is impossible that Feder should be guilty unless Polsky is, the crime is in every sense indivisible, its essence is the mental confederation, not of any two of numerous persons (some perhaps to the "grand jury unknown"), but of these two particular defendants, Feder and Polsky. We (in Lord Denman's phrase) "cannot separate" these defendants; for the conspiracy is already reduced to its very lowest terms, viz., two persons. Therefore the rule still applies.

New trial—to one conspirator—effect on others.

Judgments reversed, and new trials ordered.

### ANNOTATION.

#### Effect of death of one party to conspiracy before trial or conviction of another.

While the offense of conspiracy is one which requires the concurrence of two or more persons in its commission, a single conspirator may be convicted if it is shown that others not before the court participated with him. See 5 R. C. L. title, Conspiracy, ¶ 23. Accordingly, the few cases which have passed on the question are in accordance with the reported case (*FEDER v. UNITED STATES*, ante, 370), in holding that the trial and conviction of a conspirator is not prevented by the fact that his co-conspirator died before the trial. *People v. Olcott* (1801) 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *Rex v. Nicolls* (1746) 2 Strange, 1227, 93 Eng. Reprint, 1148.

In *People v. Olcott* (N. Y.) supra, the defendant was convicted of a conspiracy to defraud, entered into with a person who died before the finding of the indictment, and a third, who was acquitted. Sustaining the conviction, Kent, J., said: "The second ground on which the motion was made is that the conviction of two persons is requisite to constitute the crime of conspiracy; and Aborne being acquitted, and Roe being dead, the defendant

cannot legally be convicted. But the case of *Rex v. Nicolls* (Eng.) supra, is directly in point, that one conspirator may be convicted after the other is dead, before conviction. This was a determination by the court of King's bench, and a subsequent case of *Rex v. Scott* (1761) 3 Burr. 1262, 97 Eng. Reprint, 822, 1 W. Bl. 350, 96 Eng. Reprint, 195, is also in point, to show that the death of one of the number requisite to constitute the offense charged will not prevent the conviction of the survivor. It was the case of a riot, in which three persons, at least, are necessary to constitute the crime. There were six persons indicted, two were acquitted and two died before the trial, and Lord Mansfield held that the two who were convicted must have been guilty together with one or both of the persons who had died before the conviction, and yet the conviction of the two survivors was held good."

In *Rex v. Nicolls* (Eng.) supra, the defendant was indicted for conspiring with another to commit an offense. A special verdict was returned that the defendant was guilty and that her co-

conspirator had died before the indictment was preferred. The court overruled an exception "that one alone

cannot be guilty of conspiracy and here is but one convicted."

W. F. F.

TOM DICKERSON, Appt.,

v.

J. R. PERKINS.

*Iowa Supreme Court—February 9, 1918.*

(182 Iowa, 871, 166 N. W. 293.)

**Criminal law — concurrent sentences — how run.**

1. Sentences by different courts of one person to imprisonment for different offenses, which are concurrent in time, run concurrently if judgment is not so rendered that the imprisonment upon one shall commence at the expiration of the imprisonment upon the other, under a statute providing that in case of such conviction the judgment may be rendered so that one term shall commence at the expiration of the other.

[See note on this question beginning on page 380.]

**Evidence — judicial notice — serving sentence.**

2. A court to which one serving a term of imprisonment is brought from the penitentiary, for trial for another

offense, will be presumed to take notice of the fact that he was then serving a term upon a prior conviction.

[See 15 R. C. L. 1113.]

APPEAL by plaintiff from a judgment of the District Court for Lee County (Hamilton, J.) refusing to release him from the custody of defendant in a habeas corpus proceeding to secure his release because of alleged illegal restraint of liberty. *Reversed.*

Statement by Evans, J.:

This is a habeas corpus proceeding. A writ was issued and a hearing had in the district court. The plaintiff is a convict in the penitentiary at Fort Madison. The defendant is the warden. The question involved is whether the plaintiff's prison term has expired. The trial court denied his petition, and he appeals.

Mr. John E. Craig, for appellant:

Plaintiff under the law was entitled to his liberty by reason of having fully served his term under the sentence of date November 21, 1913.

*Mieir v. McMillan*, 51 Iowa, 240, 1 N. W. 525; 12 Cyc. 780; *State v. Lewis*, 63 Kan. 268, 65 Pac. 257; *Re White*, 50 Kan. 299, 32 Pac. 36; *State v. Carlyle*, 33 Kan. 716, 7 Pac. 623; *Re Walsh*, 37 Neb. 454, 55 N. W. 1075, 9 Am. Crim. Rep. 651; *Ex parte Hunt*, 28 Tex. App. 361, 13 S. W. 145.

Messrs. H. M. Havner, Attorney General, and F. C. Davidson, Assistant Attorney General, for appellee:

Sentences do not run concurrently; but the defendant must first serve out the judgment under which he was first sentenced, and at the expiration of that sentence he should begin to serve out the second sentence, although the two convictions were had by the same court and the sentences were pronounced at the same time.

*Mieir v. McMillan*, 51 Iowa, 240, 1 N. W. 525.

Mittimi which have been issued on several judgments, but not served because the defendant was not found, do not expire by lapse of time, nor because of the mittimi being returned to the clerk unexecuted.

*McKay v. Woodruff*, 77 Iowa, 413, 42 N. W. 428.

The time at which the sentence is to be carried out is directory, and forms no proper part of the judgment.

Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; State v. Cockerham, 24 N. C. (2 Ired. L.) 204; Ex parte Bell, 56 Miss. 282; Dolan's Case, 101 Mass. 219; Hollon v. Hopkins, 21 Kan. 638; Neal v. State, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858.

It is not necessary for the court to make any reference to the former sentence, where the former sentence has been entered under the judgment of another court.

Hightower v. Hollis, 121 Ga. 159, 48 S. E. 969.

A sentence is satisfied only by actual imprisonment, unless remitted by death or some legal authority.

Ex parte Oliver, 11 Okla. Crim. Rep. 536, 149 Pac. 117; Neal v. State, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198.

Mr. J. M. C. Hamilton also for appellee.

Evans, J., delivered the opinion of the court:

The plaintiff was committed to the penitentiary under two sentences of imprisonment, of five years each. Indictments for larceny were found against him in the counties of Boone and Dallas. On October 10, 1913, the district court of Boone county entered judgment against him upon a plea of guilty, and imposed the maximum sentence. A mittimus was immediately issued, and the judgment was executed by the sheriff of the county, by delivery to the warden of the mittimus and the custody of the defendant. On November 21, 1913, he was brought from the penitentiary to Dallas county to stand trial upon the indictment there. On said date judgment was again entered against him upon a plea of guilty, and the maximum sentence of imprisonment was again imposed. A mittimus was also issued hereon, and the judgment executed in like manner as before by the delivery of the mittimus and the custody of the prisoner. The question in dispute is whether the two sentences ran concurrently from the date of the delivery of the last mit-

timus and the surrender of the prisoner, or whether the execution of the second sentence should be deemed to have been postponed until the expiration of the term of the first. Section 5439 of the Code provides: "Cumulative Sentences.—If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses."

In the Revision of 1860 the section corresponding hereto (§ 4880) provided that, where the defendant is convicted of two or more offenses, the "judgment shall be so rendered that the imprisonment upon one shall commence at the expiration of the imprisonment upon any other of the offenses." This section was amended, and appears in the Code of 1873 as § 4508 as follows: "If the defendant is convicted of two or more offenses, before judgment on either the punishment . . . of which is, or may be, imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses."

This section was later amended by the elimination of the words which we have inclosed in brackets. In the case at bar the judgment in the second case was not "so rendered that the imprisonment upon it should commence at the expiration of the imprisonment" upon the first offense. Needless to say there was no such provision in the first judgment. There was not at that time any other conviction to be considered.

If § 4508 of the Code of 1873 had not received consideration in an earlier decision of this court, we should have little trouble in construing § 5439 as supporting the contention of the plaintiff. The clear implication of this section is that terms of imprisonment may be concurrent. Power is therein conferred

upon the court to so render the judgment as to make them otherwise. The power thereby conferred operates to some extent as a modification of the requirements of Code §§ 5443 and 5444, which require an immediate execution of the judgment by delivery of the custody of the defendant to the warden of the penitentiary. The original form of this enactment as it appeared in the Revision of 1860, and the subsequent amendments thereto, are suggestive. Under § 4880 of the Revision, as above quoted, it was mandatory upon the court, where two or more convictions were had, to so render the judgment that imprisonment upon one should commence at the expiration of the imprisonment upon another. In the amended statute as it appears in the Code of 1873, § 4508, the mandatory requirement was withdrawn, but the power was still conferred upon the court. The conferring of this power of discretion upon the court required it to determine whether the imprisonment upon one sentence should begin at the expiration of the imprisonment upon another. If yea, the judgment must be "so rendered." If the judgment be not so rendered, the statute confers no power upon any other official to hold the custody of the convict beyond the term that appears upon the face of the judgment. In *Mieir v. McMillan*, 51 Iowa, 240, 1 N. W. 525, a similar question arose under § 4508 of the Code of 1873. It was there held that the sentences did not run concurrently. That holding might perhaps have been safely put upon the ground that in that case the mittimus issued by the court did specify that imprisonment upon one sentence was to begin at the expiration of the term of imprisonment upon another. But the holding was in fact put upon the ground "that two terms of imprisonment cannot, in the nature of things, run concurrently." If such was a tenable ground at that time, it has long ceased to be such ere now. Terms of imprisonment upon sep-

arate convictions can and do run concurrently. We think this proposition is recognized in practically all jurisdictions. Except for such possibility of the concurrence of terms of imprisonment under two or more convictions, there would have been no occasion for the statute, either in its original mandatory form or in its later discretionary form. As already stated, the clear implication of the statute is that such terms may run concurrently, unless the court enter judgment otherwise. Under our present statute, a mittimus consists of a mere certified copy of the judgment. The warden therefore acquired no authority under the mittimus which did not appear in the judgment. It is contended in argument by the state that the implication of concurrent terms is applicable only when the two or more sentences are imposed by the same court. In support of this argument the case of *Hightower v. Hollis*, 121 Ga. 159, 48 S. E. 969, is cited. The case is not wholly in point, and, if it were, it does not meet the provision of our statute. At this point some significance must be given to the amendment of § 4508 of the Code of 1873 as indicated by the present form of the statute. Code, § 5439. It will be noted that the words appearing in the Statute of 1873, which we have inclosed in brackets in our earlier quotation thereof herein, are omitted in our present statute. The form of the Statute of 1873 would warrant the argument that it could apply only to convictions had in the same court. The elimination of the bracketed words broadens the statute greatly, and leaves little room to hold that it is not applicable to the facts of the case before us. If not, no purpose can be conceived for the elimination made. In order to be tried in the Dallas district court, the plaintiff herein was necessarily brought from the penitentiary for the purpose of such trial, upon the order of the court itself. We can



conceive of no fair reason, therefore, why the court should not be presumed to take notice of the fact that he was then serving a term upon a previous conviction. The convictions had were for like offenses. The courts wherein he was convicted were of co-ordinate jurisdiction. Maximum sentences were imposed. Whether the term of imprisonment imposed upon the second conviction should run concurrently or not was a proper matter for the consideration of the court, as bearing upon the character and severity of the punishment. We think, therefore, that a fair construction of the statute requires us to hold it applicable,

**Evidence—  
judicial notice—  
serving  
sentence.**

and that the two sentences imposed upon the plaintiff must be deemed to have run concurrently. In so far as *Mieir v. McMillan*, supra, runs counter to this view, we cannot ap-

**Criminal law—  
concurrent  
sentences—  
how run.**

prove or follow it. We have no real occasion to overrule it because of the change of the statute to its present form.

Because the judgment of conviction upon the second offense did not provide that the term of imprisonment thereunder should begin at the expiration of the term of imprisonment upon the other conviction, the terms must be deemed to have run concurrently. The judgment below is therefore reversed, and the cause remanded.

Preston, Ch. J., and Ladd and Salinger, JJ., concur.

**NOTE.**

The question which the reported case (*DICKERSON v. PERKINS*, ante, 374) answers in the affirmative, whether sentences by different courts run concurrently, is the subject of the annotation following *ZERBST v. LYMAN*, post, 380.

FRED G. ZERBST, Warden of the United States Penitentiary, Atlanta, Georgia, Appt.,

v.

JOHN GRANT LYMAN.

*United States Circuit Court of Appeals, Fifth Circuit—February 10, 1919.*

(255 Fed. 609.)

**Criminal law — concurrent sentences.**

1. Two or more sentences of a convict to the same place of confinement run concurrently, in the absence of specific provisions in the judgment to the contrary.

[See note on this question beginning on page 380.]

— imprisonment under different sentences.

2. A commitment to imprisonment of one convicted of crime, who is already serving a sentence, begins at once upon delivery to the warden, so that the two

sentences will run concurrently, notwithstanding the marshal, in delivering the commitment, states that punishment is to be effective upon completion of the present term.

[See 8 R. C. L. 242.]

(Walker, Circuit Judge, dissents.)

APPEAL by defendant from a judgment of the District Court of the United States for the Northern District of Georgia (*Neuman*, District

Judge) awarding petitioner a writ of habeas corpus to secure his release from custody to which he had been committed for fraudulent use of the mails. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Walker and Batts, Circuit Judges, and Sheppard, District Judge.

Messrs. Hooper Alexander and John W. Henley, for appellant:

The rule relative to cumulative sentences does not apply in a case where the different sentences are imposed by different courts at different times and places.

Hightower v. Hollis, 121 Ga. 160, 48 S. E. 969.

The lower court should not have discharged the prisoner without affording the trial court which imposed the sentence, an opportunity to correct the error alleged to exist in the form of the sentence imposed by that court, if any such error did exist.

United States v. Carpenter, 9 L.R.A. (N.S.) 1043, 81 C. C. A. 194, 151 Fed. 214, 10 Ann. Cas. 509; Re Bonner, 151 U. S. 242, 254-262, 38 L. ed. 149-153, 14 Sup. Ct. Rep. 323.

Mr. W. Carroll Latimer for appellee.

Batts, Circuit Judge, delivered the opinion of the court:

Pending an appeal from a judgment of conviction in the southern district of California, Lyman, appellee, was convicted of another crime in the southern district of New York, and committed to the United States penitentiary at Atlanta. The judgment of the California court was affirmed (Lyman v. United States, 154 C. C. A. 581, 241 Fed. 945), and a commitment was issued, reciting the conviction of Lyman; that he had been ordered to be imprisoned in the state penitentiary at San Quentin, California; that the judgment was affirmed; that the attorney general had designated the penitentiary at Atlanta as the place of confinement of defendant; and directing the marshal to deliver Lyman into the custody of the warden of the Atlanta penitentiary forthwith, and the warden to detain him for a period of one year and three months, "in accordance with the judgment and order." The marshal transmitted this commitment to

the warden with a letter, to the effect that "I am inclosing you official commitment for John Grant Lyman, to become effective upon completion of his present term." The letter contained a receipt for the prisoner, which was signed by the warden and returned to the marshal. At the time the commitment was received Lyman was serving the New York sentence. Upon the expiration of the fifteen months, dating from the day of the receipt of the commitment, Lyman sued out a writ of habeas corpus. The New York sentence had in the meantime expired, but one year and three months had not thereafter elapsed. The district judge held that the sentences ran concurrently, and that the applicant was entitled to his release.

After the receipt of the California commitment, the warden, already in custody of the prisoner, held him under both commitments. The time of the sentence having elapsed between the receipt of the commitment and the date of the application for the writ of habeas corpus, the only conclusion to be reached by the trial court was that the applicant had served the term. The marshal, in sending the commitment, had stated that "the punishment was to become effective upon completion of his present term." There is nothing in the commitment which indicates a time for the beginning of the punishment, other than that the marshal was to forthwith deliver Lyman into the custody of the warden at Atlanta. This commitment was the measure of the authority of the warden, and was properly the basis of the action of the district judge upon the application for habeas corpus. The marshal had no authority to change the terms of the commitment, or determine when the punishment should begin.

Criminal law—  
imprisonment  
under different  
sentences.

It is argued that it was manifest that the California court intended that the punishment should begin after the expiration of the term imposed by the New York court. This nowhere appears. It is true that, if the original order of imprisonment in the state penitentiary at San Quentin had not been changed, the imprisonment could not have begun until the prisoner had been released from the Atlanta penitentiary. But there is nothing to indicate that the court intended to do anything other than that which was done.

It could well be assumed that the court intended, if it can be assumed that it had knowledge of the pendency of another sentence, that the ordinary effect should follow. Ordinarily, two or more sentences run

—concurrent  
sentences.

concurrently, in the absence of specific provisions in the

judgment to the contrary. *United States v. Patterson* (C. C.) 29 Fed. 775; *Re Breton*, 93 Me. 39, 74 Am. St. Rep. 335, 44 Atl. 125; 1 Bishop, *Crim. Proc.* 1327, 1310. This rule seems to apply where the conviction is had in different courts. *Ex parte Green*, 86 Cal. 427, 25 Pac. 21; *Re Black*, 162 N. C. 457, 78 S. E. 273; *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484. The case cited by appellant of *Hightower v. Hollis*, 121 Ga. 160, 48 S. E. 969, if not distinguishable by reason of the nature of the punishment, is apparently in conflict with the weight of authority.

It is suggested that if the attorney general had not designated the Atlanta penitentiary as the place of confinement, and the district court for the southern district of California had caused a commitment to issue upon the original order, the appellee would have been compelled to serve both sentences fully. If the commitment had been different, and the facts different, doubtless a different conclusion would be reached. That which the court is called upon to do is to pass upon the record as it stands. The California

court either knew that Lyman was in the custody of the warden of the Atlanta penitentiary, or did not know of that fact. If it had knowledge of the fact, the commitment which it caused to be issued would evidence an intention that the sentences should run concurrently. If it had no knowledge of that fact, there could have been no intention other than that its sentence should begin forthwith, as directed by the commitment.

The appellant suggests that error was committed in not permitting the California court to amend its judgment. The record contains nothing to indicate that the trial court had any desire to make any amendment, or that it in any sense recognized or assumed that any error had been committed.

The applicant has not, as suggested by the appellant, escaped punishment because of the technical error. There is nothing to indicate that an error has been committed, and the record shows that the prisoner was held under the sentence, for the period designated by the judgment.

The judgment of the lower court is affirmed.

Walker, Circuit Judge, dissenting:

It is quite apparent that the above-mentioned commitment order by the district court for the southern district of California was not intended to change in any respect its previously rendered and affirmed judgment. In specifying the place of imprisonment, there was a compliance with the direction of the attorney general. The extent of the authority conferred on the attorney general by the statute under which he acted (*Rev. Stat. § 5546, Comp. Stat. § 10,547*) is to have the place of imprisonment changed. He is not empowered to make the period of imprisonment different from what it would have been if the place of imprisonment designated in the judgment of the court had remained unchanged. His exercise of the power conferred is not to be given the effect of accomplishing an

unauthorized result. There is nothing to indicate that the above-mentioned letter of the attorney general, or the commitment order made in pursuance of it, purported or was intended to have the effect given to it by the order appealed from. If the change of the place of confinement of the convict had not been so made, his confinement in the San Quentin penitentiary could not have commenced until he was released from confinement in the Atlanta penitentiary, under the New York conviction.

Under the facts of the instant case, there is nothing upon which to base the conclusion that the sentence on the conviction in California was imposed under such circumstances as to make it run concurrently with any other sentence. So far as appears, at the time that sentence was imposed, the convict was not the subject of any other sentence, imposed by that or any other court. As above stated, the commitment order made by the California trial court does not purport to make any change in its judgment rendered at a previous term and thereafter affirmed. To give that order, the writ issued under it, and the written statement made by the warden on his receipt of the commitment writ, the effect of making the period of the convict's confinement shorter than it would have been if the place of confinement had not been changed, would amount to making a change in the effect and operation of the affirmed judgment which was not authorized, and which does not ap-

pear to have been intended by either the attorney general or the court making the order of commitment. It was not in the power of the warden to make an authorized change in the place of imprisonment have the further effect of shortening the period of imprisonment.

Under the circumstances of the issue of the California commitment writ and the receipt of it by the warden, the latter was thereby authorized, upon the expiration of the period of the convict's imprisonment under the New York sentence, to retain him in custody for the period required by the California sentence. The marshal did not execute the writ by arresting Lyman and delivering him to the warden. The convict was already in the warden's custody, held under another unexpired sentence. In the opinion of the writer, what was done did not have the effect of making the convict's confinement in the Atlanta penitentiary under the California sentence commence sooner than it could have commenced if the place of his confinement had not been changed. The application of the conclusion just stated to the facts disclosed leads to the further conclusion that when the writ of habeas corpus was issued, and when the order appealed from was made, the appellee was not entitled to be discharged from custody, because the period of his imprisonment under the California sentence had not expired; and that the court erred in ordering his discharge.

## ANNOTATION.

### Sentences by different courts as concurrent.

#### General rule.

Where a person is under sentence for a crime, and is convicted and sentenced for another offense in a different court, the sentences, ordinarily, are concurrent. *Ex parte Green* (1890) 86 Cal. 427, 25 Pac. 21; *DICKERSON v. PERKINS* (reported herewith), ante,

374; *Rex v. Bath* (1788) 1 Leach, C. L. (Eng.) 441. And see the reported case (*ZERBST v. LYMAN*, ante, 377).

In *Ex parte Green* (Cal.) supra, it appeared that the petitioner was convicted in the superior court of libel, and sentenced to imprisonment for the term of six months. After serving

four days of this sentence he was released on bail, pending an appeal. While so at large, he was convicted in the police court of conspiracy, and sentenced to imprisonment in the county jail for one year. Again he was released after serving one day, on bail, pending an appeal. Later the conviction in the superior court was affirmed, and he was committed to jail. About four months later his conviction in the police court was also affirmed. A petition for a discharge on a habeas corpus was instituted one year from the date of the affirmance of the conviction in the superior court. The court, after holding that the term of imprisonment of the second conviction ran from the date of its affirmance, held that for so much of the first term of six months as had not expired at the time of the affirmance of the second term, the two terms would run together, but that the prisoner would not be entitled to his discharge until one year from the date of the affirmance of the second conviction. It was said: "It is now claimed that the moment he was arrested and imprisoned under the bench warrant of November 22, 1889, his sureties on the undertaking, given on the appeal from the police court judgment, were relieved from liability, and that, as a consequence, the 364 days of the unexpired term of that judgment then commenced to run, notwithstanding the fact that the judgment itself was not affirmed until March 8, 1890, and that from that date, November 22, 1889, the unexpired term of imprisonment under both judgments commenced and ran together, and that, the longest of these terms having now expired, the prisoner is now entitled to his discharge. Sections 669 and 670 of the Penal Code are relied upon, and numerous authorities are cited in support of the proposition that the sureties upon the second appeal were discharged the moment the prisoner was rearrested on the first judgment. Even if that be true, it does not follow that his term of imprisonment for the unexpired portion of the judgment in the case wherein they were sureties then commenced to run. Nor is there

anything in the sections of the Penal Code cited which makes such term commence before the appeal in the case was decided. In my judgment, the term of imprisonment under the unexpired term of the police court judgment did not commence until the 8th day of March, 1890. I think it did not commence on that day, and that, for so much of the term of the first judgment of six months as had not then expired, the two terms ran together, and that the prisoner will be entitled to his discharge at the end of one year, less one day, from the 8th day of March, 1890, and not before."

In *DICKERSON v. PERKINS* (reported herewith), ante, 374, it appeared that the accused was sentenced in the district court of one county for the maximum term for larceny, and later sentenced in a district court of another county for the maximum term for a similar offense. At the expiration of the term a petition for a writ of habeas corpus was filed. A statute (Code, § 5439) relating to cumulative sentences provided as follows: "If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses." The court held that, as the sentence in the second offense did not provide that the term of imprisonment should begin at the expiration of the first term, it ran concurrently.

In *Rex v. Bath* (1788) 1 Leach, C. L. (Eng.) 441, it appeared that the accused was convicted of grand larceny and sentenced at the Old Bailey in the February sessions to imprisonment for seven years. Later he was tried and convicted, at the Lent assizes for the county of Surrey, of stealing an amount of money on a navigable river. He was sentenced to seven years' imprisonment, to commence from the time of his conviction at the Lent assizes.

A contrary doctrine has been held in Georgia, where it is asserted that sentences by different courts are successive, even though not stated so to

be. *Hightower v. Hollis* (1904) 121 Ga. 160, 48 S. E. 969. In that case it appeared that the petitioner was tried and convicted in the city court, and sentenced to pay a fine or be confined in the chain gang for nine months. Pending a certiorari he was released on bond. Subsequently, he was indicted, and, on pleading guilty to the indictment of carrying concealed weapons, was sentenced by the superior court to six months on the public works. The petitioner was held in jail until ten days after the dismissal of the petition for a certiorari, when he was hired out to the chain gang for a period of six months, the period of his second sentence. At the expiration of that time, he was again hired out for a further period of nine months. At the end of nine months from the dismissal of the petition of certiorari, the accused petitioned for a habeas corpus. The court held that sentences imposed by different courts are not concurrent, even though they were not stated to be successive, saying: "The case of *Fortson v. Elbert County* (1903) 117 Ga. 149, 43 S. E. 492, is relied upon by counsel for the plaintiff in error as authority for the contention that the two sentences are concurrent. An examination of that case shows that it is not applicable to a state of facts like the present. It was there held, in effect, that if one is found guilty of more than one offense, and the imprisonment under one sentence is to commence on the expiration of the other, the sentence must so state, or the two punishments will be executed concurrently. It is apparent from a consideration of the opinion in that case that the principle ruled is applicable only where the two or more sentences are imposed by the same court. This court was showing that the law as to misdemeanor sentences at common law was the same as it now is in felony cases, under the Penal Code, § 1041, which provides that 'where a person shall be prosecuted and convicted on more than one indictment, and the sentences are imprisonment in the penitentiary, such sentences shall be severally executed, the one after the expiration of the oth-

er; and the judges shall specify in each the time when the imprisonment shall commence and the length of its duration.' In the opinion delivered by Mr. Justice Lamar, the last clause of the Code section quoted is placed in italics, and it seems perfectly clear that that clause had reference only to cases where an accused person convicted of crime should be sentenced at the same term for more than one offense by the same judge. Certainly the rule could not apply where, as in the present case, the two sentences were imposed by different courts."

#### Exceptions to rule.

A prisoner who escapes from prison, and, while at large, is apprehended, convicted, and sentenced under an assumed name for a different offense, and who is not recognized until during his period of confinement under that sentence, must serve the period of his last pronounced sentence, and then the remainder of his first term. *Henderson v. James* (1895) 52 Ohio St. 242, 27 L.R.A. 290, 39 N. E. 809, 9 Am. Crim. Rep. 711. In that case it appeared that petitioner had been sentenced to five years' imprisonment. After serving a little over two years of that sentence, he escaped. Subsequently he was sentenced in another county under an assumed name, for a period of five years. After being committed to the same penitentiary from which he escaped, a deputy warden recognized him. On the expiration of the second term, the warden retained him to serve the remainder of his prior sentence. A petition was thereupon filed for a habeas corpus. The court said: "Had the court known that the prisoner on trial was the escaped convict Henderson, the court might, on proper proof of that fact, have sentenced him to five years' service in the penitentiary, and ordered him to be delivered to the warden, and fixed his term of service to begin at the expiration of the Warren county sentence. The power of the court to do this, in the absence of any statute, seems clear from the cases above cited. Again, had the court known that the prisoner under indictment in Cuyahoga county was the escaped convict Henderson, the

warden of the penitentiary might have been notified, and the convict returned to the penitentiary to serve out his Warren county sentence. Being then in the penitentiary under a sentence from one county, and under indictment for another crime in another county, § 7234, Revised Statutes, would have been applicable, and under that section he could have been taken from the penitentiary to Cuyahoga county, and tried under the indictment pending against him there, and, upon conviction, he could have been sentenced to the penitentiary, and returned thereto under § 7238, Revised Statutes, to serve out the full term of both sentences. Sections 7234 and 7238 are as follows: 7234. A convict in the penitentiary who escapes or forfeits his recognizance before receiving sentence for a felony of which he is convicted, or against whom an indictment for felony is pending, may be removed to the county in which such conviction was had, or such indictment is pending, for sentence or trial, upon the warrant of the court of such county; but this section shall not extend to the removal of a convict for life, except the sentence to be imposed, or the indictment pending against him, is for murder in the first degree.' 7238. If such convict be acquitted, he shall be forthwith returned by the sheriff to the penitentiary, there to serve out the remainder of his term; but if he be sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff, and his term of imprisonment thereon shall begin to run from the expiration of the term for which he was imprisoned at his removal; or, if he be sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary.' These two sections clearly show the legislative intent that convicts shall serve out one sentence for each offense of which they are convicted and sentenced. It is therefore clear, from these two sections and the decisions of this court sustaining cumulative sentences, that the service under the Cuyahoga county sentence could apply on that sentence only, and that

after having served out that sentence, he still remained an escaped convict under the Warren county sentence, subject to be held to serve out the remainder of that sentence."

Where a sentence is designated to begin at the expiration of a previous sentence imposed by another court, the prisoner must serve the term so imposed successively. *Rigor v. State* (1905) 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719; *Culwell v. State* (1913) 70 Tex. Crim. Rep. 598, 157 S. W. 765; *Miller v. State* (1898) — Tex. Crim. Rep. —, 44 S. W. 162.

In *Rigor v. State* (1905) 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719, it appeared that a prisoner, while serving a five-year sentence imposed by the circuit court of Baltimore county, was tried, convicted, and sentenced by the criminal court of Baltimore city to imprisonment for nine years to begin immediately on the expiration of the five-year sentence previously imposed on him. The accused contended, among other things, that the sentence was cumulative. The court held that a court could impose a sentence to begin in the future at the expiration of a prior sentence, and that it made no difference whether the prior sentence was made by the same court, or a different court, saying: "The matter just indicated concerns the sentence imposed by the criminal court. It has been objected to the sentence, first, that it is cumulative, that is to say, by its terms it was not to begin until the expiration of a prior sentence imposed by another and a different tribunal. . . . In 25 Am. & Eng. Enc. Law, 2d ed. 303, it is said: 'When a defendant is already in execution of a former sentence, sentence of imprisonment may be given against him to commence from the expiration of the term of imprisonment which he is, at the time, serving;' and in support of the text the subjoined cases are cited in note 11. *Wilkes v. Rex* (1770) 4 Bro. P. C. 360, 2 Eng. Reprint, 244, 4 Burr. 2575, 98 Eng. Reprint, 354; *Wallace v. State* (1899) 41 Fla. 547, 26 So. 713; *Kite v. Com.* (1846) 11 Met. (Mass.) 581; *Mims v. State* (1880) 26 Minn. 498, 5 N. W. 374; *Ex*

parte Ryan (1874) 10 Nev. 261; Mills v. Com. (1850) 13 Pa. 630; Russell v. Com. (1821) 7 Serg. & R. (Pa.) 489. See Hochheimer, *Crim. Law*, § 195. If a court, exercising jurisdiction in criminal cases, may lawfully impose a sentence to begin in the future upon the expiration of a prior sentence, it can make no possible difference whether the prior sentence was imposed by the same or some other court, deriving its power from the same authority. Jurisdiction to inflict cumulative punishment is dependent, not on the accident that the offender has been convicted twice or oftener before the same tribunal, but upon the fact that distinct violations of the law have been committed by one individual, whose malefactions merit separate, and therefore cumulative, penalties. Authority to sentence at all is incident to and a consequence of the power to try an accused, and the right to try is founded on the fact that the crime was committed within the jurisdiction of the court, and upon the further fact that the prisoner, after being indicted, is present in person before the court during the trial. It is not material how or by what means he was brought into court, as will be shown later on in discussing another phase of the case. If the court which imposed a sentence that is to begin upon the expiration of a prior punishment, inflicted by some other tribunal of the same commonwealth, has jurisdiction of the offense charged, and over the culprit, it can unquestionably proceed to try him, and, upon conviction, can sentence him for that violation of the law by imposing a cumulative penalty. If this were not so, the subsequent offense might remain unpunished by reason of the death of material witnesses during the running of the prior sentence."

In *Culwell v. State* (1913) 70 Tex. Crim. Rep. 596, 157 S. W. 765, the accused was tried and convicted of false swearing in the district court of one county. Pending a motion for a new trial, he was taken from the sheriff of that county on a bench warrant, issued by the district court of another county, and was tried and convicted of incest,

and sentenced to ten years in the penitentiary. He was then returned to the first county, where he withdrew his motion for a new trial, and was sentenced to two years in the penitentiary, to begin at the expiration of the ten-year sentence. It was held that, the statute having provided for cumulative sentences, it was perfectly proper for the sentence to be so imposed. The court said: "We deem it unnecessary to discuss this question. Our statute, article 862, Code of Criminal Procedure, prescribes: 'When the same defendant has been convicted in two or more cases, and the punishment assessed in each case is confinement in the penitentiary or the county jail for a term of imprisonment, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction have ceased to operate, and the sentence and execution thereof shall be accordingly.' Under our law the judgment of conviction in a felony case is not the final judgment. It takes the sentence, and, until the sentence, the judgment is not final. While the judgment of conviction was had in the Potter county case before the conviction and sentence in the Floyd county case, under the law, the conviction in the Floyd county case became final before that in the Potter county case." And upon rehearing it was said: "It was the evident intention of the legislature and we think the only reasonable construction that can be placed on said article 862, that whichever sentence is first pronounced and entered is the first conviction. And that, to take the whole article and the clear purpose and intent of the legislature, it is clear to us that the last sentence pronounced is, in contemplation of that article, the second and subsequent conviction, and that the last sentence, whether it be the case first originally tried wherein a verdict of guilty is rendered, or not, is the subsequent or



last conviction and sentence contemplated by said article and the law."

In *Miller v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 162, the accused, while serving a term of imprisonment imposed by a district court of one county, was sentenced by another court to another term of imprisonment, to begin at the expiration of the one he was then serving. The record of the former sentence was before the court when it imposed the later sentence. The court held that a cumulative sentence was authorized in such a case.

But a cumulative sentence is not authorized when there is no record of the former sentence before the court, but merely the accused's own testimony and the fact that the accused was taken from the penitentiary for the later trial. *Bullard v. State* (1890)

40 *Tex. Crim. Rep.* 270, 50 S. W. 348. In that case it appeared that the accused had been sentenced to seven years in the penitentiary for a theft of a horse, to begin at the expiration of the term of sentence which the accused was then serving. It appeared that the record of the former sentence, which was in a different county, was not before the court at the last sentence. It was held that unless the record of the former conviction of the accused, together with the evidence as to his identity, was introduced, the court would not be authorized in making the sentence cumulative, unless the conviction occurred at the same term of the court, though the accused's own testimony, and the fact that he was taken from the penitentiary to be tried, were before the court.

R. C. L.

HARRY H. BREWER et al., Appts.,

v.

A. H. WARNER.

*Kansas Supreme Court — July 5, 1919.*

(— *Kan.* —, 182 *Pac.* 411.)

#### Judicial sale — confirmation — effect as adjudication.

1. Confirmation of a sheriff's sale of land, made under a general execution issued on a judgment for debt, is not an adjudication that the land was lawfully subject to sale; and in an action by the debtor against the creditor for damages for deprivation of exempt property the debtor may show that the land was his government homestead, and that the debt was contracted before patent issued, notwithstanding confirmation of the sale.

[See note on this question beginning on page 390.]

#### Exemption — construction of "not exempt."

2. A provision in a state statute, making subject to execution lands not exempt by law, includes exemptions under Federal as well as under state laws.

#### Judgment — exemptions — conclusiveness.

3. An adjudication that homestead land was subject to execution is not subject to collateral attack, although erroneous.

[See 15 R. C. L. 859 et seq.]

#### —adjudication as to judicial sale.

4. In case of a judicial sale the court

actually or presumptively adjudicates every matter essential to the propriety and validity of the sale decree.

[See 16 R. C. L. 32.]

#### Judicial sale — sheriff as agent of court.

5. The sheriff does not, in selling under general execution, act as the agent of the court.

[See 10 R. C. L. 1288.]

#### —innocent purchaser.

6. The purchaser at sheriff's sale is, not an innocent purchaser.

[See 10 R. C. L. 1824.]

**APPEAL** by plaintiffs from a judgment of the District Court for Finney County (Downer, J.) in favor of defendant in an action brought to recover damages for alleged wrongful sale of plaintiffs' government homestead. *Reversed.*

The facts are stated in the opinion of the court.

Mr. H. O. Trinkle, for appellants:

Unless plaintiffs maintain this action for damages, they have no remedy for the wrongs committed by defendant. The sale of their land on the execution was not only wrongful, but wilful; and defendant testified that he knew that the land was the government homestead of plaintiffs when he filed his judgment in the district court.

*Nash v. Farmers' & M. Bank*, 3 Kan. App. 694, 44 Pac. 907; *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Mullaney v. Humes*, 48 Kan. 368, 29 Pac. 691; *Stark v. Bare*, 39 Kan. 100, 7 Am. St. Rep. 537, 17 Pac. 826; 18 Cyc. 1489; 17 Cyc. 1577; *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703, 60 N. W. 561; *Erath v. Glenn*, 89 Kan. 55, 129 Pac. 830.

Messrs. Hoskinson & Field and Richard J. Hopkins, for appellee:

The judgment was regular in all respects, and plaintiff was bound to take notice of all the proceedings had therein. If there were any irregularities in the proceedings in any way they were cured by the confirmation of the sale.

*Knox v. Doty*, 81 Kan. 139, 135 Am. St. Rep. 351, 105 Pac. 437; *Head v. Daniels*, 38 Kan. 2, 15 Pac. 911; *White v. Houser*, 98 Kan. 645, 158 Pac. 1123.

If plaintiff had desired to claim his land exempt, it was his duty when execution was issued to have notified the sheriff, or to have objected to the confirmation, or to have moved to set aside the confirmation as made.

*Day v. First Nat. Bank*, 6 Kan. App. 821, 49 Pac. 691; *J. B. Watkins Land Mortg. Co. v. Mullen*, 62 Kan. 4, 84 Am. St. Rep. 372, 61 Pac. 385; *Doran v. Kennedy*, 237 U. S. 362, 59 L. ed. 996, 35 Sup. Ct. Rep. 615.

**Burch, J.**, delivered the opinion of the court:

The action was one for damages for depriving the plaintiff of his government homestead by means of a sale under execution to satisfy a debt contracted prior to issuance of the patent. The defendant prevailed, and the plaintiff appeals.

The petition tendered other issues than the one stated. They were either waived by the plaintiff, or were properly adjudicated against him,

and will receive no further attention.

The plaintiff made final proof under his homestead entry, and received a final receipt on November 22, 1912. The patent followed on March 25, 1913. On December 2, 1912, judgment was rendered by a justice of the peace in favor of the defendant and against the plaintiff, on a grocery bill then more than six months overdue. A transcript of the judgment was filed in the district court on December 4th. On January 29, 1915, the defendant caused execution to issue, which the sheriff levied on the land in controversy. The land was sold to the defendant, the sale was confirmed, and a sheriff's deed was duly issued and recorded. Immediately after receiving the sheriff's deed the defendant sold the building on the land, and later sold and conveyed the land itself. The defendant testified that at the time he filed the transcript in the district court he knew the plaintiff had filed on the land as a government homestead, had made final proof, and had received his final receipt. The plaintiff testified that at the time the legal proceedings described were taken he was absent from the state, and knew nothing of them until after the sheriff's deed was recorded.

The plaintiff's position is that the proceedings were perfectly regular, in the sense they were conducted according to all the statutory formalities, but that the defendant abused legal process, and thereby deprived the plaintiff of his homestead, contrary to the express prohibition of the Federal statute: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." U. S. Rev. Stat. § 2296, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575.

The defendant's position is that confirmation of the sheriff's sale constituted an adjudication that the land was subject to sale and lawfully sold, and that the plaintiff is not at liberty to attack adjudication collaterally, as by the present action.

The statute provides that lands "not exempt by law" shall be subject to payment of debts, and shall be liable to be taken on execution and sold in the manner prescribed.

Exemption—  
construction of  
"not exempt." Gen. Stat. 1915, § 7344 (Code Civ. Proc. § 440). The

phrase, "not exempt by law," includes Federal as well as state law.

The Federal statute is open to interpretation. Under certain circumstances a government homestead may be sold to satisfy debts contracted before patent, notwithstanding the declaration that "no lands . . . shall in any event become liable," etc. In applying the statute, questions of fact arise: When was the debt created, and when was the patent issued? There is abundant room, therefore, for exercise of the judicial function, and if, in exercise of that function, it has been adjudicated that homesteaded

Judgment—  
exemptions—  
conclusiveness.

land was subject to sale on execution, it is of no consequence that the court erred. The adjudication cannot be attacked except by direct proceeding in the same court or by appeal. Was confirmation of the sheriff's sale in this case such an adjudication?

In considering the question just stated, the distinction between a judicial sale proper and a sale by virtue of a general execution must be kept in mind. Norton v. Reardon, 67 Kan. 302, 100 Am. St. Rep. 459, 72 Pac. 861; Carter v. Hyatt, 76 Kan. 304, 91 Pac. 61. In the case of a judicial sale the court actually or presumptively adjudicates every

—adjudication  
as to judicial  
sale.

matter essential to the propriety and validity of the sale decree. Powers which the court possessed at the time of entering the decree may be exercised at the

time of confirmation; and in a given instance it may be presumed that this occurred. In the case of a sale under general execution the sheriff does not act as the agent of the court. Judicial sale—  
sheriff as agent  
of court. The court has not specified the property or adjudicated the lien, and has not otherwise been concerned with the course which the sheriff shall pursue. In executing the process the sheriff has no guidance but the law, and takes his chance of finding and levying on property which is not exempt.

The purchaser at a sheriff's sale is not an innocent purchaser. He knows the limitations on the sheriff's —innocent  
purchaser. power, and buys what the sheriff can sell, and no more. When the sheriff's return of sale comes before the court for confirmation, the proceeding may be, and commonly is, ex parte. Confirmation may take place on the motion of the sheriff, or of the purchaser, or on the court's own motion, and at any time, without notice to anybody. Confirmation usually follows an inspection of the writ and the return, and, so far as the record discloses, confirmation in this case was typical. The order of confirmation is, indeed, an adjudication of all the facts involved in the inquiry (Carter v. Hyatt, 76 Kan. 304, 306, 91 Pac. 61); but how does the question of the exempt character of land seized and sold get into the case at that time?

Formerly the statute relating to confirmation read as follows: "If the court, upon the return of any writ of execution, for the satisfaction of which any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tene-

ments. . . ." Gen. Stat. 1868, chap. 80, § 458.

The present statute, enacted in 1909, reads as follows: "The sheriff shall at once make a return of all sales made under this act to the court; and the court . . . if it finds the proceedings regular and in conformity with law and equity, shall confirm the same, and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in this act." Gen. Stat. 1915, § 7404.

Under the old law, if the proceedings were regular, that is, if the machinery of the law had been manipulated according to rule, the court was obliged to confirm the sale. Thus, inadequacy of price, unless so gross as to indicate no real sale, was not ground for setting aside a sale. The present statute was designed to give the court larger authority and larger discretion in dealing with sheriffs' sales, in order to promote justice.

It is impossible to say that the Statute of 1909 enlarged the issues presented by a motion to confirm, to include the subject under consideration. The subject is purely one of legal, and not of equitable, cognizance, and is of precisely the same character as it was before 1909. The sheriff is forbidden to subject exempt property to execution process. The execution debtor's right is a legal right, and neither the creditor nor the purchaser, nor anyone else, has any equities in the matter. The result is we are still confronted by the old question, in the old form: What does confirmation of a sheriff's sale made under a general execution adjudicate?

The decisions of this court are uniform and unanimous to the effect that confirmation of an execution sale does not adjudicate the fact that the land sold was lawfully subject to seizure

and sale. The sheriff may sell land not subject to execution, because it belongs to a person other than the execution debtor. In that event, confirmation adjudicates nothing against the owner. *Capital Bank v. Huntton*, 35 Kan. 577, 11 Pac. 369, syl. 1. Indeed, the owner is not even concluded by denial of his motion to set aside the sale, interposed before confirmation. *White-Crow v. White-Wing*, 3 Kan. 276; *Harrison v. Andrews*, 18 Kan. 535, syl. 3; *Mills v. Pettigrew*, 45 Kan. 573, 26 Pac. 33, syl. 2.

The case last cited is instructive. Pettigrew claimed title under a deed executed by the receiver of a railroad company. Mills claimed title by virtue of a sale made under an execution issued to collect a judgment against the railroad company. Pettigrew tried to enjoin the sale, but the proceeding failed, otherwise than on the merits. Pettigrew then contested the sale by motion to set it aside, was defeated, and the sale was confirmed. Pettigrew then commenced an action of ejectment against Mills, and the decision of this court was that he was not concluded by the adjudication denying his motion and confirming the sale.

The principle just discussed applies when exempt property is sold. The sheriff suffers from a defect of power. He has no more authority to seize and sell property of the judgment debtor which is exempt than he has to seize and sell property of a stranger. He cannot create a lien, to be adjudicated by confirmation, by simply seizing and selling land withdrawn by law from the scope of his official activity. The issues on confirmation are precisely the same in one instance as in the other. The judgment of confirmation adjudicates no more in one case than in the other, and this court has so decided. *Gapen v. Stephenson*, 17 Kan. 613, syl. 3.

In the case just cited land was attached for the debt of Gapen, who moved to discharge the attachment on the ground the property was the homestead of himself and wife. The

—confirmation—  
effect as  
adjudication.

motion was denied, and after judgment a decree was entered for sale of the property to satisfy the judgment. After sale Gapen and his wife joined in a motion to set aside the sale, on the ground the land was their homestead. The motion was denied. In this court the wife's appearance was disregarded, and the appeal was disposed of as if Gapen alone had moved to set aside the sale. It was said the motion to set aside the sale was in effect a renewal of the motion to discharge the attachment, so was virtually, but not strictly, governed by the doctrine of *res judicata*. Since, however, the motion had once been denied, and because the decision on the motion would "not affect the ultimate rights of the parties in a regular suit involving the same issues" (page 618 of 17 Kan.), the court saw no reason to interfere with the decision of the district court, overruling the motion on the point presented, that the land was a homestead.

In the case of *Treptow v. Buse*, 10 Kan. 170, judgment was rendered against Treptow by a justice of the peace, an abstract of the judgment was filed in the district court, execution was issued, and land was sold. Treptow's wife moved to set aside the sale, on two grounds: First, that she owned the property; and, second, that it was the homestead of herself and husband. The motion was denied, and a counter-motion to confirm was allowed. In the opinion the court said: "We cannot say that the district court abused its discretion when it decided to let the question go before a jury in an action of ejectment. It must be remembered that this decision on the motion is not conclusive as to the facts. If the conveyance was in good faith and for a valuable consideration, or if the property is her homestead, these facts can be shown in defense to an action of ejectment by the purchaser. No writ of assistance runs to put him in possession. He must bring his action at law, and either party will then be entitled to a jury." 10 Kan. 180.

There is no reason for saying that adjudication of the motions to set aside and to confirm would have been more inclusive, of more force against Treptow, if he had presented the homestead question instead of his wife. Very clearly adjudication of the motion to confirm would not have foreclosed further litigation if the confirmation had been *ex parte* and the homestead question had not been presented at all.

The defendant cites the case of *J. B. Watkins Land Mortg. Co. v. Mullen*, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 385, in which an administrator's sale and deed of a government homestead were collaterally attacked by a motion to set aside a subsequent sheriff's sale. The probate court, having jurisdiction over the subject, had adjudicated liability of the land to appropriation for payment of debts, and it was held the adjudication, even if erroneous, could not be collaterally impeached. The defendant also cites the case of *White v. Houser*, 98 Kan. 645, 158 Pac. 1123. In that case Krouse obtained a judgment against White. Land was attached, the attachment was confirmed, the land was sold, and the sale was duly made and confirmed. Houser was subrogated to the rights of Krouse. The land sold in the Krouse Case was White's government homestead. The sale was upheld, not because the confirmation adjudicated the homestead question adversely to White, but because liability of the land to seizure and sale had been determined in the principal judgment, and the sheriff, in making the sale, acted pursuant to an order of the court itself, establishing the lien and directing the sale.

The court concludes that the order confirming the sheriff's sale did not adjudicate that the land was lawfully subject to appropriation to satisfy the judgment on which the execution was issued.

The judgment of the District Court is reversed, and the cause is remanded for a new trial.

All the Justices concur.

### ANNOTATION.

#### **Confirmation of execution sale of land as adjudication that the land was not exempt.**

The confirmation of an execution sale of land is not an adjudication that the land was not exempt. *Treptow v. Buse* (1872) 10 Kan. 170; *Gapen v. Stephenson* (1877) 17 Kan. 613; *BREWER v. WARNER* (reported herewith) ante, 385; *Schribar v. Platt* (1886) 19 Neb. 625, 28 N. W. 289 (under a statute similar to the one first quoted in the reported case); *Baumann v. Franse* (1893) 37 Neb. 807, 56 N. W. 395; *Best v. Zutavern* (1898) 53 Neb. 619, 74 N. W. 81; *Best v. Grist* (1901) 1 Neb. (Unof.) 812, 95 N. W. 836; *Harding v. Atlantic Trust Co.* (1901) 26 Wash. 536, 67 Pac. 222; *Whitworth v. McKee* (1903) 32 Wash. 83, 72 Pac. 1046 (where the point is not discussed).

It was held in *McHugh v. Smiley* (1885) 17 Neb. 620, 20 N. W. 296, that an ex parte confirmation does not affect a homestead right.

In *Best v. Zutavern* (1898) 53 Neb. 619, 74 N. W. 81, supra, it was held that the court properly refused to consider the question of homestead as an objection to confirmation.

In 2 *Freeman on Executions*, 3d ed. § 311, p. 1819, it is said: "Whether the exemption of the property is a proper subject of consideration upon motion to confirm an execution sale is a question which has been but infrequently considered. If a sale may be refused confirmation on the ground that the property sold was exempt therefrom, the granting of an order of confirmation might involve an adjudication, actual or presumed, that the property sold was not exempt from such sale. We think the better opinion is that the right of exemption, where claimed,

should be left for determination in some subsequent action to recover the property sold, or to otherwise determine its title, and hence, that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead, and was, therefore, not subject to execution sale."

But in the state of Washington the court follows the general rule, as will appear from the cases heretofore cited, although in that state it is held that the court may refuse to confirm the sale on the ground that the land is homestead. *Field v. Greiner* (1895) 11 Wash. 8, 39 Pac. 259; *Waldron v. Kineth* (1906) 41 Wash. 459, 111 Am. St. Rep. 1022, 84 Pac. 16 (overruling as dictum the statement to the contrary in *Harding v. Atlantic Trust Co.* (1901) 26 Wash. 536, 67 Pac. 222); *Mowbray Pearson Co. v. Pershall* (1916) 92 Wash. 516, 159 Pac. 682. But it should be said that in *Harding v. Atlantic Trust Co.* (1901) 26 Wash. 536, 67 Pac. 222, supra, the court gives as its reason for the general rule that "the rights concerning the homestead could not have been heard or determined upon the motion to confirm the sale," which statement is, as aforesaid, overruled as dictum in *Waldron v. Kineth* (Wash.) supra.

It may be noted that in *White v. Houser* (1916) 98 Kan. 645, 158 Pac. 1123, discussed in the reported case (*BREWER v. WARNER*, ante, 385) it was held that the remedy was by appeal or by opening the judgment.

B. B. B.

KENTUCKY LUMBER & MILL WORK COMPANY et al., Appts.,  
v.  
KENTUCKY TITLE SAVINGS BANK & TRUST COMPANY.

(184 Ky. 244, 211 S. W. 765.)

*Kentucky Court of Appeals — May 9, 1919.*

**Mechanics' lien — what is actual notice.**

1. Knowledge by one advancing money on mortgage of real estate that improvements are being made on the property, without knowledge of the nature of the contract under which they are performed or that the laborers are not paid in cash, does not amount to the actual notice which, by statute, subordinates the mortgage to the lien of the materialmen.

[See note on this question beginning on page 398.]

**—determination of validity.**

2. The validity and dignity of mechanics' liens must be determined by the provisions of the statute which creates them, and the application of such equitable principles as apply in the absence of express statutory provisions.

[See 18 R. C. L. 872, 873.]

**—priority of mortgage — notice of claim.**

3. The notice of materialmen's claims which a mortgagee must have had to make his mortgage inferior to that of the materialmen who had not filed notice of their claims before the mortgage was executed must be actual, under a statute giving a laborer or materialman a lien superior to a mortgage or encumbrance created subsequent to the beginning of the labor or furnishing of materials, provided it shall not take precedence of a mortgage for value, without notice, duly recorded, unless notice of intention to perform the labor shall have been filed in the clerk's office.

[See 18 R. C. L. 956.]

**Mortgage — for future advances — validity.**

4. A mortgage given to secure future advances in good faith, and properly recorded, is valid as between the parties to it and all subsequent encumbrancers, although the mortgage does not on its face expressly state that it is to secure future advances.

[See 19 R. C. L. 393, 429; see annotation 1 A.L.R. 1586.]

**—notice of work done and unpaid for.**

5. Notice that labor has been performed or materials furnished for a building on real estate, which have not been paid for, is sufficient to subordi-

nate one taking a mortgage upon the property to mechanics' liens subsequently perfected under the statute, for the labor and materials so furnished.

[See 18 R. C. L. 956, 957.]

**—notice of lien claim.**

6. One advancing money to another to construct a house, with knowledge that materials and labor have been furnished for it, and that the borrowed funds are all that are available to pay for the work, is chargeable with notice that the labor is being done with the expectation of perfecting liens under the statute.

**Notice — facts dependent upon inquiry.**

7. When one is put upon inquiry the knowledge amounts to notice of the actual facts, if the inquiry is a duty and would lead to the requisite knowledge of the facts if ordinary intelligence and understanding were used.

[See 20 R. C. L. 346.]

**Mortgage — building subsequently constructed.**

8. A mortgage of real estate does not fail to attach to a building subsequently erected thereon because it was not in existence when the mortgage was executed.

[See 19 R. C. L. 390.]

**Subrogation — advancement to pay purchase money note.**

9. One advancing money to discharge a purchase money note upon real estate is entitled to subrogation to the rights of the payee as against persons performing labor and furnishing materials for the erection of a building on the property before the advancement is made.

[See 25 R. C. L. 1351.]

**Mortgage — to secure future advances — when value attaches.**

10. A mortgage to secure future advances does not become a mortgage for value until the advances are made.

[See 19 R. C. L. 286, 287.]

**Vendor and purchaser — bona fide purchaser — who is.**

11. One has protection as a bona fide

purchaser of real estate only if his payments are made before notice of outstanding equities.

**Attachment — future advances.**

12. Money not yet advanced under a mortgage to secure future advances is not subject to attachment for debts of the mortgagor.

**APPEAL** by plaintiffs from a judgment of the Chancery Branch of the Circuit Court for Jefferson County, Second Division, in favor of defendant in a suit to enforce mechanics' liens. *Reversed.*

The facts are stated in the opinion of the court.

Mr. David R. Castleman, for appellant Lumber Company:

Notice of a materialman's equity deprives a subsequent mortgage of priority.

*Foushee v. Grigsby*, 12 Bush, 75; *Scheas v. Boston*, 125 Ky. 535, 101 S. W. 942; *Trust Co. v. Young*, 181 Ky. 771, 115 S. W. 780; *First Nat. Bank v. Chowning Electric Co.* 142 Ky. 624, 134 S. W. 1156; *Voss v. Home Loan & Bldg. Asso.* 167 Ky. 231, 180 S. W. 368.

Before paying over the proceeds of the mortgage, defendant knew that material and labor used in improving property were not paid for, which in law constituted notice of resulting statutory liens.

*Everidge v. Martin*, 164 Ky. 497, 175 S. W. 1004.

The right of a mortgagee to priority must be reckoned from the date he actually pays over the proceeds, and not from the date the mortgage is recorded.

*Hardin v. Harrington*, 11 Bush, 367; *Winlock v. Munday*, 156 Ky. 806, 162 S. W. 76; *Moulder Holcomb Co. v. Glasgow Cooperage Co.* 173 Ky. 519, 191 S. W. 275.

A part of the proceeds of the mortgage was attached in the hands of the Trust Company, and this fund should be subjected to appellant's attachment if it is held that the Trust Company's mortgage is a first lien.

*Jones v. Dulaney*, 27 Ky. L. Rep. 702, 86 S. W. 547; *Miles v. National Bank*, 140 Ky. 376, 131 S. W. 26.

Funds created for a "building loan" cannot be diverted to any other object.

*Smith v. Sanborn State Bank*, 147 Iowa, 640, 30 L.R.A.(N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; *Sawyer v. Connor*, 114 Miss. 363, L.R.A. 1918A, 61, 75 So. 131, Ann. Cas. 1918B, 388.

Mr. Joseph J. Hancock also for appellants.

Messrs. Keith L. Bullitt and Bruce & Bullitt for appellee.

*Hurt, J.*, delivered the opinion of the court:

Charles Wright purchased a lot in the city of Louisville, on the 17th day of December, 1915, for which he promised to pay the sum of \$800. He paid \$50 of the agreed price, and the vendor retained a lien in the deed, which he executed to Wright for the lot, to secure the remainder of the purchase price. Wright at once began to negotiate with materialmen, mechanics, and laborers for the erection of a dwelling house upon the property. He entered into a contract with the appellant Kentucky Lumber & Mill Work Company to furnish certain materials to be used in the construction of the house, and under this contract the company began to deliver materials upon the ground, where the house was to be erected, on the 30th day of December, 1915, and, including the 14th day of January, 1916, it delivered materials under the contract, which, at the contract prices, amounted to the sum of \$648.23, and which were used in the construction of the building. Wright promised to pay the company one half of the amount of the account when the roof should be put upon the house, and the remainder on the 15th day of January, 1916. Wright also contracted on the 30th day of December, 1915, with the Carl Althaus Company to do work and furnish materials to aid in the construction of the house, and between that date and January 12,



1916, this company, under its contract, did labor and furnished materials in the sum of \$134.45, concluding its contract on the 11th day of January, 1916. Various other persons, under contracts with Wright, did labor and furnished materials in the construction of the house; but as they are not appealing from the judgment their claims will not be considered.

About the 30th of December Wright opened negotiations with the appellee Kentucky Title Savings Bank & Trust Company, to make a loan to him of \$2,500, to be used in constructing the building, at the same time submitting the plans and specifications of the proposed building. The appellee caused an appraisal of the lot to be made, and ascertained that the value of the naked lot was only \$700, but with the completion of the proposed building it would be of the value of \$3,500. It also ascertained that at that time excavations were being made upon the lot for the purpose of the erection of the building. Wright, on the 4th day of January, 1916, made application in writing to the Bank & Trust Company for the loan, when the latter caused an examination of the title to the lot to be made, and agreed to make the loan, and on the 8th day of January, 1916, Wright executed his promissory note to the Bank & Trust Company, for the \$2,500, to be paid in 663 equal weekly instalments, and with the provision that if he failed to make either of the weekly payments all of the instalments should then become due and collectable. To secure the payment of the note according to its terms, Wright executed to the Bank & Trust Company a mortgage upon the lot upon which the house was being built, and the mortgage was recorded in the office of the clerk of the county court on the 11th day of January, 1916. While the note was executed for the entire amount of the loan, as though it had all been furnished, at the date of the note it was not so furnished, but the loan was made upon

an agreement that the Bank & Trust Company was to retain the amount, deposited to the credit of an account termed a "special," and which was used by the Bank & Trust Company in conducting loans, made for the purpose of erecting buildings, and, after the payment of certain fees to the Bank & Trust Company out of it, for causing the appraisal to be made, and the investigation of the title to the lot, and for handling such a loan, and for thereafter investigating to see if there were any liens upon the property or taxes unpaid upon it, and reporting such matters to the mortgagor, and causing the release of liens for materials and construction, and causing the property to be insured, if deemed needful, the remainder of the loan was to be advanced to the mortgagor as the erection of the building progressed. The mortgagor was not to receive any of the money for any purpose except to pay for the materials and labor as the erection of the house progressed, and not until the improvements to be paid for were put upon the lot, when the men who furnished the materials would be paid for them by the Bank & Trust Company, upon bills indorsed as correct by the mortgagor. There was no express agreement that the money loaned would not be paid to the mortgagor, but was to be paid to him under the circumstances above stated. Out of the amount for which the note was executed, the Bank & Trust Company on January 11th paid the sum which Wright yet owed upon the lot, and which amounted to the sum of \$753.13, and on the same day paid the Kentucky Title Company for the examination of the title, \$30.75, and to itself the sum of \$62.50, for the services to be rendered by it as above stated. On January 12th it advanced to Wright the sum of \$300, and on January 15th the sum of \$450, leaving a balance on its hands of \$903.62. On the 15th day of January, Wright fled the country, and has not been since heard of,

leaving his building partially completed, and his creditors for labor and materials unpaid.

Neither of the parties who furnished materials or performed labor in the construction of the building filed in the clerk's office the preliminary statement showing that he had performed or furnished, or expected to perform labor or furnish materials, before the recording of the mortgage of the Bank & Trust Company, as provided by § 2463, Ky. Stat., except one of them, who filed a statement showing a lien for an insignificant amount; but, after the recording of the mortgage on the 11th day of January, the appellant Kentucky Lumber & Mill Works Company, and the Carl Althaus Company, each filed the statements entitling them to a lien upon the house and lot, as provided for by § 2463, Ky. Stat., the one on the 22d day of January, and the other on the 19th day of January, and many others who performed labor or furnished materials did likewise within the time to create liens in their behalf.

The appellant Kentucky Lumber & Mill Work Company sought to enforce its lien, and obtained an attachment upon the sum of \$903.12 of the loan, which the Bank & Trust Company had not yet advanced or paid to Wright. The other lien holders were made parties to the action, and upon a final hearing the court adjudged that the lien of the Bank & Trust Company, by reason of the mortgage, was superior to the liens of any of the materialmen or laborers, and that it had a right to credit its note with the amount of the loan which had not been advanced, and dismissed the attachment. The property failed to sell for a sufficiency to pay all the liens, and from the judgment the Kentucky Lumber & Mill Work Company and Carl Althaus Company have appealed.

No case has ever been determined by this court where the state of facts was similar to those in the instant case, and the judicial de-

terminations in other jurisdictions have been controlled by statutes essentially different from the one in force in this state upon the same subject, and many of the adjudications of this court, touching the liens of materialmen and laborers, have been rendered when the provisions of the statute laws were different from those now in force. The liens which appellants sought to enforce are creatures of the statutes, and their validity and dignity must be determined by the provisions of the statutes, and the application of such equitable principles as apply in the absence of express statutory provisions. The statutes, so far as same is applicable to the facts of this case, are as follows:

"2463. Lien of—How Perfected—Amount of—Mortgage or Conveyance—Notice. A person who performs labor or furnishes materials in the erection, altering, or repairing a house, building, or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement in any manner of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect, or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or encumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: . . .

And provided that such lien shall not take precedence of a mortgage or other contract, lien, or bona fide conveyance for value without notice, duly recorded or lodged for

*Mechanics' Lien*  
—determination  
of validity.

record according to law, unless person claiming such prior lien shall before the recording of such mortgage or other contract, lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished materials, or shall expect to perform labor or furnish materials, as aforesaid, a statement showing that he has performed or furnished, or that he expects to furnish such labor or materials, and the amount in full thereof and his lien shall not as against the holder of said mortgage, or other contract, lien, or other conveyance, exceed the amount of the lien claimed or expected to be claimed as set forth in such statement.

It will be observed that one rendering labor or furnishing materials in the erection of a house, to secure the payment of his debt, has a lien upon the house and the land upon which it is erected, superior to any mortgage or encumbrance which is created subsequent to the beginning of the labor or furnishing of the materials, if the lien is asserted in the manner and within the time provided by § 2468, Ky. Stat., and when it is so asserted it relates back to and takes effect from the time of the commencement of the labor or the furnishing of the materials. The exception allowed by the statute to the superiority of the lien of the materialman or laborer is the lien created by a mortgage, or other contract, lien, or bona fide conveyance for value, without notice, duly recorded or lodged for record according to law, and the superiority of such latter character of liens is avoided, if the materialman or laborer, before the mortgage or other contract lien or conveyance is recorded, shall have given notice by filing in the clerk's office a statement showing that he has performed labor or furnished materials, or intends to do so, and the amount of his then claim, or what he expects to claim. The statute, it will be observed, does not

give to the materialman or laborer a superior lien to a mortgage or encumbrance created upon the property, and of which there is notice, actual or constructive, before the commencement of the labor or the beginning of the furnishing of materials.

In the instant case, the appellees' mortgage having been recorded after the appellants had commenced to labor and to furnish materials, although the appellants had given no constructive notice of having worked or furnished materials by filing in the clerk's office a statement of the labors performed or materials furnished, or what they expected to do or to furnish, they filed in the clerk's office the statements necessary to mature their inchoate right to a lien, as provided by § 2468, supra, and their liens relate back and take effect prior to the mortgage—in fact, take effect at the time they commenced to furnish materials and to labor, and hence their liens are necessarily superior to the lien of the mortgage, unless the mortgage was taken by appellee in good faith, for value, and without notice of the appellants' right to a lien, and recorded according to law. The notice which appellee must have had to render its lien subordinate to appellants' lien must have been an actual notice, as <sup>—priority of mortgage—</sup> <sub>notice of claim.</sub> distinguished from the constructive notice which appellants might have made effective by filing in the clerk's office, prior to the recording of the mortgage, the preliminary statements of their work or materials furnished, or of their intentions to work or furnish materials. *Foushee v. Grigsby*, 12 Bush, 75; *Scheas v. Boston*, 125 Ky. 536, 101 S. W. 942; *Voss v. Home Loan & Bldg. Asso.* 167 Ky. 231, 180 S. W. 368; *First Nat. Bank v. Chowning Electric Co.* 142 Ky. 624, 134 S. W. 1156; *Trust Co. v. Young*, 131 Ky. 771, 115 S. W. 780. The above cases also established the doctrine that the knowledge by the mortgagee that improvements are

being made upon property, but without knowledge of the nature of the contract between the owner and the materialmen and laborers, and without knowledge that the latter has a lien, as they may be paid in cash, does not amount to the actual notice, which is required to render the lien of the mortgagee inferior to that of the materialmen and laborers. In those cases, however, there was no such a contract between the mortgagee and mortgagor, as to the advancements of the funds and the purpose and the time when they should be advanced, as exists in this case, nor did there exist the same elements of knowledge on the part of the mortgagee, as existed in the instant case.

The general rule is that a mortgage given to secure future advances, if in good faith and properly recorded, is valid as between the parties to it and all subsequent encumbrances, although the mortgage does not, on its face, express that it is to secure future advances; nor need the agreement to that effect be in writing, although it cannot be enforced except as to the sums advanced, and after they are advanced, and in accordance with this rule, it is held in many jurisdictions that a mortgage, executed and recorded to secure money for the express purpose of making improvements or placing buildings upon the property mortgaged, and when recorded before any work is commenced or materials furnished, is a superior lien to the liens of the materialmen and laborers, and particularly so if the mortgagee is bound to make the advances, or the money is used in making the improvements. *Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 581, 43 L.R.A. 622; *Bartlett v. Bilger*, 92 Iowa, 732, 61 N. W. 233; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Ackerman v. Hunsicker*, 85 N. Y. 46, 39 Am. Rep. 621; *Googins v.*

*Gilmore*, 47 Me. 13, 74 Am. Dec. 472; *Morris v. Cain*, 39 La. Ann. 712, 1 So. 797, 2 So. 418; *Kiene v. Hodge*, 90 Iowa, 212, 57 N. W. 717; *Taylor v. La Bar*, 25 N. J. Eq. 222; *Wroten v. Armat*, 31 Gratt. 228; *Building & L. Asso. v. Coburn*, 150 Ind. 684, 50 N. E. 885. But the statutes of most states give to the materialmen and laborers a superior lien to an encumbrance created after the commencement of the labor or the furnishing of the materials, and it will be observed that the above-cited cases were all dealing with the dignity of a mortgage lien created before the work had commenced or the materials were furnished, for which the laborers' and materialmen's liens were asserted.

The appellants' liens in the instant case, dating from the beginning of their work and furnishing materials, were prior to the lien of the mortgage of appellee, and we are relegated to the express terms of our statute to determine rights of the parties. Under the express terms of the statute, the lien of appellee being created after the beginning of the work and the furnishing of materials, for which appellants' liens are asserted, their liens are necessarily superior to that of the mortgagee, unless the lien of appellee's mortgage was created for value and without actual notice on the part of appellee of appellants' rights.

To have actual notice of appellants' equity, the Bank & Trust Company must have known that the appellants had furnished materials or done labor, for which they had not been paid, and for which they were entitled to assert the statutory lien. To require more knowledge than this would defeat the purpose of the statute touching the notice, as the appellee could not know whether the appellants would perfect their lien by filing a final statement as provided in § 2468, *supra*, until it was done, and the appellants could not file such statement until their work

—what is actual notice.

Mortgage—  
for future  
advances—  
validity.

—notice of work  
done and  
unpaid for.

had been completed under their contracts. Hence the only question for determination is whether, under the evidence, the Bank & Trust Company, when its lien was created, had actual knowledge that work had been done or materials furnished and not paid for, and for which the appellants were entitled to assert liens.

The proof shows that up to the times the advancements were made to Wright, of \$300 on January 12, and \$450 on January 15, and at the times the other and previous advancements were made, that the Bank & Trust Company did not have actual knowledge, according to the doctrine of *Foushee v. Grigsby*, 12 Bush, 75, and *Scheas v. Boston*, 125 Ky. 536, 101 S. W. 942, of the equities of the appellants; but, when those two advancements were made, they had actual knowledge, received from Wright, that work had been done and materials furnished in the construction of the house, which had not been paid for. It also knew that the mortgage had been executed expressly to obtain funds with which to erect the house, and from the promise to discharge it by weekly instalments, in a small amount and extending over such a length of time, that Wright did not have means to construct the house, other than that which the Bank & Trust Company advanced to him under the mortgage; and in the evidence the Bank & Trust Company's agents admit that they believed such to be the fact. It had already discharged the lien which the vendor held for the purchase money of the lot. The Bank & Trust Company, under the agreement with Wright, had assumed the duty of looking after the release of liens, and under the contract had the right to withhold the money from Wright until it should be assured that it was used for paying for the labor and materials, so that the property would not be encumbered with liens for the prices of such

things. The proof fails to show that the Bank & Trust Company knew the names of the materialmen and laborers or amounts due them when the two advancements were made, but had abundant knowledge to put it upon inquiry, and where a party is put upon inquiry the knowledge amounts to notice of the actual facts, if the inquiry is a duty, as in case of purchasers and creditors, and would lead to the requisite knowledge of the facts, if the party uses ordinary intelligence and understanding. 29 Cyc. 1114; *Willis v. Vallette*, 4 Met. 186; *Russell v. Petree*, 10 B. Mon. 184; *Bennett v. Titherington*, 6 Bush, 196; *Everidge v. Martin*, 164 Ky. 497, 175 S. W. 1004; *Summers v. Taylor*, 80 Ky. 429; *Lain v. Morton*, 23 Ky. L. Rep. 438, 63 S. W. 286..

The contention of appellants that the Bank & Trust Company's mortgage does not attach to the house, because it was not in existence when the mortgage was executed, cannot be sustained. Where a lien is created upon land, and buildings are thereafter erected upon it, the lien attaches to the buildings, as they are constructed, and has priority over the liens of materialmen and laborers for constructing the buildings. *Cooley v. Black*, 105 Ky. 267, 48 S. W. 1075; *Orr v. Batterton*, 14 B. Mon. 100. In the absence of a statute to that effect, a prior lien cannot be restricted to the land itself, when a building is thereafter erected upon it; nor can the liens of mechanics and materialmen, for the erection of a house upon land which is covered by a prior lien, be restricted to the building alone, as the statute provides the lien to be upon both the lands and the houses upon it. For the reasons above stated, the lien of the Bank & Trust Company for the amount of the purchase money note

—notice of  
lien claim.

Notice—facts  
dependent  
upon inquiry.

Mortgage—  
building  
subsequently  
constructed.

which it discharged, upon both land and house, is superior to the liens of appellants, as the company is entitled to be subrogated to the lien of the vendor.

**Subrogation—  
advancement  
to pay purchase  
money note.**

The mortgage to the Bank & Trust Company attached to the property as the advancements under it were made, and, as said heretofore, it could only be enforced to the extent of the advancements made as against the mortgagor. It did not become a mortgage "for value" until the money it was intended to secure was advanced by the mortgagee, and, whatever may be the rule as to computing the date as to which it would become valid as to subsequent encumbrancers, the mortgagee under it would not be protected as to prior encumbrancers, except to the extent it became a valid obligation for value and without notice to the mortgagee of opposing equities. It has been held many times that one claiming to be a bona fide purchaser of land, for value and without notice of outstanding equities against the land, is only protected in his purchase to the extent that he has made payment before notice, and if he has not completed payment before receiving notice of outstanding equities, he will be charged with the equity to the extent of the unpaid purchase money. Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397; Hardin v. Harrington, 11 Bush, 367; Lain v. Morton, 23 Ky. L. Rep. 438, 63 S.

**Mortgage—  
to secure  
future advances  
—when value  
attaches.**

**Vendor and  
purchaser—  
bona fide pur-  
chaser—who is.**

W. 286; Winlock v. Munday, 156 Ky. 806, 162 S. W. 76. There appears to be no good reason why the same rule should not apply to a mortgagee, under a mortgage wherein the money for which the mortgage was given was to be advanced in instalments. Gere v. Cushing, 5 Bush, 304; Foushee v. Grigsby, 12 Bush, 75; Kentucky Bldg. & L. Asso. v. Kister, 101 Ky. 323, 41 S. W. 293. It does not seem equitable that the mortgagee with notice of the equities of the materialmen and laborers against the property should be permitted to destroy the effectiveness of their liens, and thereby make its own security sufficient at their expense.

The attachment upon \$903.12 of the proposed loan was properly dismissed, and the appellant Lumber & Mill Work Company denied the right to subject it to its debt. The money had never been advanced to Wright, and he, having failed to keep his contract with the Bank & Trust Company, in the payments to be made by him and his creditors, could not have any greater right in regard to it than himself. Cissna v. Smiley, 10 Ky. L. Rep. 722.

**Attachment—  
future  
advances.**

It is therefore ordered that the judgment be reversed, and cause remanded, with directions to set aside the judgment, so far as it adjudges that the appellee's mortgage lien was superior to the lien of appellants upon the house and lot to the extent of the \$750 advanced to Wright on the 12th and 15th days of January, and for further proceedings not inconsistent with this opinion.

## ANNOTATION.

### Priority as between mortgage for future advances and mechanics' liens.

As to what amounts to a mortgage for future advances, see annotation in 1 A.L.R. 1586.

The decisions collected in this annotation reflect the variations of opin-

ion upon the general question of the relative priority of mortgages for future advances, and liens and encumbrances attaching subsequently to the making of the mortgage, but before

all the mortgage money has been advanced. By the weight of authority, a mortgage for future advances becomes an effective lien from the time of its execution, or, as to subsequent purchasers and encumbrancers, from the time of its recordation, rather than from the time when each advance is made, where the making of the advances is obligatory upon and not merely optional with the mortgagee (see *Allis-Chalmers Co. v. Central Trust Co.* (1911) 39 L.R.A.(N.S.) 84, 111 C. C. A. 428, 190 Fed. 700; *Valley Lumber Co. v. Wright* (1905) 2 Cal. App. 288, 84 Pac. 58; *Weissman v. Volino* (1911) 84 Conn. 326, 80 Atl. 81; *Anglo-American Sav. & L. Asso. v. Campbell* (1898) 13 App. D. C. 581, 43 L.R.A. 622; *Gray v. McClellan* (1913) 214 Mass. 92, 100 N. E. 1093; *Whelan v. Exchange Trust Co.* (1913) 214 Mass. 121, 100 N. E. 1095; *Hill v. Aldrich* (1892) 48 Minn. 73, 50 N. W. 1020; *Erickson v. Ireland* (1916) 134 Minn. 156, 158 N. W. 918; *Taylor v. La Bar* (1874) 25 N. J. Eq. 222; *Blackmar v. Sharp* (1901) 23 R. I. 412, 50 Atl. 852), or where such advances are made without actual notice of the claim forming the basis of the mechanics' lien (see *Tapia v. Demartini* (1888) 77 Cal. 383, 11 Am. St. Rep. 283, 19 Pac. 641; *Richards v. Waldron* (1892) 9 Mackey (D. C.) 585; *Finlayson v. Crooka* (1891) 47 Minn. 74, 49 N. W. 398, 645; *Central Trust Co. v. Continental Iron Works* (1893) 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 20 Atl. 595; *Richards v. Chamberlain* (1878) 25 Grant, Ch. (U. C.) 402). In some instances, however, knowledge of the fact that the work was being performed has been held to postpone the lien of the mortgage as to advances made while the work was going on, to mechanics' lien claims therefor. See *W. A. Allen Co. v. Emerton* (1905) 108 Me. 221, 79 Atl. 905; *Gray v. McClellan* (1913) 214 Mass. 92, 100 N. E. 1093.

A mortgage for future advances has, in cases where the making of such advances was apparently obligatory, been held to be a "prior mortgage" (*Jacobus v. Mutual Ben. L. Ins. Co.* (1876) 27 N. J. Eq. 604), and the mort-

gagee to be a "prior bona fide mortgagee" (*Hill v. Aldrich* (1892) 48 Minn. 73, 50 N. W. 1020), and its lien has been held not to be one attaching (*Valley Lumber Co. v. Wright* (1905) 2 Cal. App. 288, 84 Pac. 58; *Home Sav. & L. Asso. v. Burton* (1899) 20 Wash. 688, 56 Pac. 940) or originating (*Lyle v. Ducomb* (1813) 5 Binn. (Pa.) 585) subsequently to the commencement of the work, within the meaning of the provision of Mechanics' Lien Laws fixing the relative priority of such liens and other encumbrances on the property.

But a mortgage securing future advances, the making of which is optional with the mortgagee, is not a mortgage "actually existing," within the meaning of such a statutory provision. See *Gray v. McClellan* (1913) 214 Mass. 92, 100 N. E. 1093.

The right of a mortgagee for future advances to priority over mechanics' liens for advances made during the progress of the work is sometimes a matter of balancing conflicting equities. Where the mortgage money is to be advanced and used for the carrying on of the work, and the lien claimants have furnished labor or materials with actual or constructive notice thereof, the mortgagee is ordinarily deemed entitled to priority. See *Jorammon v. McPhee* (1903) 31 Colo. 26, 71 Pac. 419; *Young v. Haight* (1903) 69 N. J. L. 453, 55 Atl. 100; *Platt v. Griffith* (1876) 27 N. J. Eq. 207; *McAdams v. Piedmont Trust Co.* (1914) 167 N. C. 494, 83 S. E. 623, Ann. Cas. 1916B, 669; *Culmer Paint & Glass Co. v. Gleason* (1913) 42 Utah, 344, 130 Pac. 66; *Iaeger v. Bossieux* (1859) 15 Gratt. (Va.) 83, 76 Am. Dec. 189; *Wroten v. Armat* (1879) 31 Gratt. (Va.) 228; *Wright v. Vaughan* (1899) 2 Va. Dec. 662, 33 S. E. 595; *Wisconsin Planing Mill Co. v. Schuda* (1888) 72 Wis. 277, 39 N. W. 558, but compare *Building & L. Asso. v. Coburn* (1898) 150 Ind. 684, 50 N. E. 885. So, where the advances are all made before the work is done or material furnished, the equity of the mortgagee is superior to that of the lien claimant. See *Kiene v. Hodge* (1894) 90 Iowa, 212, 57 N.

W. 717; *Martsof v. Barnwell* (1875) 15 Kan. 612.

It has been held that a mechanics' lien for materials furnished and services rendered in good faith, without notice other than that given by the record of a mortgage made in part to secure future advances, but which disclosed no agreement to make them nor indicated the amount to which they might be made, was entitled to priority over the lien of such mortgage as to advances made subsequent to its execution. *Balch v. Chaffee* (1900) 73 Conn. 318, 84 Am. St. Rep. 155, 47 Atl. 327.

Mechanics' lien claimants are in many respects a privileged class, and the right to precedence over subsequent liens which a mortgagee for future advances might otherwise enjoy may be affected by the provisions of the local statute. Consideration of convenience have, therefore, dictated an arrangement of cases with reference to the jurisdictions in which they were decided.

#### California.

In *Tapia v. Demartini* (1888) 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641, it was held that a mortgage made in good faith to cover future advances, and duly recorded before the performance of labor on the mortgaged property, is entitled to priority over mechanics' liens therefor as to advances made before actual, as distinguished from constructive, notice of such liens.

In *Valley Lumber Co. v. Wright* (1905) 2 Cal. App 288, 84 Pac. 58, it was held that mechanics' liens were not entitled to priority over a deed of trust duly acknowledged and recorded before any labor was performed on the building and before any material was commenced to be furnished, under a statute which declares such liens to be "preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced or materials were commenced to be furnished," although such deed of trust was to secure a loan to be used in erection of a building and to be paid over from time to time as the work progressed, and the lender

had notice that plaintiff had commenced to perform labor and furnish materials prior to the actual payment of any of the borrowed money, where the lender was under an enforceable obligation to furnish the money.

#### Colorado.

In *Joralmon v. McPhee* (1903) 31 Colo. 26, 71 Pac. 419, it was held that under a statute providing that the right of lien shall not impair any valid encumbrance upon the land on which a building is constructed, which is recorded prior to the signing of a contract for the erection of such building or the commencement of work thereon, but giving mechanics' liens priority as against the improvements made under the building contract (a deed of trust for advances to be made for building purposes, executed and recorded before the building contract was entered into and before the work was commenced, has preference over the lien claimant, in so far as the land is concerned, up to the amount of the indebtedness actually owing on the note secured thereby; and that, as the mechanics and materialmen had notice of the existence of such deed of trust and knew that it had been given for the purpose of securing funds to construct an improvement, and that the funds thus obtained had been applied in that way, their rights must be held subordinate to that of the mortgagee to the extent of such advances.

For a contrary decision under a similar statute, see *Building & L. Asso. v. Coburn* (1898) 150 Ind. 684, 50 N. E. 885,—set forth *infra*.

#### Connecticut.

In *Weissman v. Volino* (1911) 84 Conn. 326, 80 Atl. 81, a mechanics' lien was held not entitled to priority over a mortgage binding the mortgagee to make future advances, made and recorded before the furnishing of materials and rendition of services by the lien claimant, although the agreement respecting such advances permitted the mortgagee to withhold payment of any one or more of the advancements, provided any lien or claim of lien against the property should ex-



ist at the time prescribed for making such payment.

Another Connecticut decision set forth in the introductory portion of this note, and which need not be repeated here, is *Balch v. Chaffee* (1900) 73 Conn. 318, 84 Am. St. Rep. 155, 47 Atl. 327.

**District of Columbia.**

A mortgage for future advances which is obligatory upon the mortgagee, and which has been put on record before any contract for building, has priority over all liens for labor and materials subsequently supplied for the building, even though the mortgagor may have had notice of claims for labor and materials furnished for the building, and of the filing of liens therefor, at the time of making some of the advances. *Anglo-American Sav. & L. Asso. v. Campbell* (1898) 13 App. D. C. 581, 43 L.R.A. 622.

In *Richards v. Waldron* (1892) 9 Mackey (D. C.) 585, a deed of trust to secure advances to be made, but which on its face did not disclose that it was for future advances, recorded before the commencement of the construction of the building with reference to which the mechanics' liens were filed, was valid as against such liens, notice of which was not filed until after all the advances had been made.

**Indiana.**

In *Building & L. Asso. v. Coburn* (1898) 150 Ind. 684, 50 N. E. 885, it was held that under a statute which provides that a mechanics' lien shall attach to the "building" and to the "interest of the owners" in the lot or land, and that where "the land is encumbered by mortgage the lien, so far as concerns the buildings erected by said lien holder, is not impaired by . . . foreclosure of the mortgage; but the same may be sold to satisfy the lien," a mechanics' lien took precedence, so far as the building was concerned, over a prior mortgage for an amount which the mortgagee advanced from time to time, as the erection of the building progressed, for labor and materials employed therein.

For a contrary decision under a 5 A.L.R.—26.

similar statute, see *Joralmon v. McPhee* (1903) 31 Colo. 26, 71 Pac. 419,—set forth supra.

**Iowa.**

In *Kiene v. Hodge* (1894) 90 Iowa, 212, 57 N. W. 717, it was held that one who had loaned money on mortgage for the purpose of erecting a building, paying the money over to the material furnishers and others as the building progressed, had a superior equity to a first lien upon the entire property as against persons who thereafter furnished materials for the building.

See also to the same effect *Bartlett v. Bilger* (1894) 92 Iowa, 732, 61 N. W. 233.

**Kansas.**

A lien claimant has no legal or equitable right to preference over a mortgage to secure a loan of money to be advanced from time to time as the work should progress, where it does not appear that the claimant supplied any material or did any work for which he did not receive pay or for which he claimed a lien, prior to the last advance of money by the mortgagee. *Martsolf v. Barnwell* (1875) 15 Kan. 612.

**Kentucky.**

In *Kentucky Bldg. & L. Asso. v. Kister* (1897) 101 Ky. 321, 41 S. W. 293, it was held that a statute enacting that a mechanics' lien "shall not be effectual against a bona fide purchaser for a valuable consideration without notice, actual or constructive; but if such purchaser receives notice of the lien before the payment of the whole of the purchase money, the lien shall operate on the purchase money remaining unpaid," did not operate to give a materialman, who had filed his lien for the balance due him for lumber furnished, a right to a sum remaining in the hands of a building and loan association as part of a loan, the mortgage to secure which had been executed before the contract had been made or the labor employed or the material furnished in the erection of the improvement.

See also in this connection, the reported case (*KENTUCKY LUMBER & MILL WORK CO. v. KENTUCKY TITLE SAV. BANK & T. Co.* ante, 391).

**Maine.**

In *W. A. Allen Co. v. Emerton* (1911) 108 Me. 221, 79 Atl. 905, it was held that under a statute providing that one performing labor or furnishing material for the erection or repair of a building by virtue of a contract with or by the consent of the owner has a lien thereon and on the land on which it stands, "and on any interest such owner has in the same," to secure the payment thereof, a prior recorded mortgage took precedence over liens claimed, only as to the amount advanced before the furnishing of labor and materials by the claimant, where at the time of making such subsequent advances the mortgagee knew that the work was going on. The court said: "The case shows that the association knew that the house was being erected, and that the claimants were furnishing the material and labor for the same. It was bound to know whenever it made any advancement under the mortgage, whether the property had become subject to any encumbrances, for, if any, these took precedence over the subsequent advances. Though the advancements diminished the value of the equity of redemption, they did not postpone prior lien claims."

In *Allis-Chalmers Co. v. Central Trust Co.* (1911) 39 L.R.A.(N.S.) 84, 111 C. C. A. 428, 190 Fed. 700, it was held that the circumstance that the money had not actually been paid on bonds secured by mortgage on real estate, before work was done on the property which would support a mechanics' lien, did not postpone the mortgage to the lien claimant, if, prior to the origin of the alleged lien, binding agreements had been made to improve the property in consideration of the transfer of the bonds, and to pay the contractor cash for his interest in them.

**Maryland.**

In *Brooks v. Lester* (1872) 36 Md. 65, it was held that a mortgage to secure future advances, if recorded before the commencement of the building, had priority over mechanics' liens.

**Massachusetts.**

In *Gray v. McClellan* (1913) 214 Mass. 92, 100 N. E. 1093, it was held

that, notwithstanding a provision of the Mechanics' Lien Law that "the lien shall not avail against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed," a mortgagee under a mortgage purporting to secure a present debt, but which was in fact one to secure future advances which the mortgagee was not bound to make if it did not see fit to do so, was not entitled to priority in respect to advances made after the commencement of work and with knowledge that it was being performed, the court saying that by the words, "actually existing," as used in the statute, something more than a title in mortgage, when taken in good faith and founded upon a valuable consideration, is meant. The court said, however, that if the mortgagee had bound himself absolutely to advance the stipulated sum by instalments, it would have been secured to the amount fixed by the mortgage, which would have outranked the lien even if its officers knew at the time of making advancements that the buildings were in process of construction, and that mechanics were actually at work.

So also in *Whelan v. Exchange Trust Co.* (1913) 214 Mass. 121, 100 N. E. 1095, it was held that a mortgage made and recorded before the date of the contract under which a mechanics' lien was claimed, and which was to secure future advances which the mortgagee was obligated to make, took precedence over such liens to the full amount of such mortgage, and that it was immaterial that only a very small portion had been advanced before the lien claimant began work, or that before the entire amount had been disbursed the mortgagee received notice of the lien.

**Minnesota.**

In *Finlayson v. Crooks* (1891) 47 Minn. 74, 49 N. W. 398, 645, it was held that in the case of a mortgage to secure future advances the mortgagee cannot, as against the subsequent lien claimant, claim the benefit of the security for optional advances made after actual notice of such lien,—at least, in the absence of any facts creating

such an equity as would take the case out of the general rule.

In *Hill v. Aldrich* (1892) 48 Minn. 73, 50 N. W. 1020, it was held that one who sold to another on credit a lot upon an agreement that the purchaser should proceed to erect a house upon the premises, that the seller would lend her \$1,000 for that purpose, and that the purchaser would give a mortgage on the property to secure the purchase price and the sum to be advanced, and whose mortgage was recorded before any work had been commenced or any materials furnished for the contemplated building, was a prior bona fide mortgagee within the meaning of a provision of the Mechanics' Lien Law, giving such a mortgagee priority over mechanics' liens.

In *Hewson-Herzog Supply Co. v. Cook* (1893) 52 Minn. 534, 54 N. W. 751, the owner of certain property made application for a loan, at the same time executing and delivering his promissory note for the amount, and a mortgage upon the property to secure its payment. These instruments bore date August 1st, 1890, and the mortgage was that day placed upon record. The application for the loan was refused; and on September 3d the owner made another application for a loan of the same amount, which was accepted. In this application it was stated that certain buildings were in process of construction upon the property, which was the fact, and that the money applied for was to be used in their erection. It was held that as the note and mortgage had no effect, as to the lien claimant, until the second application had been favorably acted upon by the lender, the mortgagee was not a prior mortgagee within the statute giving such mortgagee a priority as against claimants who had, before the granting of the loan, commenced to work upon the building.

In *Erickson v. Ireland* (1916) 134 Minn. 156, 158 N. W. 918, it was held that a mortgage given to secure future advances, and upon which advances were later made, has priority over mechanics' liens attaching after the mortgage was given and recorded, but before the advancements were made,

though the mortgagee knew that the building was contemplated, where the making of the advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor.

#### New Jersey.

In *Taylor v. La Bar* (1874) 25 N. J. Eq. 222, it was held that under a provision of the Mechanics' Lien Law that a sale to satisfy a lien shall convey the estate of the owner in the land and in the buildings, "subject to all mortgages and other encumbrances created and recorded or registered prior to the commencement of the building," a mortgage recorded before the commencement of the building was entitled to priority over lien claims, although the money secured by it was payable in instalments, all of which were paid after the commencement of the building, where the lender was bound by his agreement to make such advances as the building reached various stages of completion.

In *Platt v. Griffith* (1876) 27 N. J. Eq. 207, it was held that a mortgage recorded before the building was commenced was entitled to priority over mechanics' liens, although the money which it was intended to secure was not advanced before the commencement of the building, but was paid over, according to the agreement between the parties, in instalments, as the work on the building progressed, and was used in the construction of the building.

In *Jacobus v. Mutual Ben. L. Ins. Co.* (1876) 27 N. J. Eq. 604, it was held that a mortgage made and recorded by the mortgagor in pursuance of a prior contract for a loan, prior to the commencement of the building, though not delivered to the mortgagee nor the mortgage money advanced thereon until afterward, was a prior mortgage within the meaning of a provision of the Mechanics' Lien Law that the deed of the sheriff to the purchaser, upon a sale to satisfy the lien claim, shall convey the estate in the lands and buildings which the owner had at, or at any time after, the commencement of the building, "subject only to all mortgages and oth-

er encumbrances created and recorded or registered prior to the commencement of the building."

In *Central Trust Co. v. Continental Iron Works* (1893) 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 28 Atl. 595, it was held that a mortgage delivered and recorded prior to the commencement of the building, to secure bonds, was entitled to priority over mechanics' liens, though no bonds were issued or sold until after the commencement of the building, where neither the trustee nor the bondholders had actual notice of the lien claim.

In *Central Trust Co. v. Bartlett* (1894) 57 N. J. L. 206, 30 Atl. 583, it was held that a mortgage made and recorded before the commencement of the building took precedence over subsequently accruing mechanics' liens, although it was made to secure bonds none of which had been put into circulation before the attachment of the mechanics' liens.

In *Reed v. Rochford* (1901) 62 N. J. Eq. 186, 50 Atl. 70, it was held that a mortgage given to secure a sum a part of which, by a contemporaneous parol agreement, was to be advanced after its execution and delivery, was entitled to priority as to advances made while alterations were in progress, but without actual notice thereof, as against one claiming a mechanics' lien therefor which, by the provisions of the Mechanics' Lien Law, was not effective against a bona fide purchaser or mortgagee before its filing in the county clerk's office.

In *Young v. Haight* (1903) 69 N. J. L. 453, 55 Atl. 100, it was held that the effect of § 15 of the Mechanics' Lien Law, which provided that "every mortgage given or to be given upon lands in this state shall have priority over every claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged land or any alterations, repairs, or additions to any building on such lands; provided such mortgage be registered or recorded before the filing of any such claim," and § 23, which provided that upon a sheriff's

sale under a judgment upon a lien claim the purchaser should acquire the estate which the owner had in the lands at the commencement of the building, "subject to the lien of any mortgage given and recorded or registered under the circumstances contemplated by and in conformity with the provisions of § 15 of the act,"—was to make the lien of a mortgage given for moneys advanced for the erection of a building, and actually used for that purpose, superior to a mechanics' lien filed upon the property subsequent to the recording of the mortgage, notwithstanding the fact that the moneys had been advanced and the mortgage had been executed while the building was in course of erection, and irrespective of whether the mortgage was made to secure future advances or money already advanced.

Under a New Jersey statute which provides that mechanics' liens shall be prior to "advanced money mortgages" "to the extent only of the moneys remaining to be advanced by the mortgagee under such agreement," the owner of a lot who sold it to a builder and took a mortgage in excess of the purchase money price, and agreed to pay the excess to the builder from time to time as the building progressed, is entitled to priority over mechanics' liens to the amount actually advanced, although at the time of the giving of the deed and the taking of the mortgage the buildings had already been begun. *Franklin Soc. v. Thornton* (1916) 85 N. J. Eq. 525, 96 Atl. 921.

**New York.**

In *Hirshfield v. Ludwig* (1893) 69 Hun, 554, 24 N. Y. Supp. 634, it was held that a mortgage to secure advances was entitled to priority over a mechanics' lien filed after the presentation or notice to the mortgagee of orders drawn by the mortgagor upon funds in his hands, although such orders were not paid until after the filing of the lien, on the ground that the indebtedness for which such orders were drawn became that of the drawee at the date of the presentation, or notice thereof, rather than from the time when such orders were actually paid.

**North Carolina.**

In *McAdams v. Piedmont Trust Co.* (1914) 167 N. C. 494, 83 S. E. 623, Ann. Cas. 1916B, 669, it was held that a mortgage to secure a building loan, the proceeds of which were disbursed by the mortgagee from time to time, took precedence over a mechanics' lien attaching subsequently to the date when such mortgage was given.

**Pennsylvania.**

In *Lyle v. Ducomb* (1813) 5 Binn. 585, a mortgage intended as a security to the mortgagee for notes drawn or to be drawn for the accommodation of the mortgagor, to the amount of \$9,000, was held not to be a lien "which originated subsequent to the commencement of the building," within the meaning of the Mechanics' Lien Law giving such liens priority over "any other lien which originated subsequent to the commencement of the said building."

In *Moroney's Appeal* (1855) 24 Pa. 372, it was held that one whose mortgage for future advances, to be made from time to time as the building progressed, had been recorded prior to the commencement of work, took priority over builders' liens, it being the mortgage and not the advances which created the lien.

In *Rauch v. Island Park Asso.* (1910) 226 Pa. 178, 75 Atl. 202, it was held that under a statute providing that "an estate, charge or lien, of which the claimant had actual or constructive notice before the date of such visible commencement on the ground, if given to secure advances of money, knowingly to be furnished for the purpose of making the improvement in whole or in part, shall have, with prior liens and encumbrances, a preferential claim upon the funds raised by a judicial sale of said property to the extent only of the actual value of the property immediately prior to such visible commencement of the work; but the proceeds of such sale above such value shall be applied to the payment of the mechanics' claims in preference to such estate, charge or lien," mechanics' liens created after the recording of a mortgage, to secure bonds, "to be sold and

disposed of from time to time as the necessities of the company demand," were not entitled to priority, where the bonds were issued, so far as anything appeared in the record, to raise money for the general purposes of the association, and were sold in the ordinary course of business without knowledge by or notice to the purchaser of any particular use to which the money was to be applied.

In *Page v. Carr* (1911) 232 Pa. 371, 81 Atl. 430, it was held that the statutory provision quoted in the preceding case was unconstitutional as offending a provision that "the general assembly shall not pass any local or special law . . . providing or changing methods for the collection of debts or the enforcing of judgments or prescribing the effect of judicial sales of real estate," its effect being to grant mechanics' liens a preference and to give to them a priority of payment that they did not have and to which they were not entitled prior to the adoption of the Constitution.

**Rhode Island.**

In *Blackmar v. Sharp* (1901) 23 R. I. 412, 50 Atl. 852, mortgages securing the purchase price of lots and advances to be made by the seller, for the purpose of enabling the purchaser to build thereon, as the work progressed, and recorded before work was commenced, were held entitled to priority over a mechanics' lien which attached before any of such advances were actually made, where the making of the advances was obligatory upon the mortgagee, and this even though such advances may have been made before they were actually due under the contract, or were used by the mortgagor for other purposes than those agreed upon.

**Utah.**

In *Culmer Paint & Glass Co. v. Gleason* (1913) 42 Utah, 344, 130 Pac. 66, it was held that a duly recorded mortgage given to secure a building loan, the amount of which was apparently retained by the mortgagee in its possession and paid out from time to time upon vouchers issued by the borrower, was entitled to priority, as to sums actually advanced, over a me-

chanics' lien upon the mortgaged property.

**Virginia.**

In *laege v. Bossieux* (1859) 15 Gratt. 83, 76 Am. Dec. 189, the equity of a building fund company which agreed to advance to one of its members money to build a house on a lot owned by him, and which from time to time made payments upon the building contract, was held to be superior to that of an assignee of the building contract who had undertaken to advance the money to the contractor and who had procured his contract to be recorded so as to create a mechanics' lien.

One who contracts to complete a building with full knowledge of the means which have been used to raise the money to pay for the work, and who has received a large part of such money, is equitably estopped from claiming, as against the deed of trust executed to secure the loan, the priority over such deed of his claim to a mechanics' lien. *Wroten v. Armat* (1879) 31 Gratt. 228.

In *Wright v. Vaughan* (1899) 2 Va. Dec. 662, 33 S. E. 595, it was held that a trust deed to secure a building loan, the proceeds of which were to be paid over from time to time as the building progressed, and of which the contractor had at the time of entering into his contract both actual and constructive notice, was entitled to priority over a mechanics' lien filed by him.

**Washington.**

In *Home Sav. & L. Asso. v. Burton* (1899) 20 Wash. 688, 56 Pac. 940, it was held that a statute providing that mechanics' liens "are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lien holder had no notice, and was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished," did not operate to give a mechanics' lien precedence over a mort-

gage duly recorded at the time the work was commenced, to secure advances which were not made until after the building was begun.

The same point was decided upon the authority of the foregoing case, in *Stetson-Post Mill Co. v. Brown* (1899) 21 Wash. 619, 75 Am. St. Rep. 862, 59 Pac. 507, and in *Heal v. Evans Creek Coal & Coke Co.* (1912) 71 Wash. 225, 128 Pac. 211.

**Wisconsin.**

In *Wisconsin Planing Mill Co. v. Schuda* (1888) 72 Wis. 277, 39 N. W. 558, it was held that a mortgage, executed in good faith to secure advances thereafter to be made to pay for labor performed and materials furnished for a building, which advances were so made, although after the commencement of the building, became a lien upon the mortgaged premises from the time of the execution and recording of such mortgage; and that, if recorded before the commencement of the building, it would take precedence of liens for labor performed and materials used in the erection of the building.

**Canada.**

In *Richards v. Chamberlain* (1878) 25 Grant, Ch. 402, it was held that a mechanics' lien was not entitled to priority over a mortgage given while the building was in course of erection, though the mortgagee may have known that work was going on, and advanced part of the money to the mortgagor after the execution of the work for which the lien was claimed, but without notice of such claim.

And in *Cook v. Belshaw* (1893) 23 Ont. Rep. 545, it was held that a mortgage for advances to be made from time to time as the work progressed, though subsequent in time to the beginning of the work, and therefore not a "prior mortgage" within the meaning of the statute giving mechanics' liens a preference as to the increase in value by reason of the improvement, as against a "prior mortgage," was, in virtue of its prior registration and the fact that the advances had been made in good faith without actual notice of plaintiff's unregistered lien, entitled to priority over it.

E. S. O.

STATE OF LOUISIANA

v.

MIKE JOHN, Appt.

*Louisiana Supreme Court—June 16, 1917.*

(142 La. 65, 76 So. 241.)

**Intoxicating liquors — names of witnesses.**

In a prosecution for selling intoxicating liquor without a license, the defendant is not entitled, as a matter of right, to be informed in advance of the trial, of the name or identity of the person who is supposed to have bought the intoxicating liquor, or of the name or identity of any witness for the state.

[See note on this question beginning on page 409.]

Headnote by O'NIELL, J.

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Caddo (Webb, J.) convicting him of selling intoxicating liquor without a license. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Levy & Crane for appellant.  
Messrs. A. V. Coco, Attorney General, Lal C. Blanchard, and Vernon A. Coco, for the State:

The granting or refusal to grant a continuance is left largely to the discretion of the trial judge, and his ruling will not be disturbed unless it is arbitrarily made.

State v. Leary, 111 La. 302, 35 So. 559; State v. Poindexter, 117 La. 386, 41 So. 688; State v. George, 37 La. Ann. 786; State v. Crawford, 41 La. Ann. 590, 6 So. 471; State v. McCarthy, 44 La. Ann. 824, 10 So. 673; State v. Fulco, 138 La. 993, 71 So. 133.

Defendant was not entitled to be informed in advance of the name of the purchaser of the liquor, or the names of the state's witnesses.

State v. Coile, 137 La. 673, 69 So. 90; State v. Smith, 139 La. 443, 71 So. 734; State v. Munlin, 138 La. 60, 62 So. 351; State ex rel. Wickliffe v. Balckman, 39 La. Ann. 847, 2 So. 588; State v. Kane, 36 La. Ann. 153; State v. Heibel, 116 Mo. App. 43, 90 S. W. 758; Shuler v. State, 125 Ga. 778, 54 S. E. 691; Lincoln v. Linker, 5 Kan. App. 242, 47 Pac. 174; State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Back, 99 Mo. App. 34, 72 S. W. 466; State v. Isaac, 129 La. 124, 55 So. 786.

O'Niell, J., delivered the opinion of the court:

The defendant, appellant, was convicted of selling intoxicating liquor without a license, was condemned to serve nine months' imprisonment and to pay a fine of \$500, and, in default of payment of the fine, to serve an additional term of six months in prison.

He complains of the ruling of the trial judge granting the district attorney a continuance on account of the absence of two witnesses for the state, without requiring the district attorney to make an affidavit or disclose what he intended to prove by the absent witnesses. The witnesses referred to were the sheriff and a deputy sheriff, who were temporarily absent from the parish. Although a denial of a motion for a continuance or postponement of a criminal trial might be a denial of justice to the party asking it, the granting of a continuance is not likely to do injustice to the party opposing it. At any rate it does not appear that the continuance or delay in this instance was disadvan-

tageous to the defendant, or that he was better prepared to defend the case when it was continued than he was when it was tried.

Before pleading to the bill of information, the defendant asked for a bill of particulars disclosing: (1) The name of the person to whom intoxicating liquor was supposed to have been sold; (2) whether that person was a "spotter" or detective; and (3) whether he was a stranger in the parish, and, if not a stranger, how long he had resided in the parish. The district attorney refused to disclose any of that information, and to the judge's refusal to require him to disclose it the defendant's attorney reserved a bill of exception.

It is well settled that the defendant in a prosecution for selling intoxicating liquor without a license is not entitled to be informed in advance of the trial, of the name or identity of the person supposed to have bought the liquor.

On the trial of the case the district attorney produced as a witness for the state a negro, who testified that he resided in the state of Mississippi and had been hired by the prosecution as a "spotter" or detective to catch persons supposed to be selling intoxicating liquor. Thereupon the defendant's counsel stated that he was taken by surprise, and filed a motion asking for a continuance of the trial to allow him a reasonable time to investigate the character or reputation of the witness for truth and veracity. The continuance was denied, and the defendant's attorney reserved another bill of exception, in which it is recited that the hired negro "spotter" from Mississippi was the only witness who testified directly to a sale of liquor by the defendant, from which we assume that the sleuth is the man supposed to have bought the intoxicating liquor.

The learned counsel for the defendant cites and relies upon the decision in *State v. Mines*, 137 La. 489, 68 So. 837, where, as in this case, the district attorney refused

to divulge the name or identity of the party who was supposed to have bought intoxicating liquor from the defendant, and the judge refused to grant the defendant a continuance to allow him an opportunity to impeach the witnesses, when two hired "spotters" were produced and testified that one of them was the purchaser. In that case this court condemned the method that is complained of in this case and set aside the judgment of conviction. It was observed, however, in the decision that, as a general rule, the district attorney is not required to inform the defendant in a prosecution for selling intoxicating liquor without a license, of the name or identity of the supposed purchaser, or of any of the witnesses who are to testify for the state. Hence the court disclaimed any intention of holding that in every case the right of a defendant to attack the character of the state witnesses is to be held paramount to all other considerations. And the ruling then made was expressly confined to the facts of that case. There were two important facts recited in the bill of exceptions in that case that are not shown affirmatively in this case. One is that the detectives who testified in the case cited were paid only in the event of a conviction. The other fact is that the only evidence introduced against the defendant in the case cited was the testimony of the detectives. In the present case it is not shown affirmatively that the pay of the hired and imported negro "spotter" was contingent upon his success in procuring the conviction of the suspects whom he "turned up." Nor is it shown positively that the testimony of this hired and imported negro "spotter" was the only evidence against the defendant. The only recital in the bill of exceptions in that respect is that he "was the sole witness testifying directly to a sale of liquor on defendant's part." Nothing is said as to whether there was sufficient circumstantial evidence to prove the guilt of the defendant beyond a reasonable doubt;



and we assume there was such evidence. We are strengthened in the belief that the defendant was not convicted merely on the testimony of the hired negro "spotter," by the fact that the district attorney himself regarded that witness as being so unworthy of confidence that even he was afraid to trust him or risk his being tampered with; and that is why the prosecuting officer would not divulge the name or identity of the witness until he was called to the witness stand. We refer to this remark in the district attorney's brief: "The reason for withholding the name of the purchaser of intoxicating liquors is to prevent the defendant from tampering with the witness. These witnesses are of such a class as are easily influenced, and are themselves participants in the crimes about which they are called upon to testify, and it is good policy to remove them, as much as possible, from those evil influences."

Whether it would not be equally good policy not to offer in evidence at all against the defendant in a criminal prosecution the testimony of a "spotter" who was hired to procure evidence against the accused—a witness whom the prosecuting officer himself is afraid or unwilling to trust—is a question which we are not called upon to decide. The objection to such evi-

dence is to its lack of value or effect; and that is a matter for the trial judge to consider.

The contention of the learned counsel for the defendant that he should have been given an opportunity to prove to the satisfaction of the trial judge that the testimony of this witness was not worthy of belief appears to us as a travesty on the impeachment of the credibility of a witness.

In the absence of a showing to the contrary, we must assume that there was sufficient circumstantial evidence before the trial judge to warrant this conviction, without any regard for the testimony of the negro "spotter," who testified for pay, and whose identity the prosecuting attorney would not divulge for fear of his being influenced or tampered with. To assume that the defendant was convicted on the testimony of that witness alone would be to assume that the zealous public officials who are the guardians of justice committed an outrage upon her.

The defendant was not entitled, as a matter of right, to be informed before the trial, of the names or identity of the witnesses to be called by the state.

The judgment appealed from is affirmed.

*Intoxicating  
liquors—names  
of witnesses.*

## ANNOTATION.

### Right of one charged with unlawful sale of intoxicating liquor to be informed before trial of name or identity of purchaser.

In many jurisdictions, it is held that an indictment for the illegal sale of intoxicating liquor must allege the name of the purchaser. See 15 R. C. L. 387. In those jurisdictions the question whether the accused has a right to be informed of the purchaser's name before the trial obviously cannot arise. Moreover, in most jurisdictions, the granting of a bill of particulars in a criminal case is confided wholly to the discretion of the trial judge. 16 R. C. L. p. 190. It is probably by reason of the foregoing facts

that the right of a person accused of selling intoxicants to be informed before the trial, of the name of the alleged purchaser, has arisen in but few jurisdictions, and has been passed on directly only in Louisiana. In that jurisdiction, in a number of cases involving a charge of sale without a license, an application for a bill of particulars showing the name of the purchaser has been denied. *State v. Brown* (1889) 41 La. Ann. 771, 6 So. 638; *State v. Selsor* (1910) 127 La. 513, 53 So. 787; *State v. Isaac* (1911) 129

La. 124, 55 So. 736; *State v. Moeling* (1911) 129 La. 204, 55 So. 764; *State v. John* (1911) 129 La. 208, 55 So. 766; *State v. Daspit* (1911) 129 La. 752, 56 So. 661; *State v. Munlin* (1913) 133 La. 60, 62 So. 351; *State v. Jackson* (1914) 135 La. 365, 65 So. 491; *State v. Mines* (1915) 137 La. 489, 68 So. 837; *State v. Coile* (1915) 137 La. 673, 69 So. 90. And see the reported case (*STATE v. JOHN*, ante, 407).

In *State v. Moeling* (1911) 129 La. 204, 55 So. 764, supra, the defendant was accused of selling intoxicating liquors without a license. The defendant moved that the district attorney be required to furnish him with a bill of particulars, showing, among other things, the name or names of witness or witnesses, to whom the intoxicating liquors were sold. The court, in refusing so to do, said: "We know of no law which requires the state to set forth in a bill of information, the names of the witnesses by whom it expects to prove the offense charged; nor do we know of any reason why the name of the person to whom liquor is sold in violation of law should be stated in such bill, since the offense is the same if the name of such person be not known and never ascertained."

But in *State v. Stovall* (1915) 137 La. 404, 68 So. 741, the defendant was indicted for retailing intoxicating liquor without a license. In an anticipatory bill of particulars, the district attorney stated that the sale was made in a drug store, and was for 1 pint of alcohol. The counsel for the defendant moved for a further bill of particulars, stating the date of sale, whether the alcohol was sold on prescription, and the name of the purchaser. The motion was overruled and the defendant excepted. The court held that the defendant had the right to know these facts, and said: "The act complained of was not a crime or offense unless the alcohol was sold without a prescription, or on a sham prescription. What service or benefit would it have been to the defendant to have produced a prescription without having a date to compare it with? How could he find the prescription,

without first knowing the name of the person to whom the drug was sold and the date of the sale? He was not informed of the name of the purchaser until he went into the trial and was informed of the date of the sale."

In *State v. Chisnell* (1892) 36 W. Va. 659, 15 S. E. 412, while the case turned, in the main, on the sufficiency of the indictment, nevertheless there was dictum as follows: "The indictment not naming the purchaser gives the defendant no notice of what particular sale is charged against him. He knows this perhaps first when the state has proven its case, and then must set about his defense. Hard as this may seem, it is allowable under authorities holding good an indictment charging unlawful sale in a general way, without naming the purchaser."

In *State v. Huff* (1917) 80 W. Va. 468, 92 S. E. 681, the defendant was convicted of an unlawful sale of intoxicating liquor. The indictment did not contain the name of the purchaser, and the defendant moved that the prosecuting attorney be required to designate the name of the vendee. The court held, in accordance with *State v. Chisnell* (W. Va.) supra, that the refusal of the lower court to grant the defendant's motion designating the name of the vendee was warranted.

In *Com. v. Wood* (1855) 4 Gray (Mass.) 11, the defendant was indicted in the court of common pleas for illegally selling intoxicating liquors. The defendant moved for a bill of information specifying the persons to whom, and the times when, the sales were made. The court overruled the motion and the defendant excepted. The supreme court, in passing on the action of the lower court, held that it had been within the discretion of the presiding judge to allow the motion for the bill, and that the defendant could not obtain the bill of particulars as a matter of right.

In *Lauer v. District of Columbia* (1897) 11 App. D. C. 453, it was held that it was within the discretion of the trial court to refuse to order a bill of particulars showing, among other things, the names of the persons to

whom illegal sales of liquor were made, and that the discretion was not abused by such a denial, where the charge did not rest in a single sale,

but on a general course of conduct in engaging in the business of a common seller of liquor without a license.

W. K. M.

HIGGINS OIL & FUEL COMPANY, Appt.,  
v.  
GUARANTY OIL COMPANY, Limited.

*Louisiana Supreme Court — May 5, 1919.*

(145 La. —, 82 So. 206.)

**Mines — right to pump oil.**

1. An owner of land under which there is fugitive mineral oil cannot complain that his neighbor uses a pump in a well located on the neighbor's property, although the effect is to drain oil from beneath that of the property owner.

[See note on this question beginning on page 421.]

**Property — right to use — injury to neighbor.**

2. An owner cannot be deprived, even by statute, of the legitimate use of his property because it may cause a real damage to his neighbor.

[See 1 R. C. L. 371.]

**Mines — ownership of oil.**

3. An owner of land does not own the fugitive oil beneath it.

[See 18 R. C. L. 1205, 1206.]

**Injunction — against leaving open un-producing oil well.**

4. One operating a pump in an oil well on his own land may enjoin his neighbor from leaving open an un-producing well on his property, the effect of which is to interfere with the action of the pump on the oil beneath the property of the complainant.

[See 18 R. C. L. 1252.]

**Adjoining landowners — duty to protect neighbor.**

5. A property owner is not bound to do anything to save his neighbor from loss.

[See 1 R. C. L. 371, 372.]

**Mine — right to operate oil well to injury of neighbor.**

6. When an oil well proves to be injurious to a neighbor, the rights of the parties can be solved only by a consideration of all the attendant circumstances.

**— right to protect oil beneath surface.**

7. A property owner may drill an air hole on his property for the purpose of preventing neighboring property owners from pumping oil from beneath the surface of his property.

(Monroe, Ch. J., dissents.)

**APPEAL** by plaintiff from a judgment of the Judicial District Court for the Parish of Caddo (Bell, J.) in favor of defendant in an action brought to compel him to close an abandoned oil well and to recover damages for alleged reduced production of plaintiff's pump because of said well. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Blanchard, Goldstein, & Walker, for appellant:

Although a proprietor of an estate may do whatever he please, still he can-

not make any work on it which may deprive his neighbor of the liberty of enjoying his own, or which may cause damage to him.

Wilson v. Great Southern Teleph. & Teleg. Co. 41 La. Ann. 1041, 6 So. 781; Egan v. Hotel Grunewald Co. 129 La. 163, 55 So. 750; Heine v. Merrick, 41 La. Ann. 207, 5 So. 760, 6 So. 637; Jones v. Forest Oil Co. 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350.

Defendant had no right to permit the abandoned well to remain open and unplugged, and prevent plaintiff from drawing oil from the common reservoir.

Thornton, Oil & Gas, 2d ed. § 30, p. 49; Ohio Oil Co. v. Indiana, 177 U. S. 205, 44 L. ed. 737, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Hague v. Wheeler, 157 Pa. 340, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714; Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658, 14 Mor. Min. Rep. 308; Barclay v. Abraham, 121 Iowa, 619, 64 L.R.A. 256, 100 Am. St. Rep. 365, 96 N. W. 1080; Katz v. Walkinshaw, 99 Am. St. Rep. 71, note.

Messrs. Alexander & Wilkinson, for appellee:

Plaintiff's petition does not state a cause of action.

Thornton, Oil & Gas, §§ 28, 29; 40 Cyc. 626; Gould, Waters, § 290; Farnham, Waters, § 836; Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Rives v. Gulf Ref. Co. 133 La. 178, 62 So. 623; Cooke v. Gulf Ref. Co. 135 La. 609, 65 So. 758.

Provosty, J., delivered the opinion of the court:

The plaintiff holds an oil lease of a tract of land adjoining another tract of which the defendant holds a lease of the same kind. The plaintiff sunk a well on its tract, and was drawing oil from it by means of a pump at the rate of some 124 barrels a day, when defendant sunk a well on its tract approximately 400 feet from plaintiff's well. This well of defendant's proved a nonproducer, and was abandoned. Through some underground communication it lets air into the radius affected by plaintiff's pump, thereby reducing the suction power of the pump, and as a consequence reducing markedly its production. By closing this dry well, which may be done with no trouble or expense by simply putting back the plug that has been taken out, the capacity of plaintiff's

pump is at once restored. Defendant refuses to close it; and plaintiff brings this suit to compel defendant to do so, and also to recover the damages suffered up to now, and continually being suffered, as the result of the reduced production of the pump. The petition of plaintiff alleges these facts, and that, while plaintiff's pump is thus being prevented from working to its full capacity, the pumps which are being used by other parties on all the adjoining tracts of land are depleting the reservoir of oil which lies under the lands of that locality. And the petitioner further alleges as follows: "That by permitting the said abandoned well to remain open does not in any way profit or aid the said Guaranty Oil Company, its lessee, the Nash Oil & Gas Company, in getting production from the producing well, Guaranty No. 2, and that the only effect of having the said well open is to injure petitioner, without bringing about any advantage whatever to the said Guaranty Oil Company or the Nash Oil & Gas Company."

Plaintiff does not allege that the underlying oil cannot be brought to the surface otherwise than by pumping, but that allegation is impliedly contained in the allegation which is made that every operator in that oil field is using a pump.

An exception of no cause of action was sustained below, and plaintiff has appealed.

The articles of our Code bearing upon the matter are the following:

"Art. 491. Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances."

"Art. 505. The ownership of the soil carries with it the ownership of all that is directly above and under it.

"The owner may make upon it all the plantations, and erect all the buildings which he thinks proper, under the exceptions established in the title: 'Of Servitudes.'

"He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue, under such modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police."

"Art. 666. The law imposes upon the proprietors various obligations towards one another, independent of all agreements; and those are the obligations which are prescribed in the following articles.

"Art. 667. Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own or which may be the cause of any damage to him.

"Art. 668. Although one be not at liberty to make any work which his neighbor's buildings may be damaged, yet everyone has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor."

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

This last article can be but of little assistance in the case, for it applies only to a person who is at fault, or, in other words, who has committed, or is committing, a wrong; and the question in the case is whether the defendant is "at fault."

The provision of article 667 that the owner may not make any work on his property "which may be the cause of any damage to" his neighbor is found under the title "Of Servitudes," and hence, apparently, is one of the exceptions to which article 505 refers, and hence would seem to be a limitation upon article 505.

It is also apparently in direct conflict with the provision of article 491 that "ownership gives the right to enjoy and dispose of one's property in the most unlimited manner." The line of demarcation between what

an owner may do with impunity and what he may not do without incurring liability is drawn by article 668 between what is a mere inconvenience and what causes a real damage. But that cannot be the meaning; for very evidently an owner cannot be debarred from the legitimate use of his

property simply because it may cause a real damage to his neighbor. It would be contrary to the fundamental legal principle according to which the exercise of a right cannot constitute a fault or wrong, and, besides, every damage is real; and unreal damage cannot be a damage.

Property—  
right to use—  
injury to  
neighbor.

We cannot reconcile these contradictions, or gather the true meaning or scope of these articles, from the articles themselves, but, for ascertaining this true meaning, must resort to the works of Pothier and Toullier, whence these articles were derived by the framers of our Code.

Pothier, in his second appendix to his work on Partnership, Paris ed. 1835, vol. 3, says at page 549: "Neighborhood is a quasi contract which creates reciprocal obligations between the neighbors; that is to say, between the owners or possessors of contiguous estates." And at page 556: "The laws of good neighborhood forbid me to cause anything to pass from my estate to that of my neighbor which may damage him; but they do not prevent me from depriving him of some convenience which he derives from my estate. For instance, if he derives light from my estate, I may, by raising a building on my estate, deprive him of this light."

And in his general introduction to his treatise on Customs, vol. 10 of same edition, he says at page 40: "Ownership may be defined to be the right to dispose of a thing as one pleases, provided the rights of others are not thereby infringed, or some law violated."

At page 41: "The rights here alluded to as not to be infringed upon are not only those which others may

at some future time be entitled to have in the estate, but also those of the owners or possessors of neighboring estates. Although ownership gives to the owner the power to dispose of his estate as he pleases, he nevertheless cannot do what the obligations of neighborhood do not allow him to do to the prejudice of his neighbors."

And in his treatise on Ownership, vol. 8 of same edition, he says at page 117, No. 13: "We have defined ownership to be the right to dispose at one's pleasure of a thing; and we have added, without, however, infringing the rights of others. . . . Among these rights are those of owners and possessors of neighboring estates. The owner of an estate, howsoever perfect his ownership may be, cannot injure these rights, and, in consequence, cannot do that within his estate which the obligations arising from neighborhood do not allow him to do therein to the prejudice of his neighbors."

Toullier, *des Biens*, vol. 3, p. 207, No. 327, says:

"Independently of these special cases the law forbids, in general terms, all such use of one's property as may cause a real damage to the public or to individuals; and by damage we are to understand whatever loss or diminution we suffer in our property by the fault or the act of another.

"328. But the damage must be real. A simple inconvenience, or even the prejudice which might be caused to the neighbor by legitimate acts of ownership such as I have the right to exercise on my property, would not be a sufficient motive to cramp my liberty in the exercise of these rights, and to furnish ground of complaint to the neighbor, provided these acts are not dictated by a desire to injure the neighbor, without any usefulness to myself.

"Now, the desire to injure is not to be presumed in the person who does but use a right he has.

"For example, if in digging a well for my own utility I cut off the spring which was feeding the well

of my neighbor, he has no right to complain."

The commentary of Toullier in elucidation of these principles is not nearly so satisfactory as that of Pothier, and especially as those of the commentators of the Code Napoléon. We will, therefore, for brevity's sake, omit that of Toullier, and give those of some of these commentators. As there is no difference between them, with one exception, Demolombe, we will confine ourselves to Laurent and Baudry-Lacantinerie and Chauveau, who are the most satisfactory. The Code Napoléon not containing a provision corresponding with the said proviso of article 668, Demolombe, basing himself upon the definition of ownership as giving the right to use, enjoy, and dispose of one's property in the most unlimited manner, and upon the principle that one who but exercises a right he has cannot be at fault, concludes that, even though what is done is simply for the purpose of injuring the neighbor, with no benefit to the owner, the neighbor has no right to complain; but the author adds that the contrary doctrine "which is very ancient," is generally admitted. *Des Servitudes*, Nos. 66 and 648.

Laurent, *De La Propriété*, vol. 6, p. 186, No. 138, says: "The science of jurisprudence requires as much precision as the imperfection of language will allow of. The laying down of principles so vague as to open the door to conclusions evidently false ought to be avoided. In our present discussion, the word 'damage' ought to be discarded, and the expression 'infringement of right' adhered to; no doubt, a damage results from such infringement of right, but the sole fact of there being a damage does not suffice for giving rise to an action. And this is, at bottom, the doctrine which has been consecrated by the decisions of the courts."

And again at page 183, No. 136: "We come to another formulation of the principle, precisely as Pothier formulates it: The right of the

owner is limited only in so far as it comes in conflict with some equal right of another owner. Hence, in order that he should have to repair a damage caused by him in the exercise of his right, it does not suffice that he should have caused the damage, but some right of the neighbor must have been thereby infringed. If he does not infringe some right of the neighbor, though he cause a damage, he is not held to any reparation."

No. 140: "It is, then, a settled principle that a person who uses his own right without infringing the right of another owes no reparation for the damage he may cause. But the application of that principle gives rise to more than one difficulty. If the owner who uses his right does it through malice, from a desire to injure, without any profit to himself, will he be held bound to repair the damage he causes, although he does not infringe any right? There is an ancient maxim inscribed in the Roman laws which says that we must not favor the perversity of men. Now, would it not be to encourage this perversity, if a right were allowed to be used for the sole purpose of injuring another. Perhaps another maxim, equally inscribed in the Roman laws, will be invoked, according to which what one does in the exercise of one's own right cannot injure one, in this sense that the person acting is not held to repair the injury. But can it well be said that to exercise one's right for the sole purpose of causing injury is the exercise of one's right? Why are rights sanctioned by law? Because they are faculties which are necessary to enable us to fulfil our mission on this earth. Is it our mission, forsooth, to do evil for the mere pleasure of doing evil? And does the legislator owe protection to him who employs for doing evil a right which has been accorded to him as an instrument for intellectual and moral development? Conscience answers with the Roman juriconsults: *'Malitiis hominum non est indulgendum.'*

"And that has been the view taken by the courts. An owner constructs a building which cuts off his neighbor's light. In so doing he but exercises a right he has, and therefore owes no reparation of the damage he causes to the neighbor. But he does more; he erects in front and almost against the window of his neighbor, part of which is already masked by the new building, a dummy chimney, beginning on the roof, resting on the rafters, at the extreme corner of the gable end of the building, and which cuts off all the light from the window. The court of Colmar ordered the suppression of the dummy chimney. It acknowledges that the owner can, in strictness, abuse of his property, but on one condition, that he does not do it for the purpose of injury. Rights are serious things and must be used seriously. Beyond that serious use there is no right, but only wickedness, and justice cannot sanction an act prompted by malevolence.

"An owner constructing works on his land diminishes the volume of a spring, the benefit of which his neighbor has been having. He is within his right. If he thereby causes an injury to his neighbor, the latter cannot complain; for he has not the absolute ownership of the waters. But, if it has been by malice that the works have been undertaken, for the sole purpose of injuring the neighbor, we have no longer the exercise of a right, but spitefulness, and he who abuses malignantly of his right ought to repair the damage he causes. This was the decision of the court of Lyons in the following case: A mineral spring spreads over several tracts. One of the owners sets up a pump for getting a larger quantity of the water, not for using it, but for pouring it, in pure waste, and we will add, through spite, into a river. The court condemned him in damages, but without ordering the suppression of the pump. We think that in the latter connection the court was too conservative. From the moment that an act can be characterized as il-

licit the owner can no longer invoke any right of ownership; now an unlawful act should disappear."

The treatment of the same matter by Baudry-Lacantinerie and Chauveau, *des Biens*, p. 159, No. 215 et seq., is as follows:

"Ownership is subject not alone to the restrictions imposed by law and by the regulations of police. Notwithstanding its absolute character, it has to be circumscribed within rational limits which secure the legitimate faculties inherent in this right. It is, in truth, no longer a matter of actual infringement upon the right of ownership; it is no longer a sacrifice demanded of it; the limits are established rather in its own interest; they have for their object to render more precise its normal operation, its natural exercise, to secure respect for it against the possible acts of other owners—in a word, to regulate the conflicts of a private nature, or of civil right, which are likely to arise between neighboring owners in their relations with each other. The general object of civil law is to assign to the exercise of the natural liberty of each individual the restrictions which are necessary to make it compatible with that of others. This principle applies as well to the exercise of the right of ownership as to that of any other right. The respect which I exact for my property obliges me to respect that of others, so true it is that every right has for its correlative an obligation; and so the right to use one's property at pleasure finds itself necessarily limited by the obligation to leave to the neighbor the faculty of also enjoying his property. Portalis has put that idea in a very clear light in his exposition of motives: 'The right of the owner,' said he, 'however extensive it may be, suffers certain limitations which the state of society renders indispensable. Living with our equals, we have to respect their rights, as they have to respect ours. We must not allow ourselves, even on our own property, to do

anything which may injure the acquired rights of a neighbor or of anyone else.' Pothier, on his part, had already been careful to note the same idea in his definition of ownership: 'The right to dispose of a thing as one pleases, provided the rights of others are not thereby injured, or some law violated.'

"If article 544 [of the Code Napoléon] has not reproduced this same reservation [the Louisiana Code has reproduced it; vide article 667], we must not conclude therefrom that the framers have repudiated the soundness of that notion; the exposition of motives would of itself have sufficed to show the contrary, even if the Code had not made elsewhere formal applications of that idea, under the title, 'Of Servitudes,' as, for example, in articles 671, 674, 675, and 684. Moreover, this indispensable limitation upon the right of ownership results from general legal principles; for the obligation which rests upon every owner to respect the rights of others and to repair any unjust damage he may have caused, even by the exercise of the attributes attached to his right of ownership, finds a sufficient sanction in the sweeping terms of article 1382 of the Code. [Our article 2315. "Every act of man which causes damage," etc.]

"216. The simple fact of neighborhood, then, imposes certain limitations upon the exercise of the faculties inherent in ownership; and this is the reciprocal interest of the owners. This feature of reciprocity shows the correctness of the observations made hereinabove, and proves that the sole purpose is to cause ownership to be restricted, and to regulate the conflict of rights between the neighboring proprietors. The Code has made express provisions for some of these limitations, those most usual, most indispensable, those which are of general and constant application; thus the provisions found under the title, 'Of Servitudes,' concerning the precautions which must be taken for the drainage of waters (article



681), the regulation of lights and views (articles 675-681), the distance to be left between plants (articles 671-674), the distance and the intervening works required for certain constructions (article 674), rest upon the necessity of reciprocal limitations being imposed upon adjoining proprietors.

"217. But there are other applications of the same idea which the Code has not noted, and which it is well to call attention to here as corollaries of the general formula with which the obligation inherent to neighborhood finds itself circumscribed. The wording of this formula seems, it is true, to be a rather difficult matter, and one can hardly flatter oneself to be able to attain any very great precision. Here is, however, a proposition which appears acceptable: That every owner is limited in the exercise of his right of ownership by the inhibition to injure the equal right of the neighboring owner. This formula implies, in the first place, that simply to deprive the neighbor of some enjoyment, or to cause him a prejudice of whatever kind, would not be sufficient to fetter the exercise of the right of ownership. The question of determining the point where an act begins or ceases to be injurious to the right of the neighbor is, no doubt, a very delicate one; it will be of absolute necessity to have recourse to an analysis, minute in its details, of the faculties, of the attributes, of the advantages which compose the right of ownership, to know if one of them is infringed upon, and thus to diagnose the injury to the neighbor's right. . . .

"220. We must guard, however, against a too hasty application of this formula. In one sense it implies a restriction, and in another sense it implies a certain extension. It is restrictive in the sense that the injury must be of a certain gravity; in other words, the neighbor cannot complain of those inconveniences which are habitual and inevitable, the trifling annoyances inseparable from neighborhood; the necessities

of life in common impose certain usages susceptible of causing annoyance, but each one must bear these reciprocal inconveniences; so long as they do not transcend the normal and habitual measure of inconveniences resulting from neighborhood, no action in damages will lie. The courts must consider whether the prejudice complained of is excessive, greater than the ordinary inconveniences which the obligations of life create; they may take into consideration in that connection certain circumstances, varying according to locality, and take into account the local habits. . . .

"222. On the contrary, in the extensive sense of the formula, an action in damages lies even though the owner be within the limits of his rights, if he acts through malice, for the sole purpose of causing an injury to another, or even if, acting without any evil intention, he acts with great imprudence, and thereby causes injury to his neighbor. In such a case, indeed, the question is no longer as to whether the owner has overstepped the limits of his rights, but, all question of ownership being put aside, to restrain an illicit act, to repair an offense or quasi offense of a civil nature, inherent in every malicious or damageable act. Thus, an owner could not raise opposite the window of his neighbor a dummy chimney for no other purpose than to obstruct the opening and to deprive the neighbor of the little light which was left him by the new construction. In like manner an owner could not wickedly cut the source of a spring which comes out on his neighbor's property, not for the purpose of himself using the waters of the spring, but to pour them out in pure waste into a river. However, the mere inaction of an owner could not serve as a basis for a demand in indemnification, although the prejudice should result from this inaction. Thus an easy-going neighbor neglects to defend his property against the action of waters. The land is carried away little by little, and this brings on the

collapse of the neighboring houses. This fact does not make the owner responsible, and he cannot be compelled to do anything to prevent the ruin of the houses.

"When a neighbor has legitimate grounds of complaint against the acts of another owner, what is the result of the suit he brings? There can be no doubt that the courts can allow damages to the extent of the prejudice that has been caused. The indemnity must first make good the damage suffered in the past, and not alone that suffered since the putting in default. Article 1146 [1926, La. Code] has no application to matters of offenses and quasi offenses. The courts can, moreover, award damages in reparation of the prejudice which will occur in the future, if things remain in the same condition. So long as the injurious fact subsists, the prejudice continues to be certain, and the courts may take into consideration the future consequences of this known fact in order to save the parties from the too frequent renewal of the same suit: the judgment, it is true, in so far as relating to the future, will have a conditional character. The condemnation will be subordinated to the continuance of the actual prejudice, which will allow the parties to ask at any time its modification, accordingly as the prejudice may increase or diminish, or cease altogether.

"224. The courts have another way of solving the problems arising from the apprehension of future prejudice; they have at their disposition, in that regard, another sanction, for they may order a modification of the prejudicial condition of things, and order the doing of whatever may be necessary to be done to put an end to the abusive exercise of the right of ownership."

On the point of an owner not being allowed through pure spite or wantonness to do something on his property injurious to his neighbor, we find but one dissenting voice among the French law writers and decisions. It is Demolombe, who, in

his work on *Servitudes* (vol. 12 of the Paris ed. of 1859, at pages 139 and 140), says:

"No. 647. . . . Digging a well on one's own property, although it may cause the neighbor's well to go dry, is none the less a permitted act; this result is a purely fortuitous event; strictly speaking, it is less an actual damage the neighbor suffers as that he ceases to enjoy an accidental, casual, provisional profit, on which he had no right to depend.

"And this principle is now generally recognized.

"No. 648. We must add, however, that generally a very important qualification is applied to that principle, which it is contended would be no longer applicable if the owner, in constructing on his land some work the effect of which is to deprive the neighbor of an advantage he has been enjoying, did so for no other purpose than to injure this neighbor with no benefit to himself.

"This modification, indeed, appears to be as ancient as the principle itself, and we invariably find it coupled with the principle in the works of the Roman juriconsults (L. 1, paragraph 12, f. f. de aqua), and of our ancient authors [citing long list], and in the decisions of the courts [citing decisions].

"This modification, despite its traditional ancientness, appears to us to be inadmissible.

"The text of article 644 is formal; it is in the most absolute manner that an owner may use or enjoy his property.

"Legally no account can be required of him of his motives; there is here a bar which precludes the making of any allegation that he has acted from malice."

From Carpentier and Du Saint: "If it is found that an owner who has dug his soil has been prompted in doing so simply by the desire to injure his neighbor, the court can abate what has been done." Carpentier and Du Saint, *Rep. du Droit Français*, vo. Eaux, p. 435, No. 145, citing numerous authorities.

From these excerpts it is clear

that cases like the present are not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them, by diagnosing them, to use the expression of Baudry-Lacantinerie and Chauveau, with the aid and guidance of the two principles, that the owner must not injure seriously any right of his neighbor, and, even in the absence of any right on the part of the neighbor, must not in an unneighborly spirit, do that which, while of no benefit to himself, causes damage to the neighbor.

Defendant does not contest the right of plaintiff to get out of its land all the oil it possibly can, and by means of a well, but contests plaintiff's right to do this by means of a pump, because a pump sucks the oil from under defendant's land. The argument is that plaintiff may appropriate the oil passing from defendant's land to plaintiff's, provided the oil passes, or flows, from the one tract to the other "naturally," that is, by gravity, and not as the effect of the use of artificial means.

So far as artificiality is concerned, we do not see the difference between a well and a pump; both are artificial; both cause the oil to flow from the neighbor's land; and both produce that effect by creating a vacuum which the oil from the neighbor's land comes in to fill. In both cases the oil flows from the neighbor's land by gravity. The fact that some of the oil which plaintiff's pump is producing may come from defendant's land can make no difference; for in the case of a flowing well so close to the boundary line that one half of its product would to a reasonable certainty be known to be coming from the adjoining tract the owner of this tract would hardly, we imagine, claim either the ownership of one half of the oil or the right to close the well; and the reason would be that an owner of land does not own the fugitive oil beneath it.

**Mine—  
ownership  
of oil.**

The analogy between the subter-

anean oil and subterranean or percolating waters is, we believe, complete, and defendant cites the case of *Forbell v. New York*, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, where the operation of a pump was enjoined because it had the effect of drying up the surface of the land to the great damage of the neighbor. That decision would be in point if the surface of defendant's land was being injured by plaintiff's pump. True, the court reasoned the case somewhat differently; but that was the true ground of the decision, for the court admitted that, so far as the water was concerned, the complainant had no ownership of it, and of course, if so, the taking of it, whether by means of a pump or otherwise, invaded no right of the complainant, and therefore furnished no ground of action. But invasion of the surface did, because the complainant had the right to use and enjoy the surface uninterfered with by the pump of the defendant city. In a pumping case where no surface right of the neighbor was being interfered with, but only the percolating water was being taken, the supreme court of Mississippi denied an injunction, although the complainant's supply of water was being thereby reduced. *Clarke County v. Mississippi Lumber Co.* 80 Miss. 535, 31 So. 905. In the civil law the right to drain off by means of a deeper well the subterranean water of the neighbor is well settled, and apparently in the common law too. 20 Am. & Eng. Enc. Law, 314. Judge Thornton, in his work on *Oil & Gas*, 2d ed. p. 49, says that if pumps could not be used, oil territory would be practically useless, and few wells would ever be drilled. And, of course, what is meant by this is that the neighbor <sup>—right to pump oil.</sup> cannot complain, even though possibly, or probably, the oil under his land is being drained off by the pump.

All operators in the oil field in question, including defendant, are

using pumps; what good ground, then, could defendant have for denying plaintiff the right to do that same thing?

Plaintiff's right to operate this pump would appear, therefore, to be clear, and that defendant's well, or air pipe, is seriously interfering with the operation of the pump, is one of the facts alleged in the petition which for present purposes must be taken for true.

Were defendant leaving this well open for some purpose of utility other than the supposed utility of preventing the drainage of the oil from under defendant's land, a different case might perhaps be presented; but the allegation, which must be taken for true, is that leaving this well open is of no benefit to defendant. It will be noted that this action of defendant in leaving this well open has the effect not merely of preventing plaintiff from drawing the oil from under defendant's land, but also from under plaintiff's own land; so that an unquestioned right of plaintiff is being interfered with.

**Injunction—**  
against leaving  
open unproduc-  
ing oil well.

**Adjoining**  
landowners—  
duty to protect  
neighbor.

Where this result brought about by the mere inaction of defendant, plaintiff could not complain. An owner is not bound to do anything to save his neighbor from loss. The only restriction upon him is that he abstain from doing anything that may cause a loss. In the present case, defendant is not charged with mere inaction, but with the action of having bored this well and thereby opened a vent for the air to penetrate where it causes injury. Had defendant left things in their original condition, plaintiff would not be suffering. Defendant is causing this air to pass from its land to that of plaintiff. True, defendant is now merely passive or inactive; but the agency complained of was set in motion by defendant. Defendant alone is responsible for its beginning and

its continuing: its activity is, therefore, that of defendant.

An owner has the perfect right to put down an oil well; but, when the well proves to be injurious to the neighbor, this brings about a complication—a complication which can be solved only by a consideration of all the attending circumstances. A strikingly illustrative case is *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466, where, because an oil and gas basin is the common property of the owners of the several tracts of land above it, the owner of one of the tracts was restrained from wasting the gas even though his doing so was for the, to him, useful purpose of lifting the oil to the surface. In that case the owner, in tapping the stratum of oil and gas, and using the gas for bringing up the oil, was but exercising a right clearly and admittedly incident to his ownership, and yet he was restrained because his act was injurious to the other owners in the same oil and gas field. The rights of the several owners of the gas field are coequal; one owner cannot exercise his own right so as to preclude his neighbor from exercising his, or so as to interfere with the neighbor.

**Mine—right to**  
operate oil well  
to injury of  
neighbor.

The allegation is that the air is being let into a fissure or conduit through which it passes out of defendant's land into that of plaintiff, and into the radius affected by plaintiff's pump. Now if, knowing of this fissure, and knowing that any air let into it would go to plaintiff's land and paralyze plaintiff's pump, the defendant had sunk the dry well in question for the very purpose of its having that effect, would it not be plain that the defendant was not merely exercising its own right, but deliberately injuring the right of plaintiff. And what difference is there between sinking this dry well intentionally for that purpose, and letting it re-

main open intentionally for that purpose.

In last analysis the case must turn upon whether the plaintiff has the right to operate the pump in question, and whether, if plaintiff has that right, defendant may interfere with it with no benefit to itself, but simply to hinder plaintiff.

In the case supposed above of a well so near the boundary line as to be deriving one half of its product from the adjoining land, we do not suppose there would be any dispute as to the right of the adjoining owner to interpose a partition between the two tracts of land so as to prevent the escape of oil from his land. Unquestionably he could build a wall for preventing the wild animals on his land from escaping; and oil comes much nearer forming part of the realty than the wild animals do. And if an owner may thus protect

himself by means of a partition or wall, why not by any other kind of work on his land? So that, if defendant's action were limited to preventing the oil from escaping to plaintiff's land, we should

—right to protect oil beneath surface.

be clear that plaintiff would have no good ground for complaining. But for all that is known, no oil is being drawn out of defendant's land, while to a certainty defendant is directly and seriously interfering with plaintiff's right to operate for oil, and is doing so with no benefit to itself.

The judgment appealed from is therefore set aside, the exception of no cause of action is overruled, and the case is remanded for trial.

Monroe, Ch. J., dissents.

Petition for rehearing denied, June 2, 1919.

## ANNOTATION.

### Respective rights of adjoining owners as to pumping oil.

An extended search has revealed but few cases directly adjudicating the respective rights of adjoining owners as to pumping oil. The rule laid down in the reported case (*HIGGINS OIL & FUEL CO. v. GUARANTY OIL CO.* ante, 411), that an owner may pump oil from his own lands irrespective of the damage which may be caused to an adjoining owner by reason of a diminished or impoverished production from the latter's wells, finds support in at least two additional cases (*Kelley v. Ohio Oil Co.* (1898) 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; *Jones v. Forest Oil Co.* (1900) 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350).

In the reported case (*HIGGINS OIL & FUEL CO. v. GUARANTY OIL CO.*) the court upholds the right of an owner to increase the flow of oil from his wells by artificial means, such as the creation of a vacuum which the oil from the neighbor's land comes in to fill, and states as a reason therefor that the owner of land does not own the fugitive oil beneath it. Directly

in line with this statement that the owner of land cannot complain if the fugitive oil beneath it is being drawn off by a pump on an adjoining tract is the decision in *Jones v. Forest Oil Co.* (Pa.) supra. In that case, the plaintiff claimed that the defendant, an adjoining owner, was using a powerful suction pump to increase the amount of oil flow from its wells, and that the use of such pump greatly diminished the production of oil on the adjoining premises. The relief prayed for was an injunction restraining the use of the pump. The court below stated that the question to be decided was to what extent an owner of oil wells could use mechanical devices for bringing the oil to the surface, when the use thereof diminished the production of adjoining wells, and said: "The plaintiff's claim is that the use of a gas pump in the production of oil is unlawful, because, as he alleged, by its powerful suction the oil and gas are drawn from his adjoining farm, thereby decreasing his production. Plaintiff assumes that there is a cer-

tain fixed amount of oil and gas under his farm, in which he has an absolute property. True, they belong to him while they are part of his land, but when they migrate to the lands of his neighbor, or come under his control, they belong to the neighbor. . . .

The property of the owner of lands in oil and gas is not absolute until it is actually within his grasp and brought to the surface. If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?" On appeal to the supreme court, judgment for the defendant was affirmed on the opinion below.

In *Kelley v. Ohio Oil Co. (Ohio)* supra, it appeared that the plaintiff, by agreement with one Hastings, was operating two oil wells on the lands of the latter. Underlying the lands of both Hastings and adjoining owners was a porous sand formation, permeated with valuable mineral oil. The plaintiff alleged that the defendant company, owner of adjoining lands, had located a line of oil wells along the east and south sides of Hastings's land, with the wilful design of extracting the mineral oils under the lands controlled by him. It was further alleged that despite the fact that, with the usual pumping appliances attached to oil wells, one well would drain all the oil within a radius of 200 feet or more, the defendant had located its line of wells just 25 feet from the line of Hastings's land, with the result that they were draining their supply of oil indiscriminately from the deposits under the lands controlled by the plaintiff, to his great injury. Wherefore he prayed for an accounting of the oil so taken, and for all other proper relief. The court, rendering judgment for the defendant, said: "The only question of practical importance is, Had the oil company the legal right to drill the wells? When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own prop-

erty carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others. To drill an oil well near the line of one's land cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well belongs to the owner of the well, no matter where it came from. In such cases the well and its contents belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas, or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining owner. The right to drill and produce oil on one's own land is absolute, and cannot be supervised or controlled by a court or an adjoining landowner. So long as the operations are legal, their reasonableness cannot be drawn in question. . . . Protection of lines of adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for the supposed grievances complained of . . . without resort to either an injunction or an accounting."

The supreme court of Indiana has held that, even if an owner of oil lands might be enjoined from injuring an adjoining owner by the use of artificial devices in pumping oil, the fact that the injured person had employed similar means on his own property would prevent him from obtaining relief. Thus, in *Ilo Oil Co. v. Indiana Natural Gas & Oil Co. (1910)* 174 Ind. 635, 30 L.R.A. (N.S.) 1057, 92 N. E. 1, the plaintiff alleged that the defendant company, by means of compressors, pumps, and suction lines, was producing a vacuum under its lands, and thereby sucking the oil and gas from the plaintiff's property, to the destruction of his wells and leases. An injunction was sought to restrain the alleged unlawful acts. The defendant answered by setting up a general denial, and then alleging that the plaintiff was guilty of the same acts complained of, though admittedly to

a lesser degree. The court expressly evaded the question whether the defendant might, as a matter of law, be enjoined from the acts complained of, but stated that, even if he might be restrained, the plaintiff, under a finding that he had employed similar means in pumping his own wells, was not in a position to obtain such relief.

When a property owner creates a condition on his lands which interferes with the right of an adjoining owner to operate for oil, and the interference is of no benefit to the first party, the condition may be abated. *Steelsmith v. Aiken* (1900) 14 Pa. Super. Ct. 226. And see the reported case (*HIGGINS OIL & FUEL CO. v. GUARANTY OIL CO.* ante, 411). Thus, in *Steelsmith v. Aiken* (Pa.) supra, it was held that, under the Pennsylvania statute requiring the plugging of abandoned oil wells, one who found

his oil operations interfered with might, for the protection of his property, enter on the lands of another owner and plug an abandoned well thereon; and the cost of plugging the well could be recovered from the one who left it in such unlawful condition. So, in the reported case (*HIGGINS OIL & FUEL CO. v. GUARANTY OIL CO.*) the court holds that, while an owner is not bound to do anything to save his neighbor from loss, he will be restricted from doing that which may cause a loss when no benefit accrues to himself; and, it appearing that the defendant drilled a nonproducing well in such manner that air was let into the radius affected by the plaintiff's pump, and later refused and neglected to plug such well, the court holds that this was a condition the continuance of which would be enjoined.

R. E. B.

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MARTHA I. HUSTON et al., Respts.,

v.

F. P. GRAVES, Appt.

*Missouri Supreme Court (Division No. 2)—June 3, 1919.*

(— Mo. —, 213 S. W. 77.)

**Evidence — presumption — names in chain of title.**

1. Where the same name appears successively in a chain of title as grantee and grantor, the presumption is that it was the same person in each case.

[See note on this question beginning on page 428.]

—grantee and ancestor.

2. A grantee of a certain name in a certain county is presumed to be the same as claimant's ancestor of the same name, who lived in the same county at the time the deed was given, but this presumption may be rebutted by slight circumstances.

[See 10 R. C. L. 877, 878.]

—overcoming presumption — conveyance without joining wife.

3. The mere fact that a grantee conveyed a portion of the tract without his wife joining in the deed does not overcome the presumption that such grantee was the same person as claimant's ancestor of the same name, living in

the same county, although he was married at the time the deed was executed.

**Adverse possession — land lying in two sections.**

4. Adverse possession cannot be acquired of land lying in a section adjoining that in which the land actually possessed lies, under a conveyance amounting merely to color of title of land in two adjoining sections, merely by cutting timber upon it and warning trespassers off a few times over a series of years.

[See 1 R. C. L. 697, 727 et seq.]

**Evidence — possession of real estate — presumption.**

5. Possession of one having the rec-

ord title to real estate is presumed until something occurs to show otherwise.

[See 1 R. C. L. 692, 729.]

— showing adverse possession.

6. Adverse possession of real estate in period.

is not established by evidence which fails to show that the owner of the record title was not in possession or failed to pay taxes within the statutory

APPEAL by defendant from a judgment of the Circuit Court for Reynolds County (Dearing, J.) in favor of plaintiffs, in a suit to quiet title to certain land. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Abbott & Edwards, John H. Keith, and Lester M. Hall, for appellant:

Whatever presumption might exist of the identity of H. C. Robbins was counterbalanced by the presumption that another H. C. Robbins was the grantee of Denny, and that he was then unmarried.

Lucas v. Current River Land & Cattle Co. 186 Mo. 453, 85 S. W. 359; Lackland v. Nevins, 3 Mo. App. 335.

The evidence was undisputed and unequivocal that, for more than ten years immediately preceding the institution of this suit, defendant and those through whom he claimed had been in the actual, open, notorious, adverse, and exclusive possession, beginning with C. H. Smith, claiming title. The bar of the ten-year statute was complete.

Pharis v. Bayless, 122 Mo. 116, 26 S. W. 1030; Morgan v. Pott, 124 Mo. App. 378, 101 S. W. 717; Brown v. Hartford, 173 Mo. 192, 73 S. W. 140; Leeper v. Baker, 68 Mo. 400; Mississippi County v. Vowels, 101 Mo. 225, 14 S. W. 282; Fletcher v. Fuller, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. Rep. 667.

There was no conflict of possession. Neither respondents nor their ancestor had ever been in actual possession of the land in litigation, or any portion thereof. Their constructive possession was ousted by operation of law, when Smith took actual possession of northeast quarter, section 35, in 1901, with color of title to the whole tract.

Ozark Plateau Land Co. v. Hays, 105 Mo. 152, 16 S. W. 957; Crispin v. Hannan, 50 Mo. 549.

Having paid no taxes, nor been in the actual possession of the premises, whatever title may have been vested in plaintiffs or their ancestor became vested in defendant.

Spicer v. Spicer, 249 Mo. 594, 155 S. W. 832, Ann. Cas. 1914D, 238; Haarstick v. Gabriel, 200 Mo. 243, 98 S. W.

760; Campbell v. Greer, 209 Mo. 215, 108 S. W. 54; Golterman v. Schiermeyer, 125 Mo. 301, 28 S. W. 616; Laclede Land & Improv. Co. v. Epright, 265 Mo. 210, 177 S. W. 386; Ewing v. Burnett, 11 Pet. 53, 9 L. ed. 629; Scanell v. American Soda Fountain Co. 161 Mo. 618, 61 S. W. 889; Kirton v. Bull, 168 Mo. 633, 68 S. W. 927; Franklin v. Cunningham, 187 Mo. 196, 86 S. W. 79.

The law will protect those who honestly purchase and enter into actual possession of the improvements under color of title, like other bona fide purchasers, in the constructive possession of the premises so purchased, according to the boundaries contained in the instrument under which they enter, having, by the proper registration, given the world and the true owner notice of the extent of their claim.

Crispen v. Hannan, 50 Mo. 548; Ozark Plateau Land Co. v. Hays, 105 Mo. 152, 16 S. W. 957.

Where acts of ownership have been done on land, which from their nature indicate a notorious claim of property in it, such acts are evidence of an ouster of a former owner, and an actual adverse possession under the conditions shown by the evidence.

Leeper v. Baker, 68 Mo. 400.

If the indications of the claim and possession are so patent and so open that if the true owner remained in ignorance it must be his own fault, he is presumed to have knowledge of it.

Key v. Jennings, 66 Mo. 367.

Smith's claim of ownership and possession were notorious; that is, the land was generally known in the neighborhood as Smith's land. His acts of ownership and possession were visible and conspicuous.

Spicer v. Spicer, *supra*; Maxwell Land Grant Co. v. Dawson, 151 U. S. 603, 38 L. ed. 284, 14 Sup. Ct. Rep. 458.

Messrs. Arthur T. Brewster and S. M. Brewster for respondents.



White, C., filed the following opinion:

The suit is to determine title to a tract of land in Reynolds county, Missouri, to wit, the northwest quarter of section 36, township 33, range 2 east.

The answer sets up in defense the ten-year Statute of Limitations and the thirty-year Statute of Limitations. There was a judgment for plaintiffs, and the defendant appealed.

The plaintiffs were heirs of Henry C. Robbins, deceased, who was the common source of title. Their evidence showed the tract in dispute was entered by William Denny, who, by deed dated the 9th day of September, 1858, conveyed the tract to H. C. Robbins of Jefferson county, Ohio. The deed also conveyed the northeast quarter of section 35, the same township and range.

The deposition of plaintiff Martha I. Huston was read. She testified that her father, H. C. Robbins, lived in Steubenville, Ohio, in 1858, and was engaged in the dry goods business. He died in 1900 at Lisbon, Ohio. She herself was born in 1858; she had never heard of any other person of the name of H. C. Robbins in Jefferson county, Ohio. She had no deeds nor tax receipts relating to the land in question, and didn't know whether her father ever owned any land in Missouri. The first she ever heard of the land in question was when she received a letter written her by her attorney in 1910. The same facts were testified to by Clara Bough, another plaintiff and daughter of H. C. Robbins. She was born in 1848, and was therefore ten years old at the time her father lived at Steubenville. She testified that her father lived in Jefferson county, Ohio, about three years. This was all the evidence introduced by the plaintiffs.

The defendants filed a demurrer to the evidence, which was by the court overruled. The defendants thereupon introduced a sheriff's

deed conveying the northeast quarter of section 35 and northwest quarter of section 36, in pursuance of a judgment and sale for taxes for the years 1876 to 1878. The purchaser and grantee in the tax deed was Samuel Irving. It was admitted that the deed conveyed no title, but it was offered to show color of title. The deed was executed in 1880. In 1882, Irving and wife conveyed the two quarter sections to A. P. Schriver. The claim of Schriver then passed by mesne conveyances to Cornelius H. Smith, who acquired it in 1884. The title of Cornelius H. Smith passed to the Maxwell-Crouch Mule Company by foreclosing a deed of trust in 1905, and was thereafter conveyed by the Crouch Mule Company to the defendant. The payment of the taxes as shown by the record is as follows:

The taxes were assessed on the two quarter sections to one Pogue from 1881 to 1893, inclusive; the taxes for 1881 to 1885 were paid, but the name of the payer is not given. Taxes for 1885 were paid by the Missouri Iron & Silver Mining Company; from 1886 to 1893, the taxes were paid by C. H. Smith; from 1903 to 1908 the taxes were paid by the Maxwell-Crouch Mule Company; 1909 to 1911, inclusive, paid by F. P. Graves, defendant.

The acts of possession under which the defendant claims were as follows:

C. H. Smith in 1901 built a house and barn on the tract in section 35, cleared up some of the land, and built a sawmill. These buildings and improvements were occupied and used by Smith and his grantees and their tenants down to the time of bringing the suit.

The possessory acts relating to the tract in dispute in section 36 are as follows:

Smith claimed to own that tract, and cut timber on it to haul to his sawmill, which was erected on section 35. This occurred during a year or two, about 1900-1901. It is not shown that he cut any timber for sawmill after that time on sec-

tion 36. One Arthur Parker, witness for defendant, testified to the facts above stated, and then stated that he had charge of the property in section 35 for the Maxwell-Crouch Mule Company in 1909, and continued in charge of it under the defendant after that time down to the time this suit was instituted; that during that time he sold timber off of section 36. During part of the time when he said he had charge of section 36 he did not live in the house on section 35, but at another place, so that the land in section 36 was not used, at least part of the time he was in charge, in connection with the improvements on section 35. In addition to selling the timber he said his business was to see that timber was not stolen off of it. He sold timber to different persons; he mentioned two. How much timber he sold, how often he cut it for the purpose of selling, the witness does not state. Another witness testified that, acting for the Maxwell-Crouch Mule Company, he warned some trespassers off the land in 1905. The defendant also introduced a deed from H. C. Robbins to James McCarroll, conveying the northeast quarter of section 35, no wife joining him in the deed. The purpose of this deed was to show that, although Robbins at that time had a wife living, he conveyed without having his wife joining, indicating that the Robbins conveying the land was not the same Robbins who had received the conveyance from Denny.

I. The first point made by the appellant is that the plaintiffs failed to make out a case, because there was no proof that the H. C. Robbins named as a grantee in the deed from Denny was the Robbins who was ancestor of the plaintiffs. The only proof indicating that he was the same was that he lived in Jefferson county, Ohio, at the time the deed was executed.

**Evidence—  
presumption—  
names in chain  
of title.**

Where the same name appears successively in a chain of title as grantee and grantor, the

presumption is that it was the same person in each case. *Flournoy v. Warden*, 17 Mo. 435; *Geer v. Missouri Lumber & Min. Co.* 134 Mo. 85, loc. cit. 95, 56 Am. St. Rep. 489, 34 S. W. 1099. This rule is characterized by the books as necessary, otherwise it would be impossible to prove the identity of the parties in a chain of title after the lapse of years. In such cases the two names claimed to be identical appear in the record; in this case only the name of the grantee appears in the record. The plaintiffs desire to identify that name with that of their ancestor. It has been held that the presumption of identity obtains in a case where a party claims under an ancestor with the same name as the patentee. *Jackson ex dem. Shultze v. Goes*, 13 Johns. 518, 7 Am. Dec. 399; *Jackson ex dem. Bogart v. King*, 5 Cow. 237, 15 Am. Dec. 468. The rule has been applied in this state where a name appearing in a record is the same as the name of the person under whom the parties litigant claim. State *v. Moore*, 61 Mo. 276; *Hoyt v. Davis*, 21 Mo. App. 235; *Gitt v. Watson*, 18 Mo. 274.

—grantee and  
ancestor.

In all such cases it is held that the presumption of identity may be overcome by slight circumstances. This court considered the matter in the case of *Keyes v. Munroe*, 266 Mo. 114, loc. cit. 121, 180 S. W. 863, where the identity of an ancestor of parties to the suit with the record title owner was held to be prima facie shown, on account of the identity of names. This court, in discussing the matter, held that the inference from the identity of names would vanish if facts inconsistent with that identity appeared. The facts in that case the court held to be sufficient to make out a case, and they were similar to the facts here, except it was testified by a party to the suit that the ancestor at one time came to Missouri to look after land, a circumstance which the court regarded as negligible.

The appellant, while admitting the presumption, asserts that it is overcome by the fact that Robbins conveyed the land in section 35 in 1861, without his wife joining, while at that time the evidence shows his wife was living. Appellant infers that it must have been another Robbins and a single man that made that conveyance, and not the ancestor of plaintiff. This point by appellant would be of some force

—overcoming  
presumption—  
conveyance  
without joining  
wife.

if the acknowledgment of the deed recited that H. C. Robbins, the grantor in that deed,

was a single man. The abstract of the record does not show enough as to what the deed contains. It fails to show where Robbins, the grantor, lived or executed the deed; no recital in the deed is mentioned. For aught the abstract of the record shows, that deed may contain recitals which would indicate that he was the same person as the plaintiff's ancestor.

While the evidence is very slight, under the authorities it is sufficient to raise the prima facie presumption until rebutting evidence is introduced. This is usually a question of fact upon which a jury may pass. *La Riviere v. La Riviere*, 77 Mo. 512, loc. cit. 517; *Carleton v. Townsend*, 28 Cal. 219. The trial court had the deed executed by Robbins before it for consideration, and evidently found it was insufficient to counteract the presumption arising in the identity of names. That issue was found in favor of the plaintiff, and this court cannot say the finding was unsupported by the evidence.

II. Next it is claimed that the ten-year Statute of Limitations would bar the action. This claim is based on the theory that the actual possession of the tract in section 35 on which Smith made improvements in 1900 and 1901, which improvements continued to be occupied by him and his grantees and their tenants down to the time of bringing this suit, would put and keep in op-

eration the Statute of Limitations as to section 36, which was not in possession, but which was included in the same chain of title and the same deed under which the defendant claims. The facts here are similar to the facts in the case of *Bevier v. Graves*, — Mo. —, 213 S. W. 74, determined at this term of court. It is the same possession in section 35 by which this same defendant claimed a tract in section 34 in the *Bevier Case*. The difference between the two cases is that in the *Bevier Case* the tract in dispute was separated from the tract in possession in section 35 by the distance of a half mile of intervening land, while in this case the tract claimed in section 36 is adjacent to the tract in section 35, which was held in possession. What was said there and the cases cited, in relation "to the usual acts of ownership over the whole tract," apply to this case. In the present case it was shown that timber was cut on the tract in dispute in the years 1900 or 1901, to haul to a sawmill which Smith, the claimant, had erected in section 35. This, however, did not continue to exceed a year or two. It was not shown that any other "acts of ownership over the whole tract" occurred until 1909, when Parker took charge for the Maxwell-Crouch Mule Company. At that time it seems that he sold timber from section 36, and kept trespassers off. How often he did that the evidence does not show. From the evidence it might not have been more than once or twice he sold the timber or warned trespassers off. Besides this, there was a single instance of where persons were forbidden to cut timber on the land in 1905. These alleged possessory acts were entirely insufficient. *Bevier v. Graves*, supra, and cases cited. *Chilton v. Comanianni*, 221 Mo. loc. cit. 699, 120 S. W. 1174.

Adverse possession—land lying in two sections.

III. Appellant also claims that the thirty-year Statute of Limitations bars the recovery of the plain-

tiffs. What is said upon that proposition in the *Bevier Case* also applies here, although the facts are somewhat different. There is no evidence pro nor con as to whether H. C. Robbins was ever in possession of the land,

**Evidence—  
possession of  
real estate—  
presumption.**

but, having the record title, his possession is presumed to follow until something occurred to show otherwise. *Weir v. Cordz-Fisher Lumber Co.* 186 Mo. 388, loc. cit. 397, 85 S. W. 341; *Bran-nock v. McHenry*, 252 Mo. loc. cit. 9, 158 S. W. 385. In these cases it was held that the presumption of possession following the record title was not overcome by showing that the land was wild, vacant, and uncultivated. There were no possessory acts on the part of the defendant until 1900-01, when timber was cut to haul to the sawmill in section

**—showing  
adverse  
possession.**

35. So, there was a failure to prove that the plaintiffs' ancestors were out of possession for thirty-one years prior to bringing the suit. There was no proof that

the plaintiffs' ancestors failed to pay the taxes for thirty years prior to the acts of possession above mentioned, or prior to bringing the suit. It was shown that the land was sold for taxes for the years 1876-78, inclusive, but the taxes were paid from 1881 to 1885, and the record fails to show who paid them. Smith acquired his color of title in 1884. There was no effort to show that he or his grantors had paid the taxes for those years. It was not shown that they were not paid by Robbins, who was then the record owner of the land. The evidence was entirely sufficient to support the finding of the trial court that the defense under the thirty-year Statute of Limitations was not made out.

The judgment is affirmed.

Roy, C., absent.

**Per Curiam:**

The foregoing opinion by *White, C.*, is adopted as the opinion of the court.

All the Judges concur.

## ANNOTATION.

**Presumption of identity of persons from identity of name in chain of title to real property.**

- I. Introductory, 428.
- II. Prima facie evidence, 429.
- III. Presumption, 431.
- IV. Father and son, 433.
- V. Miscellaneous, 433.

### *I. Introductory.*

While the *idem sonans* cases strengthen the rule of presumption, they have been excluded from this note.

Some of the cases, in dealing with the subject of the proof of identity of persons of similar name, use the expression "prima facie evidence," or "prima facie proof," or "sufficient evidence;" others use the expressions, "presumption and presumptive evidence." Occasionally the court will use both classes of expression in the same case, and probably the courts do

not usually, in dealing with identity, mean to distinguish between *prima facie* evidence and presumptive evidence, or presumption. The attempted separation of the cases in this note, under the heads, respectively, of "Prima facie evidence" and "Presumption," is due simply to the effort to give the various decisions in the manner in which the courts gave them, and it is not intended to indicate by this arrangement that there is a general distinction in law between the two classes of cases so separated; but it may be, however, that in some instances the court intended to make a distinction.

Often, particularly where the identity claimed is that of a former owner with an ancestor of a party, the proof is very slight. In some of these cases,

as in the reported case (*HUSTON v. GRAVES*, ante, 423), there is other evidence, it may be but a trifle; in others, the rule seems to rest simply on the similarity of name. The rule is one of convenience, and perhaps the general theory is that the *prima facie* case or presumption is so slight that a very little will overcome it, such as, for example, facts brought out on the cross-examination of the claimant,—that his ancestor never lived in the locality, that he never heard of his having any property there, nor found any papers in regard to it, that he was not a man of large means nor accustomed to deal frequently in real estate, etc., etc.

## II. *Prima facie* evidence.

In tracing titles, identity of name is *prima facie* evidence of identity of person.

**United States.**—*Stebbins v. Duncan* (1882) 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313 (where there was other evidence).

**District of Columbia.**—*Crandall v. Lynch* (1902) 20 App. D. C. 73.

**Iowa.**—*Gilman v. Sheets* (1889) 78 Iowa, 499, 43 N. W. 299; *Paxton v. Ross* (1894) 89 Iowa, 661, 57 N. W. 428.

**Kentucky.**—*May v. Chesapeake & O. R. Co.* (1919) — Ky. —, 212 S. W. 131 (as stating the rule, there being other evidence).

**Michigan.** — *Eames v. McGregor* (1880) 43 Mich. 313, 5 N. W. 408; *Tillotson v. Webber* (1893) 96 Mich. 144, 55 N. W. 837.

**Minnesota.** — *Horning v. Sweet* (1880) 27 Minn. 277, 6 N. W. 782; *Morris v. McClary* (1890) 43 Minn. 346, 46 N. W. 238.

**Missouri.**—*Gitt v. Watson* (1853) 18 Mo. 274; *La Riviere v. La Riviere* (1883) 77 Mo. 512; *Geer v. Missouri Lumber & Min. Co.* (1895) 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099.

**New York.** — *Jackson ex dem. Shultze v. Goes* (1816) 13 Johns. 518, 7 Am. Dec. 399, per Spencer, J. (stating the rule); *Jackson ex dem. Woodruff v. Cody* (1828) 9 Cow. 140.

**Texas.**—*Chamblee v. Tarbox* (1863) 27 Tex. 139, 84 Am. Dec. 614 (stating the rule); *Robertson v. De Bose*

(1890) 76 Tex. 1, 13 S. W. 300; *Yarbrough v. Johnson* (1895) 12 Tex. Civ. App. 95, 34 S. W. 310; *Hill v. Lofton* (1914) — Tex. Civ. App. —, 165 S. W. 67 (stating the rule where there was other evidence); *McDoel v. Jordan* (1912) — Tex. Civ. App. —, 151 S. W. 1178.

**Vermont.**—*Bogue v. Bigelow* (1857) 29 Vt. 179 (where some of the uses showed a difference in spelling).

**Canada.** — *Simpson v. Malcolm* (1914) 43 N. B. 79.

Where the plaintiff had offered a deed, apparently from the patentee, referring to the patent, the court said: "In the case of *Chamblee v. Tarbox* (Tex.) supra, this court said that similarity of name alone "is ordinarily sufficient evidence of identity of a purchaser in a chain of conveyance." In the absence of evidence casting doubt upon the identity of a party to a conveyance of land, we think it ought to be held sufficient in every case, and the jury, if instructed upon the subject at all, ought to be told so." *Robertson v. De Bose* (1890) 76 Tex. 1, 13 S. W. 300, supra.

The contrary view has been taken in New Hampshire, where, in a case where the question of title in the plaintiff, the court said: "It is not often a matter of controversy whether the identity of the plaintiff is established, because the doubt, if any arises, can generally be readily removed. But, if a question is made, a jury is not at liberty to presume that a person even of so peculiar a name as Timothy Mooers is the same person as the man of the same name who is shown to be entitled to a particular estate." *Mooers v. Bunker* (1854) 29 N. H. 420.

Under the California statute, the identity of person is presumed from identity of name. *Ward v. Dougherty* (1888) 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

The most frequent illustration of the rule is in showing identity of a patentee or grantee with a subsequent grantor. *Stebbins v. Duncan* (U. S.) supra (where there was other evidence); *Mott v. Smith* (1860) 16 Cal. 533; *Gilman v. Sheets* (the second

deed having a warranty); and *Paxton v. Ross* (Iowa); *Eames v. McGregor*, *Tillotson v. Webber* (Mich.), *Horning v. Sweet* (Minn.), and *Geer v. Missouri Lumber & Min. Co.* (Mo.) *supra*.

*Prima facie*, the transferrer of a certificate of location is the person of the same name mentioned in the certificate. *Gitt v. Watson* (Mo.) *supra*.

It was held in *Kimball v. Davis* (1838) 19 Wend. (N. Y.) 437, that identity would be inferred of a patentee and a subsequent grantor; but this case was reversed in (1840) 25 Wend. 259, probably on another ground, though one of the senators added the ground of the identity of the grantor.

In *Gallivan v. O'Donnell* (1875) 36 U. C. Q. B. 250, it was held that possession of patent and deeds was sufficient, with the identity of names, to show the identity of grantors.

In a case where the evidence was held sufficient against identity, the court, after citing Texas cases, said: "We understand the effect of those decisions to be that, where no issue is raised as to the identity of persons, the identity of names is sufficient to establish such identity. For instance, if in a chain of title there be a deed to John Smith, and following such deed one from John Smith, without any further evidence this would be sufficient to show that the John Smith to whom the land was conveyed was the same person who made the succeeding conveyance, and the same rule would apply when plaintiffs claim as heirs of a person named in a deed or grant." *Blunt v. Houston Oil Co.* (1912) — Tex. Civ. App. —, 146 S. W. 248.

In *Atchison v. McCulloch* (1836) 5 Watts (Pa.) 13, the court said: "It has certainly not been in the practice, when a deed is regularly proved or acknowledged in conformity to our act of assembly, purporting to convey the right of a warrantee or patentee of land to the plaintiff in the ejectment, first to make proof, before such deed can be admitted in evidence, that the grantor therein named, bearing the same name as the warrantee or pat-

entee, was the identical person to whom it was granted by the commonwealth. This is a matter of fact which must be submitted to the decision of the jury, after all the evidence on both sides shall have been given."

In some of the cases the later deed contained a reference to the earlier deed or patent. *Stebbins v. Duncan* (1882) 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313, *supra*. See also *Grant v. Searcy* (1896) — Tex. Civ. App. —, 35 S. W. 861, *infra*.

Where a grantor having the same name as the patentee stated in his deed that the land had been confirmed to the party of the first part by the board of commissioners, thus referring to proceedings described in the patent, this was held sufficient evidence of identity to allow the deed in evidence. *Mott v. Smith* (1860) 16 Cal. 533.

The fact that the residence of the person is given differently in the two instruments does not alter the rule. *Paxton v. Ross* (1894) 89 Iowa, 661, 57 N. W. 428; *Tillotson v. Webber* (1893) 96 Mich. 144, 55 N. W. 837; *Geer v. Missouri Lumber & Min. Co.* (1895) 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099. See also *Carleton v. Townsend* (1865) 28 Cal. 219, *infra*, III.; *Cross v. Martin* (1873) 46 Vt. 14, *infra*.

Thus, that the grantee is of a certain city, and the grantor, twenty years later, is of a county in another state across a river from such city, does not interfere with the conclusion of identity. *Tillotson v. Webber* (1893) 96 Mich. 144, 55 N. W. 837.

It may be noted that evidence of identity was held sufficient when property was conveyed to M. Thompson of Washington, and was conveyed by "Michael Thompson, now of Honolulu," who signed "M. Thompson," and the notary certified, "Before me personally appeared Michael Thompson, to me known to be the person described in and who executed the foregoing instrument," etc. *Paxton v. Ross* (1894) 89 Iowa, 661, 57 N. W. 428.

The *prima facie* rule has also been applied in case of heirs or devisees of

a grantee. *Scott v. Hyde* (1898) 21 D. C. 531 (as stating the rule); *Ingram v. Jeffersonville, N. A. & S. Rapid Transit Co.* (1917) — Ind. App. —, 116 N. E. 12; *Morris v. McClary* (1890) 43 Minn. 346, 46 N. W. 238; *Yarbrough v. Johnson* (1895) 12 Tex. Civ. App. 95; *Hill v. Lofton* (1914) — Tex. Civ. App. —, 165 S. W. 67 (where there was other evidence); *McDoel v. Jordan* (1912) — Tex. Civ. App. —, 151 S. W. 1178; *Simpson v. Malcolm* (1914) 43 N. B. 79.

Thus, without evidence other than the deed showing similarity of name, the grantee therein was held to be the plaintiffs' ancestor. *Morris v. McClary* (1890) 43 Minn. 346, 46 N. W. 238, *supra*.

In *McDoel v. Jordan* (1912) — Tex. Civ. App. —, 151 S. W. 1178, *supra*, the court said: "We think there is no merit in appellant's contention that the evidence is insufficient to support the judgment of the court that the A. M. Dunn named in the probate proceedings, and who signed the will, was the same A. M. Dunn named in the patent offered in evidence by appellees. The names are identical, and, in the absence of any other evidence, that fact is sufficient to support the conclusion of the trial court that they are the same person."

The rule was applied in *Grant v. Searcy* (1896) — Tex. Civ. App. —, 35 S. W. 861, where the deed of the administrator of the patentee, J., referred to the land as the headright of J.

In *Scott v. Hyde* (1897) 21 D. C. 531, where there was other evidence, the court said that the plaintiffs who claimed through heirs of Dr. John Willis, as the grantee in a deed to Dr. John Willis, might well stand upon the *prima facie* proof of title resulting from the identity of the name.

In *Simpson v. Malcolm* (N. B.) *supra*, where the plaintiff, claiming as heir and devisee of A, produced a patent from the Crown to A, it was held that this was sufficient proof of identity.

Where a deed of the premises to G. D. had been admitted, it was held error to exclude a deed acknowledged

before a notary, of part of the same premises, described as part of the estate of G. D., purporting to be executed by the heirs of G. D., and by a certain person, trustee under his will. *Ingram v. Jeffersonville, N. A. & S. Rapid Transit Co.* (1917) — Ind. App. —, 116 N. E. 12.

In *Yarbrough v. Johnson* (1895) 12 Tex. Civ. App. 95, 34 S. W. 810, *supra*, it was held that the evidence required the conclusion of identity of the patentee in a patent of land from the Republic of Texas, dated 1845, with the ancestor, where it was shown that the ancestor emigrated to Texas during the war between Texas and Mexico, for the purpose of serving in that war, and the court reversed a judgment holding the contrary.

In *La Riviere v. La Riviere* (1883) 77 Mo. 512, it was held that identity of name is evidence of identity of a claimed ancestor with an heir of the former owner.

The original patent to Captain Adam Graves, with a deed from the heir of one Adam Graves who had been a captain in the navy, is sufficient evidence of identity for the jury. *Brown v. Livingston* (1870) 29 U. C. Q. B. 520.

But in *Doe ex dem. Hanson v. Smith* (1808) 1 Campb. (Eng.) 196, Lord Ellenborough expressed the opinion that identity of names with devisees was not sufficient in ejectment, without proof of identity.

In *Sailor v. Hertzogg* (1845) 2 Pa. St. 182, it was held error to admit a petition in insolvency of a person having the same name as one under whom the other party claimed, without proof of identity.

### III. Presumption.

Some of the cases declare the rule in titles to be that there is a presumption of identity from similarity of names. *Brown v. Metz* (1864) 33 Ill. 339, 85 Am. Dec. 277; *Goodell v. Hibbard* (1875) 82 Mich. 47; *Flournoy v. Warden* (1853) 17 Mo. 435; *Bresee v. Parsons* (1910) 87 Neb. 327, 127 N. W. 123; *HUSTON v. GRAVES* (reported herewith) ante, 423; *Jackson ex dem. Shultze v. Goes* (1816) 13 Johns. (N. Y.) 517, 7 Am. Dec. 399, per Spencer,

J. (stating the rule); *Jackson ex dem. Bogart v. King* (1825) 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *Nicholson v. Burkholder* (1861) 21 U. C. Q. B. 108 (as stating the rule).

The grantor will be presumed to be the grantee of the same name in an earlier deed of the property. *Brown v. Metz* (Ill.) *supra*.

This rule was applied even in the case of "John Smith," though that might weaken the presumption, and it was held to be error to instruct that other proof was required. *Flournoy v. Warden* (1853) 17 Mo. 435, *supra* (compare *Freeman v. Loftis* (1859) 51 N. C. (6 Jones, L.) 524, *infra*).

The identity of names of grantee in one deed and grantor in a later deed is presumptive evidence of identity, though the residence in one deed is in a different county from that in the other. *Carleton v. Townsend* (1865) 28 Cal. 219.

The identity of name of a grantor with a devisee named in the will of the earlier owner of the property will be presumed. *Goodell v. Hibbard* (1875) 32 Mich. 47.

If the plaintiff in ejectment shows a patent to one W. A., and his descent from one W. A., the identity will be presumed unless the presumption is repelled. *Jackson ex dem. Bogart v. King* (1825) 5 Cow. (N. Y.) 237, 15 Am. Dec. 468.

"As a general proposition identity of name is prima facie evidence of identity of person, and is sufficient proof of the fact in the absence of all evidence to the contrary." *Warvelle, Ejectment*, § 291. We believe, in the absence of evidence to the contrary, the presumption must be applied." *Bresee v. Parsons* (1910) 87 Neb. 327, 127 N. W. 123.

In ejectment, "whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is prima facie evidence that the lessor is the real grantee; the burden of disproving this, and repelling the presumption, is thrown on the defendant, and he may prove that the deed was granted to a different person or the same name." *Spencer, J., in Jackson ex dem. Shultze v. Goes*

(1816) 13 Johns. (N. Y.) 517, 7 Am. Dec. 399, where the proof overcame the prima facie evidence.

In *Jackson ex dem. Woodruff v. Cody* (1828) 9 Cow. (N. Y.) 140, where the defendant had shown that there were two persons of the same name, the court, having quoted the statement of *Spencer, J., in Jackson ex dem. Shultze v. Goes* (N. Y.) *supra*, continued: "But it is not sufficient for him to prove that there was another person of the same name. He must prove that he was the person to whom the grant was made; otherwise, the prima facie evidence of the plaintiff is not repelled."

In *Cross v. Martin* (1873) 46 Vt. 14, the court said: "It is claimed that *Elijah Gore*, the grantor in the deed to *Zenas and Polly Barney*, of the 7th of February, 1821, is not the same person as the grantee in the deed from *Elijah Gore to Elijah Gore, Jr.*, dated June 1, 1789, for the reason that *Elijah Gore* is described in the deed as resident of *Ellisburgh, Jefferson county, New York*, while in the latter deed, his residence is set up as *Halifax, Windham county, Vermont*. We think that parties in successive deeds constituting a chain of title, of the same name, are presumptively the same person; and that in this country, there is no intendment that a party in twenty years may not change his residence. Such intendment would be against all experience, and, applied to a migratory people, would work great mischief. Parties identical in name are presumed to be identical in person, unless such presumption shall be rebutted and overcome."

"A woman to whom a devise was made, by the name of *Sarah V. Mc-Lauchlin*, and who afterwards conveyed the devised premises as *Sarah V. Butler*, describing herself in the conveyance as formerly *Sarah V. Mc-Lauchlin*, should be presumed to have acquired her new name by marriage, and no proof of her identity is required merely in consequence of this change of name." *Dowdy v. Mc-Arthur* (1894) 94 Ga. 577, 21 S. E. 148.

But in one case where *Smith*, an



owner of property, had a son Moses, and the plaintiff showed a deed from Moses Smith, it was held that there was no presumption of identity in case of such a common name. *Freeman v. Loftis* (1859) 51 N. C. (6 Jones, L.) 524. (Cited in *Nicholson v. Eureka Lumber Co.* (1912) 160 N. C. 33, 75 S. E. 730, Ann. Cas. 1914C, 202.)

#### IV. Father and son.

A father is presumed to be the grantee in a deed, over a son of the same name. *Stevens v. West* (1858) 51 N. C. (6 Jones, L.) 49. This rule was recognized where the jury were instructed too strongly in its favor (*Graves v. Colwell* (1878) 90 Ill. 612); where there was proof to the contrary (*Doty v. Doty* (1895) 159 Ill. 46, 42 N. E. 174); where there was other evidence (*Dehn v. Dehn* (1912) 170 Mich. 407, 136 N. W. 453); where the presumption was overcome by evidence (*Hess v. Stockard* (1906) 99 Minn. 504, 109 N. W. 1113; *Bolster v. Lambert* (1913) 67 Or. 134, 135 Pac. 325).

In *Chapman v. Tyson* (1905) 39 Wash. 523, 81 Pac. 1066, the court said, obiter: "When a father and son have the same name, and a conveyance of land is made without designating whether to the father or son, the law will presume that the father was intended for the grantee, in the absence of proof to the contrary."

Where the court held the facts sufficient to overcome the presumption, it was said: "Upon principle and authority we are of the opinion, and so hold, that where father and son have the same name as the grantee in a conveyance of land, and neither is otherwise designated as the grantee, the father will be presumed to be the grantee, if other things are equal and there is no evidence to the contrary."

5 A.L.R.—28.

*Hess v. Stockard* (1906) 99 Minn. 504, 109 N. W. 1113, supra.

In *Fyffe v. Fyffe* (1883) 106 Ill. 646, it was held that a deed delivered to a father is presumed to be to him rather than to his son of the same name.

But in *Simpson v. Dix* (1881) 131 Mass. 179, it was held that when the son purchases land there is no presumption that the deed is to his father of the same name.

It is possibly suggested, by the omission to mention any presumption in *Kingsford v. Hood* (1870) 105 Mass. 495, that there may be no such presumption in Massachusetts.

In *Hunt v. Searcy* (1901) 167 Mo. 158, 67 S. W. 206, it was held that a deed in the name of a father, to whom is joined as grantor a woman who was his wife, will prima facie be presumed to be the deed of the father, although he had a son of the same name. The court said: "The identity of name is prima facie evidence of identity of person, and it devolves upon him who denies the identity to overcome the presumption."

#### V. Miscellaneous.

Two certificates for lands in the same county in the same name will be presumed to be to the same person, in the absence of evidence. *Cates v. Loftus* (1820) 3 A. K. Marsh. (Ky.) 202.

Where a deed ran to A. B., "Jr.," and A. B., "Jr.," conveyed to C., C. must take notice of a judgment entered against A. B., while A. B., Jr., owned the property, as Jr. is no part of a name. *Bidwell v. Coleman* (1866) 11 Minn. 78, Gil. 45.

*White v. Bates* (1908) 234 Ill. 276, 84 N. E. 906, would be an interesting case in this connection, if it appeared just what was shown by the abstract which was attacked. B. B. B.

ELIZA DAMET et al., Plffs. in Err.,  
v. •  
ÆTNA LIFE INSURANCE COMPANY.

*Oklahoma Supreme Court—March 4, 1919.*

(— Okla. —, 179 Pac. 760.)

**Mortgage — right to declare due — waiver.**

1. Where a mortgage provides that, upon default in the payment of the principal debt or any instalment of interest and taxes secured thereby, the whole amount secured shall become immediately due and payable at the option of the holder, "immediately due" means "immediately upon or after the holder's election," and he is not bound to elect immediately after default, and such a provision does not simply render the notes due for purposes of foreclosure in case the option is exercised, but for all purposes, and the right to exercise the option exists as long as the default continues, and it is not waived by a mere delay, which has not operated to the benefit of the mortgagee nor to the detriment of the mortgagor.

[See note on this question beginning on page 437.]

**Tender — of amount in default under mortgage.**

2. Where a mortgagee has exercised an option granted in the mortgage,— "in case of default in the payment of any instalment of taxes or interest, the whole amount secured shall become immediately due and payable at the option of the holder," and that said mortgage

may be foreclosed accordingly,—by filing an action of foreclosure, and the makers of the notes and mortgage, or their vendees, offer thereafter to pay the amounts in default, such does not amount to a tender within the meaning of the law, and is not sufficient to support the plea of tender.

[See 19 R. C. L. 450, 540.]

Headnotes by JOHNSON, J.

**ERROR** to the District Court for Wagoner County (De Graffenried, J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note, and to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Graves & Dickey for plaintiffs in error.

Messrs. Ames, Chambers, Lowe, & Richardson and Watts & Summers, for defendant in error:

The right to elect to declare the debt due was not waived because, instead of obtaining a benefit, the plaintiff suffered a detriment.

Kansas Loan & T. Co. v. Gill, 2 Kan. App. 488, 43 Pac. 991; Jones, Mortg. 6th ed. § 76; Wheeler & W. Mfg. Co. v. Howard, 28 Fed. 741; Washburn v. Williams, 10 Colo. App. 159, 50 Pac. 223; Provident Sav. Life Assur. Soc. v. Georgia Industrial Co. 124 Ga. 399, 52 S. E. 289.

Johnson, J., delivered the opinion of the court:

This is an appeal from the dis-

trict court of Wagoner county. In this case, the plaintiff below filed a motion for judgment upon the pleadings, which was sustained by the court, and judgment rendered thereon as prayed for.

The principal question for determination rests on these facts:

On the 6th day of September, 1913, the defendants, Eliza Damet and John P. Damet, executed one principal note for \$3,200, due on the 1st day of March, 1921, and the interest thereon at 6 per cent per annum was evidenced by promissory notes in the sum of \$192, each due, respectively, on the 1st day of March of each year thereafter, all of which were made payable to the

Ætna Life Insurance Company, the plaintiff below, and on the same date executed a mortgage upon the lands in Wagoner county to secure the payment of the said notes.

It was provided in said notes and mortgage that on the failure to pay the principal note or any instalment of interest thereon at maturity, and in case of default in the payments of any instalment of taxes or assessments upon said property, the whole amount secured should become immediately due and payable at the option of the holder.

Thereafter the land covered by the mortgage was conveyed by Damet and wife to the defendant James A. Harris by a general warranty deed, with a provision that the notes and mortgage hereinbefore described were expressly excepted in said deed of conveyance.

In the plaintiff's petition filed on the 11th day of August, 1916, it prayed judgment for \$3,398, with interest from March 1, 1916, at 10 per cent per annum, \$350 attorney's fee, and for foreclosure of its mortgage upon the land covered by the same, alleging default on the part of the defendants to pay the taxes for the year 1915, and the instalment of interest amounting to \$192, which was due upon the 1st day of March, 1916, in which petition the plaintiff averred the foregoing stipulation in the notes and mortgage and the exercise by it of its option, and declared the whole amount secured by the mortgage to be due.

The defendants demurred to the petition of the plaintiff, which being overruled by the court, filed their answer consisting of a general denial, and a further answer admitting the conveyance of the land by Damet and wife to Harris, and admitting the omission to pay at maturity the notes and taxes referred to in plaintiff's petition, but charged that the plaintiff neglected to declare default on the 1st day of March, 1916, until a long time thereafter, in order to obtain the benefit of additional 4 per cent interest on the principal of said notes and mort-

gage, and thereby deriving from its laches to the detriment of the defendants the amount of said interest at the rate of 4 per cent per annum from and after the 1st day of March, 1916, up to the filing of its suit. That no demand had ever been made upon them, or either of them, for payment until a short time after filing of plaintiff's action, at which time the defendant Harris offered, tendered, and agreed to pay to plaintiff all interest and taxes then due, together with a reasonable attorney's fee. The mortgage provided for an attorney's fee of \$350 in case of foreclosure by suit.

Thereafter the plaintiff filed its motion for judgment upon the pleadings, which motion was by the trial court sustained, and judgment rendered in favor of the plaintiff in the amount sued for, except the rate of interest which was allowed was only 6 per cent until the date of judgment, and for 10 per cent thereafter, from which judgment the defendants below appeal to this court and assign error.

The plaintiffs in error cite in support of their contention an excerpt from 27 Cyc. 1533, following: "Proceedings to foreclose a mortgage should be taken with reasonable promptness, and the right under the terms of the mortgage to foreclose for the entire indebtedness on a partial default may be lost by laches, although not, it seems, by any delay which has not operated to the benefit of the mortgagee or the detriment of the mortgagor."

And from Kansas Loan & T. Co. v. Gill, 2 Kan. App. 488, 43 Pac. 991, as follows: "If by reason of the delay the plaintiff should gain any advantage, or the defendant should suffer any detriment or loss, other considerations would enter into the case, and it might then be said that there was a waiver."

After which they concluded by saying that "from the above authorities it is apparent that where the delay operates to the benefit of the mortgagee, and to the detriment

of the mortgagor, it will be deemed a waiver."

The foregoing was taken from the plaintiffs in error's brief, and contains practically all they offer in support of their contention that the trial court should be reversed, which contention is that the plaintiff waives its right to declare the debt due, because the delay from March 1 to August 11, 1916, was an advantage to the plaintiff, and a detriment to the defendants. Neither party cites any Oklahoma case in support of their respective contentions.

In *Jones on Mortgages*, 6th ed. § 76, it is said: "A stipulation that the whole sum shall become due and payable upon any default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture."

Mr. Justice Brewer, in the case of *Wheeler & W. Mfg. Co. v. Howard* (C. C.) 28 Fed. 741, in passing upon this question, said: "Where a mortgage provides that, upon default in the payment of either of the notes secured thereby, all shall become 'immediately due, at the option of the holder,' 'immediately due' means 'immediately upon or after the holder's election,' and he is not bound to elect immediately after default."

What constitutes a reasonable time in which to declare an election is passed upon by the supreme court of Colorado in *Washburn v. Williams*, 10 Colo. App. 159, 50 Pac. 225, in which it is said: "What constitutes a reasonable time is not definitely fixed, either by law or custom, but must depend upon the circumstances of each particular case. It appears from the evidence, and is also a matter of common knowledge, that during the years 1893 and 1894 great financial stringency prevailed throughout the country, so that it was difficult to secure a loan of money upon even the best security. We do not think, therefore, that the indulgence of a creditor on such an occasion as this

should be construed against him. The delay was for the benefit of plaintiff, was for the purpose of enabling him to sell the land, or otherwise raise money to discharge the debt, and, under these circumstances, four months was not, in our opinion, an unreasonable time within which to make the election."

The supreme court of Kansas, in the case of *Kansas Loan & T. Co. v. Gill*, supra, said "that the right to exercise the option exists as long as default continues."

**Mortgage—  
right to  
declare due—  
waiver.**

The record discloses that the status of the parties remained the same from March 1, 1916, when default was made, until August 11, 1916, when the foreclosure action was filed, nothing occurring during the interim which operated to the advantage of the *Ætna Life Insurance Company*, or to the disadvantage of the mortgagor.

The default was continuous during this period, and was in such condition that the mortgagors or the defendant Harris could have prevented the exercise of the election to declare the debt due. This they did not see proper to do. There was no tender by the defendant Harris until after the foreclosure proceedings had been commenced, and therefore he was not in a position to urge successfully that a sufficient tender had

**Tender—  
of amount in  
default under  
mortgage.**

been made at the time he offered to pay what he deemed to be due. In fact the whole debt had become due by the exercise of the option by the plaintiff, given it in the contract. *Isbell v. Walton Trust Co.* — Okla. —, 163 Pac. 716; *Bly v. Pool*, — Okla. —, 159 Pac. 511.

There was no error committed by the trial court in sustaining the plaintiff's motion for judgment on the pleadings and in rendering the judgment complained of.

The judgment of the trial court is affirmed.

Petition for rehearing denied, March 8, 1919.

## ANNOTATION.

**Effect on acceleration clause in mortgage of delay in declaring mortgage due.**

- I. Necessity for immediate action, 437.
- II. Obligor has reasonable time after default:
  - a. Rule stated, 437.
  - b. What constitutes reasonable time, 438.
- III. Option continuous with default, 438.
- IV. Subsequent default not affected by waiver of previous default, 439.

**I. Necessity for immediate action.**

The decisions are practically unanimous to the effect that the obligee in a mortgage, or other similar instrument, is not bound immediately to exercise the option given by an acceleration clause in such an instrument under penalty of waiver of his right to declare the instrument due. For instance, it has been expressly said that a mortgage provision that, upon a partial default, the whole shall become "immediately due" at the option of the holder, means "immediately upon or after the holder's election," so that he is not bound to elect immediately after default, but may postpone the election, the provision being for his benefit. *Wheeler & W. Mfg. Co. v. Howard* (1886) 28 Fed. 741. So, it has been said that it is not necessary for mortgagees to exercise their option under an acceleration clause *eo instanti* the partial default, and that it is sufficient if it be exercised with such reasonable expedition as that the mortgagors may not be lulled into the belief that there has been a waiver of the right to elect to declare the mortgage due. *Caldwell v. Kimbrough* (1908) 91 Miss. 877, 45 So. 7.

And see the cases set out in the following subdivisions of this annotation.

**II. Obligor has reasonable time after default.****a. Rule stated.**

The great weight of authority is to the effect that, under ordinary acceleration clauses in a mortgage, mortgage note, or trust deed, the obligee has at least a reasonable time after

default in which to elect to declare the mortgage due. The following cases are to this effect:

*United States.—Wilson v. Winter* (1881) 6 Fed. 16.

*Arkansas.—Farnsworth v. Hoover* (1899) 66 Ark. 367, 50 S. W. 865..

*California.—Crossmore v. Page* (1887) 73 Cal. 213, 2 Am. St. Rep. 789, 14 Pac. 787; *Hewitt v. Dean* (1891) 91 Cal. 5, 27 Pac. 423; *Fletcher v. Denison* (1894) 101 Cal. 292, 35 Pac. 868; *Glas v. Glas* (1896) 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667; *Trinity County Bank v. Haas* (1907) 151 Cal. 553, 91 Pac. 385.

*Colorado.—Lovell v. Goss* (1909) 45 Colo. 304, 22 L.R.A. (N.S.) 1110, 132 Am. St. Rep. 184, 101 Pac. 72; *Goss v. Lovell* (1909) 45 Colo. 315, 101 Pac. 75; *Washburn v. Williams* (1897) 10 Colo. App. 153, 50 Pac. 223.

*Iowa.—Swearingen v. Lahner* (1894) 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431.

*Mississippi.—Caldwell v. Kimbrough* (1907) 91 Miss. 877, 45 So. 7.

*Wisconsin.—Berrinkott v. Traphagen* (1875) 39 Wis. 219.

In *Washburn v. Williams* (Colo.) *supra*, it was said that a rule that the obligee must, upon a partial default being made, exercise his power of election at once, was a harsh and unreasonable one, since "it would prevent a creditor from extending any indulgence whatever to his debtor, except at the risk of ultimately finding his security insufficient to meet the accumulated obligation." And in *Caldwell v. Kimbrough* (Miss.) *supra*, it was said that it was only necessary for mortgagees to exercise an option in an acceleration clause "with such reasonable expedition as that the mortgagors might not be lulled into the belief" that their rights under the mortgage were to be waived.

And it has been held that an option to declare a mortgage due "immediately" upon a partial default may be exercised within a "reasonable" time after the default. *Crossmore v. Page* (Cal.)

supra; *Hewitt v. Dean* (1891) 91 Cal. 5, 27 Pac. 423 (holding that mere forbearance or inaction for a reasonable time does not constitute a waiver of right of election); *Fletcher v. Dennison* (1894) 101 Cal. 292, 35 Pac. 868; *Glas v. Glas* (1896) 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667; *Berrinkott v. Traphagen* (Wis.) supra. In *Hewitt v. Dean* (1891) 91 Cal. 5, 27 Pac. 423, supra, it was said that the provision was inserted for the mortgagee's benefit, and meant that he was to be allowed a reasonable time for enabling him to determine whether the exercise of the option was necessary for his protection or advantage.

And the same has been held where the instrument became payable "at once" upon the default, at the option of the obligee. *Lovell v. Goss* (1909) 45 Colo. 304, 22 L.R.A. (N.S.) 1110, 132 Am. St. Rep. 184, 101 Pac. 72; *Goss v. Lovell* (1909) 45 Colo. 315, 101 Pac. 75; *Caldwell v. Kimbrough* (Miss.) supra.

And in *Cresco Realty Co. v. Clark* (1908) 128 App. Div. 144, 112 N. Y. Supp. 550, it was said that the right to foreclose a mortgage containing an acceleration clause, for default in payment of interest, depends upon election to do so being "seasonably" made.

In *Wilson v. Winter* (1881) 6 Fed. 16, under a provision that the mortgagee may, at his option, declare the mortgage due after default in the payment of interest for ten days, it was held that such option must be declared within a "very short and reasonable time" after the expiration of the ten-day period.

*b. What constitutes reasonable time.*

Under the general rule that the option of declaring the whole amount due upon a partial default must be exercised within a reasonable time, it has been held that indulgence for a period of nine months is not an "unreasonable" length of time to wait, especially where the parties were conferring about the matter during such time. *Farnsworth v. Hoover* (1899) 66 Ark. 367, 50 S. W. 865. And an opinion to the effect that a delay of seven months is not unreasonable has also been expressed. *Swearingen v. Lahner*

(1894) 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431. And the same has been held as to a delay of four months, where a great financial stringency prevailed at the time, and the delay consequently was to the benefit of the debtor. *Washburn v. Williams* (1897) 10 Colo. App. 153, 50 Pac. 223.

But under the ruling that "immediately" or "at once" upon default means a reasonable time after default, it has been held that a seven-months' delay is unreasonable. *Crossmore v. Page* (1887) 73 Cal. 213, 2 Am. St. Rep. 789, 14 Pac. 787. On the other hand, it has been held that a delay of eight months in making an election is not so unreasonable a delay as to constitute a waiver. *Glas v. Glas* (1896) 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667. Likewise, sixty-four days is not an unreasonable time. *Lovell v. Goss* (1909) 45 Colo. 304, 22 L.R.A. (N.S.) 1110, 132 Am. St. Rep. 184, 101 Pac. 72; *Goss v. Lovell* (1909) 45 Colo. 315, 101 Pac. 75. And it has been said that it cannot be held that, as matter of law, fifty-nine days is an unreasonable time within which to make an election. *Fletcher v. Dennison* (1894) 101 Cal. 292, 35 Pac. 868. And in *Berrinkott v. Traphagen* (1875) 39 Wis. 219, the exercise of an option to declare a mortgage due for a default in the payment of interest within five weeks of the default was held to have been within a reasonable time after default, especially in view of the fact that the obligor had moved to a distant state. And a mere indulgence of twenty-eight days in exercising an option under an acceleration clause in a trust deed does not itself operate as a waiver, especially where such indulgence was at the request of the obligor, and for his benefit. *Caldwell v. Kimbrough* (1907) 91 Miss. 877, 45 So. 7.

However, a delay of six weeks has been declared to be too great, under a ruling that the mortgagee must elect within a "very short and reasonable time." *Wilson v. Winter* (1881) 6 Fed. 16.

*III. Option continuous with default.*

In a number of jurisdictions the

courts have in effect rejected the so-called reasonable-time rule, and have adopted an even broader one, holding that mere delay does not constitute a waiver, and that the option exists so long as the default continues, provided only that in the meantime the obligee shall not have gained any advantage or the obligor have suffered any detriment or loss. The following cases in effect lay down this rule: *Kansas Loan & T. Co. v. Gill* (1896) 2 Kan. App. 488, 43 Pac. 991; *DAMET v. ETNA L. INS. CO.* (reported herewith) ante, 434; *Atkinson v. Walton* (1894) 162 Pa. 219, 29 Atl. 898. And see *Swearingen v. Lahner* (1894) 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431, wherein it was said that delay did not prevent an election, provided the obligor had been in no way prejudiced by the delay; and *Lee v. Security Bank & T. Co.* (1911) 124 Tenn. 582, 139 S. W. 690, wherein it was held that an agreement by a mortgagee not to exercise an option to declare the mortgage debt due, pending the decision of a certain suit, did not estop him from electing to foreclose it at "any time" after the termination of such suit, the debtors not having been misled to their injury by the delay and the subsequent exercise of the option so as to prejudice the right of the mortgagee.

In the reported case (*DAMET v. ETNA L. INS. CO.* ante, 434) where the acceleration clause provided that upon partial default the whole debt should become, at the option of the holder, "immediately due," it is held that the quoted phrase meant "immediately due upon or after the holder's election," so that he was not bound to elect immediately, but could delay as long as the default existed, provided

the delay did not operate to the benefit of the mortgagee or to the detriment of the mortgagor.

And in *Atkinson v. Walton* (1894) 162 Pa. 219, 29 Atl. 898, in holding that mere nonprejudicial delay does not constitute a waiver, it was said that a delay of three months was evidence of indulgence merely.

*IV. Subsequent default not affected by waiver of previous default.*

The rule is that the fact that a mortgage is not foreclosed on the first default in payment does not prevent a foreclosure for a subsequent default, since such indulgence cannot affect a right not yet accrued. *Bower v. Stein* (1910) 101 C. C. A. 299, 177 Fed. 673; *Crossmore v. Page* (1887) 73 Cal. 213, 2 Am. St. Rep. 789, 14 Pac. 787; *Washburn v. Williams* (1897) 10 Colo. App. 153, 50 Pac. 223; *Pennsylvania Hospital v. Gibson* (1839) 2 Miles (Pa.) 324; *Berrinkott v. Traphagen* (1875) 39 Wis. 219.

In *Pennsylvania Hospital v. Gibson* (1839) 2 Miles (Pa.) 324, supra, it was said that the nonenforcement of the option on several occasions constituted a mere indulgence to the mortgagors as to time, and that such circumstances did not per se constitute a waiver of the right of the mortgagees to insist on its rights on a subsequent default occurring.

And see *Lawler v. French* (1905) 104 Va. 140, 51 S. E. 180, where mortgagors failed to pay taxes "for several years," and each failure rendered the mortgage due "at once," at the pleasure of the mortgagee, and in which it was held that the fact that the mortgagee had not earlier exercised his option was not a waiver of his right.

G. J. C.

LAURA B. HAM  
v.  
MASSASOIT REAL ESTATE COMPANY.

*Rhode Island Supreme Court — July 2, 1919.*

(— R. I. —, 107 Atl. 205.)

**Deed — restrictions — parol.**

1. Restrictions cannot be imposed upon a tract opened for residence purposes by the insertion of them in a deed of one lot, accompanied by oral representations that the entire tract would be restricted, and followed by the erection of a residence upon the lot granted.

[See note on this question beginning on page 448.]

**Fraud — nonperformance of agreement.**

2. Mere nonperformance by a grantor of his agreement to restrict remaining lots in the tract in which the granted property is located is not fraud.

[See 12 R. C. L. 254 et seq.]

**Specific performance — equitable relief — fraud.**

3. Equity will not grant relief in all cases where it would appear to be fraudulent to set up the Statute of Frauds to avoid performance of a contract.

[See 25 R. C. L. 259.]

**— part performance — erection of dwelling.**

4. Erection of a residence on a restricted lot in a residence tract is not

such part performance as will entitle one to specific performance of the grantor's oral promise to restrict the remaining lots in the tract.

**Easement — negative — restrictions on residence tract.**

5. Restrictions on the remaining lots in a residence tract in favor of a lot sold are negative easements in the land of the owner of the tract, which cannot be established by parol evidence under the Statute of Frauds.

[See 9 R. C. L. 746.]

**— how created.**

6. An easement is a hereditament and an interest in land capable of creation or transfer only by operation of law, or by grant, or prescription.

[See 9 R. C. L. 745.]

**CERTIFICATION** by the Superior Court for Kent County for the determination by the Supreme Court of a bill filed to enjoin respondent from conveying certain house lots free from restrictions contained in a deed from it to complainant's husband, and to compel the removal of certain buildings. *Decree for complainant in part.*

The facts are stated in the opinion of the court.

Mr. G. F. Troy, for complainant:

That complainant or her husband did not demand removal of the buildings in question cannot be construed as an acquiescence in the violation of the restrictions.

Berry, Real Prop. 374, 376, 377; Ball v. Milliken, 31 R. I. 36, 37 L.R.A. (N.S.) 623, 76 Atl. 789, Ann. Cas. 1912B, 30.

The fact that complainant and her husband did not object to the erection of a carriage house on land within the "restricted area" does not deprive complainant of her equity of protection.

Berry, Real Prop. § 374; Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369; Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Johnson v. Robertson,

156 Iowa, 64, 135 N. W. 585, Ann. Cas. 1915B, 137.

The fact that complainant's husband built a garage on his lot is not a violation of the restrictions.

Beckwith v. Pirung, 134 App. Div. 608, 119 N. Y. Supp. 444.

Complainant is entitled to relief on the ground that respondent is equitably estopped to deny the existence of the restrictions.

13 Cyc. 715; Turner v. Howard, 10 App. Div. 555, 42 N. Y. Supp. 335; Bimson v. Bultman, 3 App. Div. 193, 38 N. Y. Supp. 209; Tallmadge v. East River Bank, 26 N. Y. 105; Trenton Bkg. Co. v. Duncan, 86 N. Y. 221; Aldrich



v. Billings, 14 R. I. 233; Providence Tool Co. v. Corliss Steam Engine Co. 9 R. I. 564; Foster v. Brownie, 4 R. I. 47, 67 Am. Dec. 505; McManus v. Cooke, L. R. 35 Ch. Div. 681, 56 L. J. Ch. N. S. 662, 56 L. T. N. S. 900, 35 Week. Rep. 754, 51 J. P. 708; Columbia College v. Lynch, 70 N. Y. 447, 26 Am. Rep. 615; Hodge v. Sloan, 107 N. Y. 250, 1 Am. St. Rep. 816, 17 N. E. 535; Equitable Life Assur. Soc. v. Brennan, 148 N. Y. 672, 43 N. E. 173; Schermerhorn v. Bedell, 163 App. Div. 445, 148 N. Y. Supp. 896; Schickhaus v. Sanford, 83 N. J. Eq. 454, 91 Atl. 878.

Complainant is entitled to relief on the ground that part performance of the contract lifted it out of the Statute of Frauds.

Pom. Eq. Jur. 3d ed. § 1409; Browne, Stat. Fr. § 457; Tallmadge v. East River Bank, 26 N. Y. 105.

Complainant is entitled to relief because of fraud on the part of respondent's agent, D. Russell Brown.

Pom. Eq. Jur. 3d ed. § 909; 20 Cyc. 118; Stouffer v. Alford, 114 Md. 110, 78 Atl. 387; McLaughlin v. Thomas, 86 Conn. 252, 85 Atl. 370; Creditors Nat. Clearing House v. Lamoureux Bros. 78 N. H. 604, 99 Atl. 786; Pierce v. Cole, 110 Me. 134, 85 Atl. 567; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19; Smith, Frauds, 266.

Complainant is entitled to a mandatory injunction requiring respondent to remove certain buildings erected by respondent on land laid out as a street within said restricted area, and to refrain from further so obstructing any streets on said plat.

Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829.

The restrictions were not intended as a mere reservation of personal rights to be enforced for the sole benefit of respondent, but were for the mutual benefit of the grantees.

Sprague v. Kimball, 213 Mass. 382, 45 L.R.A.(N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431.

If there be sufficient facts stated in the bill to disclose fraud, it is unnecessary to charge in express terms that the acts complained of were fraudulent.

16 Cyc. 231; Pilant v. Davis, 2 Ky. 40; Chapman v. Chapman, 13 R. I. 680; Boyd v. Shirk, 125 Md. 175, 93 Atl. 417; Fried v. Burk, 128 Md. 548, 97 Atl. 909; Bloomer v. Fowler, 85 N. J. Eq. 600, 97 Atl. 950; Rice v. Braden, 243 Pa. 141, 89 Atl. 877; Vaiden v. Edson, 85 N. J. Eq. 184, 95 Atl. 980.

The party for whose benefit the restrictions are created is entitled to insist upon them, as long as they will be of benefit to him.

Abraham v. Stewart, 83 Mich. 7, 21 Am. St. Rep. 585, 46 N. W. 1030; Island Heights Asso. v. Island Heights Water Power, Gas & Sewer Co. — N. J. Eq. —, 62 Atl. 773; Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; Ewertsen v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051.

The evidence shows such a general plan on the part of the respondents in restricting the area in question as to warrant the court in granting relief.

Sprague v. Kimball, supra; Stott v. Avery, 156 Mich. 674, 121 N. W. 825; Allen v. Detroit, 167 Mich. 464, 36 L.R.A.(N.S.) 890, 133 N. W. 317; Tallmadge v. East River Bank, 26 N. Y. 105; Lewis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81.

Even recognizing the corporation as something more than a form, respondent is still liable for the reckless or otherwise fraudulent misrepresentations of its agent.

Lynch v. Mercantile Trust Co. 5 McCrary, 623, 18 Fed. 486; Thomp. Corp. 2d ed. § 3481.

Messrs. Wilson, Churchill, & Curtis, for respondent:

The deeds to complainant and her husband create no restrictions upon the remaining property of the defendant company.

Anderson v. Nelson, — R. I. —, 101 Atl. 136.

The alleged representations and agreements of the defendant company, if prior to the delivery of said deeds, were merged in the same, and, if subsequent, were without consideration.

Providence Tool Co. v. Corliss Steam Engine Co. 9 R. I. 564; Pyper v. Whitman, 32 R. I. 510, 35 L.R.A.(N.S.) 938, 80 Atl. 6; Squire v. Campbell, 1 Myl. & C. 459, 40 Eng. Reprint, 451, 6 L. J. Ch. N. S. 41; Wood v. Stehrer, 119 Md. 143, 86 Atl. 128; Powers v. Radding, 225 Mass. 110, 113 N. E. 782.

The restrictive agreements set forth in the bill of complaint, and which, it is claimed, are proved by some portions of the testimony, have the effect of creating negative easements or servitudes in the remaining land of the defendant company, and as such are unenforceable because not in writing.

Kenyon v. Nichols, 1 R. I. 411; Fos-

ter v. Browning, 4 R. I. 47, 67 Am. Dec. 505; Greene v. Creighton, 7 R. I. 1; Pyper v. Whitman, 32 R. I. 511, 35 L.R.A.(N.S.) 938, 80 Atl. 6; Sprague v. Kimball, 213 Mass. 380, 45 L.R.A.(N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; Sargent v. Leonardi, 223 Mass. 556, 112 N. E. 633; Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Norton v. Ritter, 121 App. Div. 497, 106 N. Y. Supp. 129; Johnson v. Robertson, 156 Iowa, 64, 135 N. W. 585, Ann. Cas. 1915B, 137; Clark v. McGee, 159 Ill. 518, 42 N. E. 965; Curtis v. Rubin, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291; Wood v. Stehrer, 119 Md. 143, 86 Atl. 128; Glave v. Harding, 27 L. J. Exch. N. S. 286.

Relief cannot be granted to the complainant on the ground of fraud, estoppel, or part performance.

Sprague v. Kimball, 213 Mass. 380, 45 L.R.A.(N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; Kenyon v. Nichols, 1 R. I. 411; Pyper v. Whitman, 32 R. I. 515, 35 L.R.A.(N.S.) 938, 80 Atl. 6; Providence Tool Co. v. Corliss Steam Engine Co. 9 R. I. 564; 2 Pom. Eq. Jur. 4th ed. § 807; Graves v. Goldthwait, 153 Mass. 268, 10 L.R.A. 763, 26 N. E. 860; Peckham v. Barker, 8 R. I. 22.

The evidence does not sustain the allegations that an agreement was made by defendant company to hold and convey its remaining land subject to the restrictions therein alleged.

Davidson v. Sohler, 220 Mass. 270, 107 N. E. 958; Gerling v. Lain, 269 Ill. 337, 109 N. E. 972; Loomis v. Collins, 272 Ill. 221, 111 N. E. 999; Curtis v. Rubin, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; Wood v. Stehrer, 119 Md. 143, 86 Atl. 128.

The evidence does not show such a general plan on the part of the defendant company in restricting the portion of the plat involved as to warrant the court in granting relief.

Allen v. Detroit, 167 Mich. 464, 36 L.R.A.(N.S.) 890, 133 N. W. 317; Powers v. Radding, 225 Mass. 110, 113 N. E. 782; Webber v. Landrigan, 215 Mass. 221, 102 N. E. 460.

There is no proof that Brown, as treasurer of the defendant company, was authorized to bind the company by any agreement to restrict the remaining land of the company, and consequently such agreement, if any, cannot be enforced against the company.

Elliott, Corp. 4th ed. § 532, p. 723;

Clark, Priv. Corp. 2d ed. p. 482; Thomp. Corp. 2d ed. § 1608; Schlessinger v. Forest Products Co. 78 N. J. L. 637, 30 L.R.A.(N.S.) 347, 138 Am. St. Rep. 627, 76 Atl. 1024; T. E. Wells & Co. v. Sharpe, 125 C. C. A. 609, 208 Fed. 393; Daniell v. Burlington Real Estate & Mfg. Co. 84 N. J. Eq. 53, 92 Atl. 587; Greene v. Creighton, 7 R. I. 1; Rhode Island Hospital Trust Co. v. Commercial Nat. Bank, 14 R. I. 625.

Complainant has acquiesced in the violation of the alleged restrictions by other lot owners and lessees, and has been guilty of laches, so that her right to relief has been forfeited.

Bedford v. British Museum, 2 Myl. & K. 552, 39 Eng. Reprint, 1055, 2 L. J. Ch. N. S. 129, 16 Eng. Rul. Cas. 702; Roper v. Williams, Turn. & R. 18, 37 Eng. Reprint, 999, 23 Revised Rep. 169; Sayers v. Collyer, L. R. 24 Ch. Div. 180, 52 L. J. Ch. N. S. 770, 48 L. T. N. S. 939, 32 Week. Rep. 200, 47 J. P. 741; Hemsley v. Marlborough Hotel Co. 62 N. J. Eq. 164, 50 Atl. 14, affirmed in 63 N. J. Eq. 804, 52 Atl. 1132.

Complainant has herself violated the alleged restrictions, and is, therefore, in no position to enforce them.

Riley v. Barron, 227 Mass. 325, 116 N. E. 473; Hepburn v. Long, 146 App. Div. 527, 131 N. Y. Supp. 154; Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583; Kneip v. Schroeder, 255 Ill. 621, 99 N. E. 617, Ann. Cas. 1913D, 426; Curtis v. Rubin, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; Compton Hill Improv. Co. v. Tower, 158 Mo. 282, 59 S. W. 239; Sutcliffe v. Eisele, 62 N. J. Eq. 222, 50 Atl. 69; Olcott v. Sheppard Knapp & Co. 96 App. Div. 281, 89 N. Y. Supp. 201.

The character of the neighborhood has so materially changed as to make it inequitable to enforce at the present time the alleged restrictions.

Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Kneip v. Schroeder, 255 Ill. 621, 99 N. E. 617, Ann. Cas. 1913D, 426.

The relief prayed for will confer no substantial benefits upon the complainant, and may cause irreparable damage to the defendant company.

Bochterle v. Sanders, 36 R. I. 39, 88 Atl. 803.

Rathbun, J., delivered the opinion of the court:

This is a bill in equity seeking to enjoin the respondent from convey-

ing certain house lots free from restrictions such as are contained in a deed from respondent to complainant's husband; also seeking to compel respondent to remove certain buildings which are located within the street lines as laid out on the plat.

The bill was heard on bill, answer, and proof by a justice of the superior court, who, without rendering any decision, certified the case to this court, in accordance with the provisions of General Laws 1909, chap. 289, § 35.

In 1903, the respondent platted certain land situated south of the railroad at Oakland beach, and caused the plat to be recorded. Two streets appear on this plat running south from the railroad location to the shore, and approximately parallel with each other, viz., Maple street and Oakland beach avenue. The complainant's claim is that, during the negotiations which resulted in a purchase of lot No. 866 on said plat by complainant's husband, the respondent, by its agents Brown and Deio, represented to complainant and her husband that all lots between Maple street and Oakland beach avenue, and also the row of lots on the easterly side of Oakland Beach avenue, were subject to the same restrictions as were incorporated in respondent's deed conveying lot No. 866 to complainant's husband, and that all of its lots within this area would be held or sold subject to said restrictions.

On May 7, 1910, respondent conveyed by warranty deed lot 866 within the above-described area to complainant's husband. The lot was subsequently conveyed to complainant, and is now owned by her. The deed to complainant's husband contained the following restrictions, viz.:

"To have and to hold the aforegranted premises . . . upon condition nevertheless:

"First. That no building at any time shall be erected or placed upon said premises within 10 feet of the

line of any street, avenue or park, as laid out upon said plat, nor shall any barn or stable be erected or placed upon said premises, nor shall any house be erected upon said premises that shall cost less than \$2,000, nor shall any house or building erected thereon be used at any time for any other purpose than as a residence, and for the use of a private family.

"Second. That said premises nor any part thereof shall not at any time be used for carrying on any mechanical or manufacturing business, or public trading of any kind, nor shall any spirituous or intoxicating or malt liquors be at any time made, sold, or kept for sale at any time therein or thereon.

"Third. The foregoing conditions shall be binding upon the grantee, his heirs, successors, and assigns."

Later complainant purchased from respondent lot 865, situated within the above-described area. The deed of lot 865 contained restrictions identical with those contained in the deed to complainant's husband. Previous to the sale to complainant's husband, respondent had conveyed, subject to restrictions, two lots in the above-described area. Within one month thereafter it conveyed, free from restrictions, a lot within the same area. Thereafter several conveyances were made with the same or different restrictions, and many lots were conveyed by deeds containing no restrictions. Before suit was commenced respondent had entered into agreements to sell, free from restrictions, seventeen other lots within this area. There was no covenant in the deed to complainant's husband or in any of the other deeds, binding the respondent to hold and convey the remaining lots subject to restrictions.

Hedley V. Ham, complainant's husband, testified as follows: "He said his idea in restricting those lots was to have a good class of houses built in that area. . . . Yes; he said he had built a very nice house there, and the reason he

put on the restrictions was to have that area restricted and have a nice class of houses put up there."

Laura B. Ham testified as follows: "He told us they were restricted, and all that whole plat right up through there was, and really got us to agree to put up a good house so as to advertise the plat for other houses and to get our friends if we could. . . . No; he told us they were already restricted. He said, 'And my house cost \$8,000, and my two daughters built right beside me, and perhaps my son will build later, and of course I have restricted all this land right through here.'"

Brown and Deio, having deceased, were unable to either affirm or deny the allegations and testimony relative to oral representations.

The respondent in its answer denies making said oral representations, and sets up the Statute of Frauds, and urges that, if any such oral representations or agreements were made, they were merged in the deed, and that complainant is barred by the Statute of Frauds.

Whatever may have been the original intention of the respondent, the land had not been restricted when the complainant purchased, and thereafter no consistent scheme to restrict was followed. A much larger number of lots were sold free from restrictions than were conveyed subject to restrictions. Respondent's land never became restricted by reason of any scheme to restrict. Whether the parol agreement to restrict could be proved by parol evidence, providing that nearly all of the conveyances had been made subject to the same or substantially the same restrictions, we do not decide.

The complainant argues that she is entitled to relief on the ground of fraud, estoppel, and part performance.

The proof does not show and the

complainant does not contend that actual fraud was committed by Brown or Deio in representing that the land either was or would be restricted. No relation of trust or confidence existed between the parties. In *Sprague v. Kimball*, 213 Mass. 380, 45 L.R.A. (N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431, the court said: "But the mere nonperformance of an oral contract, within the statute which is pleaded, as in the case at bar, and where no relation of trust and confidence exists, does not constitute fraud."

Courts of equity sometimes grant relief on the ground of estoppel and part performance, even when there was no fraud in the inception of the contract. For example, A orally agrees to sell a house to B for a stipulated sum, and B, relying upon the oral contract, with full knowledge of A, enters upon the land and erects a house, whereupon A, changing his mind, decides not to give B a deed. In such a case it is clear that a court of equity would decree specific performance, notwithstanding the Statute of Frauds. A, knowing that B was relying upon the oral contract, permitted B to expend his time and money in constructing a house on A's lot. A would be estopped to set up the Statute of Frauds, thereby preventing proof of the contract, because such conduct would be fraudulent. The case would be lifted out of the Statute of Frauds. His conduct is an admission that a contract existed between the parties. But equity will not grant relief in all cases where it would appear to be fraudulent to set up the Statute of Frauds. In the case suggested for illustration, there is evidence to aid the court outside of the story of the complainant and his witnesses. The house is visible and tangible evidence that the parties have entered into a contract. The court will inquire into

Fraud-non-performance of agreement.

Specific performance—equitable relief—fraud.

its terms, and compel the vendor to comply with his part of the oral agreement.

The complainant argues that the payment of the purchase price of the lot constituted such a part performance as will entitle her to relief in equity; also that the expenditures of money in the erection of the house, made with knowledge of Brown, estopped the respondent to set up the Statute of Frauds.

The lot was purchased and the house erected because complainant and her husband desired a summer residence at Oakland beach. It is as reasonable, at least, to assume that the house was erected for the purpose of occupancy by complainant and her family, and that Brown supposed it was being constructed for that purpose, as it is to assume that the house was built because she relied on Brown's oral representations or promise. She built and occupied a house, as has been done by millions of other persons who expected to obtain no right or interest in their grantor's remaining land. The complainant simply improved her own real estate. She made no expenditures or improvements on the grantor's remaining land, on which she seeks to impose a burden. See *Peckham v. Barker*, 8 R. I. 17.

The court, in *Sprague v. Kimball*, supra, 213 Mass. at page 384, used the following language: "Nor did the plaintiffs, on whom, and not on the defendant, the burden of part performance rests where this ground for relief is sought, by taking title, entering into occupation, and making improvements on their own estates in reliance upon the parol agreement, acquire any legal or equitable interest in the defendant's remaining land"—citing *Caton v. Caton*, L. R. 1 Ch. 137, 35 L. J. Ch. N. S. 292, 12 Jur. N. S. 171; *Graves v. Goldthwait*, 153 Mass. 268, 269, 10 L.R.A. 763, 26 N. E. 360; *Low v. Low*, 173 Mass. 580, 582, 54 N. E. 257; *Sarkisian v. Teele*, 201 Mass. 596, 88 N. E. 333.

The equitable rule that part performance will take a contract out of the Statute of Frauds

—part performance—erection of dwelling.

does not apply. This is not a suit to obtain or reform a deed. It is an attempt to enforce an oral agreement. The complainant's husband purchased a house lot, and, upon payment of the purchase price, received a deed, which is a solemn instrument under seal, intended to recite definitely and accurately everything which the grantee takes and is to enjoy in consideration of the purchase price. See *Pyper v. Whitman*, 32 R. I. 511, 35 L.R.A. (N.S.) 938, 80 Atl. 6; *Norton v. Ritter*, 121 App. Div. 497, 106 N. Y. Supp. 129; *Sprague v. Kimball*, 213 Mass. 380, 45 L.R.A. (N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; *Squire v. Campbell*, 1 Myl. & C. 459, 40 Eng. Reprint, 451, 6 L. J. Ch. N. S. 41.

These restrictions, if established, are negative easements in respondent's land. *Kenyon v. Nichols*, 1 R. I.

Easement—negative—restrictions on residence tract.

411; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Greene v. Creighton*, 7 R. I. 1; *Pyper v. Whitman*, 32 R. I. 511, 35 L.R.A. (N.S.) 938, 80 Atl. 6; *Sprague v. Kimball*, 213 Mass. 380, 45 L.R.A. (N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; *Sargent v. Leonard*, 223 Mass. 556, 112 N. E. 633; *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Norton v. Ritter*, 121 App. Div. 497, 106 N. Y. Supp. 129.

Our Statute of Frauds and statute on "the conveyance of estates" each forbid the establishing of an easement on parol testimony.

"No action shall be brought:—First. Whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer time than one year, . . . unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to

be charged therewith, or by some other person by him thereunto lawfully authorized." Gen. Laws, chap. 283, § 6.

"Every conveyance of lands, tenements or hereditaments, absolutely, by way of mortgage, or on condition, use or trust, for any term longer than one year, and all declarations of trusts concerning the same, shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence in the town or city where the said lands, tenements or hereditaments are situated." Gen. Laws, chap. 253, § 2.

Each of the above statutes contains the word "hereditaments." An easement is a hereditament and an interest in land —how created. capable of creation or transfer only by operation of law, or by grant, or prescription. 2 Words & Phrases, 2d ed. Series, p. 211.

This question has been considered and determined in this state in the recent case of *Pyper v. Whitman*, 32 R. I. 511, 35 L.R.A. (N.S.) 938, 80 Atl. 6. The facts in said case were admitted to be true on demurrer. The case came to this court upon appeal from decree of the superior court sustaining the demurrer and dismissing the bill. The complainant purchased a tract of land from the respondent, relying on a plat exhibited at the time of the sale which showed a contemplated street running along the back end of the property purchased by the complainant. This plat was extensively used by the respondent in advertising his land for sale. The plat was posted in several places in the vicinity. At the time of purchase the respondent represented to the complainant that all of the streets designated upon the plat would be laid out and opened for public use. The complainant, relying upon these representations, purchased the property and alleged that he paid a larger price therefor because of the fact that a street was

laid out along the back end of the same as shown by the plat. There was no reference to the plat or to the street in question in the deed to complainant. The property was replatted by the respondent, and the street in question was moved 100 feet to the west, leaving a row of house lots between complainant's property and the street. The bill prayed that the respondent might be compelled to lay out the street as shown on the original plat. The demurrer to the bill of complaint was sustained, and, upon an appeal, the action of the superior court was affirmed. In considering the case this court said: "There being, then, no grant of a right of way by express terms by the deed, or by reference to the plat, no claim of a right of way acquired by implication by reason of any actual existing way in use as an apparent and continuous easement, and no claim of a right of way by necessity, we are unable to find that the complainant has acquired any right of way in Conimicut avenue (so-called) merely by the exhibition of a plat to him prior to the sale of the land to him, on which plat there was a street delineated and shown under the name of Conimicut avenue."

The only distinction that can be drawn between the case of *Pyper v. Whitman* and the case now under consideration is that the former case involved the consideration of what might be termed a "positive easement," viz., a right of way, and the present case concerns a negative easement, viz., a restriction upon the land of the respondent company, and it does not appear in *Pyper v. Whitman* that the complainant erected a house on the land. These distinctions are immaterial. The second distinction has been considered above. The evidence in *Pyper v. Whitman* was far stronger as to the character of the representations alleged to have been made than in the present case, and the added element was present in that case of a plat duly laid out and used extensively for advertising pur-

poses. To this extent there was a written or rather printed paper which was some evidence of what was the original intention of the parties. In the present case we have no evidence of any tangible nature by which the fact (if it is a fact) that representations were made by the respondent's agents can be established. To supplement the oral testimony of the complainant, her husband, and two other witnesses, each testifying to different conversations held at different times with the company's treasurer, we have nothing but a plat on which a pencil mark has been drawn around certain house lots by some person at some time. We are aware of the fact that in some jurisdictions there are cases which appear to be opposed to the doctrine laid down in *Pyper v. Whitman*, supra, but we think that our conclusions are not only founded on the better reason, but are supported by the great weight of authority. *Pyper v. Whitman*, supra; *Norton v. Ritter*, 121 App. Div. 497, 106 N. Y. Supp. 129; *Sprague v. Kimball*, 213 Mass. 380, 45 L.R.A. (N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; *Squire v. Campbell*, 1 Myl. & C. 459, 40 Eng. Reprint, 451, 6 L. J. Ch. N. S. 41.

In *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876, each of several purchasers, including defendant, entered into a parol agreement with the grantor "that no portion of the premises so sold should be used for the sale of intoxicating liquors. This agreement was in each case a part consideration of the sale." The court evidently found that the whole tract had been restricted, and that each lot owner, when he purchased, understood and agreed that his lot would be restricted. Upon complaint of grantor and other lot owners, the defendant was enjoined. The court found that the oral agreement was not an agree-

ment for the sale of an interest in or concerning real estate. We have already stated that the restrictions contended for in this case are easements and interests in land. The court in *Hall v. Solomon* cited *Tallmadge v. East River Bank*, 26 N. Y. 105. The latter case is also cited in the complainant's brief in this case. The language used in *Norton v. Ritter*, 121 App. Div. 497, 106 N. Y. Supp. 129, namely, "The agreement was deemed valid in *Tallmadge v. East River Bank*, supra, whether correctly or not," indicates that there was at least a question in the mind of the New York court whether the latter case was correctly decided.

We find that the complainant is not entitled to have the restrictions contained in the deed to her husband imposed upon the respondent's house lots.

Deed—restrictions—parol.

It appears in evidence that a "plat office" building and two other small buildings used as stores are located within the street lines at the junction of Warwick avenue and Oakland Beach avenue. Counsel for respondent admitted in argument that respondent was bound to remove all buildings under its control which were located within the street lines. For a long time the respondent, in connection with its business, used the "plat office." Mr. Ham testifies that Brown, the respondent's treasurer, leased to tenants the two small store buildings. The complainant is entitled to a decree for the removal of these buildings. On July 7, 1919, at 10 o'clock A. M., parties may present decree in accordance with this opinion.

A motion for rehearing having been filed the Court handed down the following response:

The complainant's motion for reargument filed July 10, 1919, is denied and dismissed.

## ANNOTATION.

**Oral agreement as to restrictions upon the use of real property as within the Statute of Frauds.**

In *Sprague v. Kimball* (1913) 213 Mass. 380, 45 L.R.A. (N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431, a grantee of lots by deed imposing upon such lots certain equitable restrictions was held not to be entitled to enjoin his grantor from conveying to another the remaining portion of one of such lots without imposing thereon similar restrictions, there being no agreement in writing that the remaining land should be conveyed under similar restrictions. Such an agreement is held to be required to be in writing by a statute providing that a contract for the sale of lands, "or of any interest in or concerning them," must be "in writing and signed by the party to be charged therewith." It is further held that the purchaser, by entering into occupation of the premises and making improvements on the lands conveyed, in reliance upon the parol agreement of the grantor, did not acquire any legal or equitable interest in the grantor's remaining lands so as to make the oral contract enforceable on the theory of performance. *Sprague v. Kimball* is followed in *Sargent v. Leonardi* (1916) 223 Mass. 556, 112 N. E. 633, where it is stated to be well settled "that an easement in the nature of an equitable restriction cannot be imposed upon land by parol." It was urged that the principle stated in *Sprague v. Kimball* did not apply in the *Leonardi* Case, for the reason that in a mortgage given by the defendant's predecessor in title there was a recital which amounted to an acknowledgment by him of the existence of the restriction, and was sufficient not only to establish that he agreed to these restrictions when he purchased the lot, but that the omission of the same from the deed to him was due to accident and mistake. In answer to this contention, the court states that if the deed to the defendant's predecessor in title omitted to refer to the restrictions, and such omission was due to accident and mutual mis-

take, the remedy of the grantors, or those claiming under them, is by a bill to reform the deed.

See the reported case (*HAM v. MASSASOIT REAL ESTATE Co.* ante, 440).

In *Norton v. Ritter* (1907) 121 App. Div. 497, 106 N. Y. Supp. 129, where the owner of four adjoining lots sold and conveyed two of them to purchasers, to whom, in order to induce the purchase, he represented that each of the remaining lots was restricted against the erection of any building thereon except a private residence like those on the lots sold, and promised that no other kind of building would be erected thereon, it was held that this oral promise was void under the Statute of Frauds.

An oral agreement between adjoining owners, one of whom has erected a building upon his land, that the other shall not erect a building beyond the line of the building of the former, is unenforceable under the Statute of Frauds. *Rice v. Roberts* (1869) 24 Wis. 461, 1 Am. Rep. 195. The right claimed by the owner of the building first erected under this agreement to control or dictate as to the use which should be made of the adjoining lot, or the manner in which the owner should build upon or occupy it, is stated to be obviously an interest in or power over land; that by the Statute of Frauds every such interest in or power over the land of another must be granted or created by writing, subscribed by the party granting or creating the same, or it is void, and that the contract, being clearly within the statute, is therefore void, and no action can be sustained upon it in this respect. A similar decision appears in *Wolfe v. Frost* (1846) 4 Sandf. Ch. (N. Y.) 72, where it is held that an agreement between the owners of two adjoining city lots that, if the one will build a dwelling upon his lot 3 feet back from the line of the street, the other will, whenever he builds on his



lot, set his buildings back the same distance from the street, is held to be an interest in land, and, if not in writing, to be void by the Statute of Frauds.

An agreement in a lease, restricting the sale of beer or liquor on the premises to those of the lessor's manufacture, is a covenant restricting the use of the land, and within the Statute of Frauds. *Mausert v. Feigenspan* (1905) — N. J. Eq. —, 64 Atl. 801.

On the contrary, certain agreements as to restrictions upon the use of property have been held not to be within the Statute of Frauds.

In *Immel v. Herb* (1910) 43 Pa. Super. Ct. 111, the grantee of land, who was induced to purchase the same by an oral agreement of his vendor to remove a foundry owned and operated by the vendor in the vicinity of the land thus purchased, and to erect dwelling houses in place of the foundry, within a stipulated time, was held entitled to recover for breach of his vendor's contract, the oral contract being held not to be within the Statute of Frauds. The court states that the agreement does not purport to convey any right of possession or title to any of the vendor's land, and the action at bar was not one brought for the purpose of enforcing the right of possession to any land. In Pennsylvania, however, the 4th section of the original Statute of Frauds not having been adopted, a vendee may recover damages for breach of an oral agreement to convey land, although the contract cannot be specifically enforced.

An agreement by a mill owner not to use his mill after a certain day is held in *Bostwick v. Leach* (1809) 3 Day (Conn.) 476, not to be within the Statute of Frauds and Perjuries, for the reason that this statute "contemplates only a transfer of lands, or some interest in them. In this case there was no transfer of any right, but only an agreement not to exercise a right. He [the mill owner] parts with no interest to any person. There is no conveyance of the stream, or, indeed, of any interest whatever. Thus, it differs nothing in principle from a case where a man has carried on a

trade in his house or shop, and agrees for a valuable consideration not to carry on his business at that particular stand, and yet such contract has never been held to be within the statute."

The oral agreement of the owner of two taverns, upon a sale of one of them, that the other should be closed and not used as a tavern house, was held not invalidated by the Statute of Frauds in *Leinaw v. Smart* (1850) 11 Humph. (Tenn.) 308. Accordingly, the vendee was held entitled to recover damages for breach of his vendor's agreement. The court states, with reference to the argument in relation to the provision of the Statute of Frauds as to agreements not to be performed within one year, that this enactment extends only to contracts which are not to be carried into full, effective, and complete execution within a year from the making thereof, or, in other words, to cases in which, by the express appointment or understanding of the parties, the thing is not to be performed within a year, that "of necessity it can be applicable only to affirmative contracts, for how can it be held to apply to a negative contract or stipulation,—to a thing not only not to be done within a year, but not to be done at all, at any time."

In *Hall v. Solomon* (1892) 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876, an agreement not to carry on the business of selling intoxicating liquors on certain premises is held not to be an agreement for the sale of an interest in or concerning said premises, and is, therefore, not invalid under the Statute of Frauds because not in writing, nor is it an agreement not to be performed within one year, and invalid, under the clause of the statute making invalid oral agreements not to be performed within one year.

An agreement between the lessees of adjoining oil lands not to drill a well within a specified distance from the boundary line between the tracts was held not to be void, although oral, under a Statute of Frauds providing that contracts for land, or concerning interest in land, shall be void unless some note or memorandum of such

contract is in writing, and signed by the parties, in *Ware v. Langmade* (1894) 2 Ohio Dec. 116. In coming to this conclusion, the court states that "neither party by the terms of the agreement proposed or did in fact part with or acquire any interest or right in the land. After the contract was concluded each party still retained, unaffected and unimpaired, all the rights and powers granted by the instruments of lease. The right to drill wells, operate for, and produce petroleum, oil, and gas on the lands included in their respective leases remained intact, and there was absolutely nothing in the agreement that would in the least limit, curtail, or prevent either one from operating for, securing, and enjoying all the mineral deposits, petroleum, oil, and gas contained in their respective lands. To secure all the oil and gas belonging to the leased land it was not necessary to make wells within 200 feet of the division line; and in making the agreement not to drill wells within that distance of the line the parties only yielded the abstract right to injure, annoy, and make each other uncomfortable; and no valuable right or interest in lands was sought to be, or was in fact, in any way affected. The agreement was merely an arrangement as to the best manner of operating contiguous oil territory so as to produce the best results with the least annoyance and expense."

A grantee of land in a tract which has been subdivided, and a plat thereof containing certain building restrictions placed of record, whose deed contains the restriction that the conveyance is subject to the building and building-line restrictions of record, is bound by such restrictions, although he did not sign the plat. *Doran v. Graham* (1915) 195 Ill. App. 65. It was argued by the grantee in this case that the declaration of restrictions made by the original owner of the plat, in such plat, was in violation of the Statute of Frauds because he did not sign the same. In answer to this contention the court states that it fails "to see what possible bearing the Statute of Frauds has upon the ques-

tion as to whether or not the alleged restrictions are binding upon the defendant. This is not an action brought to charge any person upon any contract for the sale of lands, etc. Moreover, if a deed refers to a plat that contains building-line restrictions, the restrictions are binding on the grantee, although the latter does not sign the plat or the deed, and when the owner of land sells the same he may insert in the deed of conveyance such terms and conditions as he pleases touching the mode of enjoyment and use of the land, and if they are not objectionable in law they will be binding on the grantee who accepts such deed, although the latter does not sign the deed."

There are a number of cases in which oral agreements restricting the use of property have been enforced, in which there is nothing said in regard to the Statute of Frauds. This class of cases is illustrated by *Tallmadge v. East River Bank* (1862) 26 N. Y. 105, where the owner of a tract of land which had been laid out in lots erected a number of houses on the various lots, according to a plan which he had prepared and which he exhibited to purchasers of the lots, assuring them that the houses were to be set back from the street as shown on the plat, and where it was held that such restrictions were valid and binding upon one who had purchased with notice thereof. Accordingly, a subsequent purchaser of one of the lots was restrained, at the suit of proprietors of adjacent lots, from violating the building plan. The court, after referring to the fact that the plaintiffs had purchased their lots upon the assurance that the plan would be adhered to, and had probably paid a higher price therefor, because of such restrictions, states that "selling and conveying the lots under such circumstances and with such assurances, though verbal, bound . . . [the original owner] in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which Maxwell and others had bought their lots would be kept or fulfilled. This equity at-

tached to the remaining lots, so that anyone subsequently purchasing from Davis any one or more of the remaining lots with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity." In *Bimson v. Bultman* (1896) 3 App. Div. 198, 38 N. Y. Supp. 209, where the lots were sold under a general plan or building scheme, the owner orally representing that the lots in the tract were subject to building restrictions, the remaining lots were held bound, and the principle which binds them is stated by the court to be that, "where an owner of land contracts with the purchaser of successive parcels in respect to the manner of the occupation and improvement of such parcels, he thereby

affects the remainder of the land with an equity which requires it also to be occupied and improved in conformity to the general plan, and this equity is binding upon a subsequent purchaser of the remaining parcel, who has notice of the prior agreement, though his legal title be unrestricted." *Bimson v. Bultman* is approved in *Turner v. Howard* (1896) 10 App. Div. 555, 42 N. Y. Supp. 335. In this connection, it is to be observed that this note is not concerned with cases involving building schemes in which restrictive covenants, though not in writing, have been enforced without any discussion of the Statute of Frauds. See, for example, *Allen v. Detroit* (1911) 167 Mich. 464, 36 L.R.A.(N.S.) 890, 138 N. W. 317.

W. A. E.

R. PRINS, Appt.,

v.

HOLLAND-NORTH AMERICA MORTGAGE COMPANY, Respt.

*Washington Supreme Court (Dept. No. 1)—May 28, 1919.*

(— Wash. —, 181 Pac. 680.)

**Libel — publication — communication from home office to branch.**

1. The sending by a corporation of a communication from its home office to a branch office for the attention of employees located there is not a publication within the law of libel.

[See note on this question beginning on page 455.]

— communication to person libeled.

2. It is not a publication of a libel for

a person to write and mail a libelous letter to the person libeled.

[See 17 R. C. L. 316.]

**APPEAL** by plaintiff from a judgment of the Superior Court for King County (Frater, J.) dismissing an action brought to recover damages for an alleged libel. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Fred W. Catlett, for appellant:

The letter in question was libelous per se.

*Wilson v. Sun Pub. Co.* 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442; *Olympia Waterworks v. Mottman*, 88 Wash. 694, 153 Pac. 1074; *Dick v. Northern P. R. Co.* 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638; *Cyclo-homo Amusement Co. v. Hayward-Lar-*

*kin Co.* 93 Wash. 367, 160 Pac. 1051; 25 Cyc. 344; *Norfolk & W. S. B. Co. v. Davis*, 12 App. D. C. 306; *Gaither v. Advertiser Co.* 102 Ala. 458, 14 So. 788.

Messrs. Ballinger, Battle, Hulbert, & Shorts, for respondent:

The language contained in the letter in no event is actionable per se.

*Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Ratzel v. New York News*

Pub. Co. 67 App. Div. 598, 73 N. Y. Supp. 849; *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; *Wood v. Star Pub. Co.* 90 Wash. 85, 155 Pac. 400.

The letter complained of was a privileged communication.

*Fahey v. Shafer*, 98 Wash. 517, 167 Pac. 1118; *Locke v. Bradstreet Co.* 22 Fed. 771; *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211; *Finley v. Steele*, 159 Mo. 299, 52 L.R.A. 852, 60 S. W. 108; *Dale v. Harris*, 109 Mass. 193; *Gulf, C. & S. F. R. Co. v. Floore*, — Tex. Civ. App., 42 S. W. 607; *Rothholz v. Dunkle*, 53 N. J. L. 438, 13 L.R.A. 655, 26 Am. St. Rep. 432, 22 Atl. 193; *Ginsberg v. Union Surety & G. Co.* 68 App. Div. 141, 74 N. Y. Supp. 561; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840; *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270; *Richardson v. Gunby*, 88 Kan. 47, 42 L.R.A.(N.S.) 520, 127 Pac. 533; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 26 L.R.A.(N.S.) 1080, 121 S. W. 100; *Bohlinger v. Germania L. Ins. Co.* 100 Ark. 477, 36 L.R.A.(N.S.) 449, 140 S. W. 257, Ann. Cas. 1913C, 613; 13 Enc. Pl. & Pr. 107.

The letter not being libelous per se, and the complaint failing to allege special damages, respondent's demurrer was properly sustained in any event.

*Denney v. Northwestern Credit Asso.* 55 Wash. 331, 25 L.R.A.(N.S.) 1021, 104 Pac. 769; 18 Am. & Eng. Enc. Law, 1088; *Newell, Slander & Libel*, 2d ed. p. 866, § 39; *Windisch-Muhlhauser Brewing Co. v. Bacon*, 21 Ky. L. Rep. 928, 53 S. W. 520; *Sanders v. Edmonson*, — Tex. Civ. App., 56 S. W. 611; *Herrick v. Lapham*, 10 Johns. 281; *Butler v. Hoboken Printing & Pub. Co.* 73 N. J. L. 45, 62 Atl. 272.

Sufficient publication was not alleged.

*Owen v. J. S. Ogilvie Pub. Co.* 32 App. Div. 465, 53 N. Y. Supp. 1033; *Sylvis v. Miller*, 96 Tenn. 94, 33 S. W. 921.

**Fullerton, J.**, delivered the opinion of the court:

The action is for libel. The defendant is a corporation organized under the laws of the Kingdom of the Netherlands, having its principal office at Gorinchem therein. It is engaged in the business of loaning money on first-mortgage security. It has a branch office at Seattle,

in this state, of which the plaintiff was formerly sole manager, and, at the time of the publication claimed to be libelous, was comanager with one Wabeke. The publication complained of is a letter written by the defendant at its main office and sent to its branch office at Seattle. The letter was written in the Dutch language, and, as translated in the complaint, reads as follows:

Gorinchem, Oct. 17, 1916.

Holland-North America Mortgage Co., Seattle.

Gentlemen:—

No. 65. The accountant has finished the profit and loss account over the first half-year. The result is very regrettable, as you can see from inclosed copy. The profit only amounts to Fl. 895:10. This bad result must be ascribed wholly and totally to the little activity in the investing of the moneys in America during the first half year.

If a considerable amount is not very soon placed on first mortgage, the loss by Dec. 31 next will be considerable. Nearly the total amount of the issue is yet to be loaned out; *this* causes us loss of interest of nearly 4 per cent per annum, and *this* is the cause of the big loss we now have to expect. It looks to us that, although there are many good deals that could have been made, we have failed to have a good organization. De Noord Amerikaasche Hyp. Bank at Leeuwarden, which has placed this year a considerable greater amount of bonds than we have, is now again advertising that it is selling 5½ per cent bonds. This it certainly would not do, if it still had considerable sums for investment.

We trust, however, that our business is now being conducted with a firm hand in the right path, and we soon shall receive reports about investments. With very great interest we are looking forward to this.

Respectfully,

Holland-Noord Amerika Hypotheek-bank,

(Copy.) F. Fernhout—B. Cool.

The letter was received at the branch office at Seattle in due course, and was read by Wabeke and a bookkeeper in the office, both of whom understood the Dutch language. No other publication of the libel is set forth in the complaint.

In his complaint the plaintiff set forth his relation with the defendant, his sole management of the business in America during the period spoken of in the letter, averred that the letter was written with malice, that it was false and defamatory, and by innuendo sought to show that it charged him with neglect of duty, want of capacity, and breach of trust, and hence was per se libelous.

To the complaint the defendant interposed a demurrer, which the trial court sustained. The appellant elected to stand upon the complaint, whereupon the court entered a judgment of dismissal with prejudice. The plaintiff has appealed.

The ground upon which the trial court rested its judgment does not appear in the record. It would seem, however, that the judgment can be justified on any one of several grounds. Since we have concluded there was no publication of the libel, within the meaning of the rule relating to such publications, this is the only question we shall discuss.

Publication of a libel is the communication of the defamatory matter to some third person or persons. Here the communication was sent from the main office of the company to its branch office. Until the appellant himself spread the letter broadcast to the world, it does not appear from the complaint that it was exhibited to anyone other than the officers and employees of the respondent company, whose very duties in the conduct of the ordinary business of the company brought them in contact with it. Agents and employees of this character are not third persons in their relations to the corporation, within the meaning of the laws pertain-

ing to the publication of libels. For the time being, they are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, cannot be a publication of the libel on the part of the corporation. It is but communicating with itself. The corporation can act only through officers and agents, and the officers and agents authorized to act for it are as much a part of the corporation at one place as at another, and the receipt or perusal of the letter by the corporation officers and agents at Seattle was as much the act of the corporation as was the writing of the letter by an officer or agent at the place of origin of the letter. It is not the publication

of a libel for a person to write and mail a libelous letter to the person libeled, if he gives it no further publication, and, for a much stronger reason, it is not a publication of a libel for one person to write a libelous letter to himself, which he exhibits to no other person. It must follow that a corporation, although it can act only through officers and agents, is not guilty of publishing a libel, when it writes

a libelous letter at one of its branch offices and mails it to another.

We are aware that the foregoing principle has not met with uniform approval. It is the rule announced, as we read the case, in *Owen v. J. S. Ogilvie Pub. Co.* 32 App. Div. 465, 53 N. Y. Supp. 1033. There it was said: "The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and deliv-

Libel—communication to person libeled.

—publication—communication from home office to branch.

ered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265. Has such rule application to the facts of this case? The letter was dictated to the stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelop, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances, we do not think that the stenographer is to be regarded as a third person, in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but

parts of one act; i. e., the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was, in fact, but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act."

In *Gambrill v. Schooley*, 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730, the case is commented upon and the doctrine disapproved. The precise question, however, was not before the court; the question there being whether the dictation of a libelous letter by an individual defendant to a stenographer in his employ was a publication of the letter by the person who dictated it. If the court adheres to this doctrine when the question is squarely before it, seemingly it must also hold that the very act of writing the letter is a publication, since the writer of necessity must act as the agent of the corporation, and clearly he is no more or no less an agent of the corporation than is a stenographer employed by it. The powers of certain officers and agents of a corporation with reference to its business, it is true, may be more extended than are the powers of others; but, when each acts in his line of duty to the common employer, plainly the acts of the one are to be accorded the same legal effect as the acts of the other.

The cases cited from this court we need not review. None of them touch upon the question here for determination; much less do they require a contrary conclusion.

The judgment is affirmed.

Holcomb, Main, Mount, and Parker, JJ., concur.

## ANNOTATION.

**Libel and slander: communications between different offices of corporation.**

I. Publication, 455.

II. Privilege, 455.

*I. Publication.*

The decision in the reported case (*PRINS v. HOLLAND-NORTH AMERICA MORTG. Co.* ante, 451), to the effect that the sending by a corporation of a libelous communication from its home office to a branch office, relating to and for the attention of its employees located there, is not itself a publication within the law of libel, since such employees are not third persons in their relation to the corporation,—seems to be the only one upon the question of publication by communications from one office of a corporation to another.

*II. Privilege.*

The few authorities are to the effect that libelous communications between different offices of the same corporation, if related to the business of the corporation and made without actual malice, are privileged.

Thus, in *Bohlinger v. Germania L. Ins. Co.* (1911) 100 Ark. 477, 36 L.R.A. (N.S.) 449, 140 S. W. 257, Ann. Cas. 1913C, 613, where the home office of the defendant insurance company obtained a libelous report on one who had applied to and been recommended by the manager and general agent of a branch office for a position as solicitor, and forwarded the same to such agent, who had authority to employ solicitors, it was held that the communication was qualifiedly privileged as between defendant and the general agent, which is to say that the occasion was such as to rebut the presumption of malice, and cast on the plaintiff the burden of proving actual malice, since the agent had an interest in the facts stated in the communication, by reason of his power to employ solicitors and local agents. The court said that

a communication is qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest, or in reference to which he has a duty, and to a person having a corresponding interest or duty, and does not go beyond what the occasion requires.

So, in *Nichols v. Eaton* (1900) 110 Iowa, 509, 47 L.R.A. 483, 80 Am. St. Rep. 319, 81 N. W. 792, it was again held that a libelous communication by a life insurance company to its soliciting agent in charge of a branch office, regarding the examining physician for such office, since upon a subject relating to the agency and with respect to which there was a mutual interest, was qualifiedly privileged, and that even exceeding the privilege of the communication did not destroy such privilege, the excess of statement being material only as bearing on the question of actual malice.

And in *Palatine Ins. Co. v. Griffin* (1918) — Tex. Civ. App. —, 202 S. W. 1014, it was said that libelous communications passing between the state agent of an insurance company and a local agent, with respect to company matters and for the protection of its interests, were conditionally privileged.

Another closely analogous case is *International & G. N. R. Co. v. Edmundson* (1916) — Tex. Civ. App. —, 185 S. W. 402, wherein it was held that a libelous letter from the superintendent of a railroad company to the superintendent of an express company, seeking the discharge of an express messenger who served both companies, was qualifiedly privileged. This also was upon the ground that the communication was between persons mutually interested in the subject-matter.

G. J. C.

JAMES E. SHERMAN et al.  
v.  
IDA A. FLACK et al.  
and  
AMOS E. MILLS, Plff. in Err.

*Illinois Supreme Court — April 17, 1918.*

(283 Ill. 457, 119 N. E. 293.)

**Will — renunciation of life estate — acceleration of remainder.**

1. The renunciation by a widow of a life estate in real property in favor of her dower rights accelerates the rights of the remaindermen so that they will be determined as of the date of the renunciation.

[See note on this question beginning on page 460.]

**Equity — jurisdiction of construction of will.**

2. Equity has jurisdiction of a suit to construe a will where there is a controversy as to the reconversion into real estate of a remainder devised as personalty.

[See 10 R. C. L. 361.]

**Will — devise of personalty.**

3. A direction to sell real estate after the death of the life tenant, and distribute the money, constitutes a devise of money and not of land.

[See 6 R. C. L. 1074.]

**— right to contest reconversion.**

4. Legatees who receive the cash payments to which they are entitled

under the will cannot contest the reconversion of money into realty by other devisees under the will.

**— devise to survivors — when takes effect.**

5. A devise to survivors, preceded by a life estate or other prior interest, will take effect only in favor of those who survive the period of distribution.

**Life estate — acceleration of remainder.**

6. In case of a devise to one for life with remainder to another, the remainder is accelerated and takes effect at once if for any reason the life estate fails.

[See 23 R. C. L. 556.]

**ERROR** to the Circuit Court for Macon County (Whitfield, J.) to review a decree in favor of complainants in a suit to construe the will of Charles O. Flack, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Byron M. Merris, for plaintiff in error:

Land devised to be sold and the proceeds distributed is a devise of the proceeds, and not of land.

*Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Jennings v. Smith*, 29 Ill. 116; *Rankin v. Rankin*, 36 Ill. 293, 87 Am. Dec. 205; *Germain v. Baltes*, 113 Ill. 29; *Re Corrington*, 124 Ill. 363, 16 N. E. 252; *Crerar v. Williams*, 145 Ill. 640, 21 L.R.A. 454, 34 N. E. 467.

When the will orders the sale of an estate after the expiration of a life estate, and the proceeds to be distributed between the testator's brothers and sisters, "or their heirs," the latter words will be held as providing for a substantial gift in case of the death of one of the brothers or sisters, and creates an alternative devise.

*Ebey v. Adams*, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; *Haward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503; *Starr v. Willoughby*, 218 Ill. 485, 2 L.R.A.(N.S.) 623, 75 N. E. 1029; *Burlet v. Burlet*, 246 Ill. 563, 92 N. E. 965; *Brechteller v. Wilson*, 228 Ill. 502, 81 N. E. 1094; *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; 1 Redf. Wills, 3d ed. pp. 486, 487.

When an estate is granted to a class of persons described as survivors, such estate does not usually vest until the time designated for the beginning of enjoyment of the estate for that class of persons.

*Handberry v. Doolittle*, 38 Ill. 202; *Ridgeway v. Underwood*, 67 Ill. 419; *Mather v. Mather*, 103 Ill. 607; *Schuknecht v. Schultz*, 212 Ill. 43, 72 N. E.



37; Brewick v. Anderson, 267 Ill. 169, 107 N. E. 878; Smith v. Chester, 272 Ill. 428, 112 N. E. 325, Ann. Cas. 1917A, 925.

The general rule is that where the devisees compose a class, and there are no words of devise except a simple direction to divide the property at a specified time, the gift will not vest until the time of division.

Dee v. Dee, 212 Ill. 338, 72 N. E. 429; Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430; Strode v. McCormick, 158 Ill. 142, 41 N. E. 1091; Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351; Darst v. Swearingen, 224 Ill. 229, 115 Am. St. Rep. 152, 79 N. E. 635; Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

The clear intention of the testator, shown from the entire will, to postpone the vesting of an estate until the period of distribution, must be carried out, notwithstanding the fact that the law favors the vesting of estates.

Starr v. Willoughby, 218 Ill. 485, 2 L.R.A.(N.S.) 623, 75 N. E. 1029; Johnson v. Askey, 190 Ill. 58, 60 N. E. 76; Barnes v. Johnston, 233 Ill. 620, 84 N. E. 610.

If the element of futurity is annexed to the gift itself, and not merely indicative of the time of payment, or if the time of payment is made descriptive of the class that is to take, the gift will not vest in interest until the time so fixed for payment of distribution is arrived.

McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351.

A contingent remainder is not susceptible of acceleration, since it cannot vest in possession till the happening of the contingency.

2 Tiffany, Real Prop. p. 895; 20 Cyc. 895, ¶ 5; Augustus v. Seabolt, 3 Met. (Ky.) 155; Dale v. Bartley, 58 Ind. 101.

Where the intention of the testator is that the remainder should not take effect until the expiration of the life of the prior donee, the remainder will not be accelerated.

Blatchford v. Newberry, 99 Ill. 11; Slocum v. Hagaman, 176 Ill. 533, 52 N. E. 332; Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264; Wakefield v. Wakefield, 256 Ill. 296, 100 N. E. 275, Ann.

Cas. 1913E, 414; Fowler v. Samuel, 257 Ill. 30, 100 N. E. 143, Ann. Cas. 1914A, 854.

Devisees may elect to take the land itself, instead of money, where all are competent to make such an election, but the character of the devise cannot be changed from money to land without the concurrence of all the devisees.

Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Ebey v. Adams, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; Strode v. McCormick, 158 Ill. 142, 41 N. E. 1091; Darst v. Swearingen, 224 Ill. 229, 115 Am. St. Rep. 152, 79 N. E. 635; Pasquay v. Pasquay, 235 Ill. 48, 85 N. E. 316.

Children of deceased grantors are not estopped by the covenants of warranty in the deeds given by their parents, for the reason that they do not acquire title, as heirs, by descent from their parents, but as devisees under the will of Charles O. Flack.

Ebey v. Adams, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; Golladay v. Knock, 235 Ill. 423, 126 Am. St. Rep. 224, 85 N. E. 649.

All rules of construction yield to the intention of the testator, plainly expressed in the will.

O'Hare v. Johnston, 273 Ill. 465, 113 N. E. 127; Ashby v. McKinlock, 271 Ill. 254, 111 N. E. 101; Spencer v. Spencer, 268 Ill. 339, 109 N. E. 300; McClintock v. Meehan, 273 Ill. 434, 113 N. E. 43; Dean v. Northern Trust Co. 266 Ill. 207, 107 N. E. 186; People v. Byrd, 253 Ill. 227, 97 N. E. 293; Downing v. Grigsby, 251 Ill. 572, 96 N. E. 513; Fifer v. Allen, 228 Ill. 512, 81 N. E. 1105; Morrison v. Tyler, 266 Ill. 318, 107 N. E. 602.

Messrs. McDavid & Monroe, for defendants in error:

The law favors the vesting of estates at the earliest possible moment, and estates devised will vest in interest at the death of the testator unless some later time for their vesting is expressed by the words of the will, or appears by necessary implication.

Carter v. Carter, 234 Ill. 507, 85 N. E. 292; Lynn v. Worthington, 266 Ill. 416, 107 N. E. 729.

Where it is doubtful whether words of contingency of condition apply to the gift itself, or to the time of payment, they will be construed as applying to the latter.

Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558.

Where the postponement of distribu-

tion of the estate is for reasons not personal to the remaindermen, but for the convenience of the fund or for the purpose of letting in a prior estate for life, the gift in remainder vests at once.

Meldahl v. Wallace, 270 Ill. 220, 110 N. E. 354; Northern Trust Co. v. Wheaton, 249 Ill. 606, 34 L.R.A. (N.S.) 1150, 94 N. E. 980; Thomas v. Thomas, 247 Ill. 543, 139 Am. St. Rep. 347, 93 N. E. 344.

As a general rule, where the only gift is to be found in the direction to pay or divide at a future time, the legacy is contingent upon the legatee being alive at the time specified.

Scofield v. Olcott, 120 Ill. 363, 11 N. E. 351.

Under such circumstances, therefore, the gift is not to a contingent class, but to an ascertained class at a future time.

Ibid.; Kale, Future Interests, 212; Jarman, Wills, 2d ed. p. 412; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94; Knight v. Pottgieser, 176 Ill. 373, 52 N. E. 934; Dee v. Dee, 212 Ill. 352, 72 N. E. 429; Thomas v. Thomas, supra.

Where the taking effect in possession of the ulterior devise of the remainder is postponed only in order that a life estate may be given to a life tenant upon the failure or destruction of the life estate, the rights of the second taker are accelerated, although the present donee be still alive.

Slocum v. Hagaman, 176 Ill. 533, 52 N. E. 332; Blatchford v. Newberry, 99 Ill. 11; Fowler v. Samuel, 257 Ill. 34, 100 N. E. 143, Ann. Cas. 1914A, 854; Jull v. Jacobs, L. R. 3 Ch. Div. 711, 35 L. T. N. S. 153, 24 Week. Rep. 947; Northern Trust Co. v. Wheaton, 249 Ill. 606, 34 L.R.A. (N.S.) 1150, 94 N. E. 980.

An executory devise never becomes a vested interest until it takes effect in possession or is turned into a vested interest.

Thompson v. Becker, 194 Ill. 122, 62 N. E. 558; Gray, Perpetuities, § 114.

All rules of construction yield to the intention of the testator, plainly expressed in the will.

Smith v. Chester, 272 Ill. 443, 112 N. E. 325, Ann. Cas. 1917A, 925; Morrison v. Tyler, 266 Ill. 318, 107 N. E. 602.

Persons to whom the proceeds of land are bequeathed may elect to take the land itself, if all concur in the election.

Darst v. Swearingen, 224 Ill. 229, 115

Am. St. Rep. 152, 79 N. E. 635; Pasquay v. Pasquay, 235 Ill. 48, 85 N. E. 316.

Dunn, J., delivered the opinion of the court:

James E. Sherman and Patrick J. Lovett filed their bill in the circuit court of Macon county for a construction of the will of Charles O. Flack, who died on September 27, 1902, leaving a will whereby he devised certain real estate in Macon county to his wife, Ida A. Flack, during her lifetime. The remainder was devised as follows: "At her death the real estate described as follows, W.  $\frac{1}{2}$  E.  $\frac{1}{2}$  lots 3 and 4, N. E.  $\frac{1}{2}$  4, to be sold, and from the proceeds of such sale, \$75 to be paid equally among her brothers and sisters or their heirs, together with any improvements or expense put on said real estate by her; the above mentioned \$75 was paid by Moses Baker to C. O. Flack; after all just debts and funeral expenses are paid the balance of proceeds of said sale to be equally divided among my brothers and sisters, or their heirs. Real estate to be sold to the highest and best bidder within one year from the time of her death."

He left two brothers and five sisters, who were his only heirs at law. His will was admitted to probate, and the widow renounced its benefit. The brothers and sisters, upon the theory that by reason of the failure of the life estate the period of distribution had arrived, elected to take the land in lieu of the proceeds of the sale, and paid \$75 to the brothers and sisters of the widow. The widow and the brothers and sisters of the testator, except Rebecca Tohill, one of the sisters, in 1904, executed warranty deeds of the premises to Jona M. Tohill, the husband of Rebecca, and Jona M. Tohill and Rebecca Tohill, his wife, on March 15, 1913, conveyed the whole of the premises by warranty deed to the complainants, James E. Sherman and Patrick J. Lovett, who on February 26, 1917, conveyed an undivided one half of the premises to Arnaldo B. Chapman. Sherman

and Lovett claim to be the owners in fee simple of the undivided half of the premises. They aver that their title is depreciated in value and rendered unmerchantable because of the uncertainty in meaning of the will of Charles O. Flack, and they pray that they may be declared to be the owners of the premises in fee simple. A sister and a brother of Flack died after the execution of the deeds to Tohill, leaving children. These children and the surviving brother and sisters and others were made defendants to the bill. A guardian ad litem was appointed and answered, and all the adult defendants were defaulted except Amos E. Mills. He filed an answer claiming to be a legatee under the will, and to be entitled, as one of the heirs of the deceased sister of the testator, to participate in the division of the proceeds of the devised premises in the contingency of his surviving the widow, and denying that any sale and division could be made before her death. The court construed the will in accordance with the claim of the complainants, decreeing them to be the owners of the undivided one half of the premises in fee simple, and Amos E. Mills has sued out a writ of error.

Since the amendment of § 50 of chapter 22 of the Revised Statutes in 1911, the existence of a trust is not necessary to the jurisdiction of a court of equity to hear and determine bills to construe wills, where there is doubt or uncertainty as to the rights and interests of the parties. In *McCarty v. McCarty*, 275 Ill. 573, 114 N. E. 322, we held it was error for a court of equity to assume jurisdiction of a bill to construe a will, where there was no equitable estate to be protected or equitable right to be enforced, and no necessity for the exercise of the power of the court for the conservation, preservation, protection, or betterment of the estate or the settlement of any real controversy be-

tween the parties, but where the bill was filed only for the purpose of obtaining a decree that contingent remainders had been destroyed, and that the complainant had a legal title to the premises in fee simple. In the present case, however, a question for construction arises as to the reconversion into real estate of the remainder devised by the will as personal property.

The direction to sell the real estate after the death of the testator's widow, and distribute the money, constitutes a devise of money and not of land. *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600.

Plaintiff in error contends that the brothers and sisters of the testator could not elect to take the land itself instead of the money without the consent of all the devisees, and that all of the devisees cannot be ascertained until the death of the widow. So far as the brothers and sisters of the testator's widow are concerned, the payment of the \$75 which they were to receive, and its acceptance by them, eliminates their interest. They have received everything to which they can be entitled under the will, and cannot be affected by the reconversion. *Hoopeston Public Library v. Eaton*, 283 Ill. 449, 119 N. E. 647.

It is insisted that an insurmountable obstacle to the right of election and reconversion is that the remainderman cannot be definitely ascertained until the death of the widow, and the briefs are devoted in great part to the discussion of the question whether the devise of the remainder to the brothers and sisters of the testator or their heirs was contingent or vested. The real question, however, is, What is the time of division? If that time has arrived, whatever may have been the contingency previously, it no longer exists, but the remainder is vested. The language of the will fixes the time for the sale and division at the death of the wife, and it is the

Will—devise of personality.

—right to contest reconversion.

Equity—jurisdiction of construction of will.

settled rule that a devise to survivors, preceded by a life estate or other prior interest, will take effect only in

—devise to survivors—  
when takes effect.

favor of those who survive the period of distribution. There is, however, another rule that, where there is a devise to one for life with a remainder to another, if the life estate

Life estate—  
acceleration of  
remainder.

fails for any reason the remainder is accelerated and takes effect at once. *Blatchford v. Newberry*, 99 Ill. 11. The doctrine of acceleration of remainders proceeds upon the supposition that, although the ultimate devise is in terms not to take effect in possession until the death of the life tenant, yet in point of fact it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. The doctrine is founded upon the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may be still alive, and is applied in promotion of the presumed intention of the testator, and not to defeat his intention. Where the intention of the testator is evident that the remainder should not take effect until the expiration of the life of the prior donee, the remainder will not be accelerated. *Ibid.* In the case cited the court found, in the provisions made by the will for the disposition of certain portions of his estate in case of the death or incapacity to take of the beneficiaries, evidence of an intention of the testator that the

remainder should not take effect until the death of the wife and daughters, but in the meantime the property should be held by the trustees for accumulation. In *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. 332, it is said that it seems to be settled by the weight of authority that where the widow, who has been given a life interest under the will, renounces, and elects to take her dower or the statutory allowances instead, her renunciation works an extinguishment of her life estate and accelerates the rights of the second taker, and it was held that the postponement of the division of the estate in that case, until the death of the widow, was for the purpose of securing her income during her life, and when she renounced the provisions of the will the reason for the postponement of the period of distribution no longer existed, and it was proper to make such distribution as though the widow had died. In this case there is nothing to indicate any object of the testator in postponing the final disposition of his estate except to permit his wife to enjoy the property during her life. There is, therefore, no reason why the limitation of the remainder should not be read in accordance with the presumed intention of the testator that it should take effect upon the happening of any event which removes the life estate out of the way.

Will—re-  
nunciation of  
life estate—  
acceleration of  
remainder.

The decree of the Circuit Court will be affirmed.

## ANNOTATION.

### Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substitutional gift.

For decisions upon the related question of the effect of the premature termination of a precedent estate to accelerate a remainder contingent upon surviving the life tenant, see annotation accompanying *Compton v. Barbour*, post, 465. Inasmuch as it

is often difficult to say whether a remainder is contingent upon surviving the termination of the precedent estate, or is vested subject to be divested in favor of another in event of the death of the first taker before the termination of the precedent es-

tate, such decisions may profitably be examined in this connection.

For discussion of the question whether the failure or renunciation of the precedent life estate will accelerate the vesting of a remainder limited thereon, where enjoyment is postponed by the allotment of dower or the necessity of compensating disappointed legatees, see annotation accompanying *Young v. Harris*, post, 480.

The great weight of authority supports the conclusion reached in the reported case (*SHERMAN v. FLACK*, ante, 456) that the principle of acceleration will be applied, and the result of it will be effective, in cases where there is a substitutional gift in case of the death of a remainderman in the lifetime of the life tenant. See:

**Delaware.**—*Roe v. Doe* (1914) 5 Boyce (Del.) 545, 93 Atl. 373, Ann. Cas. 1918C, 409.

**Illinois.**—*Slocum v. Hagaman* (1898) 176 Ill. 533, 52 N. E. 332; *SHERMAN v. FLACK*.

**Iowa.**—*Everett v. Croskrey* (1894) 92 Iowa, 333; *Rench v. Rench* (1918) — Iowa, —, 169 N. W. 667.

**Maryland.**—*Small v. Marburg* (1893) 77 Md. 11, 25 Atl. 920; *Randall v. Randall* (1897) 85 Md. 430, 37 Atl. 209.

**Michigan.**—*Re Schulz* (1897) 113 Mich. 592, 71 N. W. 1079.

**New York.**—*Sarles v. Sarles* (1887) 19 Abb. N. C. 322.

**North Carolina.**—*Wilson v. Stafford* (1864) 60 N. C. (Winst. Eq.) 103.

**Pennsylvania.**—*Coover's Appeal* (1873) 74 Pa. 143; *Disston's Estate* (1917) 257 Pa. 537, L.R.A.1918B, 62, 101 Atl. 804; *Woodburn's Estate* (1892) 151 Pa. 586, 25 Atl. 145; *Wyllner's Estate* (1917) 65 Pa. Super. Ct. 396.

**South Carolina.**—*Witherspoon v. Watts* (1882) 18 S. C. 396.

**Tennessee.**—Compare *Meek v. Trotter* (1915) 133 Tenn. 145, 180 S. W. 176.

**Virginia.**—*Compton v. Barbour*, post, 465.

As apparently entertaining a contrary view, see *Re Rogers* (1903) 97 Md. 674, 55 Atl. 679; *Sawyer v. Free-*

*man* (1894) 161 Mass. 543, 37 N. E. 942, and *Cotton v. Fletcher* (1914) 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1918A, 1225,—all of which are set forth at length, *infra*.

In *Roe v. Doe* (Del.) *supra*, where testator gave all his estate to his wife for life, and after her death to his "then living children, or, in case of their death, to their legal representatives, share and share alike," it was held that upon the widow's renunciation of the provision made for her in the will those children of the testator who were then living thereupon became entitled to the whole of the real estate of the testator, subject to the dower rights of the widow.

In *Slocum v. Hagaman* (Ill.) *supra*, where testator gave and devised to his widow in lieu of dower certain realty in fee, and an annuity, and further provided that after the demise of his wife, and as soon as it could be done at fair prices, his property should be sold and the proceeds thereof divided pro rata among his nephews and nieces and an adopted daughter, share and share alike, and that should any of his nephews and nieces die before such division, leaving children, such child or children should be entitled to the share of its parent, it was held that the provision for the substitution of the children of a nephew or niece dying before division did not prevent acceleration from taking place, upon the widow's renunciation of the provisions of the will.

In *Everett v. Croskrey* (1894) 92 Iowa, 333, it was held that acceleration was not prevented by a provision that if the remainderman should die before the life tenant the latter should hold the property in fee.

In *Rench v. Rench* (1918) — Iowa, —, 169 N. W. 667, testator gave his wife, in lieu of dower and distributive share, the use and income of his residuary estate during widowhood, and, after a provision to take effect in event of her remarriage, further provided: "Should my said wife not remarry, upon her death, the shares of stock described in the next paragraph above . . . shall go to my said nephew as provided in the said par-

agraph, and the remainder of my property then remaining undisposed of shall go to my said daughter or her issue, if any. If she should be dead without issue the whole shall go to my said nephew. To recapitulate in a measure, it is my will that whatever property may remain undisposed of at the death of my wife, except said shares of capital stock, whether remarried or not, shall be the property of our said daughter, if living, or of her issue, if any, if she be dead; and if she be dead without issue then it shall all be the property of my said nephew." It was held that the rejection of the life estate by the widow was the equivalent of her death, and accelerated the right of the remainderman to enter into the complete possession of the unappropriated part of the devised estate, the contingency attaching to the gift being terminated upon the termination of the life tenancy by the widow's renunciation.

That the presence of a substitutional gift will not prevent the acceleration of a remainder is also held in *Small v. Marburg* (1898) 77 Md. 11, 25 Atl. 920, where testator gave his wife a life estate in certain realty, and directed that at her death it should be sold and the proceeds should form part of the residue of his estate, which he gave to his two brothers in equal shares, adding: "And in case of the death of either of my said brothers, the share of the said residue bequeathed to him shall go to his children," the period to which the words, "in case of death," relate being the termination of the widow's life estate, which took place upon her renunciation.

In *Randall v. Randall* (1897) 85 Md. 430, 37 Atl. 209, where testator created a trust for the benefit of his widow for life, and after her death for the support and education of his children until they should respectively arrive at age or marry, then to divide the principal "among my children equally and the issue of such among them as may then have died, the issue of such children to take the portion of their deceased parent equally among them. . . . In the event of

no child or issue of a child of mine living at the death of my wife, then" to others, it was held that renunciation of the provisions of the will by the widow was equivalent to her death, and therefore that the remainder was accelerated.

In *Re Schulz* (1897) 118 Mich. 592, 71 N. W. 1079, where testator gave his residuary estate to his wife for life, and directed that at her death all his real estate should be sold for the purpose of paying expenses and "the legacies hereinafter bequeathed by me," and, after bequests to certain persons, provided that, if any of the said legatees should be dead at the time of the decease of his wife, the heirs of said deceased legatee should take the legacy bequeathed to him or her, it was held that the effect of the substitutionary clause was not to postpone distribution until the death of the wife, but that it might take place upon the termination of the widow's life estate by her election against the will.

In *Parker v. Ross* (1897) 69 N. H. 213, 45 Atl. 576, where testator gave to his wife all of his property for life with the further provision that "at her decease the remainder thereof . . . shall be divided into four equal parts and given as follows: . . . I give and devise one fourth part to the children then living of my deceased sister, Mary," and gave other fourth parts to the "children then living" of other deceased sisters, further providing that "if there should not be any of the children of either of my deceased sisters living, their portion shall be divided equally among the other legatees," it was held that the legacies to the children were accelerated by the widow's renunciation of the provisions of the will, but that the interests of the children were liable to be divested by their death before that of the life tenant.

In *Sarles v. Sarles* (1887) 19 Abb. N. C. (N. Y.) 322, where testator gave his widow a life estate in certain realty, with remainder to his daughter Alice upon the death or remarriage of her mother, if then living, and if not, to her next of kin, it was held that the

interest in remainder became accelerated upon the widow's rejection of the provisions in lieu of dower, subject to an equitable charge, to the extent that it was increased by the widow's election, for the amount charged upon the rest of the estate for the satisfaction of the widow's dower.

In *Witherspoon v. Watts* (1882) 18 S. C. 396, where testator, after giving his wife a life estate in certain property, directed that at her death it be sold and divided among his daughters and grandsons, "the child or children of my said daughters or said grandsons to represent their parent if the parent be dead," it was held that the remainder over took effect upon the renunciation of the widow.

In *Wilson v. Stafford* (1864) 60 N. C. (Winst. Eq.) 103, where testator, who had directed his estate to be kept together and used for the comfort and support of his widow and children and for the advancement of his sons and daughters in the manner specified, went on to provide: "My desire is that at the marriage of my dear wife or her death that all of my money or property of every kind be either sold or divided, as may be agreed upon by my children, to share and share alike; and if any of them should die, leaving heirs, for them to receive the share or shares of their deceased parents," it was held that the effect of the widow's dissent from the provision made for her by the will, and her claiming her share of the property as if he had died intestate, must be the same as if she had died or married, and therefore that the estate remaining after the assignment of her dower and the giving her an equal part with the children of the personal estate must be divided among the children living and the personal representatives of those who had died since the death of their father.

In *Coover's Appeal* (1873) 74 Pa. 143, where testator, after making provision for his wife, directed his executors to convert his estate into money within one year after her death, and divide the whole into ten shares, "one share to be paid to Susanna Davis or to her lawful issue," and so as to the other shares, adding, "In case

any of the legatees should die before the legacy becomes payable, without lawful issue . . . in such case the share so bequeathed shall be divided in equal shares to and amongst those who are then living and named as legatees in this will," it was held that if these bequests were contingent, to vest on the death of the widow, yet her renunciation had the same effect in determining the contingency as her death, the court saying: "It would not be pretended that, had she died when she renounced, any legatee answering the description in the will, then in full life, would not have taken under it."

In *Disston's Estate* (1917) 257 Pa. 537, L.R.A.1918B, 62, 101 Atl. 804, testator gave his residuary estate in trust to divide the income remaining after payment of an annuity to testator's sister, equally between testator's wife and children during her life, and at the death of his widow gave the principal, subject to the annuity to the sister, to his son, providing, however, that should the son then be deceased, the share in question should go to the latter's issue; the other half he directed to be retained by the trustees, and the income therefrom to be paid to his daughter for life, with remainder to her issue; he then provided that if either of his children should be dead without issue at the decease of his widow, the share of the one so dying should be paid to or held for the survivor; finally, should both children be so deceased, he gave the principal of his residuary estate to his nephews and nieces, or their issue living at the time. It was held that, the widow having elected to take against the will, it was not necessary that the son's share should remain in trust so long as the widow lived, in order to prevent him from controlling the principal during that period and to permit the alternate gifts in remainder to become effective should he die in his mother's lifetime.

That a substitutional gift will not defeat acceleration is also held in *Woodburn's Estate* (1892) 151 Pa. 586, 25 Atl. 145, where testator provided "that at the death of my wife my prop-

erty be equally divided between my five children or their lawful heirs."

In *Wyllner's Estate* (1917) 65 Pa. Super. Ct. 396, where testator gave his residuary real estate in trust to pay one third of the net income to his wife during her life, and the remaining two thirds to his daughter and his son during the lifetime of the wife, with remainder of income to their respective issue, and cross remainders in event of either dying without issue, and further provided: "Upon the death of my said wife, I give and devise the whole of my residuary estate unto my said two children. . . . Should either of them be dead at such time, leaving issue, then I direct that the share of such decedent shall go to such issue. Should either of them be dead without leaving issue, then I direct that the share of such decedent shall go to the survivor or the issue of the survivor, should the survivor also die during the lifetime of my said wife." It was held that the election of the widow to take against the will had the effect to abridge the contingency to which the remainders were subject, and that the right of survivorship as between the children did not therefore prevent the acceleration of the vesting of the estates in remainder.

That a contingency attaching to the remainder interest is terminated by the widow's renunciation of the preceding life estate seems also to be held in *Meek v. Trotter* (1915) 133 Tenn. 145, 180 S. W. 176, wherein realty was given in remainder to a daughter and granddaughter after the death of the wife, with the proviso in each case that if he should die "without bodily heirs the remainder interest in said property shall, at her death, vest in" another person, and in which the court, although holding that the limitation over was not confined to a death without issue during the lifetime of the testator, but to a death without issue at any time during the continuance of the precedent estate, went on to say that the legal effect of the widow's dissent was the same, as regards her life estate, as if she had died. Owing to the fact that the pri-

mary devisees of the remainder interest were in life, however, the question cannot be said to have been necessarily determined.

In *Compton v. Barbour* (Va.) post, 465, it is said that a remainder to a person after a life estate, or, if such person be then dead, to his heirs, is not contingent, but the provision in case of his death is substitutionary, and the mention of his heirs is intended to prevent a lapse in the event of the death of the remainderman in the lifetime of the life tenant; and if the particular estate ceases to exist in the lifetime of the tenant for life the remainder of such person may be accelerated under like conditions as a vested remainder.

**Cases in which acceleration has been refused.**

In *Re Rogers* (1903) 97 Md. 674, 55 Atl. 679, where a testator gave his estate in trust to invest and pay the income therefrom to his wife during her life, and after her death to divide the principal among his children, share and share alike, and further directed: "In said division, the child or children of a deceased parent, if there be such, are to take in equal proportion the share to which their deceased parent would have been entitled had he or she been living at the time of said division." The widow seems to have accepted the provisions of the will, but subsequently executed a paper by which she renounced all her right and interest as life tenant under the terms of the will. It was held that as the period at which the division among the remaindermen was to take place as fixed by the will was after the death of the widow, and if at that time any of the children should be deceased leaving a child or children then living, such child or children must be substituted in his place, it was impossible to ascertain with precision the person or persons who would be entitled to take at the period of the death of the life tenant, and therefore that there was no right to an immediate division of the trust estate.

In *Sawyer v. Freeman* (1894) 161 Mass. 543, 37 N. E. 942, where testator gave a sum in trust for his widow for



life, and upon her death to pay the principal and all income thereof then in the hands of the trustees to her daughter, and, in case said daughter should not be living at the death of her mother, then to pay said sum and income, share and share alike, to her issue surviving the widow, otherwise, to the residuary legatee, the court said that they could not read the words, "at the death of her mother," as meaning whenever, either at or before the death of her mother, the interest of the latter should come to an end, and therefore that the daughter was not, upon the widow's renunciation, entitled absolutely to the income by acceleration.

In *Cotton v. Fletcher* (1914) 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1918A, 1225, where testator, after giving his widow a life interest in a fund of \$50,000, went on to provide: "On the death of my wife I desire that the trust fund of \$50,000 in the hands of Carl Cotton shall be divided as follows: One half to my daughter Alice R. Fletcher, and, if she shall not be living, then to her issue, if any; one eighth to Carl Cotton; if he shall not be living then to his heirs; one eighth to G. Melrose Cotton; if he shall not be living then to his wife, and if she be dead then to their issue," etc., it was held that the widow's waiver of

the provisions for her did not accelerate the remainder after her life estate so as to take effect immediately, since as to a large part thereof it could not be determined who would take until the death of the widow.

A decision which seems to have been controlled by its special circumstances is *Batione's Estate* (1890) 136 Pa. 307, 20 Atl. 572, where testator bequeathed all his estate in trust for his wife for life, and directed, at her death, "our daughter to enjoy the benefits accruing from it until she attains the age of twenty-five years, when she is to have an absolute right to the whole of my estate, real and personal," but further provided: "In the event of my dear wife outliving our child, Modesta, at my wife's death two thirds of the whole estate is to be equally divided amongst my father and sisters then living, the remaining one third to become the absolute property of my friend, Pedro Salome." The widow elected to take against the will. The testator's daughter, Modesta, died in the lifetime of her mother, and before attaining the age of twenty-five. The court, without considering the effect of the widow's renunciation to terminate the contingency, held that, as the event described in the will had taken place, the gift over took effect.

E. S. O.

MARY B. COMPTON et al., Appts.,

v.

JOHN S. BARBOUR et al., Exrs., of John F. Rixey, Deceased, et al.

*Virginia Supreme Court of Appeals—March 13, 1919.*

(*Compton v. Rixey*, — Va. —, 98 S. E. 651.)

#### **Will — acceleration of remainder — contingent estate.**

1. The renunciation of the life tenant will not accelerate the remainder under a will directing that upon death of the life tenant the whole estate shall be equally divided among testator's children then living, and the descendants per stirpes of such as may then be dead with issue surviving.

[See note on this question beginning on page 473.]

#### **Definition — acceleration.**

2. Acceleration is the hastening of the enjoyment of an estate, which was otherwise postponed to a later period.

[See 23 R. C. L. 556.]

5 A.L.R.—30.

#### **Will — acceleration — defeating intention of testator.**

3. The doctrine of acceleration is never applied to defeat the testator's intention.

[See 23 R. C. L. 558.]

—ascertainment of intention.

4. The intention of testator which is to be considered in the interpretation of a will is the intention spoken by the words of the will, and not the intention to be deduced from speculation as to what he would have done had he anticipated a change of the circumstances surrounding him at the time of the execution of the will.

—construction — contingent remainder.

5. Under a devise to wife for life or until remarriage, and then to testator's children then living and the descendants per stirpes of such as may be dead, the children take contingent, not vested, remainders.

[See 23 R. C. L. 538, 543.]

Life tenant — acceleration of remainder.

6. A remainder to one after a life

estate to another, and if he be dead to his heirs, is not contingent but substitutionary, and if the particular estate ceases to exist in the lifetime of the tenant for life the remainder may be accelerated as though it was a vested estate.

—acceleration of contingent remainder.

7. There can be no acceleration of a contingent remainder.

—rule for acceleration.

8. Whenever it appears that the life tenant and remainderman are sufficiently designated, and it is intended that they together shall take the whole estate, acceleration will be accorded the remainderman whenever the life estate is eliminated in any manner whatever.

[See 23 R. C. L. 556.]

**APPEAL** by complainants from a decree of the Circuit Court for Fairfax County sustaining a demurrer to and dismissing a bill filed for the distribution of the estate of John F. Rixey, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Joseph F. Moore, for appellants:

Where an estate is limited upon the death of a prior donee, the ulterior donees are, as a matter of fact, to take upon any event which terminates the particular estate.

Jarman, Wills, 3d ed. p. 539.

The renunciation by the widow, being equivalent to her death, had the effect of vesting in right the interests of the children.

Blatchford v. Newberry, 99 Ill. 11; Slocum v. Hagaman, 176 Ill. 533, 52 N. E. 332; Coover's Appeal, 74 Pa. 143; Disston's Estate, 257 Pa. 537, L.R.A. 1918B, 62, 101 Atl. 804.

Messrs. R. E. Thornton and H. Thornton Davies, for appellees:

The interest of complainants is contingent.

Howbert v. Cauthorn, 100 Va. 649, 42 S. E. 683; Olney v. Hull, 21 Pick. 311; Vashon v. Vashon, 98 Va. 170, 35 S. E. 457; Allison v. Allison, 101 Va. 537, 63 L.R.A. 920, 44 S. E. 904; Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871.

Such contingent remainder was not so accelerated by the widow's renunciation as to entitle complainants to a distribution of the corpus.

Tiffany, Real Prop. p. 305; Minor, Real Prop. ¶ 784; Dale v. Bartley, 58 Ind. 101; Augustus v. Seabolt, 3 Met. (Ky.) 155; Purdy v. Hayt, 92 N. Y.

446; 16 Cyc. 651; Brandenburg v. Thorndike, 139 Mass. 102, 28 N. E. 575; Lovell v. Charlestown, 66 N. H. 584, 32 Atl. 160; Jones v. Knappen, 63 Vt. 891, 14 L.R.A. 293, 22 Atl. 630; Poythress v. Harrison, 1 Patton & H. (Va.) 197.

Burks, J., delivered the opinion of the court:

This case involves the construction of the will of John F. Rixey. The fourth and fifth clauses of the will are as follows:

"Fourth. Upon the majority of my youngest child, my wife being alive and unmarried, I direct one third of the net annual income from my entire estate, comprising that mentioned in the third as well as in the second clause hereof, to be paid over to my wife, as long as she lives and remains my widow, and the remaining two thirds to be divided equally between my surviving children and the descendants per stirpes of such as may be dead leaving descendants.

"Fifth. Upon the death of my wife, or her marriage, my youngest child living being of age, I direct my entire estate to go to and be divided equally between my chil-

dren then living and the descendants per stirpes of such as may be then dead with issue surviving."

After accepting the provision of the will and enjoying the benefit thereof for a period of seven years, the widow executed, acknowledged, and caused to be recorded the following paper:

Know all men by these presents, that I, Ellen B. Rixey, widow of the late John F. Rixey, deceased, for reasons satisfactory to myself and which are known to my children, do hereby forever renounce and disclaim all my life estate in the estate of the said John F. Rixey, deceased, and all right, title, and interest of whatsoever nature therein given to me by the provisions of the will of my late husband, the said John F. Rixey, which is of probate in the clerk's office of the circuit court of Culpeper, Virginia. And I do renounce and disclaim all right, title, and interest of whatsoever nature to which I am now entitled in said estate, whether under the said will or by way of dower or widow's portion. I do hereby bind myself and declare that I will not accept, either at present or in the future, from the executors, their successors or assigns, any portion of the income of said estate or any interest therein which may be sought to be paid to me in accordance with any right, title, or interest which I had at any time before the execution of this instrument, it being my intention in executing this instrument to terminate my life estate in the estate of the said John F. Rixey as effectively as would my death.

In witness whereof I hereunto set my hand and seal this 9th day of June, 1916.

Ellen B. Rixey. [Seal.]

At the time of the death of the said John F. Rixey, he had four living children, all of whom were still living and had attained the age of twenty-one years at the date of the renunciation by his widow. After the renunciation, these chil-

dren called upon the executors of the estate of said Rixey for a settlement of their executorial accounts and a delivery to them of the testator's estate, which delivery the executors declined to make, and thereupon they instituted this suit to compel such delivery. The circuit court dismissed their bill, upon demurrer, on the ground that the complainants had contingent and not vested remainders, and that nothing they had done, or could do, could operate to accelerate the time fixed by the testator for the distribution of his estate. We are of opinion that the decree of the circuit court is right.

The widow relinquished the provision made for her by her husband's will, and it was too late for her to claim the provision made for her by the statute. Her children claimed that her renunciation was equivalent to her death, and that by such renunciation the remainders to them became vested and their enjoyment thereof accelerated.

"Acceleration" is the hastening of the enjoyment of an estate, which was otherwise postponed to a later period, and the doctrine is only applied in furtherance, or in execution, of the presumed intention of the testator. It is never applied to defeat the testator's intention. The intention of the testator which is to be considered in the interpretation of his will is the intention spoken by the words of the will, where

Definition—  
acceleration.

Will—acceleration—defeating  
intention of  
testator.

—ascertainment  
of intention.

he has so spoken as to disclose his intention, and not the intention to be deduced from speculation as to what he would have done had he anticipated a change in the circumstances surrounding him at time of the execution of his will. The latter would amount to making a will for him, and not to be the interpretation of a will he has made. When he says, "I wish A to take my estate at a designated time," we have

no right to say that he meant that B should take it at a different time. If we could call upon him to say what he meant, he might, and probably would, say, "I meant what I said." In the case in judgment, the testator designates the remaindermen who are to take upon the death or remarriage of his wife, as "my children then living and the descendants per stirpes of such as may be then dead with issue surviving." The wife is still living and has not remarried, and no one can tell until the happening of the event which is to terminate the particular estate, which of his children will answer the description of being "then living." As said in *Blatchford v. Newberry*, 99 Ill. 11, 46: "'Surviving at the time of distribution' is a part of the description given by the will of the donees, and there is no gift to anyone who does not answer the description in this element of time—who is not at that time living."

The children of the testator took, under the will, contingent, not vested, remainders. How-  
 —construction—  
 contingent  
 remainder.  
*bert v. Cauthorn*, 100 Va. 649, 42 S. E. 683; *Smoot v. Bibb*, — Va. —, 97 S. E. 355; *Purdy v. Hayt*, 92 N. Y. 446.

There are many cases holding that where the remainder is vested, and it is apparent that the only object of postponing the remainderman is that the property may be enjoyed by the tenant for life, as where an estate is given to A for life, and after his death to B, so that it is manifest that A and B are to take the whole estate, on the termination of the estate of the life tenant in any way, or his incapacity or refusal to take, the estate of the remainderman will be accelerated. Here the testator's intention is inferred from the language of the will. *Re Rawling*, 81 Iowa, 701, 47 N. W. 992; *Clark v. Tension*, 33 Md. 85; *Hinkley v. House of Refuge*, 40 Md. 461, 17 Am. Rep. 617; *Augustus v. Seabolt*, 3 Met. (Ky.) 155; *Jull v. Jacobs*, L. R. 3 Ch. Div.

711, 35 L. T. N. S. 153, 24 Week. Rep. 947. But even where the remainder is vested, it does not necessarily follow that the time of enjoyment will be accelerated. We are still to seek to ascertain the intention of the testator from his will, read as a whole, and acceleration may not comport with that intent. There may be vested remaindermen for different parts of the estate, or vested remaindermen and residuary legatees, and perhaps other situations, where acceleration would not accord with the testator's intention, and will not be accorded. In *Jones v. Knappen*, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630, the widow renounced the provisions of her husband's will and took what the law gave her, and thereby destroyed the whole scheme of distribution of her husband's estate, and, although certain legacies were vested, their payment was not permitted to be accelerated, because it would be detrimental to the interests of the residuary legatees, and for that reason did not accord with the presumed intention of the testator. See also *Wood v. Wood*, 1 Met. (Ky.) 512; *Dean v. Hart*, 62 Ala. 308. In *Gallagher's Appeal*, 87 Pa. 200, it was held: "Where a widow elects not to take under a will, her substituted devise and bequests are a trust in her, for the benefit of the disappointed claimants, to the amount of their interests therein. A court of equity will sequester the benefit intended for the wife to secure compensation to those whom her election disappoints."

In *McReynolds v. Counts*, 9 Gratt. 242, the testator gave a tract of land to his wife for life, with remainder in fee to his son Isaac. He directed his personal estate to be divided into eight equal shares, one of which he gave to each of his seven living children, and the other to a child of a deceased son. The widow renounced the provisions made for her by the will, and thereby destroyed the whole scheme of testamentary disposition. One third of the tract of land was assigned to

her as dower. The widow by her renunciation of the will disappointed the legatees in respect to one third of their respective legacies, and by her waiver she gave up a life estate in two thirds of the real estate, and it was said that familiar principles of equity authorize and require courts of chancery jurisdiction to sequester the property thus given up, and apply its profits to indemnify the disappointed legatees, and that, after these legatees had been indemnified for their disappointment, the two thirds of the land should pass into the hands of Isaac Reynolds, the remainderman. To this extent, but to this extent only, the vested remainder of Isaac was accelerated.

A remainder to a person after a life estate to a third person, or, if such person be then dead, to his heirs, is not contingent, but substitutionary, and the mention of his heirs is intended to prevent a lapse in the event of the death of the remainderman in the lifetime of the life tenant, and, if the particular estate

**Life tenant—  
acceleration of  
remainder.**

ceases to exist in the lifetime of the tenant for life, the remainder of such person may be accelerated under like conditions as a vested remainder. *Disston's Estate*, 257 Pa. 537, L.R.A.1918B, 62, 101 Atl. 804; *Small v. Marburg*, 77 Md. 11, 25 Atl. 920; *Re Schulz*, 113 Mich. 592, 71 N. W. 1079; *Woodburn's Estate*, 151 Pa. 587, 25 Atl. 145.

There can be no acceleration of a contingent remainder, for until happening of the contingency it is uncertain who is to take the estate. 16 Cyc. 651. But where the contingency is the death of a life tenant, the courts have been very liberal in declaring that whatever terminates the life estate, or prevents it from taking effect, is equivalent to the death of the life tenant. But this holding is based upon the presumed intention of the testator, and if such presumption is not warranted by the language of

the will, construed in the light of the circumstances surrounding the testator, it will not be made. It has arisen most frequently in the construction of wills where a wife is given a life estate, followed by a remainder to take effect at her death, and the wife renounces the provision made for her, and takes what the law accords her, and thereby defeats the testator's scheme for the distribution of his estate. Generally, the remainder has been either vested, defeasible, or an estate to one person followed by a substitutionary gift, and the courts have found a presumed intention on the part of the testators that the renunciation of wife was equivalent to her death, and have applied the doctrine of acceleration.

Quite a number of such cases have come before the supreme court of Pennsylvania, some of which have been hereinbefore cited in another connection; but they all recognize the rule that the application of the doctrine must be in furtherance of the intention of the testator, and never in contravention thereof. Many of these cases were brought under review by that court, in 1917, in the case of *Disston's Estate*, supra. In that case there was a life estate to the wife, with remainder after her death to the testator's children, or, if any of the children were dead leaving issue, the parent's share was to go to such issue; if no issue, to certain nephews and nieces or their issue. The court regarded the gift over to the issue of the children or to the nephews and nieces as substitutionary. Referring to other cases, it said, among other things, that the fact that alternate remainders may be provided for, in the event of the decease of such children in the lifetime of the widow, will not take a case out of the general rule, if, on a view of the whole will or the particular part in question, such alternate remainders appear to be merely secondary or substitutionary in character. It was conceded all through the opinion, however,

that, if the intention of the testator can be gathered from the will, it must prevail, and, considering the facts of the particular case before it, it was said that the literal provisions of a will may be departed from so as to carry out what appears to be a superior or preferred intent; but when this is done the object in view must always be "to approximate as closely as possible to the scheme of the testator, which has failed by reason of intervening rights or circumstances." It was further said that the effort must be to find and carry out the testator's chief intention with the minimum disturbance of the general plan of the will, and that, after the provisions for the wife, the testator's children were the natural and primary objects of his bounty, and not their issue, still less nephews and nieces or their issue, and that the alternate provisions for others, after the testator's children, were undoubtedly intended as substitutory, in case the latter died during the life of the mother, should she take under the will; but that a testator is presumed to know that a widow's statutory rights are paramount, and that she may take against his will, and that a testator is presumed to know, also, the general rule that the election of a widow to take under the Intestate Laws is equivalent to her death, and that, unless his will plainly indicates a contrary intent, remainders are accelerated accordingly.

It was said, however, in the course of the opinion, "of course, an intent that there shall be no acceleration may be shown by inevitable implication," and among other instances given is "where the contingency upon which the remaindermen are to take is such that [in the nature of things] the person entitled can be ascertained only by the physical death of the widow."

The same view was taken in *Re Schulz*, 113 Mich. 592, 71 N. W. 1079, where there was a substitutory provision. The holding is based on *Woodburn's Estate*, 151

Pa. 587, 25 Atl. 145; *Coover's Appeal*, 74 Pa. 143; and *Small v. Marburg*, 77 Md. 11, 25 Atl. 920.

There have been similar holdings in Maryland (*Small v. Marburg*, supra; *Randall v. Randall*, 85 Md. 430, 37 Atl. 209); but there, as elsewhere, the holdings have been based upon the presumed intention of the testator, and always in subordination to that intention when it could be discovered. In *Re Rogers*, 97 Md. 674, 677, 55 Atl. 680, it is said: "The doctrine of the acceleration of estates is founded upon the desire of courts of equity to give effect to the manifest intention of the testator; and, when such intention would be frustrated by allowing it, it will be denied. The cases are too numerous to do more than refer to some of the leading cases in this state."

Then follows a citation of seven Maryland cases.

The principle underlying this class of cases seems to be that wherever it appears that the life tenant and the remainderman are sufficiently designated, and it was intended they together should take the whole estate, acceleration will be accorded the remainderman whenever the life estate is eliminated in any manner whatever, for such must have been the intention of the testator.

The case of *Blatchford v. Newberry*, 99 Ill. 11, involved a large estate, and was most elaborately argued and carefully considered. The testator gave his wife an estate for her life, and provided that, immediately after the decease of his wife, the trustees mentioned in the will should divide his estate into two equal shares, and at once proceed to distribute one of such shares among "the lawful surviving descendants of my own brothers and sisters, such descendants taking per stirpes, and not per capita," and the other to a public library. The widow renounced the will and took the provision made for her by the statute. During the lifetime of the

—rule for  
acceleration.

widow, the then living descendants of the brothers and sisters, claiming that the renunciation of the widow was equivalent to her death, insisted that there should be acceleration of the enjoyment of their estates. The court said: "The question for determination is: Can there be now, during the lifetime of Mrs. Newberry, a legal division of the estate by the trustees, one half to the descendants of the testator's brothers and sisters, and the other half to the public library?"

This question the court answered in the negative. In the course of the opinion of the court, it is said: "Under the form of gift here, there is no gift to anyone except such as are surviving and capable of taking at the time of distribution. 'Surviving at the time of distribution' is a part of the description given by the will of the donees, and there is no gift to anyone who does not answer the description in this element of time—who is not at that time living. The donees then, here, are the descendants living at the time of distribution, whenever that time may be. . . . Until the time of distribution it is uncertain who will be alive to take them, and until that time arrives it cannot be ascertained and made certain who the donees are."

Further: "This doctrine of acceleration, however, is not an arbitrary one, but it is founded on the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may be still alive, and is applied in promotion of the presumed intention of the testator, and not in the defeat of his intention. And, when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated."

Three of the eight judges sitting in this case dissented, but the conclusion of the majority of the court seems to be approved in *Slocum v. Hagaman*, 176 Ill. 533, 539, 52 N.

E. 332. In the latter case, there was a substitutionary gift, and the renunciation of the wife was held, under the circumstances, to be equivalent to her death, and acceleration was accorded in favor of those designated to take after the death of the wife.

In *Augustus v. Seabolt*, 3 Met. (Ky.) 155, there was a gift of property to a wife for life, with remainder to the children of the testator's brother, "or such of them as may be living at the time of her death." The will also provided that as to certain designated land the estate given the wife should cease upon the remarriage of the wife, and she did remarry. The wife claimed no further interest in this land, but the heirs of the testator and the brother's children aforesaid each claimed that they were entitled to it from the date of the remarriage till the death of the widow. The court said:

"But it is said that the remainder interest of the devisee was a vested one, and took effect as completely upon the marriage of the widow as though she had died. This view is clearly erroneous. The remainder is manifestly contingent in one respect, and cannot, therefore, be properly denominated a vested remainder. . . ."

"Here the estate in remainder is limited to take effect upon the happening of a certain event, that is, the death of the widow, but it is limited to such of the children of the brothers designated as shall be living at her death. Whether any of such class will be then alive, or, if so, how many, is of course uncertain, and cannot be known until the event occurs."

The court refused to accelerate the enjoyment of the estate by the brother's children, because it regarded their estates as contingent until the death of the widow.

In *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575, there was a gift to the wife for life, and upon her death "one share to each of my following nieces and nephew,

then surviving' (naming them), 'and one share to the issue of each of said nieces and nephew then deceased leaving issue then surviving, according to their right of representation.'" The widow renounced the will and the nieces and nephew sought acceleration; but the court said: "We must construe the bequest in favor of the nieces and nephew in the same manner as if the widow had accepted the provisions of the will. Recurring to this bequest, it is clear that it cannot now be determined who will take under it. It is a bequest to the nieces and nephew 'then surviving,' and to the issue of each niece or nephew 'then deceased leaving issue then surviving.' It cannot be known that any of the nieces and nephew now living will take anything under this bequest."

To the same effect is *Lovell v. Charlestown*, 66 N. H. 584, 32 Atl. 160.

We have examined many more cases from other states, but those cited are sufficient to show the trend of the decisions in other jurisdictions.

In *Poythress v. Harrison*, 1 Patton & H. (Va.) 197, a testator devised to his wife for life all his property, and at her death to certain devisees, upon the condition that said devisees should raise the sum of \$1,000, to be paid at the death of said testator's wife to Thomas P. Harrison, and, in the event of his death before the said life tenant, the said sum was to be paid to his sister. Soon after the said will was probated, the widow renounced the provisions made for her in the said will. Thereafter the said Thomas P. Harrison instituted suit to recover the said \$1,000, claiming the same by reason of the renunciation of the widow, who was still living.

The court denied Harrison the right to recover the said legacy of \$1,000, for two reasons: "First, because the said legacy was not payable to him until after the death of Mrs. Beersheba Poythress, the

testator's widow, although she had renounced the provision made for her in her husband's will; and, secondly, because the legacy, until after the death of Mrs. Poythress, was contingent, and if the appellee had died in her lifetime it would have been payable to his sister."

Under the will of Mr. Rixey, if any one of his children should die in the lifetime of the widow, the descendants of such child would take as purchasers directly under his will; but, if the renunciation of Mrs. Rixey is given the effect claimed for it, the child would take the estate now, and, if he should die in the lifetime of the widow, his descendants would take nothing under the will of Mr. Rixey, although the will gives them the whole of it. The effect would be to make a will for Mr. Rixey. He has made his own will, and no relinquishment by Mrs. Rixey of what was given her can change the direction given by Mr. Rixey of the residue of his estate.

Will—acceleration of remainder—contingent estate.

In the case at bar, we conclude that the gift in the fifth clause of the testator's will to the "descendants per stirpes of such as may be then dead with issue surviving" is not substitutionary, but that said fifth clause creates contingent remainders in the persons mentioned therein; that they take as purchasers under the will; that only those children who are living at the death or remarriage of the wife answer the description of donees under said clause; that the renunciation of the wife in this case is not the equivalent of her death; that it does not in any way affect or disturb the scheme of the testator in the distribution of his estate, but is simply a relinquishment to the estate of the testator of all interest of the wife therein, without receiving anything in lieu thereof; and that there can be no acceleration of the enjoyment of the remainders created by said clause.

The decree of the Circuit Court will therefore be affirmed.



## ANNOTATION.

**Effect of premature termination of precedent estate to accelerate contingent remainder.**

- I. Introduction, 473.
- II. Cases holding doctrine of acceleration applicable notwithstanding contingent character of remainder, 474.
- III. Cases in which acceleration of contingent remainder has been denied, 476.

*I. Introduction.*

For decisions upon the related question of the effect of premature termination of a precedent estate to accelerate a remainder of which there is an alternative substitutional gift, see annotation accompanying *Sherman v. Flack*, ante, 460. Inasmuch as it is often difficult to say whether a remainder is contingent upon surviving the termination of the precedent estate, or is vested subject to be divested in favor of another in event of the death of the first taker before the termination of the precedent estate, such decisions may profitably be examined in this connection.

For a discussion of a further question likely to arise in cases of the sort collected in this note, namely, whether the failure or renunciation of the precedent life estate will accelerate the vesting of a remainder limited thereon, where enjoyment is postponed by the allotment of dower or necessity of compensating disappointed legatees, see annotation appended to *Young v. Harris*, post, 480.

*—conflict of opinion upon question.*

The question involved in the reported case (*COMPTON v. BARBOUR*, ante, 465), and taken as the subject of annotation, is one upon which there is a difference of judicial opinion. It has not yet been so thoroughly discussed that it is possible to say that the weight of authority is on one side or the other, but the sounder view appears to be that, except where it is absolutely impossible to identify the remaindermen until the death of the life tenant, as where the remainder is to the heirs of the body of the life tenant (see *Miller v. Miller*

(1913) 91 Kan. 1, L.R.A.1915A, 671, 136 Pac. 953, Ann. Cas. 1917A, 918; *Key's Estate* (1895) 16 Pa. Co. Ct. 216), or there is other evidence of an intention to postpone the taking effect of the remainder, the contingent character of the remainder does not prevent acceleration, but the identity of the persons who are to take becomes fixed upon the termination of the precedent estate. This statement is borne out by the cases (for which see annotation to *Sherman v. Flack*, ante, 460, which hold that the possibility of an alternative substitutional gift taking effect terminates when the preceding estate terminates, and not merely upon the death of the life tenant. The only difference between cases of this class and cases of the kind collected in this note is that in the latter the condition of surviving annexed to the gift is precedent, while in the other it is subsequent. If the operation of a condition subsequent is thus limited, why not the operation of a condition precedent?

*—comment on Compton v. Barbour.*

Of the decisions cited in the reported case (*COMPTON v. BARBOUR*) in support of the conclusion reached therein, namely, *Blatchford v. Newberry* (1878) 99 Ill. 11; *Augustus v. Seabolt* (1860) 3 Met. (Ky.) 155; *Brandenburg v. Thorndike* (1885) 139 Mass. 102, 28 N. E. 575, and *Lovell v. Charlestown* (1891) 66 N. H. 584, 32 Atl. 160,—only *Brandenburg v. Thorndike* is in point. In *Blatchford v. Newberry*, the circumstance which prevented acceleration was not the way in which the remaindermen were described, but the fact that the testator had provided that the renounced provision should revert to and become a part of his estate, thereby continuing the precedent estate in existence during the lifetime of the widow. In *Augustus v. Seabolt*, the remainder was not accelerated because the time

for distribution had not been reached, and the court, in view of the fact that the testator gave the property devised to his wife during her natural life, and "after her death to be equally divided," etc., while providing that her life estate should terminate only as to a portion thereof should she marry again, did not feel at liberty to construe the remainder as one to take effect in any event which should remove the prior estate out of the way. See explanation of this decision given by the Kentucky court of appeals in *O'Rear v. Bogie* (1914) 157 Ky. 666, 163 S. W. 1107, below set forth. In *Lovell v. Charlestown*, the testator made a certain provision for his widow, and gave legacies payable upon her death. It was held that her waiver of the provisions of the will in her favor did not advance the time for the payment of such legacies, the court saying: "The bequests are not those of ordinary remainders after a life tenancy, where, by a renunciation by the life tenant, the estate in remainder is brought forward and attaches at once."

*II. Cases holding doctrine of acceleration applicable notwithstanding contingent character of remainder.*

The principle of acceleration in the vesting of a remainder by the premature termination of the preceding life estate being based on the presumed intention of the testator, there need be no distinction made between vested and contingent remainders in its application. *Roe v. Doe* (1914) 5 Boyce (Del.) 545, 93 Atl. 373, Ann. Cas. 1918C, 409.

"The fact that a remainder is contingent is not always conclusive of the right of acceleration, and the rule will not be applied where it will defeat the testator's intentions." *Keeton v. Tipton* (1919) 184 Ky. 704, 212 S. W. 909.

It is immaterial whether the remainder is contingent or vested, if the time for distribution has in fact arrived, as in such case the contingency is determined and the donees ascertained. *Blatchford v. Newberry* (1878) 99 Ill. 11.

In *O'Rear v. Bogie* (1914) 157 Ky. 666, 163 S. W. 1107, where testator

gave all of his real estate to his wife for life, remainder to his brother John for life, with the further provision: "Upon the death of both my said brother and my wife, or in the event they both should be dead at my death, I give, bequeath, and devise the remainder of my property herein given them, and not otherwise disposed of by this will, to my kindred as follows: To the descendants that are then living of my brothers and sisters as if I had died intestate. All my brothers and sisters (save John W. O'Rear) being now dead, the said property is directed to go to the children then living of my said brothers and sisters, and to the then living descendants of such of them as are then dead. The said descendants to then take what their respective ancestors would have taken if they had then been alive." Testator's brother John did not survive him, and the widow renounced the will. It was held that acceleration took place notwithstanding the contingent character of the remainder, the court saying: "It is insisted that this rule cannot be applied where the remainder is contingent, and that as the devise over is to the children then living, of the testator's brothers and sisters, and to the then living descendants of such of them as are then dead, the descendants to take what their respective ancestors would have taken if they had been alive, the persons who will take the estate at the widow's death cannot be known until her death, and therefore the remainder is contingent and cannot be accelerated by her renunciation. *Augustus v. Seabolt* (1860) 3 Met. (Ky.) 156, is relied on. In that case the testator devised his farm to his wife for life. He also provided that if she should marry again she should have a certain part of the farm only, and that at her death the whole farm should be divided between the children of four brothers, 'or such of them as may be living at the time of her death.' The widow married, and the question arose as to who was entitled to the remainder of the farm outside of that part which, by the will, she was to hold if she married. It was held that the testator

had died intestate as to this part of his estate, and that the farm could not be divided until the death of the widow. The case turns in the end upon the construction of the will which was there before the court. It will be observed that in that case the testator had provided for the contingency which had occurred. He had said in his will what part of the farm he wished his widow to take in case she married, and he had also said in his will that the whole tract of land was to be divided at her death. He had provided for only one division of the tract of land, and he had failed to provide in his will what should become of the remainder of the land outside of that to be held by the widow in case she married. The will clearly did not contemplate two divisions of the land, and the persons who would take in the division provided for by the will could not be known until the death of the widow. But that is not this case. The testator here says that upon the death of his brother and his wife, or in the event they both should be dead at his death, the remainder is then to take effect as if he had died intestate. The word 'then' refers to his death, if they should both be dead at his death, or to their death, if they should survive him. We must give some force to the words, "as if I had died intestate," as well as the word 'then.' The purpose of all construction is to effectuate the intention of the testator. All parts of the will are to be read together, and the intention of the testator, as drawn from its four corners, must control. When the testator directed that his property should go as if he had died intestate, he evidently had in mind the Statute of Descent and Distribution, under which those take who are in being at the time the property descends. He did not have in mind providing for such descendants of his brothers and sisters as should survive a certain period; he did not have in mind the keeping of his estate together until a certain period, and a distribution of it then to those who might be then living of the descendants of his brothers and sisters, for he directed that the prop-

erty should vest at his death if his brother John and his wife died before his death. What he had in mind was simply a provision for his wife and his surviving brother, and, subject to this, he desired the estate to go to the descendants of his other brothers and sisters as if he had died intestate."

In *Re Johnson* (1893) 68 L. T. N. S. (Eng.) 20, testator devised property to A and B for life, and after the death of the survivor "in trust for all my children who shall be then living and the issue then living of any deceased child or children of mine, in equal proportions as tenants in common, yet so that the issue of any deceased child of mine shall take only the share their deceased parent would have taken, if he or she had been then living." The testator, by codicil, revoked the devises for life. It was held that the words, "after the decease of the survivor," must be taken as merely indicating the order of limitation, and that the class who were to take were to be ascertained at testator's death, and not at the time of the death of the survivor of the persons named as life tenants.

In *Eavestaff v. Austin* (1854) 19 Beav. 591, 52 Eng. Reprint, 480, where testatrix directed so much of a sum of money as would produce £100 a year to be set apart, and the £100 a year paid to a granddaughter for life, and that after her death the capital should be divided among the children of a nephew, and by codicil revoked the annuity to her granddaughter, it was held that the bequest to the nephew's children was accelerated.

In *Jull v. Jacobs* (1876) L. R. 3 Ch. Div. (Eng.) 703, 35 L. T. N. S. 153, 24 Week. Rep. 947, where testator devised certain property to his daughter during her lifetime, "and after her decease the property to be equally divided between her children on their becoming of age," and the gift to the daughter was void on account of her having attested the will, it was held that the remainder was accelerated and the children took just as if the mother had died immediately after the testator.

*III. Cases in which acceleration of contingent remainder has been denied.*

Upon the other hand, in *Brandenburg v. Thorndike* (1885) 139 Mass. 102, 28 N. E. 575, where testator left the residue of his property to trustees in trust to pay his wife from the net income a certain sum annually, to add the balance thereof to the capital, and, after the death of the wife, to add the whole net income to the capital, and at the expiration of three years from the death of his wife, or at such time, whether earlier or later, as might in the discretion of the trustees be found convenient and practicable for the final settlement and distribution of the estate, to distribute the fund to each of certain named nieces and a nephew then surviving, and to the issue of each of said nieces and nephew then deceased, leaving issue then surviving, it was held that the widow's waiver of the provisions of the will did not accelerate the time of distribution, the court saying: "We must construe the bequest in favor of the nieces and nephew in the same manner as if the widow had accepted the provisions of the will. Recurring to this bequest, it is clear that it cannot now be determined who will take under it. It is a bequest to the nieces and nephew 'then surviving,' and to the issue of each niece or nephew 'then deceased, leaving issue then surviving.' It cannot be known that any of the nieces and nephew now living will take anything under this bequest. This furnishes a conclusive reason why the trust cannot now be terminated."

And in *Re Lawrence* (1902) 37 Misc. 702, 76 N. Y. Supp. 653, where the interest given to the remainderman was liable to be defeated by his death dur-

ing the lifetime of the widow, it was held that no acceleration was effected by her election to take dower, since the person entitled to such remainder pursuant to the terms of the will could be ascertained and determined only upon death of the widow.

In *Wilson v. Hall* (1892) 6 Ohio C. C. 570, 3 Ohio C. D. 589, testatrix gave her husband a life estate in certain realty during his life, and further directed that after his death her executor should sell such land, and out of the proceeds should pay, inter alia, a legacy to her two sisters, should they survive herself and her husband. The husband having elected to take against the will, it was held that such election did not accelerate the time of payment of such legacies, and therefore that the estate of a sister who died after the testatrix, but in the lifetime of the husband, was not entitled thereto. It appeared, however, in this case that the renounced life estate was applied to the satisfaction of the claims of the husband and the compensation of disappointed legatees.

In the reported case (*COMPTON v. BARBOUR*, ante, 465) the facts of which need not here be repeated, the remainder at the termination of the precedent estate was "to go to and be divided equally between my children then living and the descendants per stirpes of such as may be then dead with issue surviving." It was held that the gift to the "descendants per stirpes of such as may be then dead with issue surviving" was not substitutionary, but that the gift was one to a class of persons the identity of whom could not be ascertained until the death or marriage of the widow, and accordingly that acceleration did not take place.  
E. S. O.

JOHN W. YOUNG et al., Appts.,  
v.  
H. F. HARRIS et al.

*North Carolina Supreme Court — December 11, 1918.*

(176 N. C. 631, 97 S. E. 609.)

**Will — disaffirmance — acceleration — dower interest.**

The dissent of a widow from a will creating a trust for her during her life operates to accelerate the remainder to the testator's next of kin and to vest the title in the person answering such description at the time of the testator's death, even in the case of lands set out to the widow as dower, rather than in the persons answering such description at the expiration of the widow's dower estate therein.

[See note on this question beginning on page 480.]

**APPEAL** by plaintiffs from a judgment of nonsuit of the Superior Court for Yancey County (Justice, J.) in an action brought to recover possession of certain lands. *Affirmed.*

Statement by Hoke, J.:

The action was instituted by plaintiffs, who are, at present, the heirs at law and next of kin of C. F. Young, deceased, against the defendants, who hold the lands under a deed from J. P. Young to the widow, now deceased, of said C. F. Young, to recover the portion of the lands formerly owned by C. F. Young, and which was assigned as dower to his widow; she having entered formal dissent from her husband's last will and testament on August 26, 1887, after his death on 3d of the next preceding July. It further appeared that said C. F. Young died duly domiciled in Yancey county, on July 3, 1887, owning this and much other land and personal property, leaving a last will and testament making disposition of the same; that such will was duly admitted to probate, and thereafter his widow, Dullie Young, entered her dissent, as stated, and her dower was assigned in a part of the realty of said estate and covering the land in controversy. Admissions pertinent to inquiry appear of record as follows:

"That summons in the original between plaintiffs and defendants was issued October 30, 1914, and

was duly served. That plaintiffs submitted to a voluntary nonsuit at the August term, 1916, and judgment of nonsuit was duly signed at said term. That this action was instituted on the 12th day of March, 1917, as appears by reference to the summons in this cause.

"That J. P. Young was the father and only heir at law of C. F. Young at the time of the death of C. F. Young. It is admitted by the defendants that the plaintiffs in this action are some of the heirs at law of C. F. Young, deceased; that both parties claim under C. F. Young, the common source of title.

"That C. F. Young died on the 3d day of July, 1887. That J. P. Young died March 26, 1888. That Dullie E. Young, the widow, died October 4, 1914.

"That defendants are in possession of the lands described in the complaint.

"That the land included in the boundary of the dower laid off to Mrs. Dullie E. Young, widow of C. F. Young, is the same land as that described in the complaint, and the same land mentioned in the will of C. F. Young as the house and farm, or home place, of the said C. F.

Young, and the same land contained in the deed to Mrs. Dullie Young."

Upon this evidence and the admissions above set forth, plaintiffs having rested, on motion there was judgment of nonsuit, and plaintiffs excepted and appealed.

Messrs. Thomas A. Jones, Charles Hutchins, and G. E. Gardner, for appellants:

The testator intended that the next of kin to whom the property should go was to be fixed at the date of the death of the widow, or her marriage. The fact that the widow dissented from the will could not vest the property in J. P. Young, except so much thereof as was not covered by the dower.

Baptist Female University v. Borden, 132 N. C. 486, 44 S. E. 47, 1007; Wise v. Leonhardt, 128 N. C. 291, 38 S. E. 892; Knight v. Knight, 56 N. C. (3 Jones, Eq.) 168; Simpson v. Spence, 58 N. C. (5 Jones, Eq.) 210; Robinson v. McDiarmid, 87 N. C. 461; Carroll v. Hancock, 48 N. C. (8 Jones, L.) 471.

Messrs. Merrimon, Adams, & Johnston also for appellants.

Messrs. J. W. Pless, J. Bis Ray, and Hudgins, Watson, & Watson, for defendants:

The dissent of the widow accelerates the remainder of the legacies mentioned in the will.

Baptist Female University v. Borden, 132 N. C. 484, 44 S. E. 47, 1007; Disston's Estate, 257 Pa. 537, L.R.A. 1918B, 62, 101 Atl. 804; Northern Trust Co. v. Wheaton, 249 Ill. 606, 34 L.R.A.(N.S.) 1150, 94 N. E. 980; O'Rear v. Bogie, 157 Ky. 666, 163 S. W. 1107.

Hoke, J., delivered the opinion of the court:

The will in question of Creed F. Young, former owner of the property, and duly admitted to probate, provides that, subject to payment of debts and two specified legacies of \$1,000 each, all of the testator's property, real and personal, shall be held by S. W. Carter and John S. McElroy, trustees, also appointed executors, for the use and benefit of his wife, Dulcena E. Young, during her widowhood, allowing her to have the actual use and enjoyment of the house and farm where testator resided, such stock and property as

may be sufficient and necessary for the use of the said farm, and paying her from time to time such sums as may be necessary to her proper support, etc.; that, if the wife should ever marry, the said trustees shall take immediate possession of all the property, real and personal, and distribute the same among the testator's next of kin "who would be entitled to the same at law," etc., "except the two legacies, as stated," etc. And it appearing by the admissions of the parties that the widow, shortly after her husband's death, dissented from the will, that the father, J. P. Young, grantor of defendants, was at that time the next of kin and only heir at law of the testator, we concur in his Honor's view that his deed was effective to pass the title to defendants, and plaintiffs have therefore been properly nonsuited. The doctrine of acceleration, by which the "enjoyment of an expectant interest is hastened," rests upon the theory that such enjoyment, having been postponed for the benefit of a preceding vested estate or interest, on the destruction or determination of such preceding estate before it would regularly expire, the ultimate takers should come into the present enjoyment of their property. Unless a contrary intent is disclosed by the terms of the will, the position is fully recognized, where a widow has dissented, and, declining to take the preceding estate or interest given her by the will of her husband, has entered into the possession and enjoyment of the interests conferred upon her by the law. In that event the widow ceases to hold under the will, and, in cases like the present, the decisions hold that the rights and interests of the parties must be considered and determined as if she had married or died. Thus, in Wilson v. Stafford, 60 N. C. (Winst. Eq.) 103, Battle, J., delivering the opinion, said: "This was the dissent of the widow, and her claiming her share of the property, as if he had died intestate. The effect of this upon the disposition made for his children in the will must, after

the assignment of her dower and the giving her an equal part with the children of the personal estate, be the same as if she had died or married."

And in *Fox v. Rumery*, 68 Me. 121-129: "All the wife's interest in it is at an end as much as if she were dead. The rule is that the extinction of the first interest carved out of the estate only accelerates the right of the second taker."

And in *Re Rawlings*, 81 Iowa, 701-706, 47 N. W. 992, 993, Chief Justice Beck, delivering the opinion, said: "The property was to be kept for the use of the wife under the will. As she refuses to take under the will, that part of the items relating to the keeping of the property cannot be obeyed, and must be left out of view. The same is true as to the widow's life estate. The will provided that Ann Elizabeth Kery (Cary) and James R. Kery (Cary) shall take the property after the widow's life estate ends. But the widow refuses to take a life estate, and takes dower. It clearly appears that the testator intended that the devisees just named should take the property after its enjoyment by the widow ceased, and after her interest therein was terminated. He did not intend that the benefactions to these devisees should be under the control of his wife, or should be defeated by her. Under the exercise of her option, she refuses to take a life estate, but takes the estate the law gives her. It clearly appears that the testator intended the devisees to take of the property whatever remained after the widow's right thereto terminated. The law will effectuate the intentions of the testator, if possible, and will secure to the legatees as nearly the benefits intended by the provisions of the will in their favor as can be done. 1 Redf. Wills, 3d ed. p. 429."

On the facts of this record, there is authority tending to support the position that the ascertainment of the "next of kin," within the meaning of this will, would in any event

be referred to the death of the testator. *Jones v. Oliver*, 38 N. C. (3 Ired. Eq.) 369. But, conceding this to be otherwise in the present instance, not only is there nothing in the will that forbids the application of the principle of acceleration, to which we have referred, but it is clear from a perusal of the instrument that, subject to the payment of the legacies, which, on the facts presented, do not affect the question, the entire purpose in putting this estate in the hands of the trustees was to insure the proper maintenance of the testator's widow while she remained unmarried, or until she died without having remarried, and that the distribution among the ultimate takers was only postponed in order the better to effect the primary purpose, and, this purpose and the preceding interest conferred on the widow having been entirely removed by her dissent, the ultimate takers come into the immediate enjoyment of their rights to the extent that

Will—dis-  
affirmance—  
acceleration—  
dower interest.

the same creates no interference with the interests which the law has conferred upon the widow. The father at that time being the sole heir at law and next of kin, his deed, as heretofore stated, was effective to carry the title, subject to the widow's dower, and, she having died, the defendants have been properly declared the true owners. An interesting illustration of the principles applicable, and which we hold to be controlling on the facts presented, appears in the well-considered case of *Baptist Female University v. Borden*, 132 N. C. p. 477, 44 S. E. 47, 1007, opinion by our former Associate Justice Connor, and authoritative decisions here and elsewhere are in full support of the position. *Holderby v. Walker*, 56 N. C. (3 Jones, Eq.) 46; *Adams v. Gillespie*, 55 N. C. (2 Jones, Eq.) 244; *Dale v. Bartley*, 58 Ind. 101; *Yeaton v. Roberts*, 28 N. H. p. 459; *Marvin v. Ledwith*, 111 Ill. p. 144. There is no error in the record, and the judgment of nonsuit is affirmed.

## ANNOTATION.

**Failure or renunciation of the precedent life estate given by a will, as accelerating the vesting of a remainder limited thereon where enjoyment is postponed by the allotment of dower or the necessity of compensating disappointed legatees.**

The question involved in the reported case (*YOUNG v. HARRIS*, ante, 477), and taken as the subject of this annotation, is both interesting and important,—interesting as a topic of which there has been very little judicial discussion, and important because it is one necessarily involved wherever a remainder expectant upon the termination of an estate given to a widow is given to a class, or to ascertained individuals upon a contingency, and the widow elects against the will, and actual enjoyment by the remaindermen is postponed by the assignment of dower to the widow, or the necessity of making compensation to legatees the gifts to whom have been impaired by the widow's election of her statutory rights. Inasmuch as the assignment of dower, in states in which the widow is given a life estate rather than an absolute interest, almost invariably operates to postpone the remaindermen's right to possession of some or all of the subject of the gift, the question is one likely to arise in practice.

The doctrine of acceleration proceeds upon the supposition that, though the remainder is, in terms, not to take effect in possession until the decease of the tenant for life, it is, in point of fact, to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. When, therefore, it appears that possession of the remaindermen is postponed solely for the purpose of letting in the life estate, it is presumably the intention of the testator that a renunciation of the life estate shall be considered as equivalent to its termination by the death of the life tenant, and that the beneficiaries entitled in remainder shall enter into its enjoyment at once. This presumption may be negatived by indications of a contrary intention. Ac-

cording to the weight of authority, the fact that the right to take as remaindermen is, on the face of the will, apparently contingent upon surviving the death of the life tenant, as where the remainder is contingent upon that event (see annotation accompanying *Compton v. Barbour*, ante, 473), or where there is an alternative substitutional gift (see annotation accompanying *Sherman v. Flack*, ante, 460), will not prevent acceleration. In other words, where the purpose of the testator in postponing distribution is merely to let in the precedent estate, the premature termination of such estate will have the effect of also terminating the contingency to which the gift over is subject, which, though nominally contingent upon surviving the life tenant, is to be read as contingent upon surviving the termination of the precedent estate. As is demonstrated by the cases cited in the annotations above referred to, it is not enough, to show an intention that acceleration shall not take place, that the result may be to alter the membership of the class whose interest is accelerated.

**Dower estate as an obstacle to acceleration of vesting.**

But actual enjoyment of the property may, as in the reported case (*YOUNG v. HARRIS*, ante, 477), be postponed by the assignment of dower therefrom, or by the superior right of legatees disappointed by the widow's election, to compensation out of the testamentary provision renounced by her. In such case, the further question arises whether the postponement of the enjoyment operates to extend the operation of the contingency. Of this question there has been but little judicial discussion.

That dower constitutes no obstacle to acceleration is held in *Roe v. Doe* (1914) 5 Boyce (Del.) 545, 93 Atl. 373,



Ann. Cas. 1918C, 409, where testator gave all his estate to his wife for life, and after her death to his "then living children (or, in case of their death, to their legal representatives), share and share alike," and in which it was held that, upon the widow's renunciation of the provision made for her in the will, those children of the testator who were then living thereupon became entitled to the whole of the real estate of the testator, subject to the dower rights of the widow, and were therefore entitled to the possession thereof as against the widow, to whom her dower had not yet been assigned.

In *Brown's Appeal* (1856) 27 Pa. 62, testator gave an estate during widowhood, in certain realty, to his widow, with the direction that upon her marriage or death such property should be sold by his executor, and the proceeds divided in manner specified. By the power to sell, the fee was, under a Pennsylvania statute, vested in the executor, subject to the life estate of the widow. It was held that, upon the widow's renunciation, the life estate given her was merged in the greater estate vested in the executor, subject to her right of dower.

In *Millikin v. Welliver* (1882) 37 Ohio St. 460, where testator gave all his estate, after the payment of debts and funeral expenses, to his wife during her life, with the privilege of disposal, and further provided: "The residue of my estate is to be distributed to the heirs of my side of the house in such portions as she may direct, by will or otherwise," and the widow died without having made an election to take under the will, it was held that the failure of the widow to take under the will left the real estate to vest in the devisees of the estate in remainder, subject to the widow's dower.

The question whether the assignment of dower has the effect to postpone vesting was involved, although not in terms decided, in *O'Rear v. Bogie* (1914) 157 Ky. 666, 163 S. W. 1107, where testator gave all of his real estate to his wife for life, remainder to his brother John for life, with the further provision: "Upon the death

of both my said brother and my wife, or in the event they both should be dead at my death, I give, bequeath, and devise the remainder of my property herein given them, and not otherwise disposed of by this will, to my kindred as follows: To the descendants that are then living of my brothers and sisters, as if I had died intestate. All my brothers and sisters (save John W. O'Rear) being now dead, the said property is directed to go to the children then living of my said brothers and sisters and to the then living descendants of such of them as are then dead. The said descendants to then take what their respective ancestors would have taken had they then been alive." Testator's brother John did not survive him, and the widow renounced the will. Dower was assigned her in the land, after which she sold and conveyed her dower to a certain person, who also obtained a conveyance from the descendants of testator's brothers and sisters living at the death of the testator. It was held that such grantee took a good title, which his vendee was bound to accept. This holding necessarily implies that the reversion of the property in which dower was assigned vested, at the time of the renunciation, in the descendants then living of the testator's brothers and sisters.

A case which, though not involving the effect of the assignment of dower in the property in which a contingent remainder was given, is of collateral interest as holding that an outstanding life estate in a portion of the property will not extend the operation of the contingency, is *Spangler's Estate* (1914) 23 Pa. Dist. R. 332. There testator gave the residue of his estate in trust to pay three fourths of the income derived therefrom to his wife for life, and one fourth to his half sister for life, with a further provision that on the death of either of them, or both of them, the principal of the share of which each should have theretofore received the income should be divided equally among testator's cousins, and that "if any of the beneficiaries . . . shall die be-

fore the decease of the life tenants, the legacies herein given to them shall lapse and become part of my residuary estate." He also devised certain realty to his half sister for life, and directed that on her death it should be sold and the proceeds form part of the residuary estate. The widow having renounced the will, it was held that the remainder in three fourths of the residue was accelerated, and vested indefeasibly in his cousins then living, so that the administrator of one of them, who died in the lifetime of the widow, was entitled to participate in the proceeds of the realty devised to the half sister for life. The court said: "The wife's election terminated the trust for her benefit, and the residuary estate, except so far as the rights of Bertha E. Adams [the half sister] were concerned, and so far as it was necessary to keep the same intact, because the property, though not in possession, of the seven nephews and nieces of testator's mother, who survived him. Their enjoyment was alone postponed. Now that the wife is dead and the remainder interest is sold, the reason for withholding distribution no longer exists. If the legacies were contingent upon the death of the widow, her renunciation was the same, as to determining the contingency, as her death. Coover's Appeal (1873) 74 Pa. 143."

That the vesting of a remainder which otherwise would be accelerated by the widow's renunciation of the precedent estate may be postponed by the assignment of dower is held in *Swann v. Austell* (1918) 253 Fed. 807, rehearing denied in (1919) 257 Fed. 870. There the testator gave the family residence to his wife, "to have, hold, use, and occupy as a home for her and our children, for and during the natural life of my said wife, or until she shall marry again. Upon the happening of either of which events said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or, if any of my children shall be dead at that time leaving children surviving them, such last-mentioned

children shall take the share of their deceased parent." He also directed his executors not to sell certain realty during the life of his wife, and out of the rents therefrom to pay her the sum of \$2,000 per annum during her natural life, and to divide the balance equally between his children, and directed that after his wife's death the property should be sold and the proceeds divided among his children, share and share alike, the child or children of any deceased child to take the share of their deceased parent. He directed the residue of his estate to be sold, and the proceeds equally divided among his children. He further declared: "In any item of my will where a division of property is directed to be made between my children, I hereby declare it to be my will and desire that if any of my children should be dead at the time such division is to be made, leaving any child or children surviving them, that such surviving child or children shall take the portion of their deceased parent. And in the event any of my children shall die before the division of any part or the whole of my estate as provided for in this my will, leaving no issue or surviving children, then it is my will and desire that the portion of my estate that would have otherwise gone to such deceased child or children shall be divided between my other surviving child or children, share and share alike." The widow renounced the will and elected to take dower, which was admeasured to her in the residence property, in a portion of the property out of which the annuity was given, and in property which formed part of the residuary estate. It was held that, as to the property in which dower was assigned, the contingency of surviving the widow continued in force, and accordingly that one claiming through a child who died without issue in the lifetime of the widow was not entitled to an interest therein, on the ground that the will manifested an intention that the property which would become available for distribution upon the death of his wife should be divided only among liv-

ing children or the issue of deceased children.

**Effect of intervening right of disappointed legatees to compensation.**

As to the circumstances under which enjoyment of a remainder, accelerated by the election of the life tenant to take against the will, may be postponed for the purpose of compensating disappointed legatees, see annotation accompanying *Sellick v. Sellick*, — A.L.R. —.

The statement is occasionally to be met with in the cases that the right of legatees whose gifts have been impaired by the election of the widow to take her dower and statutory rights, to compensation out of the renounced estate, will prevent acceleration, but the context shows that it is an acceleration of the enjoyment by the remaindermen, and not an acceleration of the vesting, that is meant. An instance of this sort is *Holdren v. Holdren* (1908) 78 Ohio St. 276, 18 L.R.A. (N.S.) 272, 85 N. E. 537, in which it was held that there could be no acceleration of a remainder to testator's son expectant upon the termination of the life estate of his mother, where her election to take her dower and distributive share had the effect to diminish gifts to others; but that the widow's life estate would be sequestered

to compensate the disappointed devisees. The question whether or not, if there should be a surplus after compensating the disappointed devisees, it should be paid to the remainderman or would descend as intestate property, was expressly left undecided.

But that the right to compensation is an obstacle only to enjoyment, rather than to acceleration of the remainder, is indicated by other decisions.

Thus, for example, in *Kirchner v. Kirchner* (1911) 71 Misc. 57, 127 N. Y. Supp. 399, it is said that the renunciation of the widow could not defeat the gift of the remainder, but that the latter became immediately accelerated, charged, however, with the equity in favor of disappointed devisees.

Whether the postponement of enjoyment by the remaindermen in favor of disappointed legatees will likewise postpone the vesting seems never to have been judicially discussed, the only decision having any bearing on the question being *Meek v. Trotter* (1915) 133 Tenn. 145, 180 S. W. 176, in which the possibility of an extension of a contingency beyond the time of renunciation of the precedent estate appears to have been ignored.

E. S. O.

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IRWIN G. SMITH, Appt.,

v.

HENRY E. KIBBE, Exr., etc., of Edwin M. Smith, Deceased, et al.

*Kansas Supreme Court—February 8, 1919.*

(104 Kan. 159, 178 Pac. 427.)

**Executor and administrator — right to compel exoneration of realty.**

1. If the executor fails to follow the statutory rule requiring him to pay a mortgage debt out of the personalty, the devisee of the real estate may maintain an action to require him to exonerate the real estate devised by discharging the mortgage debt out of the personal estate.

[See note on this question beginning on page 488.]

—fund for payment of debts.

2. In the absence of a provision to the contrary in a will, the debts of the testator are payable primarily out of

the personal estate, as the statute prescribes, and if it is insufficient resort may be had to the realty.

[See 11 R. C. L. 126.]

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Headnotes by JOHNSTON, Ch. J.

—mortgage debt.

3. Where no other purpose is expressed in the will, it is the duty of the executor to pay a debt secured by a mortgage on real estate, the same as unsecured debts are payable, if there are sufficient funds for that purpose in his hands.

[See 11 R. C. L. 189, 190.]

Mortgage — assumption of debt — election by mortgagee.

4. Where a grantee in a conveyance of land assumes and agrees to pay a debt secured by a mortgage upon land, and it forms a part of the purchase price of the land, the mortgagee may accept him as a debtor, or he may rely alone upon the mortgage to meet the obligation.

[See 19 R. C. L. 374 et seq.]

—primary liability.

5. A sale of the land so encumbered, by the grantee to another, in which the other agrees to assume and pay the mortgage debt, makes the latter personally liable for such debt, if his grantor was himself liable for it.

[See 19 R. C. L. 375.]

—ruling on facts.

6. Under the facts stated in the findings herein, it is held, that the first grantee was personally liable for the mortgage debt, and the second grantee who assumed its payment was likewise liable.

[See 19 R. C. L. 375.]

—acceptance of new debtor — what constitutes.

7. The acceptance of payments of interest and of principal upon the mortgage debt by the owner of the debt is sufficient to constitute an acceptance of the payor as his debtor.

—failure to begin foreclosure — effect.

8. The fact that the owner did not begin a foreclosure proceeding on the mortgage, nor take other steps to enforce the payment of the mortgage debt by the one who assumed to pay it, does not make the obligation any the less personal.

Homestead — sale — consent of wife.

9. Under the facts of the case, it is held, that the contract for the sale of the land, which was a homestead, is not invalid because of the lack of consent of the wife of the grantor; she having signed a deed in consummation of the contract, and both being parts of a single transaction.

Executor and administrator — exoneration of land — failure to present claim.

10. The plaintiff was not barred of his relief for exoneration of the land because of a failure of the holder of a mortgage debt to present it to the probate court as a demand against the estate of the testator within the period of two years, the debt not being barred by any of the limitations prescribed by the Code.

[See 11 R. C. L. 207, 212.]

**APPEAL** by plaintiff from a judgment of the District Court for Cowley County (Fuller, J.) in favor of defendants in an action brought to compel the defendant executor to pay an indebtedness secured by a mortgage upon land of his decedent, out of the proceeds of the personal estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. S. C. Bloss, A. M. Jackson, and A. L. Noble, for appellant:

All debts must be paid out of the personal estate of decedent.

18 Cyc. 310; 2 Woerner, Am. Law of Administration, p. 1105; Page, Wills, § 756; Turner v. Laird, 68 Conn. 198, 35 Atl. 1124; Hewes v. Dehon, 3 Gray, 205; Ancaster v. Mayer, 1 Bro. Ch. 454, 23 Eng. Reprint, 1237, 18 Eng. Rul. Cas. 177; 2 Jarman, Wills, 533; Sutherland v. Harrison, 86 Ill. 363; Minter v. Burnett, 90 Tex. 245, 38 S. W. 350; Newcomer v. Wallace, 30 Ind. 216; Keene v. Munn, 16 N. J. Eq. 398; Lennig's Appeal, 52 Pa. 135.

The mortgage debt was the personal obligation of the testator.

Colorado Sav. Bank v. Bales, 101 Kan. 100, 165 Pac. 843; Union Stove & Mach. Works v. Caswell, 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; Fisher v. Spillman, 85 Kan. 552, 118 Pac. 65; Herrin v. Abbe, 55 Fla. 769, 18 L.R.A. (N.S.) 907, 46 So. 183; Perkins v. McAuliffe, 105 Wis. 582, 81 N. W. 645; Re Bernel, 165 Cal. 223, 131 Pac. 375. Ann. Cas. 1914D, 26; J. H. Magill Lumber Co. v. Lane-White Lumber Co. 90 Ark. 426, 119 S. W. 822; Martin v. Hush, 91 Kan. 833, 139 Pac. 401; McAndrew v. Sowell, 100 Kan. 47, 160

Pac. 653; Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047.

The action was not barred by the Statute of Limitations.

Russell v. Wheeler, 129 Mich. 41, 88 N. W. 73; Ross v. Woollard, 75 Kan. 383, 89 Pac. 680; Turner v. Laird, 68 Conn. 198, 35 Atl. 1124.

Mr. Charles W. Roberts for appellees.

Johnston, Ch. J., delivered the opinion of the court:

This action was brought to compel the executor of an estate to pay an indebtedness secured by a mortgage upon land of the estate of a deceased person, out of the proceeds of the personal estate, and in that way exonerate the land from the lien of the mortgage.

In 1909, Thomas Haney owned a farm on which there was a mortgage of \$3,000. He sold it to Bussart & Collier, and in the contract of purchase it was stipulated that they assumed and would pay the mortgage debt. In the deed, however, there was no mention made of the assumption, but there was a clause excepting the mortgage from the covenants of warranty. Prior to the sale the land had been occupied by Haney and wife as their homestead, and it appears that she did not sign the contract, but she did sign the deed which was executed on the same day as the contract, and deposited with it in a bank to await compliance with the conditions of the transfer. Bussart & Collier conveyed the land to Edwin M. Smith, and in the conveyance there was an express stipulation that Smith assumed and agreed to pay the mortgage debt, which was part of the purchase price of the land. Shortly after the latter conveyance Smith died testate, and in his will was a general direction for the payment of his debts out of his estate. Aside from a bequest of \$100, he gave his wife all of his personal property and a life estate in all of his realty; to his son Irwin G. Smith, the plaintiff, the fee-simple title of his real estate was given, subject to the life estate. No specific reference to the mortgage on the

land or the debt which it secured was made in the will.

The principal question presented here is, From what source should the mortgage debt be paid? The statute and the will must determine the question. Considerable is said in the briefs as to the common-law rules relating to the exoneration of the realty of an estate of a deceased person, but as our statute provides for the settlement of estates and the descent and devolution of property, we must look to it, and to the will made in pursuance of the statute, to determine from what fund the indebtedness should be paid. It was competent for the testator to require the payment of the mortgage debt out of a particular fund, or to devise the land subject to the mortgage debt. In this instance the testator did neither. In general terms he directed that his debts should be paid out of his estate, without indicating that any particular fund or property should be used for that purpose. The personal property, which amounted to \$4,016, and also the life estate in his land, were given to his wife, without indicating the part which should be devoted to the payment of debts.

The fee title, as we have seen, was given absolutely to his son, without mention of the mortgage debt or of anything indicating an obligation of the devisee to pay the mortgage debt. There being nothing in the will indicating the purpose of the testator that the debts should be paid out of any particular fund, and there being no provision that any class of his property, real or personal, should be exempted from the payment of his debts, the rule of payment prescribed by the statute must be followed. The debts of a testator are primarily payable out of the personal property. Gen. Stat. 1915, §§ 3853, 4553, 11,812. If the personal property is insufficient to pay all the debts of the deceased, resort to the real estate may be had for that purpose. Gen. Stat. 1915, §

Executor and  
administrator  
—fund for pay-  
ment of debts.

4598. This is the exoneration provided by statute, where a testator in his will has not required the appropriation of a particular part of his estate to the payment of debts. A debt secured by a mortgage falls within the class of obligations payable from personal property. The note secured constitutes the debt, and is the main thing, while the mortgage is a mere incident and collateral to the note.

It has been said: "The rule that testator's debts are primarily payable out of his personalty applies not only to his general debts, but to such debts as have become liens upon specified property of testator, whether real or personal. Unless the contrary appears in his will these debts are payable primarily out of his personal estate not specifically bequeathed. The omission of mortgagees to present their claims to the executor does not destroy the right of the devisee of mortgaged property to have the debt paid out of the personalty." Page, Wills, § 765.

See also *Newcomer v. Wallace*, 30 Ind. 216.

It follows that all the debts, secured and unsecured, of the testator herein, are payable from the personal estate, if it is sufficient for that purpose. The wife and the son each took the share given her and him, subject to the directions in the will and to the requirements of the statute.

It is contended, however, that the mortgage debt was not in fact an obligation of the testator; that, while he had specifically assumed and agreed to pay it, the promise was not binding, because his grantors, Bussart & Collier, had not agreed and were under no obligation to pay the debt.

In *Colorado Sav. Bank v. Bales*, 101 Kan. 100, 165 Pac. 843, it was decided that "a grantee who, in a deed, assumes and agrees to pay a mortgage on the land conveyed, is not personally liable to the mortgagee unless the grantor in that deed is liable." (Syl. ¶ 1.)

Although there may be no liabil-

ity to a mortgagee in such case, one may arise upon a promise of a grantee to an intervening grantor for the assumption of the mortgage as a condition of the transfer. *Morlan v. Loch*, 95 Kan. 716, 149 Pac. 431. It can hardly be said, however, that the grantors of the testator were not liable to the mortgagee for the mortgage debt. Although the assumption of the debt was not expressly mentioned in the deed executed by Haney to them, the written contract, executed in pursuance of a verbal agreement, contained an express promise to assume and pay the debt. This promise and assumption was just as binding as if it had constituted a provision of the deed. To be valid, it was not essential that the agreement be a part of the deed, nor that the promisor should have signed any writing. *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65. The fact that Bussart had his wife named as a grantee in the deed did not take away the binding effect of the obligation. She left the transaction of the business to her husband, and took her interest, whatever it may have been, subject to the agreement which Bussart & Collier made with the grantor, Haney. A valid agreement had been made between Haney and the firm of Bussart & Collier; and while the wife of Bussart, who is named in the deed, was not informed as to the contract of assumption, her agent and husband had full knowledge of that contract, and in pursuance of it the deed was made.

It is argued that there was no acceptance or ratification of the assumption of the mortgage debt by the owner of it, and that the testator could not be regarded as the debtor of the owner until there was an acceptance by him. It appears that the owner of the debt recognized the testator as a debtor, inasmuch as he accepted from Smith payments of interest as well as a small payment of the principal. It was optional with the holder of the debt to accept payment

Mortgage—  
acceptance of  
new debtor—  
what con-  
stitutes.

from the testator and the executor of his estate, or to rely on the mortgaged property for payment of the debt. There was an obligation by the testator to his grantors to pay the debt, and upon an acceptance by the owner of the debt, a liability of the testator arose in favor of the owner also. It then became a personal liability of the testator, which the owner could enforce at his option. There is a finding that the owner of the debt was satisfied with the mortgage security, and has never sought to enforce payment by those who assumed the payment of the debt. The fact that the owner did not try to enforce payment against one who assumed to pay the debt, which constituted a part of the purchase price of the land, does not make the obligation of the latter any the less personal. It has been said: "But it is clear that an actual dealing with the mortgagee is not essential to render the debt personal to the purchaser, for the same effect will be produced if the transaction between vendor and vendee is such as to show that the purchase was inclusive of the mortgagee's interest in the land, not of the equity of redemption only; the mortgage debt forming part of the price of the estate." 2 Jarman, Wills, 6th ed. \*1450.

There is a further contention that the contract of assumption is not binding because the farm was the homestead of the Haney's, that the consent of the wife to the contract was lacking, and that this circumstance caused a break in the chain of liability. This contention cannot be upheld. The title of the land was in Haney. His wife did not, it is true, sign the contract of sale in which there was an assumption of the debt, but it cannot be said that there was a

lack of her consent. The contract and the deed, which she did sign, were executed on the same day, were parts of a single transaction, and both were deposited together in a bank until final adjustment was made between the grantors and the grantees, and the transaction between them was completed. The signing of the deed and the other steps taken in the consummation of the contract evidenced a consent by her as convincing as if she had signed both papers.

Another objection urged against the claim of personal liability of the estate to pay the debt is that it was not presented to the probate court within the period prescribed by the nonclaim limitation. Gen. Stat. 1915, § 4565. The failure of the plaintiff to present such a claim is no bar to the bringing of this equitable proceeding. In

speaking of the failure of a mortgagee to present his mortgage debt as a demand against an estate, it was said: "It is generally held that claims purely equitable in their nature require no presentation or approval." Andrews v. Morse, 51 Kan. 30, 82 Pac. 640.

He had no claim against the estate to present. The owner of the mortgage had a right to look to the personal obligation of the testator to pay the mortgage debt. The liability of the testator and of the estate was a continuing one, which could be enforced at any time before the mortgage debt became barred under the ordinary limitations prescribed by the Code. The debt in question was still alive and enforceable by the owner, and, not having run as against him, it cannot be held to have run against this equitable proceeding to exonerate the land from the payment of the debts of the estate, until the personal property has been exhausted.

Homestead—  
sale—consent  
of wife.

Executor and  
administrator  
—exoneration  
of land—failure  
to present  
claim.

On the findings of the court it must be held that the plaintiff was entitled to the relief sought, and therefore the judgment

is reversed and the cause remanded, with directions to enter judgment in favor of plaintiff in accordance with the prayer of his petition.

### ANNOTATION.

**Right of heir or devisee to have real property exonerated from lien thereon at expense of personal estate.**

#### I. General rule:

- a. As to residuary estate or legacies, 488.
- b. As to specific legacies, 492.
- c. As to general or pecuniary legacies:
  1. In general, 493.
  2. Effect of charge of testator's debts upon personal estate, 496.

#### II. Enforcement of exoneration:

- a. In general, 497.
- b. Waiver, 498.

#### III. Necessity that lien be security for personal obligation of decedent:

- a. In general, 499.
- b. Where lien is for purchase price, 503.

#### IV. Effect of peculiar circumstances of devisee or heir, 504.

#### V. Effect of general direction in will, 505.

#### VI. Effect of statutory provisions, 506.

This note deals only with the question of exoneration as between the heir or devisee on one hand, and legatee or distributee on the other, and does not include cases involving the right of the widow to have exonerated real estate in which she has a dower interest.

#### I. General rule.

##### a. As to residuary estate or legacies.

It is not intended to include herein cases involving the construction of provisions in wills which refer to the liens of the decedent in such a way as to raise a question of the intent of the testator to exonerate his real estate from lien thereon, although cases are included which involve merely a general provision in the will for the payment of the testator's just debts and funeral expenses. Another class of cases excluded is that involving the construction of wills, as to whether a bequest is specific, and hence not generally subject to appropriation to the exoneration of the real estate, or whether it is residuary. Cases, however, are included wherein it is held or assumed that a bequest is residuary, and the question is passed upon as to the exoneration of the real estate by

the use of the personal assets under such circumstances.

It is a general rule, where the matter is not controlled by special statutory provisions, that the personal assets of the estate of the decedent are subject to the payment of his debts before recourse may be had to his real estate. This rule applies to debts created by the testator, which he has charged upon his real estate. Hence, as between the devisee or heir of real estate charged with a mortgage or lien executed by the decedent himself, and a residuary legatee or distributee of his personal estate, the latter is, in the absence of a contrary intention, charged with the payment of the mortgage lien in exoneration of the real estate.

California.—*Re Woodworth* (1867) 31 Cal. 595; *Phinney's Estate* (1879) Myrick, Prob. Ct. Rep. 239.

Colorado.—*Whitsett v. Kershow* (1878) 4 Colo. 419.

Connecticut.—*Bishop v. Howarth* (1890) 59 Conn. 455, 22 Atl. 432; *Turner v. Laird* (1896) 68 Conn. 198, 35 Atl. 1124; *Jackson v. Bevins* (1901) 74 Conn. 96, 49 Atl. 899; *Bulkley v. Seymour* (1902) 74 Conn. 459, 92 Am. St. Rep. 229, 51 Atl. 125; *Jacobs v. Button* (1906) 79 Conn. 360, 65 Atl. 151.



Delaware.—Re Sutton (1915) — Del. —, 97 Atl. 624.

Illinois.—Sutherland v. Harrison (1877) 86 Ill. 363.

Indiana. — Newcomer v. Wallace (1868) 30 Ind. 216; Hunt v. Hinshaw (1904) 33 Ind. App. 75, 70 N. E. 825.

Iowa.—Toner v. Collins (1885) 67 Iowa, 369, 56 Am. Rep. 346, 25 N. W. 287; Brackey v. Jensen (1914) 166 Iowa, 109, 147 N. W. 188; Re Dalton (1918) — Iowa, —, 168 N. W. 332.

Kansas.—SMITH v. KIBBE (reported herewith) ante, 483.

Maryland.—Gibson v. McCormick (1838) 10 Gill & J. 65; Chase v. Lockerman (1840) 11 Gill & J. 185, 35 Am. Dec. 277; Mitchell v. Mitchell (1852) 3 Md. Ch. 81.

Massachusetts.—Hewes v. Dehon (1855) 3 Gray, 205; Plimpton v. Fuller (1865) 11 Allen, 189; Towle v. Swasey (1870) 106 Mass. 100; Richardson v. Hall (1878) 124 Mass. 228; Morse v. Bassett (1882) 132 Mass. 506; Robinson v. Simmons (1892) 156 Mass. 123, 30 N. E. 362; Brown v. Baron (1894) 162 Mass. 56, 44 Am. St. Rep. 331, 37 N. E. 772.

Michigan.—Re Wisner (1870) 20 Mich. 442; Enders v. Enders (1882) 49 Mich. 182, 13 N. W. 507; Byrne v. Hume (1890) 84 Mich. 185, 47 N. W. 679.

Missouri.—Lewis v. Carson (1887) 93 Mo. 587, 3 S. W. 483, 6 S. W. 365; Darr v. Thomas (1907) 127 Mo. App. 1, 106 S. W. 95.

Nebraska. — Patrick v. Patrick (1904) 72 Neb. 454, 100 N. W. 939; Schade v. Connor (1909) 84 Neb. 51, 120 N. W. 1012.

New Jersey.—Whitehead v. Gibbons (1854) 10 N. J. Eq. 230; Keene v. Munn (1863) 16 N. J. Eq. 398; Campbell v. Campbell (1879) 30 N. J. Eq. 415; Slack v. Emery (1879) 30 N. J. Eq. 458; Coudert v. Coudert (1887) 43 N. J. Eq. 407, 5 Atl. 722; Morris v. Higbie (1893) — N. J. Eq. —, 27 Atl. 438; Higbie v. Morris (1895) 53 N. J. Eq. 173, 32 Atl. 372; Dougherty v. Connolly (1901) 61 N. J. Eq. 421, 48 Atl. 777.

New York.—Livingston v. Newkirk (1818) 3 Johns. Ch. 312; Rogers v. Rogers (1828) 1 Paige, 188; Morris

v. Mowatt (1831) 2 Paige, 586, 22 Am. Dec. 661; Cogswell v. Cogswell (1834) 2 Edw. Ch. 231.

North Carolina.—Moore v. Dunn (1835) 92 N. C. 63; Mahoney v. Stewart (1898) 123 N. C. 106, 31 S. E. 384.

Ohio.—Craighead v. Pike (1875) 5 Ohio Dec. Reprint, 278; Tucker v. Lungren (1896) 12 Ohio C. C. R. 622, 5 Ohio. C. D. 577.

Pennsylvania. — Re McCracken (1857) 29 Pa. 426; Lennig's Estate (1866) 52 Pa. 135; Leibert's Appeal (1888) 119 Pa. 525, 13 Atl. 327; Merkel's Estate (1890) 131 Pa. 584, 18 Atl. 931; Riegelman's Estate (1896) 174 Pa. 476, 34 Atl. 120; King v. Morrison (1829) 1 Penr. & W. 188; Re Mason (1845) 1 Pars. Sel. Eq. Cas. 132; Mansell's Estate (1849) 1 Pars. Sel. Eq. Cas. 367; Burton's Estate (1894) 15 Pa. Co. Ct. 367; Stuard's Estate (1885) 17 Phila. 498.

Rhode Island.—Gould v. Winthrop (1858) 5 R. I. 319; Atkinson v. Staigg (1882) 13 R. I. 725; Wood v. Hammond (1888) 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Dean v. Rounds (1893) 18 R. I. 436, 27 Atl. 515, 28 Atl. 802; Hunt's Petition (1895) 19 R. I. 139, 61 Am. St. Rep. 743, 32 Atl. 204.

South Carolina.—Ford v. Gaithur (1864) 19 S. C. Eq. (2 Rich.) 270; Henagan v. Harilee (1853) 31 S. C. Eq. (10 Rich.) 285.

Tennessee.—Hennegar v. Deadrick (1899) — Tenn. —, 54 S. W. 188.

Virginia — Dandridge v. Minge (1826) 4 Rand. 397; Elliott v. Carter (1853) 9 Gratt. 541; Pleasants v. Flood (1892) 89 Va. 96, 15 S. E. 504; New v. Bass (1895) 92 Va. 388, 23 S. E. 747; Todd v. McFall (1899) 96 Va. 754, 32 S. E. 472.

England. — Johnson v. Milksopp (1689) 2 Vern. 112, 23 Eng. Reprint, 681; Meynell v. Howard (1696) Prec. in Ch. 61, 24 Eng. Reprint, 30; Cope v. Cope (1707) 2 Salk. 449, 91 Eng. Reprint, 389; Howell v. Price (1715) Prec. in Ch. 423, 1 P. Wms. 291, 24 Eng. Reprint, 189, 394; Bromhall v. Wilbraham (1734) Cas. t. Talb. 274, 25 Eng. Reprint, 774; King v. King (1735) 3 P. Wms. 358, 24 Eng. Reprint, 1100, Mosely, 192, 25 Eng. Reprint, 344, 18 Eng. Rul. Cas. 1; Bar-

tholomew v. May (1737) 1 Atk. 487, 26 Eng. Reprint, 309; Hill v. Bishop of London (1738) 1 Atk. 618, 26 Eng. Reprint, 388; Galton v. Hancock (1742) 2 Atk. 424, 26 Eng. Reprint, 656; Lanoy v. Athol (1742) 2 Atk. 444, 26 Eng. Reprint, 668; Parsons v. Freeman (1751) 1 Ambl. 115, 27 Eng. Reprint, 75; Forrester v. Leigh (1753) 1 Ambl. 171, 27 Eng. Reprint, 114; Belvedere v. Rochfort (1772) 5 Bro. P. C. 299, 2 Eng. Reprint, 691; Tweddell v. Tweddell (1787) 2 Bro. Ch. 101, 29 Eng. Reprint, 58; Hamilton v. Worley (1793) 2 Ves. Jr. 62, 30 Eng. Reprint, 523; Hancox v. Abbey (1805) 11 Ves. Jr. 179, 32 Eng. Reprint, 1056, 8 Revised Rep. 124; Stephenson v. Heathcote (1815) 1 Eden, 38, 28 Eng. Reprint, 298; Noel v. Henley (1819) 7 Price, 241, 146 Eng. Reprint, 960; Bickham v. Crutwell (1838) 3 Myl. & C. 763, 40 Eng. Reprint, 1120, 7 L. J. Ch. N. S. 198, 2 Jur. 342; Colville v. Middleton (1840) 4 Jur. 1197, 3 Beav. 570, 49 Eng. Reprint, 224; Chester v. Powell (1843) 7 Jur. 389; Johnson v. Child (1844) 4 Hare, 87, 67 Eng. Reprint, 572; Swainson v. Swainson (1857) 4 Jur. N. S. 1011; Lomax v. Lomax (1869) 13 Jur. 1064, 19 L. J. Ch. N. S. 137, 12 Beav. 285, 50 Eng. Reprint, 1070.

**Ireland.** — *Burley v. Armstrong* (1861) 12 Ir. Ch. Rep. 270.

In *Mahoney v. Stewart* (1898) 123 N. C. 106, 31 S. E. 384, the judgment creditor of the husband, who was insolvent, by supplementary proceedings sought to enjoin the administrator of the estate of the debtor's wife from paying out of the personal assets, mortgage liens against the decedent's real estate, the husband being a distributee of the personalty of his deceased wife's estate, but not an heir to her real estate. The substantive question of law was not directly involved, since it appeared that the administrator was solvent, and would be personally liable for any misappropriation of his intestate's estate. In considering the substantive question, however, the court said that the notes, being a part of the indebtedness of the intestate, are none the less so because she gave security for their pay-

ment. "A mortgage to secure the payment of a debt is not the debt, but it is only a security. It does not pay the debt, nor change its nature. These notes still being the evidences of the debts, and as it appears were made by the intestate for her own benefit, it follows that they should be paid out of her personal estate—the primary fund for the payment of debts of intestate's estate."

In *Re Wisner* (1870) 20 Mich. 442, it is said that "in administration cases, the general principle of marshaling, which saves the whole or a part of the realty from the burden of the testator's debts, is not founded in any preference of one portion of the real estate over another, but proceeds upon the idea that the personal estate is the primary fund for the payment of those debts for which the testator was personally liable, unless by express words, or otherwise, a different intent is plainly apparent."

In *Re Woodworth* (1867) 31 Cal. 595, the court states the rule to be that the personal estate of the testator is first to be applied to the payment of decedent's debts, including the payment of debts charged upon the real estate by a mortgage or other encumbrances, at least, where such debt was a personal debt of the decedent, since the mortgage is regarded as merely collateral security for the personal obligation.

In *Whitsett v. Kershaw* (1878) 4 Colo. 419, it is held that a lien upon the land of the decedent is to be satisfied first out of the personal assets, and, if these are insufficient, then recourse may be had to the real estate, and that in a proceeding to collect the same the personal representative should be made a party.

It has been held, however, that the land against which there exists a mortgage stands in place of the mortgage, where the personal assets are exhausted in paying off the mortgage. *Cope v. Cope* (1707) 2 Salk. 449, 91 Eng. Reprint, 389.

It has been held not to be the duty of the administrator to go into a foreign state and redeem a mortgage against real estate there, and if he

does so he is not entitled to be reimbursed from the personal assets. *Haven v. Foster* (1829) 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

In *Rogers v. Rogers* (1828) 1 Paige (N. Y.) 188, it is held that a judgment is not a specific but a general lien upon all the property of the judgment debtor. It cannot be enforced against the real estate until the sheriff has sold the personal property; hence, where the judgment debtor specifically bequeaths personal property to one person, and devises real estate to another, without any direction as to what property shall be appropriated to satisfy a judgment against him, personal property must first be applied to that object.

In *Bond v. England* (1855) 1 Jur. N. S. 918, 3 Week. Rep. 648, 2 Kay & J. 44, 69 Eng. Reprint, 687, 24 L. J. Ch. N. S. 671, it is held that where, between the time of the death of the owner and the final administration of his estate, his direct heir died, the latter's heir was entitled to have a lien on land which descended to him, discharged from the personal assets of the original owner.

To render inapplicable the general rule of exoneration, it has been held that the intention of the testator must be to exonerate the personal assets. His intent simply to charge the real estate is not sufficient. *Morris v. Higbie* (1893) — N. J. Eq. —, 27 Atl. 438. The intention of the testator must be to charge the realty and exonerate the personalty. *Whitehead v. Gibbons* (1854) 10 N. J. Eq. 230; *Riegelman's Estate* (1896) 174 Pa. 476, 34 Atl. 120.

Parol evidence is not admissible to show the intent of the testator to exempt personal estate from the payment of debts made a charge upon the real estate. *Stephenson v. Heathcote* (1815) 1 Eden, 38, 28 Eng. Reprint, 598.

In *Jacobs v. Button* (1906) 79 Conn. 360, 65 Atl. 150, the doctrine with regard to the intention of the testator as controlling, with reference to the question under consideration, is thus supported: "A will is the legal declaration of intention as to the disposition of one's property after death. To

this intention, made known through the written declaration, the law gives effect, and so executes the testator's will. *Voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit.* Pandects of Justinian, chap. 28, 1; 2 Bl. Com. 499. The condition of a testator's property at the time his declaration of intention is made, as well as at the time it takes effect, may throw light upon the meaning and effect of the language used in expressing his intention, and for this purpose is considered, in connection with the written declaration, in determining the intention made known by that writing. . . . Reading Mr. Button's will in the light of the circumstances attending its execution, which remained unchanged until his death, his intention in respect to the defendant Welton is clear. He intended that she should have, after his death, the land described, and also that his executor should appropriate \$3,700 of his personal estate for her benefit, in the payment of the promissory notes secured by mortgage on the land, for the purpose of discharging the mortgage lien."

It has been held that, where the testator exempts the personal assets which he bequeathed to others from the payment of charges upon his real estate, upon the death of a legatee before distribution of the estate the exemption ceases, and that part of the personal estate may be used in exoneration of liens against the real estate. *Waring v. Ward* (1800) 5 Ves. Jr. 670, 31 Eng. Reprint, 796, 5 Revised Rep. 130.

Where the testator devised his land expressly subject to a mortgage, he was held to have used the terms merely as descriptive of the encumbered condition of the property, and not for the purpose of subjecting his devisee to the burden. This holding was on the ground that it requires express words or a clearly manifested intent to disturb this order of payment. There must be a manifest intent not merely to charge the real estate, but to discharge the personalty. *Re Woodworth* (1867) 31 Cal. 595. To

the same effect is *Re Brackey* (1914) 166 Iowa, 109, 147 N. W. 188.

*b. As to specific legacies.*

The rule exonerating the real estate of a deceased person from liens thereon, and requiring their payment out of the personal assets of the deceased, is applicable as between the heirs and the distributees, and the heirs and devisees and residuary legatees. It is not, however, applicable to specific legatees. Specific bequests or legacies cannot be defeated by appropriating the personal assets of the testator to the payment of encumbrances on his real estate, for the benefit of the heir or devisee thereof. Unless the debt may be satisfied out of the personal assets after paying the debts and such legacies, the personal assets cannot be appropriated to the payment of a lien on the real estate.

Georgia. — *M'Lellan v. Wallace* (1832) Dudley, 127.

Kentucky. — *Hedger v. Judy* (1894) 95 Ky. 557, 26 S. W. 586.

Maryland. — *Chase v. Lockerman* (1840) 11 Gill & J. 185, 35 Am. Dec. 277.

New Jersey. — *Thomas v. Thomas* (1866) 17 N. J. Eq. 356; *Higbie v. Morris* (1895) 53 N. J. Eq. 173, 32 Atl. 372.

Ohio. — *Glass v. Dunn* (1867) 17 Ohio St. 413.

Pennsylvania. — *Mason's Estate* (1846) 4 Pa. 497, affirming (1845) 1 Pars. Sel. Eq. Cas. 132; *Ruston v. Ruston* (1796) 2 Yeates, 54, 2 Dall. 243, 1 L. ed. 365, 1 Am. Dec. 283; *Com. use of Beelman v. Shelby* (1825) 13 Serg. & R. 348.

Rhode Island. — *Atkinson v. Staigg* (1882) 13 R. I. 725.

South Carolina. — *Brown v. James* (1849) 22 S. C. Eq. (3 Strobb.) 24.

England. — *Hawes v. Warner* (1704) 2 Vern. 477, 23 Eng. Reprint, 906, 3 Rep. in Ch. 206, 21 Eng. Reprint, 768; *O'Neal v. Mead* (1720) 1 P. Wms. 694, 24 Eng. Reprint, 574; *Lucy v. Gardener* (1723) Bumbery, 137, 145 Eng. Reprint, 623; *Lutkins v. Leigh* (1734) Cas. t. Talb. 53, 25 Eng. Reprint, 658.

Canada. — *Ricker v. Ricker* (1868) 14 Grant, Ch. 264.

And see *Tucker v. Lungren* (1896)

12 Ohio C. C. 622, 5 Ohio C. D. 577, holding that the rule does not apply as to specific legatees. It applies only where the personal representative has assets in his hands after paying off other debts and legacies.

In *Thomas v. Thomas* (1866) 17 N. J. Eq. 356, it was held that where the testator in his lifetime executed a mortgage on certain of his land, in the subsequent distribution of his estate, where the general personal assets in the residuary estate had been exhausted, the devisee of the land was not entitled to have the same exonerated in whole or in part from the mortgage lien, as against specific legatees. The court said that in such case the land must bear the entire burden of the lien.

And in *Hedger v. Judy* (1894) 95 Ky. 557, 26 S. W. 586, it was held that where land was devised subject to a mortgage, and specific legacies were sufficient to exhaust the personal assets, it will be presumed that the testator intended the real estate to bear the burden of the mortgage.

In *O'Neal v. Mead* (1720) 1 P. Wms. 693, 24 Eng. Reprint, 574, it is held that where the decedent had charged the real estate with a mortgage, and had specifically bequeathed a leasehold estate to his wife, the heir could not disappoint her legacy by laying the mortgage debt upon it, as he might have done had it not been specifically bequeathed.

In *Re Mason* (1845) 1 Pars. Sel. Eq. Cas. (Pa.) 129, it was held that the devisee of land charged with a mortgage created by the testator in his lifetime cannot call upon other devisees, who have taken other land under the same will, to contribute ratably toward the extinguishment of such encumbrance, nor is such devisee entitled to have his land exonerated from this encumbrance out of the personal estate specifically bequeathed.

In *Com. use of Beelman v. Shelby* (1825) 13 Serg. & R. (Pa.) 347, specific bequests were made to the widow of the testator, and money legacies were bequeathed to his daughters, and specific devises of the testator's real estate were made to different sons.

Some of these devises lapsed by the death of the devisees prior to the death of the testator. There was an encumbrance upon certain real estate which the testator purchased subsequently to the execution of the will. Under these circumstances it was held that the estates were to be distributed as follows: (1) That the specific bequest to the widow was to be paid out of the personal estate; (2) that the balance of the personal estate was to be applied to the payment of the legacies and all of the debts of the testator; (3) that out of the balance remaining unpaid the proceeds of the sale of the lands not disposed of were to be first applied; (4) that any deficiency was to be paid out of the lands specifically devised.

But see as to specific legacies, where the will expressly directs the payment of debts out of the personal property. *French v. Vradenburg* (*French v. French*) (1906) 105 Va. 16, 3 L.R.A. (N.S.) 898, 115 Am. St. Rep. 838, 52 S. E. 695, 8 Ann. Cas. 590, *infra*, I. c. 2.

*c. As to general or pecuniary legacies.*

*1. In general.*

There is a difference of opinion as to whether the rule of exoneration applies as against both, where the personal assets are insufficient to pay general or pecuniary legacies. In some of the cases which use general language seemingly limiting the right of exoneration of devised real estate to the residuary estate, thereby putting general or pecuniary legacies in the same favored class as specific legacies, are involved wills in which the testator expressly charged certain of his estate with the payment of his debts; and in others the court was not dealing with a specific case of exoneration of devised real estate by the use of personal assets necessary for the payment of general pecuniary legacies.

It has been held that as between a general legatee of the personal assets and the heirs of the real estate, or a devisee thereof, the personal property is first to be used in paying an encumbrance on the real estate. Where the

personal representative takes possession of the real estate and collects the rents thereof, such rents go to the heir, and the proceeds of the personal property are to be used in paying the charges on the real estate, under a statute providing that the personal estate of the deceased which shall go into the hands of the executor or administrator shall be first chargeable with the payment of the debts and expenses. *Re Woodworth* (1867) 31 Cal. 595.

In *Towle v. Swasey* (1870) 106 Mass. 100, it is held that, where real estate is devised to the widow of the decedent, and is subject to a mortgage executed by the deceased in his lifetime, it is to be exonerated out of the personal assets, although there are not sufficient personal assets to pay all of the legacies and the real-estate mortgage.

So, in *Brown v. Baron* (1894) 162 Mass. 56, 44 Am. St. Rep. 331, 37 N. E. 772, it is held that the devisee of specific real estate, against which there exists a mortgage executed by the testator, is entitled to have it exonerated from the payment of such mortgage, even though the personal estate is insufficient to pay pecuniary legacies, where no contrary intention upon the part of the testator is shown.

In *Porter v. Howe* (1899) 173 Mass. 521, 54 N. E. 255, the will specifically directed the executor to discharge liens against the real estate devised, and it was held that, notwithstanding the personal estate was not sufficient to pay all of the legacies, it was the duty of the executor to discharge from the proceeds of the personal assets the liens upon the real estate, without contribution by the devisees of any of the amount necessary to discharge such liens. The unsuccessful contention was that the executors and trustees were only to pay such proportional part of the mortgage as they paid of the pecuniary legacies, in view of the necessary abatement of the latter.

In *Todd v. McFall* (1899) 96 Va. 754, 32 S. E. 472, a pecuniary legacy had been diminished by the payment, from the personal assets, of a vendor's

lien resting upon the real estate at the time of the testator's death. The legatee was held not entitled to be subrogated to the right of the vendor against the real estate, in possession of a specific devisee. In reaching this conclusion, the court said that where the will does not charge the real estate with the payment of the debts, and makes no provision for the payment, the will makes the personal property the primary fund for their satisfaction, and if the testator was mistaken as to the value of his personal property, and it is proved inadequate to pay both this and legacies, the latter must abate to the extent of the deficiency, and the legatee cannot be reimbursed out of the land for the loss. The legatee has no right to call upon a devisee to contribute to the payment of a legacy, unless the real estate is charged with its payment, not even when the personal property has been applied in exoneration of the land from a lien.

In *Elliott v. Carter* (1853) 9 Gratt. (Va.) 541, the order for the payment of debts of the decedent, including the encumbrances upon his real estate contracted by him, is held to be as follows: First, personal estate not exempted by the terms of the will or necessary implication; second, real estate, or interest therein, expressly set apart by the will for the payment of the debts; third, real estate descended to the heir; fourth, real estate or personal property expressly charged with the payment of the debts, and bequeathed or devised subject to such charge; fifth, general pecuniary legacies; sixth, specific legacies; seventh, devises. And it was held that a devisee of real estate not charged with the payment of the debts was entitled to have the estates marshaled and applied to the debts, including encumbrances against the real estate, in the order stated. The doctrine of this case is approved and followed in *French v. Vradenburg* (*French v. French*) (1906) 105 Va. 16, 3 L.R.A. (N.S.) 898, 115 Am. St. Rep. 838, 52 S. E. 695, 8 Ann. Cas. 590. The latter case characterized as dictum and inexact, the incidental remark in *Frasier v. Littleton* (1901) 100 Va. 9, 40

S. E. 108, that real estate encumbered by subsequent mortgage fell in the fourth class of the above enumeration; the question in the *Littleton Case* being between different devisees on a deficiency of personal assets.

In *Gould v. Winthrop* (1858) 5 R. I. 319, it was said that, though the devisee is entitled to have the estate exonerated out of the personalty, he cannot claim it, for want of such personalty, out of any specific gift, either personal or real, "or even against a pecuniary legacy." But in the subsequent cases of *Atkinson v. Staigg* (1882) 13 R. I. 725, and *Dean v. Rounds* (1893) 18 R. I. 436, 27 Atl. 515, 28 Atl. 802, the *Gould Case* is apparently treated as authority for the exoneration of the devisees at the expense of any personal property not specifically bequeathed.

But in *M'Lellan v. Wallace* (1832) Dudley (Ga.) 127, it is held that the rule that an encumbrance upon real estate should be paid from the personal estate applies only as between the heirs or devisee of the real estate, and the residuary legatee of the personal estate, and it has no application to specific or general legatees or creditors.

In *Glass v. Dunn* (1867) 17 Ohio St. 413, also, the rule is stated that the devisee of real estate takes cum onere as to general pecuniary and specific legacies. The actual holding related to general legacies.

In *Morris v. Higbie* (1893) — N. J. Eq. —, 27 Atl. 438, it is held that, where the personal estate is not adequate to meet the secured and unsecured debts and legacies, the rule applies that where the testator has secured a debt by way of a mortgage on land devised, after the exhaustion of the general residuary fund, the devisee of the mortgaged land cannot call for a contribution, either on general or specific legatees. In such case the executor should apply the assets to the payment and discharge, first, of the unsecured debts, next, of the specific and pecuniary legacies, and the balance to the payment of liens on the land specifically devised, the same

having priority over the residuary devisee.

In *Johnson v. Child* (1844) 4 Hare, 87, 67 Eng. Reprint, 572, the vice chancellor said that the rule of law is clear that the testator, by devising land expressly subject to a mortgage, does not thereby declare an intention that the devisee shall take cum onere as against the testator's personal estate. It is equally well settled that the amount of the testator's general personal estate is not a circumstance from which an inference can be legitimately drawn as to the construction of his will, in this regard, and yet, if the amount of the testator's personal estate is not sufficient for payment of his debts and legacies, the court (referring to cases cited) discovers an intention on the part of the testator that the devisee of his real estate, subject to a mortgage, shall take it cum onere. He apparently regarded this as illogical; but said that he was bound by authority, and that, upon the authorities, the specific legatee of a leasehold estate subject to mortgages must take cum onere, so far as the pecuniary legatees may be entitled, under the rule referred to, to have their legacies protected. The apportionment of the mortgage debt as between the leasehold and certain policies of insurance was due to the fact that the policies were also subject to the mortgage.

In *Hamilton v. Worley* (1793) 2 Ves. Jr. 62, 30 Eng. Reprint, 523, 4 Bro. Ch. 199, 29 Eng. Reprint, 849, it is said that the right of a devisee of real estate to have the encumbrance upon it discharged as a debt of the personal estate can go no further than as between the heir, or devisee, and residuary legatee; it cannot interfere with the disposition of other properties, such as specific or general legacies.

In *Coppin v. Coppin* (1725) Cas. t. King, 28, 25 Eng. Reprint, 204, the decedent in his lifetime purchased of his brother certain real estate, and at the time of his death had paid only a portion of the purchase price. His brother, as the devisee of this real estate, was held entitled to have the balance of the purchase price paid out

of the personal property, as against the decedent's creditors, who, prior to his death, had compromised their claims for a per cent thereof, but who, he had provided by his will, should receive in full the balance of their original claim.

In *Rider v. Wager* (1725) 2 P. Wms. 328, 24 Eng. Reprint, 751, it is conceded that where a will makes real estate a fund for the payment of encumbrances thereon, even though it would be eased as against the administrator or residuary legatee, it will not be eased so as to disappoint either pecuniary or specific legacies.

In *Lapp v. Lapp* (1869) 16 Grant, Ch. (U. C.) 159, the court apparently assumed, on the authority of *Johnson v. Child* (Eng.) supra, that, where the personal estate is insufficient to pay debts and general legacies, the devisee takes cum onere as regards a mortgage antedating the will; but held that, where the mortgage is given after the will, there is no presumption that the testator intended the devisee to take cum onere; and he is entitled to have the land exonerated.

In *Ruston v. Ruston* (1796) 2 Dall. (U. S.) 243, 1 L. ed. 365, 1 Am. Dec. 283, the testator devised all of his real estate to his eldest son, and required him to pay to the testator's executors within a certain time, a designated sum of money; the will also contained several specific legacies and a residuary clause; some of the real estate devised to the son was subject to a mortgage; the will authorized the executors to sell certain of the land devised in order to raise the money to pay the debts of the decedent and the legacies, if the son, who was the devisee of this land, failed to make the required payments; upon such failure, the executors sold this portion of the real estate, not, however, including all the real estate devised to the son. The question was as to whether or not this encumbrance should be paid out of the money realized by the executors, or by the devisee. The court said: "It appears to have been the intention of the testator that the legacies, specific and pecuniary, should be paid, as well as that the devise of the real es-

tate should take effect; and, if practicable, the assets should be so marshaled that the testator's intention in the whole should be carried into execution. The testator seems to have thought the £3,000 would have been sufficient to have discharged all his debts, and also the particular pecuniary legacies; but in this he has been mistaken." Under these circumstances it is held that the specific and particular pecuniary legacy bequeathed to the children ought not to be brought in, in case of the particular lands mortgaged; the devise of the residuary part of the personal estate should give way to the devise of the real estate, subjected to the mortgage, and be applied as far as it will go in discharge of the mortgage; for the devisee of the real estate must take it cum onere, that is, subject to the mortgage, unless the residue of the personal estate will be sufficient to discharge it.

In *Re Smith* [1899] 1 Ch. (Eng.) 365, 68 L. J. Ch. N. S. 333, 47 Week. Rep. 223, 80 L. T. N. S. 113, it appeared that the mortgage debts were expressly charged upon the residuary estate. Under these circumstances it was held that the testator had not, expressly or by necessary inference, provided that the rule as to marshaling was not to apply, or that the mortgage debts were to be paid prior to the pecuniary legacies, or that the devisees of the mortgaged realty were to be considered as legatees, to the extent that the mortgagees were to share ratably with the pecuniary legatees, in case of a deficiency in the residuary estate.

**2. Effect of charge of testator's debts upon personal estate.**

In *Bishop v. Howarth* (1898) 59 Conn. 455, 22 Atl. 432, the testator gave, devised, and bequeathed to his three sons a certain store, "including buildings and the lot of land on which they stand, and also the stock, fixtures, notes, accounts, and all other property thereto appertaining after payment of my debts, which are to be paid from said personal property." This clause is held to impose upon the legatees the duty of paying a mortgage on real estate devised to

others, which the testator had mortgaged subsequently to the execution of the will.

In *French v. Vradenburg* (*French v. French*) (1906) 105 Va. 16, 3 L.R.A. (N.S.) 898, 115 Am. St. Rep. 838, 52 S. E. 695, 8 Ann. Cas. 590, a devisee of real estate encumbered subsequently to the execution of the testator's will was held, as against pecuniary and specific legatees, entitled to have the encumbrance discharged out of the personal estate, where the will directed the payment of all the debts of the testator from any ready money or other personal property that he might have at the time of his death. In this case, it is pointed out that the essential question for decision involves the right of a devisee of real estate, encumbered by the testator subsequently to the execution of his will, to disappoint legatees pecuniary and specific, by having the encumbrance discharged out of the personal estate, where the will directs the payment of all the debts of the testator from any ready money or other personal property he may have at the time of his death. The court said that the reason for the rule "which allows the legatee who has been disappointed of his legacy by the application of the personal property to disencumber real property specifically devised, to stand in the place of the encumbrancer, is to give effect to the will of the testator as a whole, which, it is said, can only be done by requiring the devisee to take cum onere. But it would seem that, under the facts of this case, to uphold the contention of the appellees would violate the principle which they invoke to sustain it; for in this instance, as we have seen, there is an express charge upon the personal estate for the payment of debts, subject to which charge the legacies were given."

In *Edmunds v. Scott* (1884) 78 Va. 720, the personal estate was charged with the payment of the testator's debts.

In *McGuire v. Brown* (1875) 41 Iowa, 650, it is held that where the widow is bequeathed all of the personal property and certain real estate



of her husband, and there is a mortgage on the real estate, which she discharges, she is not entitled to have this real estate, which, upon her subsequent marriage, descends to the decedent's heirs, including herself, charged with the encumbrance thereon which she has paid. The court said: "The appellee claims to be allowed for debts paid by her while executrix of her deceased husband's estate, and especially a mortgage debt which was a lien upon the land in controversy. She claims this because, under the will, she became entitled absolutely to the whole of the personal estate, with the exception of two small specific bequests. It is true that by the fourth clause of the will the wife is given all of the personal property of every description, with exceptions mentioned, but the will also directs that all of the just debts and expenses of burial shall be paid out of the estate. The personal property and money belonging to the estate were largely in excess of the debts. No particular fund is named or created by express language for the payment of the debts, and they are not charged upon any particular bequest, but upon the whole estate, and since the statute makes the personal estate primarily liable for the payment of the debts, which the will directs to be paid from the estate, the conclusion forces itself upon us that it was the intention of the testator that the debts should be paid from the personal estate."

In *Burley v. Armstrong* (1861) 12 Ir. Ch. Rep. 270, it is held that under a general direction by the testator to apply the proceeds of personal property, first, to the payment of his just debts and expenses, second, to the satisfaction of legacies he has provided for, the devisee is entitled to have a mortgage on the real estate devised to him paid from the personal assets, as against pecuniary legatees.

In *Scott v. Supple* (1893) 13 Can. L. T. 201, 23 Ont. Rep. 393, it appeared that the testator expressly charged his estate with the payment of encumbrances on certain lands he had devised. The court said that, were it not for this provision, the devised land

would be subject to the mortgages thereon.

## II. Enforcement of exoneration.

### a. In general.

The substantive rule which exonerates the real property at the expense of the personal property is given effect in various ways, and at various stages of the settlement of the estate, some of which are illustrated.

If the personal assets exceed the general debts, the devisee of real estate which is subject to a mortgage has a right to call upon the executor to redeem therefrom to the extent of the surplus. *Gibson v. McCormick* (1888) 10 Gill & J. (Md.) 65. Where there is sufficient personal estate, it should be used in exoneration of any encumbrance on real estate specifically devised, although the testator makes no reference to the mortgage. *Bulkley v. Seymour* (1902) 74 Conn. 459, 92 Am. St. Rep. 229, 51 Atl. 125.

In *Jacobs v. Button* (1906) 79 Conn. 360, 65 Atl. 150, it is said that "the law imposes upon an executor the duty of paying his testator's debts, and his payment of a debt secured by mortgage on land specifically devised operates in favor of the devisee, to relieve that land from the mortgage lien. When the will expressly directs the payment of a debt secured by mortgage on land specifically devised, it operates as a gift from the testator to the devisee, from the general personal assets."

In the foregoing case, after having made a will in which he bequeathed, among other real estate, the real estate in question, and directed his executor "to fully pay and discharge his just debts and funeral expenses," the testator, by a quitclaim deed reciting a consideration of "\$1 and other valuable considerations received to my full satisfaction," conveyed the same real estate to the devisee thereof. This real estate, at the time of the execution of the will and the deed, was encumbered. It was held that the devisee was entitled to have this encumbrance paid from the testator's personal estate. The court said that it was apparent that the testator, in

his will, "intended to and did give to the defendant Welton his equity of redemption in the land described, and also intended to and did give to her the right to have the general personal assets of his estate applied to the payment of the mortgage debt and the discharge of the mortgage lien; and that by his 'quitclaim' deed he made a present gift to her of his equity of redemption only, and did no act which rendered impossible the execution of the remainder of his testamentary gift. It follows conclusively that, upon his death, his mortgage debts remaining unpaid and his general personal assets sufficient to pay them, and the defendant Welton remaining the owner of the equity of redemption, it is the duty of the executor to pay these debts, and so discharge the mortgage liens. The testator may have deemed his gift of the equity of redemption, but he has not deemed the remainder of his gift."

In *Philips v. Philips* (1787) 2 Bro. Ch. 273, 29 Eng. Reprint, 150, it was held that the fact that personal estate, bequeathed to the next of kin by a residuary clause, would be entirely exhausted if it was applied to the payment of mortgages on real estate specifically devised, does not affect the rule requiring such application, unless a contrary intention upon the part of the testator is shown.

In *Schade v. Connor* (1909) 84 Neb. 51, 120 N. W. 1012, the executor was the residuary legatee, and he failed and refused to pay a mortgage upon real estate devised to others. It was held that he thereby made the debt his own, and equity would require him to pay, and procure the discharge of such mortgage for the benefit of the owner of the land.

If the mortgagee resorts to the land, the devisee or heir entitled thereto may have reimbursement for the loss of the land, or for the amount paid to redeem the same from the personal estate. *Jackson v. Bevins* (1901) 74 Conn. 96, 49 Atl. 899.

In *Robinson v. Robinson* (1869) 1 Lans. (N. Y.) 117, where the real estate of a member of a partnership was mortgaged to secure the payment of

partnership debts, the devisee thereof was held entitled to have the mortgage paid out of the firm assets.

In *Keene v. Munn* (1863) 16 N. J. Eq. 398, it is held that, while the heir or devisee may call upon the executor to apply the personal assets to the payment of a lien upon the real estate of the decedent, the grantee of such heir or devisee cannot do so.

In *Mullins v. Yarborough* (1875) 44 Tex. 14, an administrator was denied the right to discharge a vendor's lien against the homestead of the decedent, without an order of the court to that effect. But this holding was apparently based upon a question of practice, since it is pointed out that the children of the deceased claiming the homestead were not made parties. The court said that whether they had a right to claim that the vendor's lien on this 60 acres of land should be paid out of the general assets was not a question which should be discussed at that time.

In *Broome v. Monck* (1805) 10 Ves. Jr. 597, 32 Eng. Reprint, 976, 8 Revised Rep. 48, it is held that a devisee of all of the real estate of the testator is not entitled to have the personal estate used to complete the purchase of real estate contracted for by the testator in his lifetime, the title to which was defective. Nor is such devisee entitled to have another estate of the same value purchased, or the original purchase completed, notwithstanding the defect in the title.

In *Waring v. Ward* (1800) 5 Ves. Jr. 670, 31 Eng. Reprint, 796, 5 Revised Rep. 130, it was held that, where the testator exempts personal assets which he bequeathed from the payment of charges upon the real estate, upon the death of the legatee the exemption ceases, and such assets may be used in exoneration of the real estate.

#### *b. Waiver.*

Although the debt secured by a mortgage is payable, like all other debts of the decedent, out of his personal estate exclusively, nevertheless, where the devisee of real estate covered by a mortgage does not require payment thereof by the personal rep-

representative, for many years treats it as his personal obligation, and finally suffers the land to be sold in foreclosure of the mortgage, he waives any right or claim based upon his original right to have the mortgage paid out of the personal assets. *Leibert's Appeal* (1888) 119 Pa. 525, 13 Atl. 327.

But as between the devisee of real estate which is subject to an encumbrance, and the personal representative, the failure of the mortgagee to present the mortgage for payment as a claim against the estate does not relieve the personal representative of the duty of paying the mortgage indebtedness out of the proceeds of the personal assets. *Turner v. Laird* (1896) 68 Conn. 198, 35 Atl. 1124.

### III. *Necessity that lien be security for personal obligation of decedent.*

#### a. *In general.*

A distinction is made between the right of the heir or devisee of real estate subject to a mortgage, where the mortgage was created by the decedent himself, and where he acquired the land subject to a mortgage then existing against it. As shown by the cases heretofore cited, the general rule is that the devisee or legatee of land, subject to a mortgage executed by the testator in his lifetime, is entitled to have the same paid from the personal estate. The reason for this rule, as stated, is that the obligation of the testator to pay is primary, and the land is merely security therefor. Where, however, the testator acquires land subject to a mortgage, the mortgage is the primary fund or source of payment, and there is imposed upon the testator no personal obligation. Hence, it is held that the devisee or heir to such land is not entitled to have the mortgage satisfied out of the personal estate. *Stieglitz v. Migatz* (1914) 182 Ind. 549, 105 N. E. 465; *Mitchell v. Mitchell* (1852) 3 Md. Ch. 81; *Andrews v. Bishop* (1862) 5 Allen (Mass.) 490; *McLenahan v. McLenahan* (1886) 18 N. J. Eq. 101; *Tweddell v. Tweddell* (1787) 2 Bro. Ch. 101, 29 Eng. Reprint, 58; *Forrester v. Leigh* (1753) 1 Ambl. 171, 27 Eng.

Reprint, 114; *Barry v. Harding* (1844) 7 Ir. Eq. Rep. 313, 1 Jones & L. 475. This rule is also, of course, supported by the cases subsequently cited that apply the rule, even where the decedent had assumed and agreed to pay the mortgage.

In *Stieglitz v. Migatz* (Ind.) supra, it is held that, where real estate is acquired by the testator subject to a mortgage, the payment of which he did not assume, it is not to be exonerated from the payment thereof, and his personal property cannot be used to pay the same.

In *Wythe v. Henniker* (1833) 2 Myl. & K. 635, 39 Eng. Reprint, 1087, 8 L. J. Ch. N. S. 24, the court said that this doctrine proceeded upon the assumption that the devisee of land acquired by the testator subject to a mortgage was the devise of the equity of redemption only, and that the testator intended that the devisee should take the estate cum onere.

In *Scott v. Beecher* (1820) 5 Madd. Ch. 96, 56 Eng. Reprint, 832, where the mortgagor of land devised the same to his wife, and also made her his residuary legatee, and appointed her executrix, and she died before discharging the mortgage, the heir to her real estate is not entitled to have the personal assets applied to the exoneration of the real estate from such mortgage. The vice chancellor said that, if the wife had thought fit, she might have paid off the mortgage out of the personal estate, it being admitted that there were sufficient personal assets of the husband's estate to pay all debts, including the mortgage, and it may, therefore, be said that she elected to continue the mortgage as a charge on her real estate; but her personal representative was not bound to make out any such fact of election. By this gift to her as residuary legatee, the personal estate of her husband became her personal estate; but the mortgage debt was not her debt, and her heir, therefore, had no equity to pay off the mortgage out of her personal estate.

There is some difference in opinion, however, among the courts, as to the extent of the application of this rule.

In some jurisdictions it is held that, where the land remains the primary fund for the payment of indebtedness against it, the fact that the testator assumed and agreed to pay the mortgage is not sufficient to entitle his heir, or devisee thereof, to have the same paid out of the personal estate. *Creesy v. Willis* (1893) 159 Mass. 249, 34 N. E. 265; *Campbell v. Campbell* (1879) 30 N. J. Eq. 415; *Mount v. Van Ness* (1880) 33 N. J. Eq. 266; *Coudert v. Coudert* (1887) 43 N. J. Eq. 407, 5 Atl. 722; *Cumberland v. Codrington* (1817) 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Hunt's Petition* (1895) 19 R. I. 139, 61 Am. St. Rep. 743, 32 Atl. 204.

In *Mount v. Van Ness* (1880) 33 N. J. Eq. 266, in holding that the assumption of the mortgage by the testator is not sufficient to entitle the heir to have it paid out of the personal estate, the court said that the rule in this regard was that a covenant of the grantee, in a deed subject to a mortgage, to pay the mortgage, was only collateral security, and the real estate still remained primarily liable. To the same effect is *Campbell v. Campbell* (1879) 30 N. J. Eq. 415.

The apparent implication in *McLenahan v. McLenahan* (1866) 18 N. J. Eq. 101, that the rule of exoneration applies if the decedent assumed and agreed to pay the mortgage, is opposed to later authorities in the state.

In *M'Learn v. Wallace* (1836) 10 Pet. (U. S.) 625, 9 L. ed. 559, it is said that "there is no doctrine better established than that the purchase of land subject to a mortgage debt does not make the debt personal, and, on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed where additional security has been given."

In this case, the decedent's father had purchased a plantation and slaves thereon, and had suffered a judgment for the purchase price, which was a lien on both the personal and real property at the time the decedent took same under his father's will; decedent, to obtain possession of the property, gave his own bond, secured by a mort-

gage on the real and personal property, and died, leaving part of the mortgage debt unpaid. The court said, in effect, that the doctrine above quoted would have been the rule for the payment of the mortgage debt, which represented largely, though not exclusively, the purchase price of the land, if the decedent had not executed a mortgage on the personal as well as the real property, which, as devisee, he received from his father; but that in the circumstances the real and personal property should be applied in proportion to their respective amounts, to its payment. The court said: "That the land should not be wholly exempt from this encumbrance is clear by every rule of equity which applies to cases of this description. In addition to the consideration that the mortgage binds the land, the fact that a considerable part of the debt was incurred for its purchase cannot be wholly disregarded. Nor would it comport with the principles of equity to make the whole debt a charge upon the land, to the exemption of the personal property, as the lien of the mortgage covers the personal as well as the real property, and as at least a part of the debt was contracted on other accounts than the purchase of the land. . . . In equity, it would seem that each description of heirs should contribute to the payment of the mortgage debt, in proportion to the fund received. This rule, while it would do justice to the parties, would give effect to the intention of the ancestor. That intention is clearly shown by the lien created on the property, and, by the rules of equity, such intention must be regarded."

But in the reported case (*SMITH v. KIBBE*, ante, 483) it is held that the testator was personally liable for the payment of a mortgage upon lands, which, in his contract of purchase, he had assumed and agreed to pay, and that hence it was the duty of the executor to pay the same from the avails of the personal estate.

In this case the court apparently assumed without discussion, contrary to the above-cited cases, that if the decedent was personally liable for the

mortgage debt the rule of exoneration applied. As pointed out, however, the cases heretofore referred to hold the test to be whether the obligation is primary or collateral. If the assumption of the debt is collateral, of course the land still remains the primary fund for the payment of the mortgage thereon, and it is upon this ground that these cases hold that the fact that the decedent assumed and agreed to pay the debt does not entitle the devisee to have the real estate exonerated. For the rule on this point, as affected by statute, see *Newcomer v. Wallace* (1868) 30 Ind. 216, *infra*.

In *O'Conner v. O'Conner* (1889) 88 Tenn. 76, 7 L.R.A. 33, 12 S. W. 447, it is held that where the decedent, at the time he acquired land which was subject to a vendor's lien to secure purchase-money notes, expressly assumed and agreed to pay these notes as a part of the consideration, the amount thereof was payable out of his personal assets after his death, as between distributees of his personal estate and the heir to his real estate.

In *Parsons v. Freeman* (1751) 1 Ambl. 115, 27 Eng. Reprint, 75, it is held that the heir was entitled to have the real estate exonerated from a mortgage existing on the land at the time his ancestor acquired it, where his ancestor agreed to pay a certain price for the land, a portion thereof to be paid to the holder of the mortgage, and the balance thereof to the vendor. The court said that this agreement amounted to an express agreement to pay, which the mortgagee could enforce if he desired.

In *Hoff's Appeal* (1855) 24 Pa. 200, the subject-matter of the devise was land mortgaged by the testator's vendor. In the contract of purchase, it was recited that the consideration for the conveyance was a certain amount of money in hand paid, and the mortgage, which the grantee was to pay and satisfy, and the latter, in another instrument, agreed to pay interest on this encumbrance, at an increased rate. The mortgage was held to be the decedent's personal obligation and chargeable to his residuary personal estate.

So, it has been held that where the decedent, by purchasing the equitable title to land, placed himself under an implied obligation to both the original vendor and vendee to pay the balance of the purchase price, the obligation is his personal one, although he did not bind himself by covenants to pay it, and the amount was therefore payable out of his residuary estate. *Re McCracken* (1857) 29 Pa. 426.

In *Hirst's Appeal* (1880) 92 Pa. 491, the rule is stated to be that a devisee of land acquired by the testator, subject to an existing mortgage, takes the land charged with the mortgage, without claim for its satisfaction out of the personal assets, unless the will clearly indicates an intention on the part of the testator to charge such encumbrance on the personal estate, or the testator has so dealt with the encumbrance as to make it his proper debt.

There is an implication, even in some of the cases that hold that the mere assumption and agreement by decedent to pay the debt will not have the effect to put the rule of exoneration in operation, that he may have so dealt with the matter as to make his personal liability primary, and the mortgage security collateral, and thus let in the rule of exoneration.

Thus, in *Hunt's Petition* (1895) 19 R. I. 139, 61 Am. St. Rep. 743, 32 Atl. 204, it is pointed out that where real estate is acquired by the deceased, subject to a mortgage, the land is the primary fund for the payment of the debt, and on the vendee's death it passes to his devisee or heir at law subject to the encumbrance, unless he has so dealt with the mortgage debt as to make it his personal obligation. Merely assuming the payment of the mortgage at the time of acquiring the real estate is not sufficient, as between the vendee's personal representative and his heirs, since such assumption is merely equivalent to a covenant with the grantor to indemnify him against the mortgage debt. Such a covenant does not sufficiently show an intent on the part of the purchaser to transfer the debt from the real estate acquired, to himself, as between

his heir and executor and administrator. A mere covenant by the decedent in his lifetime, with the vendor, to pay a debt covering the land he acquired, is not sufficient to make the obligation personal to the vendee within the rule. *Creesy v. Willis* (1893) 159 Mass. 249, 34 N. E. 265.

In *Tweddell v. Tweddell* (1787) 2 Bro. Ch. 152, 29 Eng. Reprint, 87, it is held that, although the vendee covenanted with the mortgagor to discharge a mortgage existing against the real estate he acquired, such covenant was not sufficient to make the debt his personal obligation, so as to make his personal assets the primary fund for the payment of the debt, rather than the land covered by the mortgage.

And it has been held that the purchase of the equity of redemption, with a covenant to indemnify the vendor against the encumbrances thereon, does not make the indebtedness the vendee's own so as to render his personal estate the primary fund out of which to pay the same. In this regard, the court said that no covenant with the mortgagor is sufficient to make a debt secured by a mortgage on real estate the grantee's personal obligation. But there must be a direct communication and contract with the mortgagee, and even this is not enough, unless the dealing with the mortgagee is of such a nature as to afford evidence of an intention to shift the primary obligation from the real to the personal fund. *Cumberland v. Codrington* (1817) 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

In *Campbell v. Campbell* (1879) 30 N. J. Eq. 415, it is said that the weight of authority is that personal estate is not primarily liable unless the grantee has not merely made himself answerable for the payment of the mortgage, but has actually made the debt directly and absolutely his own, or has in some other way manifested an intention to shift the burden to his personalty.

In *Gould v. Winthrop* (1858) 5 R. I. 319, it is held that where the testatrix paid a mortgage upon real estate at the time she acquired it, by contracting a new debt in her own name, for the

payment of which she became personally responsible, the real estate charged with the mortgage is no longer the primary fund for its payment. Upon this point the court said: "There are cases which hold that, until the testator who acquires an estate thus encumbered has done some act to assume the mortgage debt and make it his own, his personal representatives cannot be charged, and the land remains the only fund for payment; and so is the law; and that no mere collateral undertaking of the testator will make the debt his, within the meaning of the rule; such as a covenant with the mortgagor to save him harmless, or one with the mortgagee, that he will pay him the debt on the giving of a promissory note for the amount of the debt. . . . If, however, it be assumed as the personal debt of the testator, the real estate mortgaged ceases to be the primary fund for payment; and the case falls within the general rule first stated, which makes the personalty first liable for the debts. The question in all these cases has been whether the purchaser has, by his conduct in relation to the debt, made it his own personal debt, and not whether, having made it his own, it was still to be paid out of the estate mortgaged. In the case before us the original debt has ceased to exist. Both the debt and the mortgage have been satisfied and discharged. No debt now exists, except the debt contracted by the testatrix herself; and there is no ground for treating her obligation here as collateral to the contract of any other person. In all the cases where it has been held that the purchaser had not made the original debt his own, that debt was still subsisting in favor of the person with whom it was originally contracted; and no case is found where the original debt has been extinguished, in which the right of exoneration has been denied."

So, where a new mortgage is executed by the testator or intestate, it is immaterial that no bond is executed and no express covenant made by the testator to repay the lien. *King v. King* (1735) 3 P. Wms. 358, 24 Eng.

Reprint, 1100, Mosely, 192, 25 Eng. Reprint, 344, 18 Eng. Rul. Cas. 1.

A personal covenant by the mortgagor to pay the indebtedness he contracts by way of a mortgage is not necessary. *Meynell v. Howard* (1696) Prec. in Ch. 61, 24 Eng. Reprint, 30.

But, in *Sawtelle's Appeal* (1877) 84 Pa. 306, it is held that where a mortgage executed by a married woman is valid, but her personal obligation secured thereby is invalid, the mortgage is not payable out of the personal assets of her estate.

In *Pleasants v. Flood* (1892) 89 Va. 96, 15 S. E. 504, the contest was between the decedent's heirs and distributees, the heirs claiming that mortgages executed by the decedent upon lands descending to them should be paid out of the personal estate, it appearing that the mortgages in question had been executed by the decedent in substitution of liens existing against it at the time the same was granted to her by her husband. It was held that the land remained primarily bound for the payment of the obligation, and that the decedent's personal liability was collateral thereto. Hence the doctrine of exoneration was not applicable. Upon this point the court said: "Up to the point when Mrs. Flood bought at the judicial sale made January 17, 1889, there was no debt due from her personally on account of this Dillard debt. It was in no degree her debt. It was a debt subjecting the real estate, and that only. The real estate was not only primarily, but solely, the fund which could be looked to. By her purchase and execution of her bonds to pay this debt, upon the delivery of the land to her unencumbered, she bound herself, and so provided another fund out of which the said debt could be satisfied, to wit, her personal estate. But the debt which she thus agreed to pay was the same debt which rested originally, primarily, and solely on the real estate. The charge of the debt was principally and primarily upon the real estate, and this personal undertaking of hers was only collateral. The land, being the primary fund, is bound to exonerate the auxiliary fund.

If the primary fund is or shall prove to be insufficient to satisfy the debt originally and primarily fastened upon it, then the auxiliary fund may be called into requisition. This is the effect of the act of Mrs. Flood. Before her purchase her personal estate was not bound at all; since her purchase her personal estate is bound, but only secondarily; and the land,—the real estate in the hands of her heirs,—is bound primarily to pay the debt originally charged on it, and which was charged on it when it came into the hands of Mrs. Flood. As between her creditors, the question would be immaterial; but between her heirs and her distributees the land remains the primary fund, as it has been from the first, to satisfy this debt." See in this connection, *M'Learn v. Wallace* (1836) 10 Pet. (U. S.) 625, 9 L. ed. 559, supra.

*b. Where lien is for purchase price.*

In *Sutherland v. Harrison* (1877), 86 Ill. 363, the court repudiated the contention that a vendor's lien for a debt incurred by the decedent in purchasing land was within the rule applicable to a mortgage executed by a former owner, which was an existing encumbrance at the time the property was acquired by the decedent. After stating the general principle that the real property is to be exonerated at the expense of the personal property, the court said: "This general principle seems to be admitted by appellant's counsel, but it is contended there is this distinction here: that in the case of a mortgage, for instance, on land, it may be made for the general benefit of the estate; the personal estate may have received the benefit. Whereas a claim for the purchase money of land, as that here, can only be for the benefit of the particular piece of land purchased, in which case it is claimed that the land is the primary fund, and is to be first applied in payment, and the personal estate is only to be resorted to as auxiliary. As supporting appellant's position, a class of cases is cited to the effect that if one purchases an estate subject to charge made upon it by a previous owner, the estate charged is the pri-

mary, and the personal estate merely the auxiliary and collateral, fund for the payment of the debt charged upon it, and the heir at law or devisee will take such estate cum onere; and as it is sometimes given as a reason that the personal estate of the purchaser has not received any addition to its funds by means of the encumbrance, that is contended to be the principle which applies, whether the personal estate has received any benefit from the encumbrance to be discharged; and that where it has not the personal estate should be exonerated, and the debt be paid by the land. There is no such principle of general application. . . . The debt here involved is not that of another, a former owner, but it is the intestate's own original debt, contracted by himself in the most binding form."

So, the amount due for real estate to which the testator has the actual title by virtue of a contract of purchase of the same is the personal debt of the testator, and the rule of exoneration at the expense of the personal estate applies. *Riegelman's Estate* (1896) 174 Pa. 476, 34 Atl. 120.

And in *Milner v. Mills* (1729) *Moseley*, 123, 25 Eng. Reprint, 307, the amount due for land which the decedent had contracted to purchase during his lifetime was charged to his personal estate, although the land was held to descend to his heir.

In *Ford v. Gaithur* (1846) 19 S. C. Eq. (2 Rich.) 270, the deceased left land which he had purchased after the execution of a will, and which he mortgaged to secure a portion of the purchase price. The amount due on this mortgage was held payable from the personal assets as against a general legatee. In this case the will provided that all of the property of the testator, both real and personal, should remain under the executor's management until all of the testator's debts were paid.

In *Brown v. James* (1848) 22 S. C. Eq. (3 Strobb.) 24, it was held that land purchased by the testator subsequently to the making of his will was to be charged with the payment of the purchase price before personal prop-

erty specifically bequeathed could be used for that purpose. That case, however, is distinguishable because a specific bequest was involved (see *supra*, I. b).

#### IV. *Effect of peculiar circumstances of devisee or heir.*

Assuming that the general rule would otherwise apply, it has been held that it did not apply where its enforcement would result in entirely defeating bequests made in a will, and would be apparently contrary to the plain intention of the testator, as, for example, where this enforcement would inevitably tend to defeat the claim for most of the lands, and virtually transfer almost the entire estate to those who otherwise would only share equally with the other legatees. *Rice v. Harbeson* (1876) 63 N. Y. 493.

Even though there is no express exoneration of the personal assets of a deceased person from the payment of liens against his real estate, the circumstances of the case may be such as to indicate the decedent's intention not to charge the personal assets with payment of liens upon his real estate. *Draper v. Brown* (1908) 153 Mich. 120, 117 N. W. 213.

In *Byrne v. Hume* (1890) 84 Mich. 185, 47 N. W. 679, the circumstances and condition of the devisees of real estate, subject to a mortgage, were held to indicate the intention of the testator to have his executor pay the mortgage out of the personal assets, the same as other debts, and that it was to be borne neither by the real estate nor by a pecuniary legacy which was also given to the devisees. The devisees in this case were the aged parents of the testator.

As between the widow of the decedent, who receives as his heir all of his personalty and one half of his real estate, and the heir to the other half of the real estate, she will be required to discharge an encumbrance upon the real estate from the proceeds of the personal property, where in amount it exceeds the amount of the encumbrance. *Sutherland v. Harrison* (1877) 86 Ill. 363.

In *Tipping v. Tipping* (1721) 1 P.



Wms. 730, 24 Eng. Reprint, 589, the lord chancellor denied it to be the rule that in all cases the personal estate of the testator was applicable in case of the real estate, and said that it should not be so applied if thereby the payment of a legacy would be prevented, much less where it would deprive the widow of her bona paraphernalia.

In *Warner v. Hawes* (1708) 3 Bro. P. C. 21, 1 Eng. Reprint, 1150, where the consideration for the devise of land nearly equaled in amount the value of the real estate devised, and the real estate was subject to a mortgage, it was held that the mortgage should be paid, first, from the general personal assets, and if they were not sufficient, the balance should be paid out of the legacy, which should abate in proportion.

*V. Effect of general direction in will.*

Cases are not included herein which construe provisions in wills for the payment of the testator's debts.

While it is not the purpose of this note to consider the question of the construction of wills with reference to the provisions for the payment of liens against real estate, it is generally held in this regard, however, that a mere general direction for the payment of all the testator's debts out of his estate does not indicate any intention upon his part contrary to the general rule heretofore referred to. *Hennegar v. Deadrick* (1899) — Tenn. —, 54 S. W. 138; *Pembroke v. Friend* (1860) 1 Johns. & H. 132, 70 Eng. Reprint, 692, 2 L. T. N. S. 742; *Brownson v. Lawrence* (1868) L. R. 6 Eq. (Eng.) 1, 37 L. J. Ch. N. S. 351, 18 L. T. N. S. 143, 16 Week. Rep. 926.

In *Woolstencroft v. Woolstencroft* (1860) 6 Jur. N. S. 1170, 2 De G. F. & J. 347, 45 Eng. Reprint, 655, 30 L. J. Ch. N. S. 22, 3 L. T. N. S. 388, 9 Week. Rep. 42, however, it is held that direction for the payment by his executor of all the testator's debts indicates an intention to charge the personal property with payment of liens on the real estate.

Where the testator directs the payment of all of his just debts, it is assumed that the debts are to be paid

from his personal property unless he makes a different provision, although the debts are secured by a mortgage on the testator's real estate. *Jackson v. Bevins* (1901) 74 Conn. 96, 49 Atl. 899.

The general rule requiring the payment of charges against real estate out of the personal assets is not affected by the fact that the testator specifically directed the executor to discharge liens upon certain real estate, but did not refer to liens upon other real estate which he also devised, and the latter real estate is also to be exonerated from the payment of liens thereon. *Richardson v. Hall* (1878) 124 Mass. 228.

Where the testator did not own a full interest in real estate, which was subject to a mortgage which, in amount, exceeded the personal estate which he had disposed of by will, it was held not to be the intention of the testator that the executor should pay the mortgage indebtedness out of the personal estate, although the will contained a general direction for the payment of the debts of the decedent. *Draper v. Brown* (1908) 153 Mich. 120, 117 N. W. 213.

In *Re Heydenfeldt* (1895) 106 Cal. 434, 39 Pac. 788, where the decedent in his lifetime conveyed by deed in escrow to one of his heirs, real estate, subject to a mortgage thereon, and recited in his will that he had made provision for certain of his heirs, including the one in question, and the will contained a provision that his nonproductive estate should be sold to pay his debts, it was held to be the testator's intention to exonerate the land thus conveyed from a lien thereon, there being sufficient nonproductive property to pay this lien.

It has been held that, where the testator directed the payment of mortgages on his real estate from the personal assets, to the extent that the mortgages are paid out of the personal estate the pecuniary legatees are entitled to stand in the place of the mortgagees. *Wythe v. Henniker* (1833) 2 Myl. & K. 635, 39 Eng. Reprint, 1087, 3 L. J. Ch. N. S. 24; *Forrester v. Leigh*

(1753) 1 Ambl. 171, 27 Eng. Reprint, 114.

*VI. Effect of statutory provisions.*

In *Emuss v. Smith* (1848) 2 De G. & S. 722, 64 Eng. Reprint, 323, it is held that the Wills Act does not affect the course of administering estates, where there has been a specific devise of real estate subject to encumbrances. For under such circumstances the devisee is entitled to have the personal estate applied in payment of the mortgage, in exoneration of the real estate.

According to *Locke King's Act* 1854, where any person dies possessed of an estate in land which at the time is charged with the payment of any mortgage, and such person shall not, by his will, or deed, or other document, have signified the contrary or any other intention, the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt satisfied or discharged out of the personal estate, or any other real estate of such person, but the land so charged shall, as between the different persons claiming through or under the deceased, be primarily liable for all the mortgage debts charged against it. *Re Birch* [1909] 1 Ch. (Eng.) 787, 78 L. J. Ch. N. S. 385, 101 L. T. N. S. 101.

In New York it is provided by statute that whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to the heir or pass to the devisee, such heir or devisee shall satisfy and discharge the mortgage out of his own property, without resorting to the personal representative, unless there is an express direction in the will for the payment of such encumbrances. *Wright v. Holbrook* (1865) 32 N. Y. 587, affirming (1864) 2 Robt. 516, 18 Abb. Pr. 202; *Rice v. Harbeson* (1873) 63 N. Y. 493; *Meyer v. Cahen* (1888) 111 N. Y. 270, 18 N. E. 852; *Fisher v. Fisher* (1850) 1 Bradf. 335; *Taylor v. Taylor* (1854) 3 Bradf. 54; *Waldron v. Waldron* (1856) 4 Bradf. 114; *Taylor v. Wendel* (1857) 4 Bradf. 324; *Rapalye v. Rapalye* (1857) 27 Barb. 610; *Mosely v. Marshall* (1858) 27 Barb. 42; *Wetmore v. Peck* (1882) 66 How. Pr. 54; *Cochrane v. Hawver*

(1889) 54 Hun, 556, 7 N. Y. Supp. 907; *Re McKay* (1900) 33 Misc. 520, 68 N. Y. Supp. 925.

This statute was held to apply to a widow of the testator as to real estate devised to her in lieu of dower, although the real estate was mortgaged to its full value, and she lost it by foreclosure of the lien. *Meyer v. Cahen* (1888) 111 N. Y. 270, 18 N. E. 852.

In *Re Rolph* (1890) 2 Connoly, 191, 9 N. Y. Supp. 293, the widow of the deceased was the administratrix of his estate and the guardian of their children, and she was allowed the amount paid by her out of the personal assets to secure the discharge of a lien upon the real estate, in which the children were interested.

It has been held that the statute is inapplicable to an equitable lien for unpaid purchase money, and that the heir or devisee is entitled to have the same paid out of the personal estate. *Wright v. Holbrook* (1865) 32 N. Y. 587, affirming (1864) 2 Robt. 516, 18 Abb. Pr. 202.

And it has been held that liens against the real estate for improvements thereon, contracted by the testator in his lifetime, are to be discharged out of the personal assets. *Taylor v. Taylor* (1854) 3 Bradf. (N. Y.) 54.

Nor does the statute apply to a mortgage executed to secure a surety on the mortgagor's note, and such note is to be paid out of the mortgagor's personal assets in exoneration of the real estate. *Cochrane v. Hawver* (1889) 54 Hun, 556, 7 N. Y. Supp. 907.

So, where a mortgage on lands was executed to secure a debt of a third person, it is the duty of his executors to use the securities in their hands belonging to the primary debtor for the payment of such mortgage. *Fisher v. Fisher* (1850) 1 Bradf. (N. Y.) 335.

The Indiana act concerning the settlements of estates of decedents, in its general scope, as well as by its specific provisions, makes the personal estate the primary fund for the discharge of all liabilities, whether for debts contracted by the intestate in

his lifetime or liabilities which are primarily encumbrances upon his real estate, including a personal liability to indemnify the grantor for the debt, should he fail to meet the obligation. *Newcomer v. Wallace* (1868) 30 Ind. 216.

In *Darr v. Thomas* (1907) 127 Mo. App. 1, 106 S. W. 95, it is held that a statute prohibiting the payment of

debts against the estate, secured upon real property, until the security has been exonerated by the creditor, construed with reference to other provisions of the statute, is in the interest of unsecured creditors, and is not intended to change the general rule for the payment of all the debts of the testator from the personal assets.

A. G. S.

CHARLES GATES, Appt.,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

*Kentucky Court of Appeals—June 20, 1919.*

(— Ky. —, 213 S. W. 564.)

**Railroad — volunteer to care for injury — liability for negligence.**

1. A railroad company which undertakes to care for an injured trespasser cannot be held liable for negligence in so doing unless the condition of the injured person was made worse by such neglect.

[See note on this question beginning on page 513.]

—liability for injury to trespasser.

2. A railroad company is ordinarily not liable for injury to a trespasser unless it could have avoided the injury with proper care after his peril was discovered.

[See 4 R. C. L. 1050; 22 R. C. L. 924.]

—extent of duty of care.

3. A railroad company which undertakes to care for an injured trespasser is not bound to continue the care until his recovery or death.

—liability for added suffering.

4. A railroad company which, after undertaking to care for an injured trespasser, leaves him without medical attention for hours, cannot be held liable for suffering and additional operations which he endures unless it ap-

pears with reasonable certainty that they would have been avoided by proper care.

—measure of duty.

5. A railroad company which has undertaken to care for an injured trespasser performs its duty by placing him in the care of a competent surgeon or physician, taking him to a hospital or infirmary, or sending him to his family or near relatives.

—liability for added pain.

6. A railroad company which, after undertaking to care for an injured trespasser, leaves him for hours without medical attention which might have been secured, is liable to him for the added pain which is caused solely by its neglect.

**APPEAL** by plaintiff from a judgment of the Circuit Court for Mason County sustaining a demurrer to a petition filed to recover damages for added pain and suffering alleged to have been caused by defendant's neglect while undertaking to care for plaintiff, an injured trespasser, on its train. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. H. W. Cole and A. D. Cole for appellant.

Messrs. Worthington, Cochran, & Browning for appellee.

Quin, J., delivered the opinion of the court:

Does a railroad company, voluntarily undertaking the care of an

injured trespasser, thereby subject itself to liability, if, through its negligence, the injuries are aggravated, or the injured person's condition is made worse? This question, a new one in our state, is presented for our decision by the present record.

The appeal is from a judgment of the lower court sustaining a demurrer to a petition alleging: "That on or about November 15, 1914, while riding with a couple of friends on one of defendant's freight trains on his way to Vanceburg, Kentucky, to obtain employment, he was thrown from said train, falling between the cars, and run over; that his left leg was cut off below the knee, and hung by his skin, and his right leg was badly bruised and mashed, his injuries being serious, but not fatal; that after he had been thus injured and rendered wholly helpless, and was bleeding profusely from both legs, the defendant, its agents and servants, assumed control and took charge of him, and conveyed him from the place of his injury to the city of Vanceburg, Kentucky; that, on arrival at defendant's depot in said city, defendant, its agents and servants, placed him on a cot and conveyed him to the office of its physician and surgeon; that the defendant, its agents and servants, carelessly and negligently allowed him to remain there in an exposed condition, without any surgical attention other than the bandages which its agents and servants carelessly and negligently placed around his legs, for the space of about four hours, and without any other effort to give him relief, although he was all the while protesting against this neglect and informing the defendant, its servants and agents, that he was without money or resources, and that his father and mother were also without money or resources, and that he was at their mercy. Plaintiff further states that after defendant, its agents and servants, had thus kept him in this condition for about four hours, he

was by defendant, its agents and servants, transported to one of defendant's trains and by it carried to its depot in Maysville, Kentucky, and there left without any further effort to procure a physician or surgeon, or other medical aid, and after this exposure and neglect he was, in about four hours after his arrival at defendant's depot at Maysville, Kentucky, taken by charitable friends to Hayswood Hospital, in Maysville, Kentucky, where both of his legs were amputated below the knee; that in consequence of said exposure and neglect he bled profusely before reaching said hospital, and suffered great and unnecessary pain and agony of body and mind; and as a further consequence of said exposure and neglect of defendant, its agents and servants, gangrene set up in his right leg, which made it necessary for him to undergo a second operation, whereby his said leg was amputated above the knee in order to save his life, and that he could and would have been spared great pain and agony of body and mind, as well as said second amputation of his right leg, 'but for defendant's negligent care and attention after it had assumed to take care and control of him.'"

Whether the company was under any legal obligation to furnish medical care and attention to appellant is not involved here, and we express no opinion on same. An examination of the adjudged cases and the textbooks on the subject indicates the closeness of the question to be decided, as they appear to be about equally divided. The following are referred to as sustaining the nonliability of the company.

*Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354, 14 Am. Neg. Rep. 78, where a girl nineteen years of age, after leaving one of appellee's stations, started to cross the company's tracks, and in so doing she fell, and an engine passed over her legs. The fireman ran to the station to notify the station master, who telephoned for a doctor.

The engineer got down from his engine and looked at the girl, but did not start his engine at once, and plaintiff claimed this was unreasonable delay.

*Adams v. Southern R. Co.* 125 N. C. 565, 34 S. E. 642. This case grew out of the refusal of the railroad company to pay a medical bill for services rendered three tramps, who were trespassers, and who were injured when the train ran into a washout and the train and coaches went down. The men were stealing a ride. The injured men were carried to a station about a quarter of a mile distant, and the engineer and conductor engaged the services of plaintiff to attend the injured men. It was held that defendant's servants had no authority to engage physicians to attend trespassers. *Wills v. International & G. N. R. Co.* 41 Tex. Civ. App. 58, 92 S. W. 273, is to the same effect.

In *Riley v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 160 S. W. 595, appellant's son was injured while trespassing, and in attempting to steal a ride on a freight train. Long delay in getting a physician and improper treatment caused the amputation of plaintiff's foot. *Elliott on Railroads*, § 1265i, and *Shearman & Redfield on the Law of Negligence*, 6th ed. § 10, are to the same effect; the text being based on the foregoing decisions.

Summarizing the above it will be found that in the *Griswold Case* a recovery was sought because of the unreasonable delay in rendition of help; the court saying there was no legal duty to give assistance to the injured girl, hence it was not the negligent performance of an assumed care. The *Adams* and *Wills* suits were for the purpose of collecting accounts for medical services rendered trespassers. The facts in the *Riley Case* are quite similar to those here, but the court finds the evidence failed to show that appellee took charge of the injured person.

In this connection it will be seen from the petition in the present

case that recovery is sought because of the negligence of appellee after it had undertaken to care for appellant, therefore the question whether the employees could bind the company in the employment of medical or other aid, or render it liable through the neglect of themselves or those employed by them, is not involved here.

*Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, seems to be the leading case on the subject, and, inasmuch as the facts appear in the opinion, we quote therefrom at length as follows: "As to the conduct of the defendant's agents after the collision, in their treatment of the injured man, though apparently dead, it was strongly indicative of the grossest negligence, and an entire indifference to the most ordinary feelings of humanity. The deceased was taken from the pilot of the engine, apparently dead, though showing no external wound to justify the conclusion that life was in fact extinct. Without notice to his family, or to any person who would take an interest in him, or sending for a physician to ascertain his condition, he was taken into the defendant's warehouse, and there laid on a plank across some barrels and locked up alone all night. It was remarked at the time that the man ought to be examined, and that the place was unfit for him to be placed in. This suggestion, however, was altogether disregarded. The next morning, when the warehouse was opened, it was found that the unfortunate man had, during the night, revived from his stunned condition, and had moved some paces from the spot where he had been laid, and was found in a stooping posture, holding his right leg with his hands, dead, but still warm, having died from hemorrhage of the arteries of his right leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's telegraph office, which was a comfortable building; but the telegraph operator objected, and directed him to

be taken into the warehouse, a place used by the defendant to deposit old barrels and other rubbish. The physician who attended the inquest proved that he thought it likely that the deceased became conscious when reaction set in, there being no apparent injury of the skull or brain. Blood would begin to flow upon the restoration of consciousness, and the party could not have lived more than an hour or two after blood began to flow. From these facts it was clearly competent to the jury to conclude that there was negligence."

And again: "3. We are next brought to the question whether the defendant be liable for the negligence of its agents in their treatment and disposition of the deceased, subsequent to the collision. This we think free from doubt or difficulty. From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of the defendant's engine, in a helpless and insensible condition, and it thereupon at once became the duty of the agents, in charge of the train, to remove him, and to do it with a proper regard to his safety and the laws of humanity. And if, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby the death was caused, there is no principle of reason or justice upon which the defendant can be exonerated from responsibility. To contend that the agents were not acting in the course of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive, or, if alive, whether his life could be saved by reasonable assistance, timely rendered. For such a rule of restricted responsibility no authority has been produced, and we apprehend none can be found. On the contrary, it is the settled

policy of the law 'to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.' 1 Redf. Railways, 510; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 483, 14 L. ed. 502, 508, 10 Am. Neg. Cas. 602. The question as to whether the agents were acting in the course of their employment was submitted to the jury, as was done in the recent case of Whatman v. Pearson, L. R. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649, decided at Easter term, 1868; and the defendant had no right to ask a more favorable disposition of it."

In the later case of Baltimore & O. R. Co. v. State, 41 Md. 268; because of the failure of proper exceptions, the court refrained from expressing any opinion on the subject.

Dyche v. Vicksburg, S. & P. R. Co. 79 Miss. 361, 30 So. 711. This was an action for the death of appellant's father. He was a trespasser, and was injured by being run over by a train belonging to the defendant. After his injury he was taken from under the car and doctors sent for, but none found. It was impossible to convey him to his home in Vicksburg, because traffic had been suspended for the night. He was put on a freight train and carried to a station 18 miles distant, where he was met by the company's doctor, who gave him morphine and bandaged his leg, and left him with a negro boy. The injured man was carried to Vicksburg the next day, on a freight train. He reached Delta, 3 miles from Vicksburg, at 7 o'clock, was carried to a transport boat and ferried back and forth two or more times before being landed; and finally reached the hospital at 3 o'clock in the afternoon, where an operation was performed about 6 or 7 P. M. He died the following day. The physician who performed the operation stated that the delay of the operation

lessened the chances of life, and the operation should have been performed immediately after the injury. A directed verdict for defendant was reversed; the court saying: "It is manifest, as we think, that the railroad company cannot be held liable for the original injury of the father of appellant. We think, too, that it is not liable for any negligence or want of skill of the surgeon at Tallulah, on the facts in this record. Nevertheless, we think the jury should have been permitted to pass on the acts of the company in shipping the helpless man to Tallulah and after they brought him back. Assuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury should have been allowed to pass upon whether or not it performed this duty. It is to be charged with no higher degree of duty than that of ordinary humanity, but the jury must settle that on the facts. We subscribe to the reasoning in the case of Northern C. R. Co. v. State, 29 Md. 439-442, 96 Am. Dec. 545, and think the authority of this case is not disturbed by Baltimore & O. R. Co. v. State, 41 Md. 288 et seq."

Thompson on Negligence, § 1744, and Beach on Contributory Negligence, 2d ed. § 215, approve the doctrine of the above; said decisions being cited in support of the text. See, also, note to Union P. R. Co. v. Cappier, 69 L.R.A. 513.

Kendall v. Louisville & N. R. Co. 25 Ky. L. Rep. 793, 76 S. W. 376, is relied upon by appellee. It was alleged among other things in the petition in this case that after the accident defendant took charge of decedent and assumed to give him all necessary medical attention, but wholly failed to do so, and that he died from lack of proper attention on its part. The witnesses for plaintiff were all employees of the company, and their testimony was directed to the accident and events leading up to it. There was no proof on plaintiff's behalf to support the above allegation. Accord-

ing to defendant's proof, after the accident deceased was at once placed in charge of competent surgeons and every necessary attention given him until his death, two days later. While the court says: "Deceased was plainly a trespasser, and the only duty imposed by law upon the defendant was to avoid injuring him after he had been discovered in a position of peril;" and "being a trespasser at the time of his injury, appellee was under no legal obligation to give him medical attention, but, as a matter of fact, it did put him in charge of competent and reputable physicians and surgeons."

It also states: "The testimony fails to support the charge that the death resulted from a lack of proper attention on the part of the defendant."

Many cases can be found on the subject of the company's duty to employees after injury, but, as this is not the question before us, we will not take the time to discuss them, other than taking the following excerpts from Troutman v. Louisville & N. R. Co. 179 Ky. 145, 200 S. W. 488: "We are also of the opinion that the same measure of duty and care exists when the company undertakes to assume control of the case and take charge of the injured employee, although under the conditions present at the time it might not have been under any duty to furnish such medical aid or attention as would exist in a state of case in which in the first instance it would have been under such duty, because the voluntary assumption of an unrequired burden may impose the same obligations as the assumption of a required duty. . . . The courts have also found much difficulty in settling on a ground on which to rest the liability of the master in cases like this, where there is no contract or statute imposing the duty of taking care of an injured servant. We think, however, it may well be put upon the ground that, as it would be a cruel and inhumane act to leave a helpless servant who was injured in the

course of his employment to suffer or die from want of care and attention, there is an obligation growing out of the relation of master and servant that puts upon the master the duty of taking such reasonable care of the servant as the existing circumstances will permit. The relation of master and servant does not terminate the very moment the servant, on account of some injury received in the course of his employment, is made incapable of performing his duties, and the master, in the face of such a misfortune, no matter whose fault caused it, must exercise the same reasonable care to save the servant from further harm or death that he would be required to exercise if the servant had not been injured. If the master cannot, without incurring liability, wantonly, recklessly, or negligently inflict harm on the servant while in the performance of his duty and when he is able to look out for himself, neither should he be allowed to wantonly or negligently abandon him to suffer or die when he is helpless and dependent, merely because he has been injured. The duty of the master should not end with the injury, but continues until the emergency created by the injury has passed, and until the servant has been placed where he will receive such reasonable care and attention as his injury demands and the surrounding circumstances will permit."

This case cites with approval *Northern C. R. Co. v. State*, supra.

Analogous to the subject under discussion is the duty of railroad companies to drunken persons; for example:

*Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, 10 Am. Neg. Rep. 60. Here the servants of the company ejected a trespasser in a drunken and helpless condition in a deep cut on a dark night, where he was killed by a train which followed, as the servants had reason to believe he would be; the railroad was held liable for his death, though the place at which

he was ejected was a place at which he entered the train. The court holds that if the company's agents, to wit, superintendent and agent, knew of decedent's plight and failed to exercise ordinary care to save his life by notifying those in charge of the train soon to pass over the tracks, and those in charge of said train could, without hazard to the lives of passengers on it, avoid running over him, the company was liable.

*Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286, presents similar facts. Defendant was drunk, failed to pay his fare when demanded, was removed in a deep snow, and fell and lay in it until he was badly frozen, thereby losing some toes, fingers, and part of his heel. The company was held liable. To same effect is *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979.

*Cincinnati, N. O. & T. P. R. Co. v. Marrs*, 119 Ky. 954, 70 L.R.A. 291, 115 Am. St. Rep. 289, 85 S. W. 188. Where employees of a switch crew of a railroad company saw a passenger of another company aroused from his stupor and put out of the car on the depot platform, and a few minutes later found him drunk and sleeping between the tracks, in their switchyard, it was their duty either to see him safely out of the yard, or to watch out for him as the engine moved about; and, having done neither, but merely aroused him and started him walking in the direction of the road, and shortly after run over him on a track, where he had again gone to sleep, their employer railroad company was held liable for his death.

Ordinarily a railroad company owes no duty to a trespasser until his peril is discovered, and is not liable for an injury to him, unless, after his peril is discovered, the injury to him may be avoided with proper care. It is not claimed appellant's peril was discovered in time to have prevented

**Railroad—liability for injury to trespasser.**



(— Ky. —, 213 S. W. 564.)

the injury; but his cause of action is predicated upon appellee's negligence in leaving him unattended for about four hours at Maysville, after having undertaken to care for him, and because of this fact the second amputation was made necessary.

Unless the acts complained of aggravated the injury, or made his condition worse, clearly the company would not be liable. Having assumed charge of appellant, as alleged in the petition, it was not incumbent upon appellee to continue to care for the injured man until he recovered or was removed by death. No such duty should be imposed. But, having undertaken to care for him, it must do so in a proper manner and without negligence.

—volunteer to care for injury—  
liability for negligence.

—extent of duty of care.

It is possible appellant would have suffered just as much, and the second amputation would have been necessary, even though he had received prompt and proper attention. That he suffered or was compelled to undergo the second operation does not of itself fix liability upon appellee. The burden is on appellant to show, with reasonable certainty, that, had he received proper care, the additional pain, suffering, and second amputation could have been avoided. This may be difficult of proof, but the rights of the company must not be guessed away; there must be some evidence to support the allegation of the petition. Had appellee, with due care and diligence, after taking charge of appellant, placed him in the care of a competent surgeon or physi-

—liability for added suffering.

cian, or taken him to a hospital or infirmary, or sent him to his family or near relatives, and stopped there, its duty and obligation to the injured man would have then ceased; more it could not be compelled to do.

We are mindful of the argument that, in ordering a reversal of the case, we will be establishing a doctrine which will allow an action against a good Samaritan and let the priest and Levite go free. But such is not the case; just the contrary being true. From the narrative as recorded by the Gospel writer, we find that the necessities of the one who had been so roughly handled by the thieves, on his way from Jerusalem to Jericho, were well and carefully attended to, his wounds were bound, oil and wine poured in, transportation furnished, and lodging provided; this kind of treatment negatives any suggestion of negligence.

Appellant had the right to assume that, having undertaken control of him, appellee would care for him in a proper manner. Answering, then, the question presented by this appeal, we are of the opinion the petition states a cause of action, and that appellee rendered itself liable for such additional or further pain, caused solely by its neglect, after it had undertaken to care for appellant. This is not more a rule of justice than a dictate of humanity.

The judgment is reversed, with instructions to overrule the demurrer to the petition and for further proceedings not inconsistent with the views herein expressed.

—liability for added pain.

## ANNOTATION.

### Duty and liability of one who voluntarily undertakes to care for injured person.

It is the purpose of this note to include only those cases which discuss the liability of a stranger who voluntarily assumes the care of an injured

person. It does not include the cases in which an employer voluntarily and gratuitously employs medical assistance for an injured employee; or cases

wherein a carrier voluntarily and gratuitously furnishes medical assistance for injured passengers; or cases of contractual duty. It also excludes the liability of charitable hospitals or free dispensaries to patients therein gratuitously treated.

When one voluntarily assumes the care of an injured person, he is charged with the duty of common or ordinary humanity to provide proper care and attention; and the breach of that duty constitutes actionable negligence. *Kendall v. Louisville & N. R. Co.* (1903) 25 Ky. L. Rep. 793, 76 S. W. 376; *Northern C. R. Co. v. State* (1868) 29 Md. 420, 96 Am. Dec. 545; *Dyche v. Vicksburg, S. & P. R. Co.* (1901) 79 Miss. 361, 30 So. 711; *New Orleans & N. E. R. Co. v. Humphreys* (1914) 107 Miss. 396, 65 So. 497. And see the reported case (*GATES v. CHESAPEAKE & O. R. Co.* ante, 507).

In *Dyche v. Vicksburg, S. & P. R. Co.* (1901) 79 Miss. 361, 30 So. 711, it appeared that a person boarded a caboose which was awaiting the make-up of a freight train, to ask permission to ride. Being refused, he came out and stood on the track at a position immediately in the rear of the caboose. A kicking switch was made, by which several cars were rolled down the track, and struck the caboose on the opposite side from which he was standing, causing the caboose to run over his leg. He was removed from under the car, and messengers were sent for a doctor, but none was found. There was a hospital across the river, but it appeared that there was no way of carrying the injured man across that night, so he was placed aboard the freight train and carried to a station about 18 miles away. There he was met by one of the railroad's doctors, who applied the necessary bandages. The following day, on the suggestion of the doctor, the injured man was sent back to the town where the injuries were received, to be carried to the hospital across the river. It appeared that he was ferried back and forth across the river several times before he was finally removed to the hospital. Later in the evening, his leg was amputated, from

the effects of which he died. It was testified that the delay in operating greatly lessened the chances of recovery, and that an operation should have been performed immediately after the accident. In an action to recover damages for the negligent treatment of the injured person after the railroad company had voluntarily assumed charge of him, the lower court directed a verdict for the defendant. On appeal it was held that, while the railroad company could not be held liable for the original injury, nevertheless it was charged with the duty of common humanity, and the jury should be allowed to pass on whether it had fully performed that duty.

In *Northern C. R. Co. v. State* (1868) 29 Md. 420, 96 Am. Dec. 545, it appeared that a man was taken from the pilot of the engine, apparently dead, though showing no external wound to justify the conclusion that life was extinct. No notice was given to his family and no physician was called, but he was laid on a plank in a warehouse and left alone all night. The next morning it was found that he had revived during the night and had moved several paces from the spot where he was laid. He was found in a stooping position with his hands on his legs, dead, but still warm, having died from a hemorrhage of the arteries of his leg. It was testified that it was probable that he regained consciousness, whereupon his blood began to flow, and that the loss of blood caused his death. The question presented was whether the railroad was liable for the subsequent conduct of its agents in not properly caring for the injured man after having assumed his care. It was held that the facts constituted negligence on the part of the company for which the company was liable.

But where the facts disclose that the duty of common or ordinary humanity to provide proper care and attention has been performed, no liability attaches. Thus, in *New Orleans & N. E. R. Co. v. Humphreys* (1914) 107 Miss. 396, 65 So. 499, an injured man was found on the pilot or "cowcatcher" of the engine with a shattered leg,

absolutely helpless. The theory was that he was stealing a ride, and that the train struck an animal on the track, which was thrown on the pilot and caused the injury. He begged to be taken to his home at Hattiesburg, a station in the same direction that the train was traveling. A fast freight was following the passenger train, and was due in about thirty minutes, but on that night was about an hour late. The train crew refused to carry the injured man on the passenger train, and instead left him at the station in the care of a doctor, to be taken to Hattiesburg, his home, where there was a hospital, by the fast freight. After his arrival at the hospital his leg was amputated, but later he died. In an action to recover damages for the failure to provide more prompt and skilful treatment, that failure being alleged in not carrying the injured man to the hospital at Hattiesburg on the passenger train, it was held that, at the most, the railroad company was charged with no higher duty than ordinary or common humanity, and that, under the facts, that duty had been performed. The court said: "The theory seems to be that when the employees of the railroad removed the wounded trespasser from the pilot of the locomotive and placed him on the platform, it became the duty of the railroad company to do everything possible to insure the comfort and safety of the trespasser. At the most, if the railroad company assumed charge of the injured man, it was charged with no higher duty to him than ordinary or common humanity. It is clear that the train was not equipped to care for a man injured as this man was, and it is also clear that he could not have had the care of a skilled surgeon if he had been taken

away on the passenger train. It will be assumed that train crews could not know what was best for the man, and surely, when they called a physician, who it is presumed did know, and placed him in charge of the physician, it cannot be said that they did not treat him with common humanity. From our standpoint, the railroad employees did what was apparently the proper thing to do; and, even if they did not, there is nothing in their actions to authorize one to believe that they ignored the dictates of common humanity. In reversing this case we have assumed that the railroad company was under duty to treat the trespasser with ordinary humanity, and, further, that it assumed charge of him when they took him from the locomotive. If a mistake was made, it was a mistake of judgment, and for this mistake the railroad is not liable."

And in *Kendall v. Louisville & N. R. Co.* (1903) 25 Ky. L. Rep. 793, 76 S. W. 376, it appeared that a trespasser went under a train, to which no engine was attached, to escape the rain. While there an engine was coupled to the train, and when the train started he was run over and seriously injured. He was immediately placed in the care of competent surgeons, and every necessary attention was given him until his death, two days later. An action was brought, alleging that the defendant assumed to give the injured man all necessary medical attention, but wholly failed to do so, and that he died from lack of proper attention on its part. It was held that the facts failed to show that the death resulted from the lack of proper attention on the part of the railroad after it assumed the care of the injured man, and that therefore no liability attached. A. S. M.

W. K. HENDERSON, Jr., et al., Appts.,  
v.

CITY OF SHREVEPORT.

*Louisiana Supreme Court—June 7, 1915.*

(137 La. 667, 69 So. 88.)

**Election — submission of proposition.**

1. There is but one definite proposition submitted to property taxpayers where the vote is taken as to whether the municipality will or will not purchase and extend an existing system or construct a waterworks and sewer system for the city.

[See note on this question beginning on page 538.]

**— publication of notice.**

2. A notice of election by a municipality, to issue bonds under article 281 of the Constitution for the purpose of purchasing and constructing a system of waterworks, etc., must be published for thirty days in the official journal of the municipal corporation, if there is one.

[See 19 R. C. L. 997.]

**Notice — publication — what sufficient.**

3. Four weeks' publication in a newspaper constitutes a publication for thirty days, provided thirty days intervene from the date on which the publication is first inserted and the day on which the election takes place.

Headnotes by SOMMERVILLE, J.

APPEAL by plaintiffs from a judgment of the First Judicial District Court for the Parish of Caddo (Land, J.) in favor of defendant in a suit to have an election on the question of incurring debt and issuing bonds for the purchase and construction of a waterworks and sewerage system declared a nullity. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Wise, Randolph, Rendall, & Freyer for appellants.

Messrs. L. C. Butler and Foster, Looney, & Wilkinson for appellee.

Sommerville, J., delivered the opinion of the court:

This suit is by certain taxpayers and residents of the city of Shreveport to have declared a nullity an election held in that city on August 20, 1914, on the question of incurring debt and issuing negotiable bonds in the amount of \$1,200,000, for "the purchase and extension, or construction, of a waterworks and sewerage system" in that city.

The plaintiffs charge: (1) That the legal notice of election required by the Constitution had not been given, and (2) that the proposition submitted to the voters was not authorized.

The defendant answered, putting at issue these two questions.

There was judgment in favor of the defendant, and plaintiffs have appealed.

Plaintiffs assign as errors that the trial court erred in deciding that publication of the notice of the election in the issues of the official organ of the city of Shreveport, of date July 17, 24, 31, and August 7, 1914, constituted the thirty days' notice required by the Constitution.

Further, that the court erred in holding that there was a proper submission to the voters.

Under article 281 of the Constitution of 1898 and the amendments thereto, and under the same article of the Constitution of 1913, thirty days' notice is called for.

The language of the article, in part, is: "After due notice of said

election has been published for thirty days in the official journal of the municipal corporation or where there is no official journal, in a newspaper published therein." And further: "No bonds shall be issued for any other purpose than that stated in the submission of the proposition to the taxpayers, and published for thirty days as aforesaid."

It was established on the trial that the only notice of the election was the mayor's proclamation which appeared in the Shreveport Journal in its issues of July 17, 24, 31, and August 7, 1914. The defendant contends that this constitutes a publication for thirty days, within the constitutional provisions, while plaintiffs contend that it does not.

The judge of the trial court adopted the view of the defendant.

Section 3 of Act No. 256 of 1910 solves the point at issue in favor of the defendant by providing: "Four weeks' publication in a newspaper shall constitute a publication for thirty days, provided thirty days intervene from the date on which the publication is first inserted and the day on which the election takes place."

But plaintiffs contend that the legislature was without authority to define a "publication" and say that "four weeks'" publication in a newspaper shall constitute a publication for thirty days, etc., when the Constitution provides that due notice of said election shall be published for thirty days in the journal of the municipal corporation or parish, and, again, that the proposition of the taxpayers must be published for thirty days as aforesaid.

The interpretation of the language of the Constitution contended for by plaintiffs, that the notice of election should be published for thirty days (that is, thirty consecutive days) might well render the constitutional right to make public improvements, and issue bonds therefor, without effect in many places in the state. For instance, in places

in which a daily newspaper is not published, it would be impracticable to publish a notice for thirty consecutive days where there was no publication of a newspaper on Sunday, or where the issue of the paper appeared only once or twice a week.

The question appears to be settled adversely to the position assumed by defendant in the decision of the cause entitled *Lower Terrebonne Ref. & Mfg. Co. v. Terrebonne Parish*, 115 La. 1019, 112 Am. St. Rep. 291, 40 So. 443. There the official journal of the parish of Terrebonne was published every Saturday, and the court held that a publication every Saturday during thirty days was sufficient.

There is no conflict between the constitutional provision and § 3 of Act No. 256 of 1910, quoted above. The act defines what a publication for thirty days consists of, and the legislature had the right to interpret the Constitution. It says: "Four weeks' publication in a newspaper shall constitute a publication for thirty days," etc.

Four weeks intervened from the date on which the first publication of the election to be held in Shreveport was inserted and the day on which the election took place. The notice appeared once in each week, and that was sufficient. The law was complied with. The second error assigned, that the court erred in holding that there was a proper submission of the question to the voters, is based upon the allegation that the proposition submitted was an indefinite one. Plaintiffs contend that two propositions were really submitted to the voters, without an opportunity being given to vote separately on them. They argue that the proposition submitted was as to the purchase or construction of a system of waterworks, etc.; that the purchase of such a system is a different thing from the construction of one; that a property holder might be willing to vote for the issuance of bonds for the purchase and extension of, but be un-

Election—  
publication of  
notice.

Notice—  
publication—  
what sufficient.

willing to vote for the issuance of bonds for the construction of, such a system, or vice versa; that if property taxpayers voted in the affirmative, they could not tell whether the waterworks plant would be purchased or constructed.

There is some authority for this contention of plaintiffs; but Mr. McQuillin says, in § 2198 of his work, that the weight of authority is to the contrary.

There was but one proposition submitted to the property holders of Shreveport, and that was the ownership vel non of a waterworks system. The proposition submitted to the voter, to vote "yea" or "nay," was the question: "Shall the city own and operate its waterworks system?" It was merely a question of municipal ownership. As to whether the city should buy or build is a matter of detail and of business judgment, which rests with the council of that city.

This view is supported by the decisions in the case of *C. B. Nash Co. v. Council Bluffs* (C. C.) 174 Fed. 182, and in *Sioux Falls v. Farmers' Loan & T. Co.* 69 C. C. A. 373, 136 Fed. 721.

The ballot submitting the question to the voter follows the language of the Constitution, which says that bonds shall not be issued for any other purpose than for purchasing and constructing systems of waterworks, sewerage, etc., except that the disjunctive "or" was used instead of the copulative "and." The language suggests one purpose. Under it, the municipal authorities may do one or both. The detail application of the proceeds of the sale of the bonds, for the purposes for which they were authorized, is left to be controlled by the discretion of the municipal authorities. *Gray v. Bourgeois*, 107 La. 671, 32 So. 42.

Plaintiffs argue on their briefs that the ordinance provides that a ratification by the "people" shall be

had before the bonds are issued for any plan to acquire or extend a water system, or to construct a new one; but that point was not assigned by plaintiffs as an error. They say that the people of the city of Shreveport can have no voice in imposing taxes on property for the payment of bonds issued for permanent public improvements; that only taxpayers can vote at tax elections. But the ratification or method of referendum has nothing to do with the issuance of the bonds. It is simply a feature of the commission form of government, as it exists in the city of Shreveport. The section of the ordinance directing that the matter shall be submitted to the people did not take anything from the validity of the bonds. The taxpayers may determine that the bonds shall be issued for the purpose of purchasing or constructing a waterworks system. The council has the right to determine which is to the best interest of the city. If the council has that right, it would have the right under the charter, to submit that question to the people to decide. But the matter is not before the court. It has not been assigned as an error; and the council has not submitted any proposition to be ratified by the "people."

Judgment affirmed.

Petition for rehearing denied, June 29, 1915.

#### NOTE.

The holding in the reported case that a proposition submitted to taxpayers to purchase and extend an existing system, or to construct a system, is a single proposition, is in accord with the majority view, as is shown in the annotation beginning at p. 538, post, under the title, "Proposition submitted to people with reference to erection or purchase of plant or other public utility as single or double proposition."

CITY OF ALBUQUERQUE  
v.  
WATER SUPPLY COMPANY, Appt.

*New Mexico Supreme Court—July 10, 1918.*

(24 N. M. 368, 174 Pac. 217.)

**Bonds — submission to voters — dual proposition.**

1. A submission by a city council to the voters of such city of a proposition to issue bonds in a stated amount for the purchase or erection of a system of waterworks for such city is not a double proposition, and does not fall within the rule announced in the case of *Lanigan v. Gallup*, 17 N. M. 627. Such a proposition is to be construed, in substance, as a proposition to acquire a waterworks system, either by purchase or construction.

[See note on this question beginning on page 538.]

**—election notice — sufficiency.**

2. Section 3717, Code 1915, requires that the notice of election for the purpose of voting upon a bond issue for the purpose of providing funds for the purchase or erection of a system of waterworks shall be published "at least once a week for four consecutive weeks immediately prior to said election." Held, that a notice of election published once a week for four consecutive weeks, the last insertion being thirteen days prior to the election, substantially complies with the statute.

[See 9 R. C. L. 993.]

**—irregularities in election — effect.**

3. Where an election is held under authority of an order of the proper authorities, and in the main conforms to the requirements of the statute, though wanting in some particular not essential to the power to hold such an election, and is acquiesced in by the people and approved by their agent, such irregularities do not render the bonds thus issued void.

[See 19 R. C. L. 997.]

**—want of effect on result.**

4. Mere irregularity in connection with an election in the case of the notice will not of itself invalidate the election, but it must further be shown that, if the statute had been strictly complied with, the results would have been different.

[See 19 R. C. L. 997.]

**—notice of sale — publication.**

5. Section 3719, Code 1915, requires publication of a notice of sale of the bonds issued by a municipality for the

purpose of providing funds for the purchase or erection of a system of waterworks, to be at least once each week for four consecutive weeks immediately prior to the date of opening the bid. Held, that such statute is substantially complied with, although the last insertion of the notice is eleven days prior to the sale of the bonds.

**—succession in office — effect.**

6. The government of a municipality is a continuing one, and, while the personnel of officers changes, the office itself continues, and an act initiated by one individual as a city officer, for and on behalf of the city, may be completed by his successor in office. Held, that bonds properly signed by officers of a city, who were such officers at the date of signing the bonds, were not rendered invalid by reason of the fact that the sale of the bonds was not concluded by such officers, but by their successors in office.

[See 19 R. C. L. 1022.]

**Tax — for water bonds — consent of Tax Commission.**

7. Chapter 74 of the Laws of 1915, which requires the approval of the State Tax Commission to a proposed increase of the rate of taxation of a municipality, where such rate amounts to more than 5 per cent in excess of the amount raised by tax levies within such municipality during the preceding year, has no application to levies made for the purpose of providing funds for the payment of the principal and interest on bonded indebtedness. Hence it was not necessary for the city

of Albuquerque to secure the approval of the State Tax Commission to the tax proposed to be laid for the purpose of providing for the payment of the principal and interest on bonds issued to purchase a waterworks system.

**Municipal corporation — ordinance — approval.**

8. Section 3624, Code 1915, requires the mayor of a city to indorse the word "Approved" on a resolution, ordinance, or other legislative action of the city council, and to sign the same. Held, that the word "Approved," followed by a blank line for the purpose of writing therein the date of the approval, and signed by the mayor, complied with the statute in this regard.

[See 19 R. C. L. 892.]

**— unconstitutional charter — effect.**

9. A municipal corporation, created under an unconstitutional charter, is a de facto corporation, and its officers are de facto officers. The existence of the corporation, and its right to make contracts and transact business as such corporation, cannot be raised collateral-

ly. The existence of such municipality can only be questioned by the state in a direct proceeding instituted by the attorney general for that purpose, and until the question is thus raised, and an adjudication had, ousting the corporation from exercise of the franchise, all acts done and contracts made by the officers of such a de facto municipality are as valid and binding upon it and the property within its limits as though such officers were de jure officers of a de jure corporation. For this reason it is unnecessary to determine the constitutionality of chapter 86, Laws 1917, under which the present charter of the city of Albuquerque was framed.

[See 19 R. C. L. 703.]

**— power to purchase waterworks.**

10. Incorporated cities, towns, and villages in the state of New Mexico have authority to purchase waterworks systems for the purpose of supplying water to the inhabitants of such city, town, or village.

[See 19 R. C. L. 717, 718, 788-790.]

**APPEAL** by defendant from a judgment of the District Court for Bernalillo County (Raynolds, J.) in favor of plaintiff in a suit to compel defendant to accept certain water supply bonds in payment of the purchase price of a waterworks system. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Alonzo B. McMillen, for appellant:

The ordinance authorizing the issue of bonds and submitting the question to the vote of the people was illegal and insufficient.

Lanigan v. Gallup, 17 N. M. 627, 131 Pac. 997; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335.

The notice of the election was not published in the manner required by law.

Ardmore v. State, 24 Okla. 862, 104 Pac. 913; Phillips Invest. Co. v. School Dist. 26 Colo. App. 362, 144 Pac. 1129; Paine v. Seattle, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580; Rands v. Clarke County, 79 Wash. 152, 139 Pac. 1090; Commissioners Ct. v. State, 151 Ala. 564, 44 So. 465; Hearn v. Blount County, 182 Ala. 392, 62 So. 535; Hicks v. Krigbaum, 13 Ariz. 237, 108 Pac. 482; Board of Education v. Citizens' Nat. Bank, 23 N. M. 205, 167 Pac. 715; Barry v. Board of Education, 23 N. M. 465, 169 Pac. 314.

Assuming that the bonds in question were properly executed by the former mayor, treasurer, and clerk, the commissioners under the new form of government have no power to complete the transaction by sale and delivery.

Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918E, 574; McQuillin, Mun. Corp. §§ 323 et seq.; Dill. Mun. Corp. 4th ed. § 308.

Mr. W. A. Keleher, for appellee:

The question submitted to the voters by ordinance 570 contained but a single proposition, and was not dual in nature.

C. B. Nash Co. v. Council Bluffs, 174 Fed. 182; Linn v. Omaha, 76 Neb. 552, 107 N. W. 983; Stern v. Fargo, 26 L.R.A.(N.S.) 667, note; State ex rel. Canton v. Allen, 178 Mo. 555, 77 S. W. 868; Ryan v. Tuscaloosa, 155 Ala. 479, 46 So. 638.

Adequate and substantial notice of the bond election was given to the voters of Albuquerque.

Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528; Myers v. Dunn, 126 Ky. 548, 13 L.R.A.(N.S.) 881, 104 S. W.



352; *Ardmore v. State*, 24 Okla. 862, 104 Pac. 913; *Grove v. Haskell*, 24 Okla. 707, 104 Pac. 56; *Ellis v. Karl*, 7 Neb. 381; *Dishon v. Smith*, 10 Iowa, 212; *McCrary, Elections*, 4th ed. ¶ 179; *Board of Education v. Citizens' Nat. Bank*, 23 N. M. 205, 167 Pac. 715; *Barry v. Board of Education*, 23 N. M. 465, 169 Pac. 314.

The water supply bonds having been duly executed, and all requirements of the statute having been complied with by the proper officers in office at the time of their issue and execution, the fact that such bonds were sold and delivered to purchasers by newly elected officers does not affect the legality of their issue, and such sale is valid and binding upon the municipality.

*Gage v. McCord*, 5 Ariz. 227, 51 Pac. 977; *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *O'Neill v. Yellowstone Irrig. Dist.* 44 Mont. 492, 121 Pac. 283; *Halsey v. Gillett*, 156 Cal. 114, 103 Pac. 339.

It was not necessary for the valid exercise of the power to levy a tax for the interest and sinking fund of these bonds, to file a special request with the State Tax Commission, or that the State Tax Commission should approve such levy.

*Ottumwa v. City Water Supply Co.* 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315; *Swanson v. Ottumwa*, 118 Iowa, 161, 59 L.R.A. 620, 91 N. W. 1048.

The action of the legislature in authorizing municipalities of a certain class or population, to adopt a charter of their own making, subject to specified limitations, was constitutional.

*Eckerson v. Des Moines*, 137 Iowa, 452, 115 N. W. 177; *State ex rel. Baughn v. Ure*, 91 Neb. 31, 135 N. W. 225; *State ex rel. Simpson v. Mankato*, 117 Minn. 458, 41 L.R.A. (N.S.) 111, 136 N. W. 264; *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

Municipal corporations in New Mexico are vested with adequate power to acquire, by purchase or otherwise, a system for supplying water for the inhabitants thereof.

*Lake Charles Ice, Light & Waterworks Co. v. Lake Charles*, 106 La. 65, 30 So. 389; *Memphis v. Memphis Water Co.* 5 Heisk. 495; *Grace v. Hawkinsville*, 101 Ga. 553, 28 S. E. 1021; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; *McQuillin, Mun. Corp.* § 1782.

*Roberts, J.*, delivered the opinion of the court:

This suit was instituted in the court below by appellee against the appellant, to compel appellant to accept \$400,000 of bonds of the city of Albuquerque in payment for its pumping station, water mains, and certain other property used in connection with supplying the inhabitants of the city of Albuquerque with water. The refusal on the part of the appellant to accept the bonds and complete the contract hereinafter referred to was based solely upon objections raised to the validity of the bonds. This action was instituted by the city to compel appellant to comply with its contracts of sale, and to accept the bonds in question in payment of the purchase price of the waterworks system.

The facts, briefly stated, are as follows: Proceedings for the issuance of \$400,000 of bonds of the city of Albuquerque, for the purpose of purchasing or erecting a system for supplying water to the city of Albuquerque and its inhabitants, were initiated in February, 1916, and the bonds were authorized by vote of such qualified electors of the city of Albuquerque as had a property tax in said city during the preceding year, on April 4, 1916. On May 21, 1917, the appellant Water Supply Company, a corporation which had theretofore owned and been operating a waterworks system for the city of Albuquerque under a franchise and the city of Albuquerque through its common council, entered into a contract by which the Water Company agreed to sell, and the city agreed to buy, certain property of the Water Company described in said contract. The Water Company, on its part, agreed to accept the fair and reasonable cash value of said property as a going concern, to be determined by three disinterested expert engineers, trained in the valuation of public utilities such as the Water Supply Company, one to be chosen by the

Water Company, one to be chosen by the city, and one to be chosen by the chief justice of the supreme court of New Mexico, the award of a majority of said arbitrators to be taken as the value of said property, and to be binding upon the parties, their successors and assigns; but it was provided, however, that the city should not be bound to purchase said property if the valuation fixed by the arbitrators should exceed the sum of \$400,000. The arbitrators were chosen in the manner provided by the contract, and fixed the valuation of said property at the sum of \$453,591. Prior to the contract in question, to wit, on April 4, 1916, there had been submitted to the qualified electors of the city who had paid a property tax in said city during the preceding year, as stated, the question of the issuance of \$400,000 of bonds of the city for the purpose of purchasing or erecting a system for supplying water. After the report filed by the arbitrators, the Water Company offered to donate to the city so much of the valuation as was in excess of \$400,000, and to accept from the city the sum of \$400,000 in full payment of such contract.

Thereupon a second contract was entered into by which the city and Water Company made a final contract, the former to buy and the latter to sell the property of the Water Company to the city for the sum of \$400,000, and to deliver a deed for the property upon the payment of that sum; and it was further agreed that, at the designated time and place for the sale by the city of Albuquerque of the \$400,000 bonds, the proceeds of which were to be used to finance the purchase by the city, the Water Supply Company would bid par and accrued interest to date of delivery for such bond issue, and carry out in good faith the obligation thereby incurred, in the event said bid should be accepted by the city. There were other matters in said contract not important in the consideration of the issues involved in this suit. The

bonds were offered for sale on the 17th day of December, 1917, at which time the Water Company bid par and accrued interest for the same. There was no equal or higher bid for such bonds.

The complaint in the present suit set out the contract above referred to, and there was filed with the complaint a complete transcript of the proceedings for the issuance of said bonds. The appellant filed its answer, setting out in detail the legal objections urged against the validity of said bonds, and alleged its readiness to accept the same and convey said property, provided said bonds were adjudged to be legally issued and binding obligations upon the part of the city of Albuquerque. The bonds in question were dated December 1, 1917, and were duly executed by Henry Westerfeld as mayor, Thomas Hughes as city clerk, and Warren Graham as city treasurer, and it was admitted that they were such officers at the time of the execution of the bonds in question.

The legislature of 1917 enacted chapter 86, Laws 1917, which authorized cities having more than 10,000 inhabitants to adopt a charter, providing for such a city such a form of government as might be deemed expedient and beneficial to the people, including the manner of appointment or election of its officers. Albuquerque is a city of more than 10,000 inhabitants, and under this act adopted what is known as a commission form of government, under which an election was held, and three commissioners, provided for by the charter, were elected. These commissioners assumed office on the 4th day of December, 1917. The sale of the bonds had been advertised to take place on December 17, 1917, and the sale was conducted by the said commissioners. The lower court held that the bonds were legal and valid, and that the city was entitled to the specific performance of the contract. Appellant, in this court, presents the various objections re-

lied upon in the lower court to the validity of the bonds, and they will be stated and considered in the order presented in appellant's brief.

Section 13 of article 9 of the state Constitution, which limits the amount of indebtedness which a city, town, or village may contract, specifically exempts debts contracted for the purpose of the construction or purchase of a system for supplying water, from the operation of the limitation. In other words, under the Constitution, there is no limitation imposed upon the amount of indebtedness which may be contracted for such purpose.

The bonds in question were issued under the provisions of §§ 3716 to 3722, Code 1915, inclusive, which were enacted by the legislature in 1912, pursuant to the constitutional provisions regulating the issuance of bonds. Section 3716 authorizes any incorporated city, town, or village, "subject to the limitations and in accordance with the provisions of article 9 of the Constitution, to issue negotiable bonds for the purpose of securing funds for the construction or purchase of a system for supplying water, or of a sewer system for such city, town, or village." Section 3717 reads as follows: "That before any bonds shall be issued, the city council or board of town or village trustees, as the case may be, shall cause the question of issuing such bonds to be submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year; said election to be held at the same time as a regular election for councilmen, aldermen or other officers of such city, town or village, by ballots deposited in a separate ballot box. Said city council or board of town or village trustees shall cause to be published at least once each week for four consecutive weeks immediately prior to said election in a newspaper of general circulation published therein, or if no newspaper is published therein, shall cause to be posted not less than twenty-five not more than thirty

days before said election, in not less than eight public places within such city, town or village, a notice of the time and place or places of holding such election, and the purpose or purposes for which such bonds are to be issued.

"The ballots cast at such election on said question shall have printed or written thereon the words, 'For waterworks (or sewer) bond issue,' or 'Against waterworks (or sewer) bond issue,' as the case may be; and such ballots shall be of uniform size and color."

Section 3718 has to do with the canvass of the vote, and authorizes the issuance of the bonds in case a majority of those voting on the question shall have voted in favor of creating such debt. Section 3719 provides for the denomination of the bonds, rate of interest, and time of payment, and provides: "And they [the bonds] shall be signed by the mayor of any such city or town . . . and by the city, town or village clerk: . . . Provided, further, that such bonds shall be sold at not less than par and accrued interest to date of delivery, for cash only, to the highest and best bidder, after publication of notice at least once each week for four consecutive weeks immediately prior to the date of opening bids therefor in one newspaper published in or of general circulation in such city or town or village, and also in one newspaper published at the state capital, and one leading financial newspaper published in the city of New York, state of New York, stating the amount, rate of interest, time of maturity and conditions of such bonds. . . ."

Section 3720 is as follows: "The city council or board of town or village trustees is hereby authorized and required to levy and collect upon all the taxable property within such city, town or village subject to taxation, such taxes as may be necessary to pay the interest and principal of said bonds, and shall provide a proper sinking fund for

the redemption of said bonds at maturity."

Section 3721 is not important in the consideration of the questions involved herein.

The first objection made to the validity of the bonds is that the ordinance authorizing the issue of bonds and submitting the question to the vote of the qualified electors contained a double proposition, and was therefore invalid under the decision by this court in the case of *Lanigan v. Gallup*, 17 N. M. 627, 131 Pac. 997. The ordinance in question follows the wording of the statute, and provides for the issue of \$400,000 of the negotiable bonds of the city of Albuquerque, "for the purpose of securing funds for the construction or purchase of a system for supplying water to the city of Albuquerque and its inhabitants." It provided that the ballots cast at such election should have printed thereon the words, "For waterworks bond issue," and "Against waterworks bond issue." These provisions seem to have followed the exact wording of the statute, but the question is raised as to whether or not it is legal to submit upon a single ballot the question of issuing bonds for the construction or purchase of a system for supplying water; in other words, whether it is submitting a double proposition.

Appellant argues that there is a division of authority upon the proposition, some courts holding that a submission to the electors of the proposition to issue bonds for the "purchase or erection" of waterworks system is a joint proposition, and such was held by the supreme court of Kansas in the case of *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, and by the Ohio supreme court in the case of *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335. The weight of authority, however, is to the effect that such a proposition is to be considered, in substance, as a proposition to acquire a waterworks system or other improvement,

either by purchase or construction, and that such submission is not invalid as submitting either a double or alternative question. *Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590; *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722; *Clark v. Los Angeles*, 160 Cal. 317, 116 Pac. 966; *C. B. Nash Co. v. Council Bluffs (C. C.)* 174 Fed. 182; *State ex rel. Canton v. Allen*, 178 Mo. 555, 77 S. W. 868; *State ex rel. Columbia v. Allen*, 183 Mo. 283, 82 S. W. 103; *Hurd v. Fairbury*, 87 Neb. 745, 128 N. W. 638; *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481; *Wood v. Ross*, 85 S. C. 309, 67 S. E. 449. In the *Lanigan Case* there was clearly a double proposition submitted to the voters, viz., the issuance of bonds for the purpose of constructing a sewer system and waterworks system. There the voters were required to vote bonds for both purposes, if they desired either. The single purpose in view in the submission in the present case was the securing of a municipal water supply system for the city of Albuquerque and the issuance of bonds therefor. The manner of securing the system, either by purchase of the existing one or the erection of a new plant, was left with the city council, where it properly belonged.

The statute under consideration does not require the council to determine, in advance of the submission, whether it will buy or build a system, but authorizes the submission to the voters of the question as to whether bonds shall be issued for the purpose of purchasing or erecting, and the form of ballot clearly evidences this intention.

The proposition in the case at bar was not dual, nor was it stated in the alternative. It was but a single proposition, i. e., as to whether bonds should be issued for the purpose of creating a municipally owned water plant. The weight of authority and reason supports this view, and the bonds were not rendered invalid by reason of the form of submission.

**Bonds—sub-  
mission to  
voters—dual  
proposition.**

And it was legal and proper for the voters to specify the maximum amount of bonds to be issued, delegating to the city council the proper exercise of discretion as to whether or not, as a result of the final negotiations, the entire \$400,000 of bonds should be issued.

The second point urged against the validity of the bonds is that the notice of the bond election was not published in the manner required by law. Section 3717, Code 1915, requires that the notice of election shall be published "at least once each week for four consecutive weeks immediately prior to said election." The notice of election in this case was published March 1, 8, 15, and 22, 1916. The election was held April 4, 1916, and it is argued that this was not "immediately prior to said election," as required by law. This point is, on principle, disposed of by the opinion of this court in the case of Board of Education v. Citizens' Nat. Bank, 23 N. M. 205, 167 Pac. 715. The election there was for the purpose of voting bonds for the erection of a school building. The statute required that the notice of election should be published ten days before the election, in two newspapers, and that the notice should be inserted in daily newspapers six times prior to the date the election was to be held, but, when there was no daily newspaper published, then such notice should be inserted in a weekly newspaper and published in two issues prior to the date of election. The election in that case was held on April 3, 1917, the last publication being the two newspapers, one apparently a daily newspaper, and the other a weekly newspaper, was March 24, 1917, the last publication in each of ten days before the election, and the question was raised that the statute intended that the notice of election should be published the required number of times within ten days next preceding the election. We said: "This statute is, we think, directory, and is sufficiently complied with, even though the first in-

sertion of the notice may have been more than ten days before the election."

In the case of Barry v. Board of Education, 23 N. M. 465, 169 Pac. 314, while the point was not actually involved, we said: "Where an election is held under authority of an order of the proper authorities, and in the main conforms to the requirements of the statute, though wanting in some particular not essential to the power to hold such an election, and is acquiesced in by the people and approved by their agent, such irregularities do not render the bonds thus issued void."

Following the rule laid down in these cases, we are of the opinion that § 3717, Code 1915, is substantially complied with when the last insertion of the notice was had thirteen days prior to the election. There is no showing that any injury resulted by reason of the premature publication of the notice, and there is no evidence of any attempt to defraud or mislead any of the voters, and, apparently, all the voters of the city were fully advised as to the date of the election and the purpose thereof.

Mere irregularity in connection with an election, in the case of the notice, will not of itself invalidate an election; but it must further be shown that, if the statute had been strictly complied with, the result would have been different. Ardmore v. State, 24 Okla. 862, 104 Pac. 913.

The third point is that the notice of sale of the bonds did not comply with the statute. Section 3719, Code 1915, requires publication of the notice of sale of the bonds to be "at least once each week for four consecutive weeks immediately prior to the date of opening bids." The notice was published November 15, 22, 29, and December 6, 1917, while the time fixed for the sale of

—irregularities  
in election—  
effect.

—election notice  
—sufficiency.

—want of effect  
on result.

the bonds was December 17, 1917, a period of eleven days after the last publication. This question is disposed of by the discussion under point 2. The publication in question complied with the spirit of the statute, and no possible prejudice could have resulted from the manner in which the notice was published.

The fourth point made against the validity of the bonds is that the officers who executed the bonds ceased to be such officers before the sale and delivery of the same. The bonds were dated December 1, 1917, and were executed on that date by Henry Westerfeld as mayor, Thomas Hughes as clerk, and Warren Graham as treasurer, and they were such officers at the time of executing said bonds. They ceased to be such officers, or at least surrendered the offices of the city government to the commissioners elected under the new charter, on the 4th day of December, 1917. The sale was held, as stated, by the commissioners. The objection is made that bonds must be executed by the officers who are in office at the time of the sale and delivery, and the following cases are cited as authority: *Coler v. Cleburne*, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Wright v. East River Irrig. Dist.* 70 C. C. A. 603, 138 Fed. 813; *Young v. Clarendon Twp.* 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. ed. 470; *Lehman v. San Diego*, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 669; *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014. These authorities, however, do not go to the extent claimed for them. For example, in the case of *Coler v. Cleburne*, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720, the party signing as mayor had ceased to be such officer before actually signing the bonds; and it is clear, upon principles governing private corporations as well as municipal cor-

porations, that in order to bind a corporation the person who undertakes to perform an official act must be such officer at the very time he performs the act, and that he cannot at a subsequent date, when he is no longer the officer he assumes to be, legally execute an instrument by dating it back to a period when he was such officer.

Section 3719 of the Code of 1915, authorizing bond issues by municipal corporations, provides that "such bonds shall be issued" by the city council, but does not provide, even by implication, that the bonds shall be sold and delivered by said council whose personnel is identical with that of the council authorizing the issue of the bonds. The statute required that bonds issued by the municipality "shall be sold at not less than par and accrued interest to date of delivery," clearly recognizing that the execution of the bonds may precede their sale and delivery by a sufficient period of time to make it an object to require the sale to be for a sufficient amount to cover the par value of the bonds and accrued interest thereon. The government of a municipality is a continuing one, and, while the personnel of officers changes, the office itself continues, and an act initiated by one individual as a city officer for and on behalf of the city may be completed by his successor in office. Upon this proposition, we believe there is no authority to the contrary. Thus, in the process of the issuance and sale of the bonds in question, it was legal and proper for the individuals in office to do such acts and things as were essential and proper to be done by them toward the execution and the sale of the bonds, and such acts were not invalidated by reason of the expiration of the term of the officer who performed the act before the completion of the sale of the bonds. Thus, the bonds were not invalidated by reason of their being signed by the proper officers in office at the date of the execution of

—succession in office—effect.

the same. This view is supported by the following cases: *O'Neill v. Yellowstone Irrig. Dist.* 44 Mont. 492, 121 Pac. 283; *Gage v. McCord*, 5 Ariz. 227, 51 Pac. 977; *Halsey v. Gillett*, 156 Cal. 114, 103 Pac. 339.

The fifth point is that it was necessary, for the valid exercise of the power to levy a tax for the interest and sinking fund of these bonds, to file a special request with the State Tax Commission, under chapter 74 of the Laws of 1915, and that the State Tax Commission should approve such levy. Section 29 of article 4 of the Constitution provides that no law authorizing an indebtedness shall be enacted, which does not provide for the levy of a tax sufficient to pay the interest and for the payment at maturity of the principal; and § 12 of article 9 provides that no city, town, or village shall contract any debt except by an ordinance which shall be irrevocable until the indebtedness therein provided for shall be fully paid or discharged, and which shall specify the purpose to which the funds to be raised shall be applied, and which shall provide for the levy of a tax not to exceed 12 mills on the dollar, upon all taxable property within such city, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. Section 13 of article 9 of the Constitution limits the amount of indebtedness which a city may contract, except that such city may contract debts in excess of such limitation for the construction or purchase of a system for supplying water or a sewer system. Sections 3716 et seq., Code 1915, conform to these constitutional requirements. Section 12 of chapter 54 of the Laws of 1915 fixes the minimum rate of tax to be levied for city, town, or village purposes or uses, at 3 mills on the dollar, but provides: "The foregoing limitations shall not apply to levies for payment of the public debt or interest thereon."

Chapter 74 of the Laws of 1915,

approved the same date as chapter 54, reads as follows:

"Section 1. No county, city, town, village, or school district shall in any year make tax levies which will, in the aggregate, produce an amount more than five per cent in excess of the amount produced by tax levies therein during the year preceding, except as hereinafter provided.

"Sec. 2. In case the amount desired to be produced by tax levies is more than five per cent greater than the amount produced in the year preceding, such fact shall be set forth in the form of a special request and filed with the State Tax Commission. In case the State Tax Commission approve such proposed increase it shall specifically authorize the same; if it disapprove, it shall so state with its reasons therefor, and its decision shall be final."

In the case of *Lanigan v. Gallup*, 17 N. M. 627, 131 Pac. 997, we held that the 12-mill levy limitation fixed by § 12 of article 9 of the Constitution did not apply to debts contracted for the purchase or construction of a system for supplying water. It would seem that inasmuch as § 12 of chapter 54, limiting the tax levies, provides that the limitation shall not apply to levies for the payment of the public debt, or interest thereon, and inasmuch as chapter 74 was approved on the same date, that there was no intention to limit the tax for the payment of the public debt or interest thereon by the provisions of chapter 74. In fact, it is apparent that chapter 74 was dealing with governmental expenditures. To give to chapter 74 the construction which would require the approval of the State Tax Commission of the proposed tax to be laid for the payment of the interest upon a bonded debt purposed to be created by a municipality, such debt having been authorized by vote of the people as required by the Constitution, would practically nullify the statute authorizing the creation of the indebtedness. The statutes in most in-

stances leave it optional with the municipality issuing the bonds to fix the time when such bonds shall become due and payable, and the provisions to be made for the levying of the tax. Waterworks bonds, for example, may be made due and payable at any time within fifty years after the date of their issuance. Suppose that the tax should be so laid, and the bonds become due and payable at such time and in such manner that it would provide for a gradual increase of the tax rate of 5 per cent or more each year, the rate for other expenditures of the municipality continuing the same as for the preceding years. The State Tax Commission would approve the increase proposed for the first year. At the time of such approval no one could say that an additional increase the next succeeding year of 5 per cent would be necessary, because there might be a decrease in the rate required for other purposes; hence it might be incumbent upon the municipality to secure the permission of the State Tax Commission the next succeeding year for the proposed increase, which might be granted or refused, and the construction of the statute which would require the approval of the State Tax Commission for the levy of the tax for the purpose of meeting the principal and interest on the public debt would destroy the market value of all municipal bonds issued in this state. We believe that chapter 74 has application only to tax levies for the ordinary expenditures of the county, city, town, village, or school district, and has no application to the levy of a tax for the purpose of providing a sinking fund and interest for bond issues voted by the people.

**Tax—for water  
bonds—consent  
of Tax Com-  
mission.**

The sixth objection made to the validity of the bonds is that ordinance No. 607 of the city of Albuquerque, providing for the issuance and form of the bonds, etc., was not valid because the ordinance was not

approved by the mayor with his official signature, as required by § 3624, Code 1915. This section, so far as material, reads as follows: "No resolution, ordinance or other legislative action of the council of cities or the trustees of towns shall be valid and effective unless indorsed 'Approved' by the mayor, with his official signature."

The parties, by stipulation, agreed that the court should examine the original ordinance, and upon examination we find that at the bottom of the right-hand side appears the signature of Henry Westerfeld, mayor of the city of Albuquerque, and the signature is attested by the city clerk, Thomas Hughes. To the left of the signature of the mayor appears, in typewriting, the following: "Approved \_\_\_\_\_." It is further stipulated that the uniform practice in the adoption of ordinances in the city of Albuquerque was for the clerk or party who prepared the ordinance to place at the left of the place for the mayor's signature, upon approval of the ordinance, the word "Approved," followed by a blank line for the purpose of writing therein the date of the approval, and also providing for certain other memoranda to be made thereon, such as the date of recording, publication, etc.; that when the mayor disapproved an ordinance, he wrote thereon, "Disapproved" or "Vetoed," and the date of his action; that there appeared upon this ordinance the word "Approved" in typewriting and the signature of the mayor. We think that this sufficiently complies with the statute.

**Municipal cor-  
poration—ordi-  
nance—approval.**

Certainly had the clerk filled in the line at the right of the word "Approved," showing the date of the approval, and this had been followed by the signature of the mayor, no one would contend that the statute had not been complied with. The omission of the date, we do not think, affects the validity of the ordinance, because this is shown by the minutes of the city council.



For this reason we do not think there is any question as to the validity of the bonds on this ground.

The seventh objection to the validity of the bonds is that the action of the legislature in authorizing municipalities of a certain class or population to adopt a charter of its own making, subject to specific limitations, is unconstitutional, in that it is a delegation of legislative power. The legislature, by chapter 86, Laws 1917, authorized cities having more than 10,000 inhabitants to adopt a charter providing for such system or form of government as might be deemed expedient and beneficial to the people, including the manner of appointment or election of its officers; provided that such charter shall not be inconsistent with the Constitution of the state, shall not authorize the levy of any tax not specifically authorized by the law of the state, and shall not authorize the expenditure of public funds for other than public purposes. It is argued that, under the rule announced by the following cases: *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 501, Ann. Cas. 1918E, 574; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 43 L.R.A. (N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774; *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820; *State, Dexheimer, Prosecutor, v. Orange*, 60 N. J. L. 111, 36 Atl. 706, the unconstitutionality of the act is clearly apparent; hence the city of Albuquerque as now constituted, under the charter adopted pursuant to the legislative act, has no existence, consequently is without power to complete the contract entered into by the appellant and the former city of Albuquerque; that any bonds delivered by it would be without validity; therefore it could not require appellant to complete the transaction provided for by the contract.

Counsel for the city contends, however, that it is neither necessary nor proper for the court to determine in this proceeding the question as to the constitutionality of

5 A.L.R.—34.

the act under which the present charter was adopted by the city; that, to say the least, the city of Albuquerque is a *de facto* corporation, and the acts of the city commissioners under the charter adopted in pursuance of said chapter 86 are valid and binding, and the authority exercised by them under the charter must prevail and be respected until the attorney general interposes by quo warranto and secures the actual ouster of the incumbents in office or the dissolution of the corporation.

It is proper that we should first examine this contention, because, if it is sustainable, the constitutionality of the act in question becomes of no importance in this action.

It must be conceded that there is very eminent authority supporting the proposition that there cannot be a corporation *de facto* under a statute which is unconstitutional. This doctrine is built upon the proposition that an unconstitutional statute is absolutely void, that it confers no rights, imposes no duties, affords no protection, and creates no office, and is in legal contemplation as inoperative as though it had never been passed. An examination of the cases supporting the rule that the corporate existence of a municipality or corporation created under an unconstitutional statute can be questioned in a collateral proceeding take as authority for the proposition the statement made by Mr. Justice Field in the case of *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121. At the outset of the discussion, however, it is advisable to examine the facts in that case, for an expression by the Supreme Court of the United States is always entitled to the highest consideration and respect. *Norton v. Shelby County* involved the validity of bonds issued by the board of commissioners of Shelby county, Tennessee, in payment of a subscription by the county to stock in a railroad company. The original act of the legislature under which the bonds were issued au-

thorized the county court of any county through which the railroad in question might run to subscribe to its capital stock. Subsequently the legislature organized the city of Memphis, and enacted that the powers theretofore vested in the quarterly court should be vested in a board of commissioners created by that act. The subscription was made by such board. The latter act was held by the supreme court of Tennessee to be unconstitutional and invalid, and the board created by it to have no legal existence. The duties conferred upon the board of commissioners created by the legislative act had been lodged in a county court, or quarterly court, as it was sometimes called, composed of justices of the peace elected in different districts, by the Constitution of Tennessee. In the state courts the validity of this act superseding the county court was at once assailed as in violation of the Constitution of the state, by the justices of the peace of the county in their official character and as private citizens and taxpayers, and the state court held the act creating the board of county commissioners to be unconstitutional. This case, it is to be observed, did not involve the corporate existence of a municipality but simply the power of the legislature to confer upon a board created by it certain rights and duties which would, by the Constitution, inhere in others; hence it cannot properly be said that the case is authority for the proposition that a collateral attack will be entertained by the courts upon the constitutionality of an act of the legislature creating a municipality. The following cases are cited and relied upon as authority for the proposition that there cannot be a corporation de facto under the statute which is unconstitutional, and that the question can be raised collaterally: *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Wilmington v. Addicks*, 8 Del. Ch. 310, 43 Atl. 297; *Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co.* 94 Ga.

306, 32 L.R.A. 208, 47 Am. St. Rep. 153, 21 S. E. 701; *Imperial Bldg. Co. v. Chicago Open Bd. of Trade*, 238 Ill. 100, 87 N. E. 167; *Clark v. American Cannel Coal Co.* 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083; *People ex rel. Standerfer v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280; *Winget v. Quincy & Homestead Bldg. Asso.* 128 Ill. 67, 21 N. E. 12; *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; *Sisters of Charity v. Morris R. Co.* 84 N. J. L. 310, 50 L.R.A. (N.S.) 236, 86 Atl. 954; *Eaton v. Walker*, 76 Mich. 579, 6 L.R.A. 102, 43 N. W. 638; *Winneconne v. Winneconne*, 111 Wis. 10, 86 N. W. 589; *Etowah Light & P. Co. v. Yancey (C. C.)* 197 Fed. 845; *Huber v. Martin*, 127 Wis. 412, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1135, 7 Ann. Cas. 400. A consideration of these cases will show that in very few of them was involved the question of the corporate existence of a municipality, most of the cases relating to attacks upon the de facto existence of private corporations.

*Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562, involved the question as to whether or not a levee district was a de facto corporation. The court held the act creating the levee district unconstitutional, and, this being true, there was no law in California under which such a corporation could be formed. The court, in the opinion, cites the case of *Norton v. Shelby County*, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1121.

*Wilmington v. Addicks*, 8 Del. Ch. 310, 43 Atl. 297, however, is not authority, because the point was not involved in the decision. The court says: "The authorities are a unit in deciding that there can be no de facto corporation when there is no possibility of the existence of a corporation. In such cases, corporate existence claimed can always be questioned in any proceeding."

In *Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co.* 94 Ga. 316, 32 L.R.A. 208, 47 Am. St. Rep.

153, 21 S. E. 701, there was a general law for the incorporation of railroad companies. The railroad company was incorporated under a special charter, which was attacked on the ground that the act was unconstitutional. The court held, however, that the railroad company was nevertheless a corporation de facto. This case is only authority upon the point that, where there cannot lawfully be a corporation de jure, there cannot be one de facto. Justice Lumpkin says: "We may assume, without further citation of authorities, and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid constitutional law authorizing the creation of such a corporation, it cannot exist, even as a corporation de facto. The rule thus stated does not by any means, however, negative the soundness of the proposition that an organization assuming to be a corporation de jure, but for sufficient reasons not so in fact, may be a corporation de facto, when it is of such a character that it could, under existing laws, have full and complete corporate being and powers."

He further says, speaking of the broad character under which the corporations were formed: "If the laws under which they proceeded were not good, they may, in our judgment, avail themselves of the existence of the general law on our statute book, and of its terms, at least so far as to enable them to be regarded as de facto corporations, because they have done practically what that general law required, though not actually following it nor professing to do so."

Imperial Bldg. Co. v. Chicago Open Bd. of Trade, 238 Ill. 100, 87 N. E. 167, involved the de facto character of a corporation formed for the purpose of acquiring real estate and erecting buildings thereon. There was no law in Illinois authorizing the formation of such a corporation. The court held that

the corporation so attempted to be formed was not a de facto corporation.

The case of *People ex rel. Standerfer v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, cited as authority, is not in point, as no such question was involved in the case.

*Winget v. Quincy Bldg. & Homestead Asso.* 128 Ill. 84, 21 N. E. 12, while cited as authority in support of the contention, would seem to be the other way. The author says: "A party who has contracted with a corporation de facto as such cannot be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, but all such objections, if valid, are available only on behalf of the sovereign power of the state. . . . And this rule applies even where the corporation is organized under a law alleged to be unconstitutional."

*Clark v. American Cannel Coal Co.* 165 Ind. 216, 112 Am. St. Rep. 217, 73 N. E. 1083, involved the existence of a private corporation and supports the rule contended for. The court says, after discussing the proposition: "It necessarily follows that there cannot be a corporation de facto under an unconstitutional statute, for such a statute is void, and a void law is no law."

The court does not discuss the question as to whether an unconstitutional statute is color of law.

*Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 83 N. E. 782, is in accord with the case of *Clark v. American Cannel Coal Co.*

In the case of *Sisters of Charity v. Morris R. Co.* 84 N. J. L. 310, 50 L.R.A. (N.S.) 236, 86 Atl. 954, the court held that, in a proceeding by the railroad company to condemn land, the court would under certain circumstances, in the condemnation proceeding, inquire into the fact as to whether or not the railroad company was a de facto corporation.

*Eaton v. Walker*, 76 Mich. 579,

6 L.R.A. 102, 43 N. W. 638, presents a case where a private corporation was formed to engage in the mercantile business under an unconstitutional statute. The court held that it was not a de facto corporation, and that a private individual could raise the question.

In the case of *Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311, the act under which a corporation was formed was held unconstitutional, and the right of the receiver of the corporation to recover a stock assessment was denied, but no point was made as to the de facto character of the corporation.

The case of *Huber v. Martin*, 127 Wis. 412, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1135, 7 Ann. Cas. 400, involved the de facto existence of a private corporation. The court held that the act under which it was formed was unconstitutional, and that an unconstitutional law was not sufficient to support even a de facto corporation.

*Winneconne v. Winneconne*, 111 Wis. 10, 86 N. W. 589, involved the corporate existence of a village. The court held that the act under which the village was incorporated being unconstitutional, it was not even a de facto corporation.

In the case of *Etowah Light & P. Co. v. Yancey* (C. C.) 197 Fed. 845, the company brought suit to condemn land owned by Yancey. Yancey demurred on the ground that the act under which plaintiff was incorporated was unconstitutional, and the court so held and sustained the demurrer. The question of the de facto existence of the corporation was not discussed or referred to.

It is thus to be seen that, of the cases referred to, only one involved the corporate existence of a municipality, the remaining all raising questions as to the corporate existence of private corporations, and upholding the right of an interested party to question collaterally the constitutionality of the act under which such corporations were formed. On the other hand, we find

many well-considered cases holding that, where a municipality is created by a statute, such statute, although it may be unconstitutional, affords color of law and is immune against a collateral attack; that the validity of the law creating it can only be raised by a direct proceeding, instituted by the attorney general on behalf of the state; that so long as the state does not question the right of the municipality to exist, its acts and doings are valid and binding. The reason for the rule is stated to be public policy or public necessity. There are many well-considered cases upholding this view.

In the case of *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565, after announcing the rule that the question of validity or invalidity of the municipal corporation can be raised only by the state by an action in quo warranto, the court says: "The reason for this rule is apparent and plain to the most ordinary understanding. If one individual in a suit for the enforcement of a private right may raise the constitutionality of the organization of a county, another may do so, and this may extend to 100 individuals, each thinking he has a new or better reason to present to the court why it should declare the law organizing a county unconstitutional, and thus the constitutionality of the law would continually be before the court in the most trivial suits, and the decision in none of the cases would be authoritative to destroy the de facto existence and organization of the county, because neither the county nor the state would or could be legally a party in any of the suits; and thus the public, consisting of all the citizens of the county or of the state, in no sense a party to the litigation, would have the validity of their corporate existence determined, or attempted to be determined. And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation."

In this case it was contended that

the act creating the county was unconstitutional.

In *Clapp v. Otoe County*, 45 C. C. A. 579, 104 Fed. 473, bonds had been issued upon the vote of the elector of a named precinct in Otoe county. One ground of defense was that the precinct was illegally constituted. Judge Sanborn, speaking for the circuit court of appeals, said: "There is another reason why the defense which we have been considering cannot be sustained. It is that the general acquiescence by the inhabitants of a political subdivision, organized under color of law, and by the departments and officers of the state and county having official relations with it, gives to the acts and contracts of those officers on its behalf as a subdivision *de facto* all the force and validity of their acts in its behalf as a subdivision *de jure*. The acts of ordinary municipal bodies organized under color of law depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. The interests of the public which depend upon such municipalities and their various subdivisions, the rights and the relations of private citizens which become fixed in reliance upon their existence, the injustice and confusion which must result from an *ex post facto* avoidance of their acts, commend the justice and demand the enforcement of the rule that, when a municipal body or a political subdivision of a state or county has, or its officers have, assumed, under color of authority, and have exercised for a considerable period of time, with the consent of the state and its citizens, powers of a kind recognized by the organic law, neither the corporation, subdivision, nor any private party can, in private litigation, question the legality of the existence of the corporation or subdivision."

The court then quotes approvingly from the case of *Speer v. Kearney*

*County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749. Certiorari was denied by the Supreme Court of the United States in 180 U. S. 638, 45 L. ed. 710, 21 Sup. Ct. Rep. 920.

State *ex rel. Coleman v. Blair*, 245 Mo. 680, 151 S. W. 148, was an action to collect drainage taxes. Blair defended on the ground that (1) only two of the viewers appointed by the court to examine the land sought to be drained reported in favor of the necessity, etc., while the third viewer reported adversely; and (2) that § 5581, Rev. Stat. 1909, was unconstitutional, in that the notice therein prescribed was not due process of law. The court said: "Neither of the issues thus tendered can avail defendant in this action, because a drainage district is a public corporation, and the legality of its organization and the sufficiency of its corporate existence cannot be inquired into in this collateral action."

In *Burkhard v. Pennsylvania Water Co.* 234 Pa. 41, 82 Atl. 1120, the supreme court approved the opinion of the lower court, which said: "It has uniformly been held that the validity of a charter for a public purpose cannot be determined in a collateral proceeding by a private suitor. It can only be done in a direct proceeding in which the commonwealth is a party."

In *Wright v. Phelps*, 89 Vt. 107, 94 Atl. 294, the court says: "And the courts go so far as to hold that, so long as the state does not see fit to interfere and terminate the existence thereof by direct proceeding, a municipal corporation which has been created under the provisions of an unconstitutional statute may exercise upon the citizen, through its officers, the powers conferred upon it by statute, as fully and completely as if it was created by a law valid in every particular. The reason is that, until the state institutes proceedings by which the organized municipal government 'is overturned and suppressed, it is *de facto*, and the public functions with which it is charged, within the

scope of its apparent powers may be lawfully exercised by its officials as de facto officers."

In *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957, it is said to be the general rule that the state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation; that, if the state acquiesces in the validity of the municipal corporation, its corporate existence cannot be collaterally attacked.

In *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742, it is said that, if the municipality has been illegally constituted, the state only can take advantage of the fact, and in a proceeding instituted for the purpose of testing the validity of its charter.

In *Fredericktown v. Fox*, 84 Mo. 59, the defendant offered to show that the plaintiff was not a corporation, but the court would not permit it, and said that such a question could be raised by the state itself, and that a private person cannot, directly or indirectly, usurp this function of government.

In the case of *State v. Rich*, 20 Mo. 393, Rich was indicted by the grand jury of Stone county. He moved to quash on the ground that the act creating Stone county, where the indictment was found, was unconstitutional. The court held that it could not inquire into the matter in a collateral way, that it could only be determined in a direct proceeding instituted by the state, saying: "Any other course would, it seems to us, be impracticable, and, if practicable, full of intolerable inconveniences, and against all reason."

In the case of *Wendt v. Berry*, 154 Ky. 586, [45 L.R.A. (N.S.) 1101, 157 S. W. 1115, Ann. Cas. 1915C, 493, it is held that where a city government is organized under a statute subsequently declared unconstitutional, persons, who, during the existence of the city government, received benefits from public improvements contracted for by the

city authorities, may not escape the payment of the amount due the contractor for the benefits on the sole ground that the city government was void, in that the persons acting as its officers were without authority to create any enforceable demand growing out of contracts entered into by them, for the officers were de facto officers.

In the case of *Nagel v. Bosworth*, 148 Ky. 807, 147 S. W. 940, it is held that the acts of the circuit judge appointed under an unconstitutional statute, performed before the statute was declared unconstitutional, were valid.

In the case of *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615, 51 L.R.A. 657, 36 Atl. 21, the court said: "No matter how clearly unconstitutional are the provisions of the general act providing for the organization of a municipality, no matter if in some other suit similar statutes or the same statute have been decided to be inimical to the Constitution, nevertheless such a municipality is a de facto corporation until its municipal existence is annulled by a direct proceeding instituted for that purpose."

And further: "After the corporation has been organized, its existence can be called in question only by information in the nature of a writ of quo warranto allowed by permission of the attorney general. No unconstitutional feature in the scheme provided by the legislature for the institution of such a municipal corporation can be made a ground for refusing to recognize the corporate function of a municipality so created, when the corporate existence is involved in a collateral proceeding."

The same view is adhered to by the court in the cases of *State ex rel. Atty. Gen. v. Dover*, 62 N. J. L. 138, 41 Atl. 98; *Lang v. Bayonne*, 74 N. J. L. 455, 15 L.R.A. (N.S.) 93, 122 Am. St. Rep. 391, 68 Atl. 90, 12 Ann. Cas. 961; *Meyer v. Somerville Water Co.* 82 N. J. Eq. 572, 89 Atl. 545; *Morris v. Fagin*, 85 N. J. L. 617, 90 Atl. 267; *Devlin*

v. Wilson, 88 N. J. L. 180, 96 Atl. 42; and *La Monte v. Lurich*, 86 N. J. Eq. 26, 100 Atl. 1031.

In the case of *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239, the court held that the constitutionality of the statute for the enlargement of the corporate areas of cities, apparently regular in form and fairly indicative of the legislative will, cannot be collaterally attacked in a prosecution for the enforcement of a city ordinance within territory annexed by virtue of proceedings authorized by such statute. The court says, after quoting from *Cooley's Const. Lim.* to the effect that the courts will not permit the corporate character of a corporation to be questioned collaterally if it appears to be acting under color of law and recognized by the state as such, and from other authorities to the same effect:

"These general statements are inconclusive, however, because the expression, 'color of law,' needs definition; and the question still remains, Will an invalid statute, or a statute invalid for particular reasons, afford 'color of law?' If the legally equivalent phrase, 'mere semblance of legal right' (7 Cyc. 401), be substituted, there is stable ground for asserting that a statute apparently complying with the forms prescribed by the Constitution for its enactment, and containing an intelligible declaration of the legislative will with respect to some matter fairly within the range of legislative cognizance, does make a semblance,—a show, an appearance,—of legal right. The argument, however, is frequently made that without a law there can be no organization or annexation, and that an unconstitutional law is no law; and from these premises it is, of course, a short cut to the conclusion that annexation under an unconstitutional statute is utterly void and may be collaterally attacked at any time.

"This reasoning utterly ignores the foundation of the rule forbidding collateral question of the exist-

ence of municipal corporations. The rule rests wholly in expediency, and operates in defiance of other legal doctrines. The consequences to society of allowing private collateral attacks upon the existence of cities would be intolerable, and hence courts are concerned with the question, not if there exists a valid law, but if considerations of the public welfare shall forbid any inquiry as to whether or not there is a valid law; not if constitutional limitations have been transgressed, but if the public tranquillity and the effective administration of government require that the matter of validity or invalidity shall be ignored, and a situation of affairs be arbitrarily recognized as if it were legal, whether in fact it be so or not."

The court held that, even though the statute authorizing annexation of adjoining territory was unconstitutional, that the question could not be raised save by the state by a direct proceeding.

In the case of *Ashley v. Presque Isle County*, 8 C. C. A. 455, 16 U. S. App. 656, 60 Fed. 55, the court said: "An unconstitutional and void law may yet be color of authority to support, as against anybody but the state, a public or private corporation de facto, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law, and the general system of law in the state."

In *Miller v. Perris Irrig. Dist.* (C. C.) 85 Fed. 693, the organization of the irrigation district was challenged as unconstitutional in a collateral proceeding. The United States circuit court for the southern district of California said: "The rule, sustained by the overwhelming current of authorities, and based on considerations of public policy, is that, where a reputed corporation is acting under forms of law, unchallenged by the state, the validity of its organization cannot be drawn in question by private parties. Corporate franchises are grants of

sovereignty only, and, if the state acquiesces in their usurpation, individuals will not be heard to complain. Neither the nature nor extent of an illegality in its organization can affect the existence of a reputed corporation, if the requisites just stated are present; that is, if such corporation be acting under color of law, and the state makes no complaint."

In the case of *Riley v. Garfield Twp.* 58 Kan. 299, 49 Pac. 85, the court held that, until the dissolution of Garfield county in an action of quo warranto brought by the attorney general for that purpose, the acts of all its officers were valid and binding, notwithstanding the unconstitutionality of its organization.

In *Dillon on Municipal Corporations*, 5th ed. § 67, the author says: "Where a reputed corporation is acting under forms of law, unchallenged by the state, neither the nature nor the extent of any illegality in the organization can affect the existence of the reputed corporation. . . . Even if the illegality in the organization arises from the unconstitutional character of the statute purporting to authorize the organization, it is nevertheless a corporation *de facto*, if its nature be such as is recognized by the general system of law of the state."

In *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749, the court said: "We are unable to yield our assent to the broad proposition that there can be no *de facto* corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the state legislative bodies, of the legislature, and of the governor, before it reaches the statute book. When it is spread upon that book, it comes to the people of a state with the presumption of validity. Courts declare its invalidity with hesitation, and after long deliberation and much consideration, even when its

violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights, they must be treated as valid and lawful. The acts of a *de facto* corporation or officer under an unconstitutional law, before its invalidity is challenged in or declared by the judicial department of the government, cannot be avoided, as against the interests of the public, or of third parties who have acted or invested in good faith in reliance upon their validity, by any *ex post facto* declaration or decision that the law under which they acted was void."

The case of *State ex rel. West v. Des Moines*, 96 Iowa, 521, 21 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818, was a direct attack by the state upon the constitutionality of the act providing for the annexation of contiguous territory by the city of Des Moines. The court held that the act was void as being a violation of the constitutional provision in regard to special and local legislation, yet the court held that the act was color of law for the annexation and for the application of the principles of estoppel.

In the case of *Chicago, St. L. & N. O. R. Co. v. Kentwood*, 49 La. Ann. 931, 22 So. 192, the court held that the constitutionality of the legislative act providing the method of creating municipal corporations and the organization of the municipal corporation under the act could not be attacked collaterally by the defendant, resisting tax claimed by the corporation. See also *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400; *State v. Gardner*, 54 Ohio St. 24, 31 L.R.A. 660, 42 N. E. 999; *Coe v. Gregory*, 53 Mich. 19, 18 N. W. 541; *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979.

Judge Cooley says (*Cooley, Const. Lim.* 363): "In proceedings where



the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such. Such a question should be raised by the state itself, by quo warranto or other direct proceeding."

Color of the law has been defined to be "the appearance or semblance, without the substance, of legal right; mere semblance of legal right." 11 C. J. 1225.

The question has never been heretofore before the courts of this state, and we are free to adopt that policy and rule of law which is calculated to best subserve the interests of the state and its people. Here we have a statute which, to say the least, has the appearance of a valid law enacted by the legislature, the branch of the state government charged with the creation of municipal corporations, under which an existing municipal corporation was given the right to reincorporate under the new statute, which its people did in good faith. The officers of the old municipality, relying upon the validity of the act, voluntarily surrendered their offices, and turned over the money and property of the city and the management of its affairs to the officers elected under the charter adopted pursuant to the new enactment. These new officers, in the utmost good faith, have administered the affairs of the city, have spent its money, levied taxes, enacted ordinances under which perhaps people have been imprisoned. The county treasurer has collected the city taxes, and, relying upon the validity of the act, has turned over to the city commissioners the money. Contracts have been made by the new city government, property acquired and used for the benefit of the city, and obligations are outstanding, signed by the officers under the new charter. If we should apply the rule adopted by some of the courts, and

hold that the doctrine announced by Mr. Justice Field in the Norton-Shelby County Case, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1121, applies, we would destroy the only existing government in Albuquerque. Chaos and disorder, confusion and endless litigation, would result, and bankruptcy and ruin would possibly confront the county treasurer, who had paid over to the supposed officers of the city, in the utmost good faith, money which he justly assumed the commissioners were entitled to receive. Further, the terms of office of the mayor and one half of the old councilmen have expired. There would not even be a quorum left to transact the business of the city and to fill the vacancies existing in the old offices.

In view of the foregoing, it is clear that the court should not adopt a rule of law which would bring about such results, unless required to do so by the most cogent reasons. As stated, the present municipal corporation was organized under sanction of a legislative act, which, at least, was color of law. If the act is invalid, we have a pretended municipal corporation usurping a franchise belonging to the state. No one but the state is injured by the usurpation, and it alone should be entitled to question the authority of the municipality which it has permitted to organize, take over the government of the city, and incur obligations, make contracts, etc.

Whether the question of the constitutionality of the charter could have been raised by private individuals before or at the time the new corporation took over the government of the city need not be determined, nor are we required to express any opinion upon the question as to whether the same rule should be applied to a private corporation. We are alone concerned with the endeavor to find the proper rule to be applied to a municipal

corporation under the circumstances presented in this case. We agree with those authorities that hold that a municipal corporation created under an unconstitutional charter is a de facto corporation, and

—unconstitu-  
tional charter—  
effect.

that its officers are de facto officers; that the existence of the corporation and its right to make contracts and transact business as such corporation cannot be raised collaterally; that it can only be questioned by the state in a direct proceeding, instituted by the attorney general for that purpose; that until the question is thus raised and an adjudication had ousting the corporation from the exercise of the franchise, all acts done and contracts made by the officers of such a de facto municipality are as valid and binding upon it and the property within its limits as though such officers were de jure officers of a de jure corporation. For this reason we decline, in this case, to pass upon the question of the constitutionality of the legislative act in question.

It is lastly urged that there is a question as to whether or not the city had the power to purchase the property of the Water Supply Company. Section 3716, Code 1915, provides: "That any incorporated city, town or village is hereby authorized and empowered, subject to the limitations and in accordance with the provisions of article 9 of the Constitution, to issue negotiable bonds for the purpose of securing funds for the construction or purchase of a system for supplying water, or of a sewer system for such city, town or village."

It will thus be seen that under

this section an incorporated city is given authority to issue negotiable bonds for the purpose of securing funds for the construction or purchase of a system for supplying water. In 3 Dillon on Municipal Corporations, 5th ed. § 1296, the author says: "The nature of the service, and the urgent necessity of furnishing it to a municipality, have led the courts to infer the power to provide it from any fair grant of power to which it may be said to be naturally incident; e. g., the general power of a city in respect to police regulations, the preservation of the public health, and the general welfare includes authority to use the usual means of carrying the power conferred into effect; and inasmuch as water and light are inseparably bound up with each of these matters, such authority, by implication, authorizes the city to construct municipal water and light works, if in so doing it contravenes no constitutional or statutory provision."

The section of the statute quoted in connection with clause 67, § 3564, which authorizes the erection and operation of gas and electric works by cities, and to provide means for protection from fire, and to issue and sell bonds for the purpose, clearly confers upon cities and towns the power and authority to purchase a system of waterworks.

Upon the whole we find no valid objection to the validity of the bonds in question, and for this reason the judgment of the court below will be affirmed, and it is so ordered.

Hannah, Ch. J., and Parker, J., concur.

## ANNOTATION.

**Proposition submitted to people with reference to erection or purchase of plant or other public utility as single or double proposition.**

### I. Proposition to erect or purchase:

- a. Majority rule, 539.
- b. Minority rule, 542.

### II. Proposition to acquire, construct, and operate, 543.

### III. Proposition to purchase site and erect thereon, 546.

*1. Proposition to erect or purchase.*

*a. Majority rule.*

The rule in the majority of jurisdictions is that a proposition submitted to the people to "erect or purchase" a plant, public building, or other public utility is a single proposition, and that, on the adoption thereof, the option to erect or to purchase becomes a matter of discretion, vested in the proper representatives of the municipality.

**United States.**—*Farmers' Loan & T. Co. v. Sioux Falls* (1905) 69 C. C. A. 373, 136 Fed. 721, reversing (1904) 131 Fed. 890; *C. B. Nash Co. v. Council Bluffs* (1909; Iowa, C. C.) 174 Fed. 182.

**Alabama.**—*Ryan v. Tuscaloosa* (1908) 155 Ala. 479, 46 So. 638; *Coleman v. Eutaw* (1908) 157 Ala. 327, 47 So. 703.

**California.**—*Hartigan v. Los Angeles* (1915) 170 Cal. 313, 149 Pac. 590.

**Illinois.**—*People v. Sisson* (1881) 98 Ill. 335.

**Louisiana.**—*HENDERSON v. SHREEVEPORT* (reported herewith), ante, 516. This case was followed by another of same title in (1915) 137 La. 672, 69 So. 90.

**Minnesota.**—*Truelsen v. Duluth* (1895) 61 Minn. 48, 63 N. W. 714.

**Missouri.**—*State ex rel. Columbia v. Allen* (1904) 183 Mo. 283, 82 S. W. 103; *State ex rel. Chillicothe v. Wilder* (1907) 200 Mo. 97, 98 S. W. 465.

**Nebraska.**—*Hurd v. Fairbury* (1910) 87 Neb. 745, 128 N. W. 638.

**New Mexico.**—See the reported case (*ALBUQUERQUE v. WATER SUPPLY CO.* ante, 519).

**New York.**—*Bergen v. Gubna* (1881) 10 Hun, 11; *Everett v. Potsdam* (1906) 112 App. Div. 727, 98 N. Y. Supp. 963. Compare *Hempstead v. Seymour* (1901) 34 Misc. 92, 69 N. Y. Supp. 462.

**Oklahoma.**—*Oklahoma City v. State* (1911) 28 Okla. 780, 115 Pac. 1108.

**Washington.**—*Tulloch v. Seattle* (1912) 69 Wash. 178, 124 Pac. 481.

In *Farmers' Loan & T. Co. v. Sioux Falls* (1905) 69 C. C. A. 373, 136 Fed. 721, reversing (1904) 131 Fed. 890, it appeared that a proposition was submitted to the people to authorize

the issuance of municipal bonds for the purpose of providing water for domestic use, either by the erection or purchase of a system of waterworks. The court held that under the statute (S. D. Laws 1899, p. 62, chap. 58) which provides in part "that there is hereby granted to cities of the first class the right and power to issue bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the purpose of providing water for domestic purposes," the proposition submitted was not for dual purposes, but solely for the purpose of providing a waterworks system, and that the question of erection or purchase for that purpose was a matter to be determined by the city council.

So, in *HENDERSON v. SHREEVEPORT* (reported herewith), ante, 516. This case was followed by another of the same name in (1915) 137 La. 672, 69 So. 90, an action brought to restrain the issuing of municipal bonds pursuant to an election held on the question of incurring a debt for the "purchase and extension or construction of a waterworks and sewerage system," on the ground that the question set forth a double proposition, viz., the purchasing or constructing of a plant. The court held that there was but one proposition, and that was the ownership of a waterworks system. Whether the city should buy or build was a matter of detail and of business judgment, resting with the city council.

In *C. B. Nash Co. v. Council Bluffs* (1909; C. C.) 174 Fed. 182, wherein it was contended that the proposition submitted to the voters, "to purchase or erect a system of waterworks," was in the alternative and invalid, the court held that, under the statute (Iowa Code, § 720), cities have the power to purchase, establish, erect, maintain, and operate a system of waterworks, and as the proposition was in the wording of the statute it was valid. The court held also that the proposition submitted only a single question for determination by the voters, viz., "whether there should or

should not be a system owned by the city."

In *Ryan v. Tuscaloosa* (1908) 155 Ala. 479, 46 So. 638, an action brought to restrain the issuing of municipal bonds for the purpose of constructing or buying a waterworks system, on the ground that the proposition submitted a double question, it was held that the proposition was single, the court saying: "The Constitution requires the issue of the bonds to bear the approval of the majority concerned. What course will be pursued in the application of the proceeds of the bonds to the ownership of a water system by the city is a matter designed by the Constitution and the act in question to be in the control and discretion of the governing body. The provisions pertinent merely require that the governing body shall determine the necessity, in its judgment, for the construction or purchase of a water system, and, this being done, the electorate must be consulted in order that the obligations of the city may be issued."

In *Hartigan v. Los Angeles* (1915) 170 Cal. 313, 149 Pac. 590, the action was to restrain the issuing of bonds of a city, authorized by an election on a proposition reading, in part, as follows: "Shall the city . . . incur a bonded debt . . . for the purpose of acquiring and constructing a certain revenue-producing municipal improvement, to wit: Works for supplying said city and its inhabitants with electricity for purposes of light, heat, and power, including the construction or acquisition of electricity-generating works, receiving substations, transmission lines, and the acquisition of lands, water rights, rights of way, machinery, apparatus, and other works and property necessary therefor." The plaintiff attacked the validity of the election on the ground that the words, "construction or acquisition," included two separate propositions. The court held that the purpose intended was a single proposition, constituting but one general plan or object.

In *People v. Sisson* (1881) 98 Ill. 335, it appeared that a school tax was

levied pursuant to a proposition submitted to the people, which read, in part, as follows: "For the purpose of voting for a schoolhouse site for a schoolhouse. . . . Also for the purpose of voting for or against issuing bonds to erect or purchase a schoolhouse for said district,"—the court held that the proposition contained a single purpose and fully complied with the statute (School Law, § 47, Rev. Stat. 1874, p. 962).

In *Truelsen v. Duluth* (1895) 61 Minn. 48, 63 N. W. 714, the action was to test the validity of an election at which several propositions were submitted to the people, of which one read as follows: "To issue water and light bonds . . . for the purpose of erecting or purchasing a water and light plant." The court held that under the statute (Sp. Laws 1891, § 35) the proposition was valid and for a single purpose, saying: "Because of these facts, and that the general tenor and purport of the law indicate that the submission of a proposition to erect a combined plant was contemplated, and, from the express provision of the law just referred to, it is obvious that it was intended and expected that a proposition to purchase an existing water and light plant would be submitted to the electors, we are of the opinion, in view of the existing facts and of the general language of the law, and that part of the same which provided for the acquisition or assumption of bonds already issued by an existing combined plant, in case such a plant should be purchased, that the first, second, and third propositions, as set out in the ballot, were not substantial or fatal departures from the statutory requirements as to how the ballots should read, and that the submission of these propositions was fully authorized if, at the same time, the other competing propositions were fully and fairly submitted to the voters."

In an action to compel the state auditor to register municipal bonds, wherein the defendant contended that a proposition submitted to the people, "to increase the debt . . . for the purpose of constructing . . . or

purchasing an electric light plant," contained two distinct propositions, the court held that the question as submitted contained but one object or proposition. *State ex rel. Canton v. Allen* (1903) 178 Mo. 555, 77 S. W. 868.

In *Hurd v. Fairbury* (1910) 87 Neb. 745, 128 N. W. 638, it was sought to enjoin the mayor, etc., of a city from issuing bonds pursuant to an election held on two independent propositions, which read in part: First, "for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city;" second, "for the purpose of purchasing or erecting, constructing, locating, and maintaining a system of water-works within said city." It was held that the statute (Anno. Stat 1909, §§ 8994, 8995) gave the municipality the power to "establish" the plants in question, and therefore was single, the court saying: "The word 'establish' includes the word 'purchase,' therefore, the alternative is but a mere repetition, and is included in the one word 'establish.'"

In the reported case (*ALBUQUERQUE v. WATER SUPPLY Co.* ante, 519) a proposition was submitted to the people for the issuing of municipal bonds for the purpose of purchasing or erecting a system for supplying water to the city. This action having been brought to restrain the bond issue because of an alleged violation of the law, in that the proposition, as set forth above, contained a double purpose or object, the court held that the proposition was single and authorized by the statute (Code 1915, § 3716), which authorizes "any incorporated city, town, or village, 'subject to the limitations and in accordance with the provisions of article 9 of the Constitution, to issue negotiable bonds for the purpose of securing funds for the construction or purchase of a system for supplying water, or of a sewer system for such city, town, or village.'" The court said: "The statute under consideration does not require the council to determine, in advance of the submission, whether it will buy or build a system, but authorizes the sub-

mission to the voters of the question as to whether bonds shall be issued for the purpose of purchasing or erecting, and the form of ballot clearly evidences this intention."

In *Tulloch v. Seattle* (1912) 69 Wash. 178, 124 Pac. 481, wherein it appeared that a proposition was submitted to the people to issue bonds for the purpose of purchasing or constructing a municipal street railway system, the court held that the alternative, "to purchase or construct," did not constitute a double proposition, but was a valid single proposition, forming a general scheme or plan.

In *Coleman v. Eutaw* (1908) 157 Ala. 327, 47 So. 703, the court held incidentally that a proposition "to purchase or construct" a public school building was not a double proposition.

In *Oklahoma City v. State* (1911) 28 Okla. 780, 115 Pac. 1108, a proposition submitted to the voters "to erect and equip public fire stations and purchase equipment therefor" was held sufficiently specific to comply with the statute (Const. art. 10, § 27) and apprise the voters of the nature of the proposition.

In *Bergen v. Gubna* (1881) 10 Hun (N. Y.) 11, the action was to restrain the supervisor of a town from issuing bonds pursuant to an election held to determine "whether a site shall be purchased for a town hall, and a building purchased or erected for such hall," on the ground that the election was illegal in that it submitted a dual proposition. The court held that by the statute (Laws 1875, chap. 482, § 20) "power is given to the board of supervisors to authorize any town, when application shall be made therefor by vote of a majority of the electors voting on the question at any annual or duly called special town meeting . . . to purchase a site for a town or village hall, and to purchase or erect a building for such hall, and to raise money as may be necessary from time to time for the care, preservation, and improvement of such hall." But in *Hempstead v. Seymour* (1901) 34 Misc. 92, 69 N. Y. Supp. 462, there was an alleged failure to comply with the provisions of the Village Law (art.

13, § 22; Laws 1897, chap. 414), in that a proposition was submitted to the people to borrow money for the purpose of purchasing, constructing, and maintaining waterworks and a lighting system. The court held that the proposition was dual in its nature, saying: "It is manifest from a careful reading of the section cited that it was intended that the establishment of a system of waterworks, or the acquisition of an existing private system, should be acted upon as a distinct and independent proposition. . . .

To 'establish' means to originate, to found, to institute, to create; not to acquire something which has already been brought into existence. As used in this statute, it contemplates, in part at least, the 'constructing' as distinguished from the 'purchasing' of 'a village improvement,' as those words are used in § 128 above referred to."

In *Everett v. Potsdam* (1906) 112 App. Div. 727, 98 N. Y. Supp. 963, wherein a proposition was submitted for the establishment or acquisition by a village of a system for supplying the village and its inhabitants with light, the court held that the proposition was single and valid, complying with § 60 of the Village Law, and § 82 of the Election Law (Laws 1896, chap. 909, as amended by Laws 1901, chap. 598). By reason of the amendment of the latter law in 1901, the court overruled *Hempstead v. Seymour* (1901) 34 Misc. 92, 69 N. Y. Supp. 462, and reverted to the original ruling, set forth in *Bergen v. Gubna* (1877) 10 Hun (N. Y.) 11.

*b. Minority rule.*

In at least three jurisdictions, the rule is that a proposition submitted to the people to erect or purchase a plant, public building, or other public utility is void and illegal, in that it submits a dual proposition which defeats the right of the voter to express his choice or preference. *Leavenworth v. Wilson* (1904) 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367; *Marcellus v. Garfield* (1904) 71 N. J. L. 373, 58 Atl. 1099; *Hensly v. Hamilton* (1888) 3 Ohio C. C. 201, 2 Ohio C. D. 114; *Elyria Gas & Water Co. v. Elyria* (1898) 57 Ohio St. 374, 49 N. E. 335.

Thus, in *Leavenworth v. Wilson* (1904) 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, the court held to be double the following question: "Shall the following be adopted? To issue bonds of the city of Leavenworth in the sum of \$400,000 to purchase, procure, provide, or contract for the construction of waterworks." The court said: "The subject of purchasing a particular waterworks plant already in existence is utterly diverse from that of building a new one. It needs neither argument nor illustration to make this plain truth apparent to any mind of ordinary capacity. The judgment of the mayor and council upon one of these subjects might well be approved by the people through a majority vote in favor of bonds, although the judgment of the same officials upon the other subject would be overwhelmingly repudiated at a bond election. The ballot required to be used at the election in question obliged the voter to approve bonds for both purposes, or to reject bonds for both purposes. If he favored one plan and disapproved the other, he was allowed no opportunity to indicate his view. Because of the dual ballot, persons adverse to purchase may have voted with persons adverse to building for bonds which, thus supported, carried, although both propositions would have failed ignominiously had they been separately submitted."

In *Marcellus v. Garfield* (1904) 71 N. J. L. 373, 58 Atl. 1099, it was held that an election on the proposition to construct or purchase waterworks was void and nugatory, in that it submitted at the election and under one question a dual proposition, the court saying: "For all that appears, the whole [number of] voters may have favored purchase, or, what is more probable, they may have been divided between purchase and construction, perhaps equally so. From no aspect of the case can it be said that the question directed to be submitted was answered in the affirmative by a majority of the voters." But see *Wormser-Goodman Constr. Co. v. Belmar* (1910) 80 N. J. L. 240, 77 Atl. 466,

wherein there is dictum to the effect that the supplement to the Borough Act (Pamph. Laws 1910, p. 362) provides that the proposition "to construct or purchase a drainage or sewer system, including a disposal plant," may be submitted to the voters at one election and upon the same ballot. However, there seems to be no judicial interpretation in this state of the proposition "to erect or purchase," other than that contained in *Marcellus v. Garfield* (N. J.) *supra*.

In *Elyria Gas & Water Co. v. Elyria* (1898) 57 Ohio St. 374, 49 N. E. 335, wherein a proposition was submitted to the people to issue bonds for the purpose of the purchase and erection of waterworks, the court held that the proposition was double, saying: "It declares the necessity for the issue and sale of the city's bonds 'for the purpose of the purchase and erection of waterworks,' and provides for the submission of the question of so issuing and selling the bonds, at the election to be held under the resolution, for the purpose thus declared. The power conferred by the statute on the council is to issue and sell the bonds of the municipality 'for the erection or purchase of waterworks.' The two purposes are entirely distinct. The purchase of waterworks necessarily implies that they have already been erected, and are a present existing property, the subject of sale and purchase; while the erection of waterworks can only have reference to their future construction. That a municipal corporation may own two plants, one acquired by purchase and another erected by it, or, after having acquired one in the former mode, may proceed to erect a new plant, is not questioned. But their acquisition by these two different methods requires different proceedings."

In *Hensly v. Hamilton* (1888) 3 Ohio C. C. 201, 2 Ohio C. D. 114, a proposition having been submitted to the voters on the question of using municipal bonds for the purpose of erecting and operating gas works, or purchasing gas works already erected in the city, the court held that the form of the proposition presented a

dual issue, and precluded the voter from exercising any choice, saying: "He may desire to vote for the purchase of the present works alone, but he is obliged to couple with that that he votes for either the purchase or construction. He may desire to vote against the issue of bonds for the purchase of gas works, but he is obliged to couple with that a vote also against erection of gas works, the latter of which he may favor."

## *II. Proposition to acquire, construct, and operate.*

A proposition submitted to the people to acquire, construct, and operate or maintain a public plant, building, or other public utility is a single proposition.

**California.**—*Clark v. Los Angeles* (1911) 160 Cal. 30, 116 Pac. 722; *Clark v. Los Angeles* (1911) 160 Cal. 317, 116 Pac. 966; *Oxnard v. Bellah* (1913) 21 Cal. App. 33, 130 Pac. 701; *Hartigan v. Los Angeles* (1915) 170 Cal. 313, 149 Pac. 590.

**Colorado.**—*Thomas v. Grand Junction* (1899) 13 Colo. App. 80, 56 Pac. 665.

**Georgia.**—*Brand v. Lawrenceville* (1898) 104 Ga. 486, 30 S. E. 954.

**Idaho.**—*Platt v. Payette* (1911) 19 Idaho, 470, 114 Pac. 25; *Corker v. Mountainhome* (1911) 20 Idaho, 32, 116 Pac. 108; *Ostrander v. Salmon* (1911) 20 Idaho, 153, 117 Pac. 692.

**Minnesota.**—*Hamilton v. Detroit* (1901) 83 Minn. 119, 85 N. W. 933.

**Missouri.**—*State ex rel. Canton v. Allen* (1903) 178 Mo. 555, 77 S. W. 868.

**Texas.**—*Simpson v. Nacogdoches* (1912) — Tex. Civ. App. —, 152 S. W. 858.

**Washington.**—*Seymour v. Tacoma* (1893) 6 Wash. 138, 32 Pac. 1077; *Blaine v. Hamilton* (1911) 64 Wash. 353, 35 L.R.A.(N.S.) 577, 116 Pac. 1076.

Thus, in *Oxnard v. Bellah* (1913) 21 Cal. App. 33, 130 Pac. 701, wherein the question: "Shall bonds of the city be issued for the purpose of the acquisition, construction, and completion of a municipal street lighting system?" was submitted to the voters, it was held that the proposition was for a single purpose, and not dual in

its nature, and the submission to the electorate was valid.

In *Clark v. Los Angeles* (1911) 160 Cal. 30, 116 Pac. 722, it appeared that a question was submitted to the electorate in the following form: "Shall the city . . . incur a debt . . . for the purpose of acquiring and constructing a certain revenue-producing municipal improvement, to wit, works for generating and distributing electricity for the purpose of supplying said city and its inhabitants with light, heat, and power, including the acquisition of lands, water rights, rights of way, machinery, apparatus, and other property, and the construction of electric generating works, substations, transmission and distributing lines, conduits, and other works necessary therefor?" The court held that the proposition involved a single purpose only, that of acquiring all the property necessary for the proposed works, saying: "To hold that the city must submit in one question the proposition to construct the electrical works, and in another question, to be voted on separately, the proposition to acquire the property necessary to be used in such construction, would be to hold that the people might by one vote authorize the construction of the plant, and by the other defeat it, by refusing authority to buy the property necessary for that purpose. It is practically imperative that the question put should include in one proposition everything necessary for the improvement."

In *Clark v. Los Angeles* (1911) 160 Cal. 317, 116 Pac. 966, it was held that a proposition stated on the ballot as follows: "Shall the city of Los Angeles incur a bonded debt of \$3,000,000, for the purpose of acquiring and constructing certain municipal improvements in said city, to wit, the construction of docks, wharves, and warehouses, the opening, improving, constructing, and maintaining of streets and highways to navigable waters, the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements?" was not invalid as presenting two distinct and

separate objects, not related to or dependent on each other, without giving the voter an opportunity to distinguish and vote for one and against the other, by reason of the fact that the resolution of the city council preliminary to such submission described the proposed improvements by dividing them into two parts, those lying northerly of a certain line, of which the estimated cost was \$1,000,000 and those lying southerly, of which the estimated cost was \$2,000,000. The court said: "The purpose intended was a single purpose, that of improving the harbor at San Pedro by the construction thereon of docks, wharves, and warehouses, with the streets and waterways necessary or convenient for their use and for access to them from the land on one side, and from the water on the other. All this constituted but one general plan or object. The fact that the estimated cost was stated in two sums, \$2,000,000 for the improvements on one side of the line described, and \$1,000,000 for those on the other side, does not render the two parts so distinct that they cannot be embraced in one scheme for improving the harbor, nor does it make each an entirely separate and distinct enterprise. The estimate might have given separately the cost of each dock, wharf, warehouse, street, and waterway, without affecting the character of the whole as a single scheme or object. The naming of warehouses does not show a double purpose. Warehouses are a necessary, or at least a convenient, adjunct to a wharf. We hold that the proceedings are not invalid in this particular."

In *Thomas v. Grand Junction* (1899) 13 Colo. App. 80, 56 Pac. 665, it appeared that an ordinance was passed, reading as follows: "An ordinance to authorize the city council to purchase and improve and repair the waterworks plant and system now in operation in said city, and, in the event of a failure to purchase, to construct a system of waterworks to be forever owned, managed, and operated by the city; and for this purpose to contract an indebtedness by the issuance of bonds of the city in the sum of \$65,-



000." The ordinance was passed under authority of subdivision 6 of § 3312 (Gen. Stat. 1891), which provided that city councils shall have the power to incur an indebtedness for the purpose of the purchase or constitution of waterworks. The court held, in an action to restrain the issuing of bonds for the reason that the ordinance was void in that it involved two subjects in the alternative, that the sole purpose of the enactment was to secure for the city the ownership of its own waterworks system. The authorization to purchase or construct did not cover two propositions, but was a single question, with a common and sole purpose.

In *Brand v. Lawrenceville* (1898) 104 Ga. 486, 30 S. E. 954, the plaintiff sought to enjoin the collection of any taxes from him for the purpose of paying the principal or interest on bonds issued pursuant to an act submitted to the people, which was entitled: "An Act to Establish a System of Public Schools in the Town of Lawrenceville, Georgia, and to Provide for Issuing of Bonds of Said Town for the Purchasing School Property [and] Building Schoolhouses." The plaintiff contended that the election was illegal and void in that the question submitted contained a dual proposition. The court held that the act contained only a single major proposition, and that the propositions, "building schoolhouses" and "purchasing school property," were only the means or instrumentalities to accomplish the one great object of the act.

In *Corker v. Mountainhome* (1911) 20 Idaho, 32, 116 Pac. 108, the action was to restrain the issuing of municipal bonds, pursuant to an act submitted to the electorate at an election duly held, which read as follows: "To provide the funds necessary to pay the cost and expense of the installation and construction of a complete waterworks system for the village of Mountainhome, and to purchase a site and location for a power house and water-power rights for the purpose of pumping water, or any other power or machinery that may be found necessary, for the purchase of ma-

terials for said works and improvements, and for the construction of the same." It was contended that the election violated § 2316 of the Revised Codes of Idaho in that the act submitted to the people involved a double proposition. The court held that the ordinance included only one purpose within the contemplation of the statute, viz., the construction and installation of a complete waterworks system, and that the purchase or construction of the necessary site and impediment of such a system were merely ancillary and auxiliary purposes.

In *Platt v. Payette* (1911) 19 Idaho, 470, 114 Pac. 25, it appeared that there were submitted to the people in separate questions two propositions: First: "For the purchase of all materials necessary for the construction and maintenance of a sewer system in [a] local sewer improvement district . . . of the . . . city," and second: "To provide the funds necessary to pay the costs of extending the water mains and water system of said city, for the purchasing of a power site for pumping purposes, and the power necessary for such pumping." It was held that there was a substantial compliance with the statute (Idaho Rev. Codes, § 2316) requiring the submission of separate and distinct purposes in separate propositions, and that each of the two propositions set forth above constituted in itself a single purpose or object.

In *Hamilton v. Detroit* (1901) 83 Minn. 119, 85 N. W. 933, it appeared that the question submitted to the voters of a community read as follows: "Shall the village . . . purchase, build, establish, and control all necessary and proper buildings, machinery, apparatus, and material for making, generating, and supplying electric light for public and private use in said village." The court held that the contention that two propositions were submitted in the election was untenable; that the proposition did not contain more than one question.

In *State ex rel. Columbia v. Allen* (1904) 183 Mo. 283, 82 S. W. 103, it appeared that a proposition was sub-

mitted to the people at a special election as follows: "For the city . . . to incur an indebtedness of \$100,000, and issue bonds as provided by law, for the purpose of acquiring by purchase and construction a waterworks and electric light plant, to be owned exclusively by the city." The court held that the words, "purchase and construction," constituted only a single proposition, saying: "There might be, as in this case, a plant already established, with its mains laid and connections established, and the city, to avoid tearing up its highways and to avoid competition, might desire to buy the old or existing plant, and yet, within the limits of its power to raise money, might desire to extend and improve that plant, and when, as in this case, the proposition is plainly put before the voters to buy the old plant and make it available for all purposes, we think it falls clearly within the meaning and spirit of the amendment of § 12a of article 10 of the Constitution; and it is not at all necessary to first purchase, and then have a second election to improve it, but it can all be submitted at one time, and it is one proposition after all."

In *Seymour v. Tacoma* (1893) 6 Wash. 138, 32 Pac. 1077, an action to enjoin the submission to the people of a proposition to issue bonds "for the purchase of the waterworks, electric light plant, and sources of supply of the Tacoma Light & Water Company, and the construction of extensions to said waterworks, and the issuing of negotiable coupon bonds of the city therefor," on the ground that the power "to purchase" was not included in the word "construct," as used in the statute (Laws 1891, p. 326), and that the purchase and construction of the waterworks included a double proposition, invalid when set forth as one question, the court held that the proposition was single, having but one purpose,—the maintaining of the public utility,—and that under the power "to construct," as used in the statute, was included the power "to purchase," saying: "Ordinarily, the meaning of the word 'construct,' in the sense here

meant, would be to build or make; but to give the law any effect whatever, it must have been known to the legislature that more than the mere cost of construction, involving the labor necessary, would have to be implied."

In *Simpson v. Nacogdoches* (1912) — Tex. Civ. App. —, 152 S. W. 858, an action to restrain the issuing of municipal bonds pursuant to a proposition submitted to the people "to issue bonds . . . for the purpose of purchasing and constructing an electric light plant," it was held that the proposition was single and valid, and by voting thereon the electors left it to the judgment of the council whether the bonds should be used for purchasing or constructing the plant.

In *Blaine v. Hamilton* (1911) 64 Wash. 353, 35 L.R.A.(N.S.) 577, 116 Pac. 1076, it appeared that a proposition was submitted to the people, combining in one proposition the constructing of a canal, excavation of a channel, and the purchase of sites for wharves and docks therefor. The court held that as the major object was a general harbor improvement the proposition was single, stating the test for singleness in propositions submitted to the people as follows: "Are the several parts of the project so related that, united, they form in fact but one rounded whole?"

In *Ostrander v. Salmon* (1911) 20 Idaho, 153, 117 Pac. 692, there was dictum to the effect that "the designation that . . . the proposed bond issue would be used for the purchase of the water system . . . and . . . to enlarge and extend said system, states one general purpose, that of acquiring and improving a water system for said city, and both relate to the same subject-matter, and constitute but one purpose as defined by the statute, and might well be submitted as one proposition."

### III. Proposition to purchase site and erect thereon.

A proposition to purchase a site and erect a public building thereon, submitted to the voters, contains but a single proposition.

Alabama.—*Graymont v. Stott* (1909). 160 Ala. 570, 49 So. 683.

**California.**—*People v. Dunn* (1889) 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140; *People ex rel. Atty. Gen. v. Caruthers School Dist.* (1894) 102 Cal. 184, 36 Pac. 396.

**Georgia.**—*Gracen v. Savannah* (1914) 142 Ga. 141, 82 S. E. 453.

**Idaho.**—*Howard v. Independent School Dist.* (1910) 17 Idaho, 537, 106 Pac. 692.

**Louisiana.**—*Directors of Public Schools v. State Bank* (1913) 133 La. 109, 62 So. 492.

**Mississippi.**—*Bingham v. Woodell* (1915) 109 Miss. 769, 69 So. 678.

**Missouri.**—*State ex rel. Carrolton School Dist. v. Gordon* (1910) 231 Mo. 547, 133 S. W. 44.

**Nebraska.**—*State ex rel. Board of Education v. Benton* (1890) 29 Neb. 460, 45 N. W. 794; *Linn v. Omaha* (1906) 76 Neb. 552, 107 N. W. 983.

**North Carolina.**—*Smith v. Belhaven* (1909) 150 N. C. 156, 63 S. E. 610.

**Oklahoma.**—*McDougald v. Broken Bow* (1919) — Okla. —, 176 Pac. 959.

**Washington.**—*Chandler v. Seattle* (1914) 80 Wash. 154, 141 Pac. 331.

In *People v. Dunn* (1889) 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140, the constitutionality of an act of the legislature, entitled "An Act to Provide a Permanent Site for the California Home for the Care and Training of Feeble-minded Children, to Erect Suitable Buildings Thereon, and Making an Appropriation Therefor" (Stat. 1889, p. 69), was attacked for the reason that it contained more than one item for appropriation, and that for more than one single and certain purpose. The court held that there was but one appropriation for a single purpose, and the proposition was not double, saying: "It was not necessary that there should have been a separate appropriation for the purchase of the land, another for the erection of the building, another for the construction of fences, and another for each improvement necessary to the proper completion of the proposed work."

The question "whether bonds should be issued for the purchase of a site and the erection of a public auditorium thereon" having been submitted to the voters at an election, it was

held in an action for the validation of the bonds that the election was not void on the ground that the question submitted was a double proposition, constituting two separate and distinct purposes, the court saying: "A site for an auditorium is inseparably connected with the auditorium itself, and an auditorium cannot be erected without a site." *Gracen v. Savannah* (1914) 142 Ga. 141, 82 S. E. 453.

In *Howard v. Independent School Dist.* (1910) 17 Idaho, 537, 106 Pac. 692, it appeared that the officers of a school district submitted the question whether bonds should be issued for "the purpose of providing said district with additional schoolhouse grounds and erecting a schoolhouse thereon; . . . and for the purpose of providing said district with additional schoolhouse grounds and erecting a four-room schoolhouse thereon, . . . (said schoolhouse to be erected in such a manner that additional rooms may be added thereto whenever the necessities therefor may require, without materially damaging such building); and for the purpose of providing said district with additional schoolhouse grounds and erecting a two-room schoolhouse thereon; . . . and for the purpose of furnishing each of said school buildings with proper and necessary furniture, apparatus, and fixtures." In an action brought to restrain the issuing of the bonds, on the ground that the election was illegal, in that it violated the Constitution of the state of Idaho (Const. art. 8, § 3) by submitting at one election more than one proposition, the court held that the question submitted only a single proposition, saying: "It is necessary to have school grounds, but grounds alone are not enough; it is also necessary to have buildings; it is likewise necessary to have furniture, apparatus, and fixtures. These things are all parts of one 'purpose,' namely, the equipment for maintaining public schools within the district. If the district had attempted to combine this proposition with a proposition to issue funding bonds, or the issue of bonds for some other separate or independent proposition, then

the objections raised would undoubtedly have been well taken, and within the purview of both the Constitution and statute."

In *People ex rel. Atty. Gen. v. Caruthers School Dist.* (1894) 102 Cal. 184, 36 Pac. 396, the action assailed the validity of an election on a question reading: "Shall bonds to the amount of ten thousand dollars be issued and sold for the purpose of purchasing a school lot, and erecting a schoolhouse thereon?" The court held that the question did not involve a double proposition, and that the proposition presented to the voters was, in form, entirely justified by law.

In *Directors of Public Schools v. Ruston State Bank* (1913) 133 La. 109, 62 So. 492, it appeared that the board of directors of the public schools of a parish submitted to the property taxpayers a proposition to levy a tax "for the purpose of purchasing a site, constructing and equipping an agricultural and domestic science high school building in said district, title to which shall vest in the public." It was held that only one proposition was involved in the question, the court saying: "Since a school building cannot be constructed without a site to put it on, we think that authority to construct the building necessarily carries with it authority to buy the site."

In *State ex rel. Carrolton School Dist. v. Gordon* (1910) 231 Mo. 547, 133 S. W. 44, it appeared that the question submitted to the people was as follows: "To create a district indebtedness by issuing . . . bonds for the purpose of purchasing a site for a new school building, erecting a building thereon, providing furniture and a heating plant for such new building, providing heating plants for old school buildings, and purchasing a site, erecting a new school building thereon, and furnishing the same for the negroes." The court held that the proposition contained therein was single in its character and wording, saying: "The unity of object is to be looked for in the ultimate end to be attained, not in the mere details and incidents leading up to that end."

Where the proposition submitted to the electors, to issue bonds for the purpose of purchasing a site and erecting a fire engine house thereon, was attacked on the ground that it was a dual proposition, it was held that the proposition was not dual, but a single definite proposition to provide a fire engine house. *Linn v. Omaha* (1906) 76 Neb. 552, 107 N. W. 983.

In *State ex rel. Board of Education v. Benton* (1890) 29 Neb. 460, 45 N. W. 794, it was held that a proposition submitted to the people to issue bonds for the purpose of the purchase of school sites and the erection of schoolhouses thereon constituted but a single proposition, having one definite object.

In *McDougald v. Broken Bow* (1919) — Okla. —, 176 Pac. 959, it was held that a proposition submitted to the people for the purchase of a site and the erection of a public building thereon did not violate the Constitution (Const. art. 10, § 27), but was a valid single proposition.

In *Chandler v. Seattle* (1914) 80 Wash. 154, 141 Pac. 331, it appeared that a proposition was submitted to issue bonds "for enlarging and extending the municipal lighting and power plant and system . . . by the acquisition, by purchase or condemnation, of lands for a site, the construction of buildings thereon . . . for a steam power plant, for furnishing electricity for lighting, heating, fuel and power purposes, and for furnishing steam for heating purposes." It was attacked on the ground that the acquisition of a site and the construction of a plant combined two separate propositions. The court held that it was a single proposition for the purpose of having one efficient lighting system.

In *Graymont v. Stott* (1909) 160 Ala. 570, 49 So. 683, it was held, inferentially, that an act "to acquire sites and build schoolhouses thereon" stated but a single proposition, the erection of schoolhouses.

In *Bingham v. Woodell* (1915) 109 Miss. 769, 69 So. 678, it was held that a municipality has the power to sub-

mit a proposition to the people "to issue bonds for the purpose of purchasing a school site and erecting a school-house thereon," although the question was raised collaterally only.

In *Smith v. Belhaven* (1909) 150 N. C. 156, 68 S. E. 610, it was held that a proposition submitted to the people "for the purpose of paying the outstanding indebtedness of the said town; to purchase a site or otherwise secure and maintain, build, and equip

a town hall; to construct, build, and maintain a public dock; to construct, build and maintain, make and repair the streets and sidewalks of said town; to purchase and maintain all necessary equipment for a well-organized fire department, and to make such other improvements as the board of aldermen may deem expedient and necessary," was a valid submission, and, inferentially, a single proposition. W. J. K.

GEORGE TUDOR  
v.  
JOHN TUDOR'S ESTATE.

*Vermont Supreme Court—June 24, 1919. •*

(— Vt. —, 107 Atl. 132.)

**Interest — on book account — annual rests.**

1. Interest is to be computed in case of ordinary running accounts on book, in the absence of special contract or circumstances, by making annual rests and allowing interest thereafter on the balance in favor of the person to whom it may be due.

[See note on this question beginning on page 551.]

—understanding that interest shall not be charged.

2. An understanding that interest shall not be computed on the annual rests of a book account is not shown by

the fact that the one who kept the books brought down the balances at the yearly periods, without including interest in them.

[See 15 R. C. L. 27.]

**EXCEPTIONS** by plaintiff to rulings of the Bennington County Court (Stanton, J.) after appeal from a disallowance by the commissioners of his claim against the estate of John Tudor, deceased, which resulted in a judgment for defendant upon report of the referee. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles S. Chase and William R. Daley, for plaintiff:

Interest should be allowed on the final balance found in favor of George Tudor, from the date of the death of John Tudor.

*Sprague v. Sprague*, 30 Vt. 483; *Austin v. Smith*, 23 Vt. 706; *Raymond v. Isham*, 8 Vt. 258.

Messrs. R. E. Healy, F. C. Archibald, and J. K. Batchelder, for defendant:

In case of ordinary running accounts on books, not controlled by a different contract, express or implied, the rule of computing interest is to make annual rests, and to allow interest thereafter

on the balance in favor of the party to whom it may be due.

*Langdon v. Castleton*, 30 Vt. 285; *Goodnow v. Parsons*, 36 Vt. 46; *Davis v. Smith*, 48 Vt. 52; *Flannery v. Flannery*, 58 Vt. 576, 5 Atl. 507; *Yeartau v. Bacon*, 65 Vt. 516, 27 Atl. 198; *Hammond v. Hammond*, 76 Vt. 437, 58 Atl. 724; *Holt v. Howard*, 77 Vt. 49, 58 Atl. 797; *Gordon v. Mead*, 81 Vt. 36, 69 Atl. 134; *Carpenter v. Welch*, 40 Vt. 251.

Miles, J., delivered the opinion of the court:

This is an appeal from the disallowance of plaintiff's claim by the

commissioners on John Tudor's estate. The case was referred by the court below to a referee, upon whose report the court rendered judgment for the defendant. The case comes here upon the plaintiff's exception to that judgment. The only question presented to this court relates to the matter of interest on the accounts between the parties. The plaintiff claimed before the referee, and he also claims here, that interest should be allowed on the balance of the accounts from Tudor's death, but not before, while the defendant insisted that it should be computed on the balance by annual rests. The referee ruled that this was a question of law, and submitted it to the court without more. The court held that interest should be computed on annual balances, and rendered judgment accordingly.

The plaintiff and John Tudor were brothers, and from July 20, 1889, to the time of John's death, February 23, 1909, had quite extensive business transactions, with a running account between them, in which the balance was sometimes in favor of one and sometimes in favor of the other; but at no time during the life of John was the account settled. The account was kept by John in his own books, upon which both parties relied upon the trial below. During the running of the account John, along from time to time, balanced the account, and, if the balance was in his favor, he would bring it down as a debit item in the new account, and if it was in favor of the plaintiff, he would bring it down as a credit item. Such balances were struck in the course of their deal something like twenty-five times. In no instance did the balance contain any interest on the preceding account. No claim was made by either party that any of those balances were the result of a settlement, nor does the referee find that any demand of payment was ever made by either party in whose favor it was found, nor that any agreement to pay interest was ever made by either party.

It may now be regarded as settled law in this state that in case of ordinary running accounts on book, not controlled by special contract, expressed or implied, and unaffected by any special circumstances, requiring the case to be made an exception to the rule, interest is to be computed by making annual rests and allowing interest

Interest—on  
book account—  
annual rests.

thereafter on the balance in favor of the party to whom it may be due. Langdon v. Castleton, 30 Vt. 285; Goodnow v. Parsons, 36 Vt. 46; Gordon v. Mead, 81 Vt. 36, 69 Atl. 134; Holt v. Howard, 77 Vt. 49, 58 Atl. 797; Hammond v. Hammond, 76 Vt. 437, 58 Atl. 724; Yeartau v. Bacon, 65 Vt. 516, 27 Atl. 198; Flannery v. Flannery, 58 Vt. 576, 5 Atl. 507; Davis v. Smith, 48 Vt. 52; Willard v. Pinard, 65 Vt. 160, 164, 26 Atl. 67.

It is held in Gordon v. Mead, 81 Vt. 36, 69 Atl. 134, that the general rule that in cases of ordinary running book accounts, not controlled by special contract, expressed or implied, and unaffected by exceptional circumstances, interest should be computed by making annual rests, and allowing simple interest on the annual balances.

In Willard v. Pinard, *supra*, the court said: "On book accounts, when no other understanding or agreement is shown, interest is allowed only on the yearly balances."

The rule as adopted in this state is well stated in Langdon v. Castleton, *supra*, as follows: "It seems now to be established in this state that in cases of ordinary running accounts on book, where there is no special agreement as to the time of payment or the payment of interest, and no particular course of dealing between the parties from which any special contract could be implied, either party is entitled to call upon the other for settlement of accounts annually, and for payment of any balance that may be due him from the other on such settlement. On the basis of this understanding it is also settled that, if the party from

whom the balance is due neglects to settle and pay such balance, that it shall stand as to interest, on the ground of any other debt falling due and not paid."

In other words, in the absence of any agreement, expressed or implied, ordinary running accounts fall due annually, and, like other debts, bear interest after falling due, unless otherwise provided by agreement express or implied.

In *Goodnow v. Parsons*, 36 Vt. 46, this court said: "It is settled in this state that in cases of ordinary running accounts on books, not controlled as to interest by a different contract, express or implied, the rule of computing interest is to make annual rests, and to allow interest thereafter on the balance in favor of the party to whom it may be due. A person dealing with another has a right to rely upon the application of this rule on the settlement of his account, unless the circumstances of the case are such as to affect him with notice or knowledge of the usage, custom, or claim of his creditor to compute interest by making rests at shorter periods than one year; and the defendant's dealings with the plaintiff must be taken to have been had with the expectation that they would be adjusted according to the settled rule and custom,

unless it is made to appear that he had information that the plaintiff would insist upon a different rule."

The referee has found no fact from which it can be inferred that there was any agreement, express or implied, taking the case out of the general rule. The claim of the plaintiff that John struck the balances as he did, and brought them down without including interest in them, raises an implied promise that he would not charge interest on those balances, or indicates that it was the understanding of John that no interest was to be computed or charged on his account, and that the plaintiff had a right to so understand it, is not well founded. That act is consistent with the theory that this was done to keep in touch with the general standing of the parties to the account along as their business and dealings progressed, and not for the purpose of fixing the exact sum due either party.

—understanding  
that interest  
shall not be  
charged.

We think the computations on the basis of annual rests were correct and in accordance with the well-established rule recognized by this court, and that there was no error in the judgment of the trial court.

Judgment affirmed. Let the case be certified back to the Probate Court.

## ANNOTATION.

### Annual rests on book accounts.

I. Introductory, 551.

II. Majority rule:

a. Generally, 551.

b. Under contract, 552.

II.—continued.

c. Under custom, 553.

III. Minority rule, 554.

IV. Rule in Vermont, 554.

#### I. Introductory.

It is not the purpose of this note to deal with the right to recover interest on book accounts. It is assumed that interest is to be allowed, and at this point the note takes up the question whether "annual rests" will be allowed in the computation of the interest, and to what extent.

#### II. Majority rule.

##### a. Generally.

While it seems to be taken for granted in the cases cited throughout this note that annual rests will not be allowed in computing interest on a book account, in the absence of a contract or usage to that effect, it has been

held that when exceptional circumstances enter into the case, and the facts are such that not to allow rests would manifestly work an injustice to one of the parties, rests will be ordered. *Barrow v. Rhinelander* (1815) 1 Johns. Ch. (N. Y.) 550. In that case it appeared that the complainant was the assignee of a bankrupt merchant who, at different intervals, being in financial difficulties, borrowed money from a confidential clerk and gave evidences of indebtedness calling for usurious interest in return. It also appeared that there was fraud on the part of the defendant, who kept the books. On one settlement, the merchant being unable to pay, the defendant demanded 18 per cent interest, to which demand the merchant was forced to submit. A court of equity set aside all the evidences of indebtedness, and opened the whole account between the merchant and the clerk. The master was instructed that interest should be allowed from the time of the receipt of the money to the time of taking the account, and that rests should be allowed at such times as the parties liquidated their accounts and agreed that interest then due should be considered as principal, and that the interest found due at the time of such rests should thereafter be considered as part of the principal.

*b. Under contract.*

By a contract, express or implied, the parties to a book account may agree for annual rests in the computation of interest thereon, settling the accounts, striking a balance, and converting the interest into principal, thus obtaining the first item on the new account for the ensuing year. *Barclay v. Kennedy* (1818) 3 Wash. C. C. 350, Fed. Cas. No. 976; *Hovey v. Edmison* (1884) 3 Dak. 449, 22 N. W. 594; *Emerson v. Atwater* (1864) 12 Mich. 314; *Bruce v. Hunter* (1813) 3 Campb. (Eng.) 467; *Clancarty v. Latouche* (1810) 1 Ball & B. (Ir.) 420.

Thus, in *Hovey v. Edmison* (1884) 3 Dak. 449, 22 N. W. 594, it appeared that there was an express contract for the payment of interest annually, and that any instalment of interest not paid when due should bear interest.

On the question of the validity of the stipulation, the court held that, while the annual-rest rule could not apply to the interest after maturity, since the parties had expressly contracted for annual rests on the interest before maturity, they were bound by their express contract, which was legal.

In *Barclay v. Kennedy* (1818) 3 Wash. C. C. 350, Fed. Cas. No. 976, it appeared that the parties had for some years been engaged in commercial intercourse, the plaintiffs purchasing and shipping goods, and making advances to the defendant, and receiving remittances in return. The usage between the parties had been for the plaintiffs to state the accounts between them annually, sometimes, however, semiannually, charging interest on the balance, on whichever side it might be, and adding it to the balance of principal, to bear interest from the day on which the account was so stated. These accounts, presenting a balance with the interest added to it, sometimes in favor of the plaintiffs, were regularly transmitted to the defendant, who had never before objected to the mode of adding the interest regularly set out in the accounts. It was therefore held that the defendant was liable under an implied agreement to pay. The court said: "In running accounts the parties may agree at stated periods to settle their accounts, strike the balance, and convert the interest into principal. The law does not forbid such an agreement, nor is it opposed to the provisions of the Statute of Usury. In such a case, the credit expires and the principal debt becomes due at the time the account is settled; and the creditor, or the party in whose favor the balance is, has a right to stipulate for a prolongation of the credit, upon the condition of making the interest principal, instead of insisting upon a payment of the whole. If such an arrangement may legally be made by an express agreement, it may be done by an implied one; and accounts, regularly stated and balanced, and the interest added to the balance, received by the debtor and acquiesced in without objection, may



fairly be considered by the jury as evidence of such agreement. In like manner, a well-established usage of trade, sanctioning such a mode of stating the account, may have the effect of an agreement. But, in such a case, the usage of such agreement is to be fully proved, and should appear to be sufficiently ancient and uniform to leave no doubt of its being known by all persons concerned in that particular trade."

And see a later Pennsylvania case, *Graham v. Williams* (1827) 16 Serg. & R. (Pa.) 257, 16 Am. Dec. 569, limiting the method of computing interest on mining accounts to an express contract.

In *Emerson v. Atwater* (1864) 12 Mich. 314, it appeared that it had been the custom of the parties to strike annual balances, and either carry the balance to the new account to draw interest, or to give an interest-bearing note in settlement. To secure a balance the plaintiff gave the defendant a mortgage on certain property. In a bill to redeem the property, exception was made to the account submitted by the commissioner, because annual rests were not allowed in the computation of the interest. It was held by the court that the transactions between the parties were of such a nature that the allowance of annual rests was warranted by their practice.

In *Bruce v. Hunter* (1813) 3 Campb. (Eng.) 467, it appeared that the plaintiff had effected insurances and advanced the premiums for the defendant; that annual accounts were rendered, with interest of the preceding year added to the principal; and, further, that the defendant had acquiesced in the accounts. It was held that the defendant was bound by an implied promise to pay interest in this manner.

In *Clancarty v. Latouche* (1810) 1 Ball & B. (Ir.) 420, Lord Chancellor Manners inferred, from the acquiescence of the debtor, an agreement at the end of every year, in favor of yearly rests, by which interest was made principal. The usage was evidence that this was the mode of deal-

ing intended. Compare *Stoughton v. Lynch* (1816) 2 Johns. Ch. (N. Y.) 210.

#### *c. Under custom.*

Where there is a well-established custom, or usage of trade, to strike a balance at the end of a year and add interest, thus obtaining the first item of the new principal for the ensuing year, custom or usage will be enforced by the courts. *Denniston v. Imbrie* (1818) 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *Von Hemert v. Porter* (1846) 11 Met. (Mass.) 210.

But though it is the custom for merchants to compute interest by annual rests, striking a balance at the end of the year and making that balance the first item of a new principal for the ensuing year, nevertheless, after the mutual dealings of the parties have ceased, this method of computation will not be allowed, except under a specific agreement.

Thus, in *Denniston v. Imbrie* (Fed.) supra, it appeared that it had been the custom of the parties during the account to add interest at the end of the year to the annual account, and also to add interest on the balance. After the mutual dealings ceased, the creditor continued to make the annual rests, and brought the action to recover the principal plus the interest so computed. It was held that, although the parties had computed interest by annual rests during the life of their dealings, yet, after such mutual dealings ceased, the custom did not apply, and that only simple interest could be computed as the final balance.

And in *Von Hemert v. Porter* (Mass.) supra, the action was on an account of long standing, and on which the plaintiff claimed interest computed by method of annual rests. The mutual dealings between the parties had ceased within a year after the last item was purchased, and the question presented was whether or not the plaintiff could compute interest by annual rests after the mutual dealings had ceased. The court held that, after the mutual trade and dealings have ceased, the right to make annual rests ceases, and the creditor is entitled to simple interest on the balance

of his account, in the absence of any specific agreement to allow compound interest.

In delivering its opinion, the court said: "As between merchants, upon their mutual accounts, it is the usage of trade to cast interest upon the several items, and to strike a balance at the end of the year, of the items of principal and those of interest, and to carry the footing of the two to a new account, as forming the first item of principal for the ensuing year. In this manner, yearly rests have for a long time been made and acquiesced in by the mercantile world. But it is not the usage of trade, after all dealings have ceased between the parties, to leave accounts standing for upwards of twenty years, compounding the interest yearly, and then claiming, as a matter of right, such accumulated balances. And though such neglect to demand payment by suit may be reasonably ascribed, in this instance, to forbearance towards the defendant, yet it furnishes no rule of law upon which to predicate a right to claim compound interest, without proof of a specific agreement to pay it. The law, as well between merchants as other classes of the community, is this: that, after the mutual trade and dealings have ceased, the right to make annual rests ceases, and the creditor is entitled to simple interest on the balance of his account, in the absence of any specific agreement to allow compound interest; the right to make the annual rests growing out of the mutuality of the debts and credits, and the allowing of interest on each side." See also *Hovey v. Edmison* (1884) 3 Dak. 449, 22 N. W. 594, *supra*.

And though accounts mature annually, according to a custom, nevertheless, if the dealings of the parties show that they have not been conducted with reference to such a custom, there is no presumption that the accounts mature annually.

*Rogers v. Yarnell* (1888) 51 Ark. 198, 10 S. W. 622. In that case, it appeared that the account covered a period of thirteen years, and items of debit and credit had been entered as

one continuous account, without rest or balance until the account was closed, and the only effort towards a statement was the putting at the bottom of each page of the account, of both debits and credits, carried forward regardless of dates or years, and where an approximate idea of the shifting balances could not have been obtained at any time. On these facts, it was held that there was no foundation for the basis of annual rests in the computation of the interest, and that only simple interest would be allowed from the 1st of January following the final settlement of the account. The court said: "The manner of keeping the accounts between the parties, acquiesced in for so long a time, shows a reciprocity of dealing which is confirmed by the testimony above detailed. Charges upon the one side were evidently intended to be credited or set off, *eo instanti*, against the charges upon the other, and the account was permitted to run for mutual convenience, the balance to be paid by the party against whom, upon final judgment, it should be found to exist. The delay in settlement was mutual and voluntary. There were strong reasons for it on both sides,—each enjoying advantages offered by the other,—and, until the dealings ceased or one party was called upon to account, neither could claim a balance. Until such an event, the account was unsettled, the term of credit had not expired, and there was nothing upon which interest could be computed, either by virtue of an implied agreement or operation of law. Interest is allowed only when a debtor is in default. There was no foundation, therefore, for the basis of annual rests which the court fixed in its order of reference to the master, for the computation of interest, or in the computation which was subsequently made by the court when the report of the master was set aside and the account restated. That would be proper only upon the hypothesis that the dealings of the parties indicated that it was their intention to strike a balance annually."

*III. Minority rule.*

However, in two jurisdictions, it is held that the computation of interest on a book account by annual rests in effect allows the compounding of interest, and is therefore illegal. *Marr v. Southwick* (1835) 2 Port. (Ala.) 351; *Averill Coal & Oil Co. v. Verner* (1872) 22 Ohio St. 372.

In the case last cited, the action was in part for balances due on account of moneys lent and moneys paid for the defendant's use. It appeared that, in stating the account between the parties, the referee made annual rests at the end of each calendar year and, having found the balance due, included interest, and incorporated the entire balance into a new principal. It was held that, while this error would not warrant the reversal of the whole judgment, this method of computing interest was not sanctioned by the laws of the state, and a remittitur would be allowed for such excess on the record.

In *Marr v. Southwick* (Ala.) *supra*, the question as to the method of computation of the interest arose in an action on an open account. It was held that the law did not allow rests, or the computation of interest upon interest, by restating the account every six or twelve months and adding interest to the new principal, and that no custom or agreement could affect or alter the law.

*IV. Rule in Vermont.*

In Vermont, in the absence of contract express or implied, or a custom or usage having the effect of an agreement, or exceptional circumstances that would warrant an exception, it is the established rule to compute interest on book accounts by permitting annual rests and allowing simple interest on the yearly balances. *Gordon v. Mead* (1908) 81 Vt. 36, 69 Atl. 134; *Holt v. Howard* (1904) 77 Vt. 49, 58 Atl. 797; *Hammond v. Hammond* (1904) 76 Vt. 437, 58 Atl. 724; *Yearteau v. Bacon* (1892) 65 Vt. 516, 27 Atl. 198; *Davis v. Smith* (1875) 48 Vt. 52; *Carpenter v. Welch* (1867) 40 Vt. 251; *Spencer v. Woodbridge* (1866) 38 Vt. 492; *Goodnow v. Par-*

*sons* (1863) 36 Vt. 46; *Birchard v. Knapp* (1859) 31 Vt. 679; *Langdon v. Castleton* (1858) 30 Vt. 285; *Wood v. Smith* (1851) 23 Vt. 706. And see the reported case (*TUDOR v. TUDOR*, ante, 549).

In *Gordon v. Mead* (1908) 81 Vt. 36, 69 Atl. 134, it appeared that the plaintiff was the defendant's attorney, and that his employment extended over a period of six years. In an action to recover fees earned, the lower court allowed the plaintiff simple interest on the balance of the whole account, commencing one year after the account ended. On appeal, this method was held to be erroneous, the court holding that a running account between attorney and client was within the rule that on ordinary running book accounts interest should be computed by making annual rests and allowing simple interest on the annual balances.

In *Holt v. Howard* (1903) 77 Vt. 49, 58 Atl. 797, it appeared that both parties intended that their business transactions should comprise a mutual and open account, and that items of debit should cancel items of credit. It was held that the rule as to book accounts applied, and that annual rests should be made and simple interest allowed on the balances.

In *Hammond v. Hammond* (1904) 76 Vt. 437, 58 Atl. 724, the action was on a book account covering thirty years. The referee computed the interest by method of annual rests, with simple interest on yearly balances, to which exception was taken. On appeal this method of computation of interest was held proper, the court laying down the rule that on book accounts annual rests should be allowed, and simple interest computed on the yearly balances.

In *Yearteau v. Bacon* (1892) 65 Vt. 516, 27 Atl. 198, it appeared that the defendant's intestate contracted with the plaintiff to board his illegitimate daughter. The account covered a period of sixteen years, during which time the defendant's intestate made only seven small payments. In an action on the account the referee allowed interest on each month's board,

to which exception was made. On appeal, the court held this method of computation improper and computed interest by method of annual rests, allowing simple interest on each year's balance.

In *Davis v. Smith* (1875) 48 Vt. 52, it appeared that the book account of the plaintiff was made up principally of charges for services and disbursements as attorney for defendant during a period of nine years. In allowing interest on the book account, computation was held to be on the basis of annual rests and interest on the yearly balances.

In *Spencer v. Woodbridge* (1866) 38 Vt. 492, it appeared that the plaintiff had been in the defendant's employ for three years, during which time the plaintiff did not render a bill for services, and the defendant made no effort to ascertain the amount of the debt or to pay it. In an action to recover for the services, the defendant claimed that interest should not be allowed because the plaintiff made no demand for payment, but the court held that a demand on the part of the plaintiff was immaterial, and that the interest should be calculated according to annual rests and simple interest allowed on the yearly balances.

In *Langdon v. Castleton* (1858) 30 Vt. 285, it appeared that the plaintiff was elected attorney for a town. A large portion of the plaintiff's account was for services and expenses. The auditor made annual rests in the account and allowed the plaintiff interest on the yearly balances, to which the defendant objected. The court held that in ordinary running accounts on book it was settled law that, in the absence of contract or exceptional circumstances that would make an exception to the rule, interest was to be computed by annual rests, allowing simple interest on the yearly balances.

In *Goodnow v. Parsons* (1863) 36 Vt. 46, it was held that a person deal-

ing with another has the right to rely on the settled rule of annual rests in the computation of interest on book accounts, and unless the party has notice or actual knowledge of the custom or usage of his creditor to compute interest by making rests at shorter periods than one year, the operation of the general rule is not affected, and interest must be computed according to the established rule in the state.

In *Wood v. Smith* (1851) 23 Vt. 706, wherein it appeared that the custom of the plaintiff was to compute interest on semiannual balances, it was held that in the absence of an agreement or knowledge of the custom the defendant was liable only for interest computed on annual balances, according to the general rule of the state.

The time at which the first rest is made and interest begun on the balance was stated in *Carpenter v. Welch* (1867) 40 Vt. 251, as follows: "In computing interest with annual rests, in the absence of any evidence of a different understanding between the parties, the first rest is to be made at the end of one year, computed from the commencement of the account, and so from year to year, and not necessarily on the 1st day of January next after the account accrued."

But the Vermont rule as to the allowance of annual rests in the computation of interest on book accounts is limited to simple interest on the balances up to the time of final adjustment, and, in the absence of a contract or usage, is not extended to allow interest on interest by adding the year's interest to the yearly balance, and thus obtaining the new principal for the ensuing year. *Birchard v. Knapp* (1859) 31 Vt. 679.

And see *Flannery v. Flannery* (1886) 58 Vt. 576, 5 Atl. 507, wherein it was held that the general rule as to annual rests is confined to running book accounts.

A. S. M.

RE LAKE CHELAN LAND COMPANY, Bankrupt.

WALTER M. OLIVE, Trustee, etc., Appt.,

v.

C. B. TYLER.

*United States Circuit Court of Appeals, Ninth Circuit — May 5, 1919.*

(257 Fed. 497.)

**Mortgage — by corporation to director — validity.**

1. A mortgage by a corporation to secure a director for money lent to pay pressing debts, and enable it to extricate itself from immediate embarrassment, is valid and enforceable.

[See note on this question beginning on page 561.]

**— by insolvent corporation — validity.**

2. A mortgage by an insolvent corporation for a present advance of money to meet its obligations is not invalid.

[See 7 R. C. L. 755, 760.]

**Appeal — effect of findings.**

3. The findings of a referee, supported by evidence and affirmed by the trial court, will not be set aside on appeal.

[See 2 R. C. L. 210, 211.]

**APPEAL** by the trustee in bankruptcy from an order of the District Court of the United States for the Northern Division of the Western District of Washington (Neterer, District J.) denying his petition for a review, and confirming the order of the referee sustaining the mortgage claim of a stockholder of the bankrupt corporation. *Affirmed.*

**Statement by Hunt, Circuit Judge:**

This is an appeal by the trustee of the bankrupt corporation from an order of the district court denying the trustee's petition for a review, and confirming the order of the referee, sustaining the mortgage claim of one Tyler; Tyler having offered proof of a secured claim, which claim was established and allowed as a preferred claim by the bankruptcy court over the objections of creditors. The substance of the referee's findings, as adopted by the district court, makes this case:

The bankrupt corporation organized in 1909, with a capital of \$500,000, to hold, develop, and sell a large tract of land. There were a small number of stockholders, and large sums of money were raised by pro rata assessments upon the stockholders. The company gave its notes for such advances of money, and upon unsecured obligations about \$340,000 were borrowed. In addition to these obligations, the company owed debts for money bor-

rowed upon its notes, which were secured by pledges of certain purchase-money contracts, covering lands that the corporation had sold, in the sum of \$110,000, \$50,000 of which notes were held by the National Bank of Commerce of Seattle, and \$60,000 held by certain individuals. In June, 1916, these secured notes were past due, and the bank notified the corporation that payment must be made by January 1, 1917.

About that time one Furey became a stockholder and was elected president of the corporation. He held one fourth of the total amount of stock and one fourth (\$85,000) of the stockholders' notes that had been issued. After demand was made for payment, Furey assured the stockholders that he could raise the money in the eastern cities to meet the obligations of the company, but after efforts he failed to do so. To avert the then apparent ruin of the corporation unless it could borrow money, two stockholders, Green

and Tyler, were asked, and agreed, to furnish the needed money to meet the obligations, which by that time amounted to about \$116,000, due upon secured notes and other debts, exclusive of notes due to stockholders. After the matter was discussed among the stockholders, it was decided that the corporation should borrow \$120,000 from Green and Tyler in order to pay the obligations and to carry the company along for a few months, during which time Furey hoped that he could borrow enough money to save the business. His general purpose was to realize funds through the sale of bonds of an irrigation district to be organized; the district to take over a water system in which the corporation had an interest.

At that time the shares were owned as follows: Tyler had three-eighths, Green one-fourth, Furey one-fourth, and Swalwell one-eighth. There were some shares held by qualifying persons. On December 14, 1916, a stockholders' meeting was held, at which all of the stockholders, seven in number, were present or represented, and the corporation, by unanimous vote, was authorized to borrow \$120,000 of Green and Tyler, and to secure the obligation by a mortgage upon all of the property and assets of the corporation. Upon the same day the trustees met and authorized the mortgage, and with provision therein that all of the income should be applied upon the mortgage. The mortgage was duly executed, and among other things provided that, while the company should continue in business and make sales, the income from sales should be applied in reduction of the mortgage debt. In carrying out this plan, the \$120,000 was paid to the company by Green and Tyler, and the company issued twelve notes, of \$10,000 each, payable to bearer, dated December 30, 1916, due on or before one year after date, and executed a real and chattel mortgage, dated December 30, 1916, upon all of its property, which mortgage was recorded Janu-

ary 22, 1917. The notes owned by Green were afterwards transferred to Tyler. The secured obligations were paid, as also were the other obligations, except what was due upon stockholders' notes, and any sums due as assessments for irrigation purposes upon the cultivated lands of the company, which, under the terms of contracts between the company and the water company, were first liens upon the lands to which the water was furnished. The collateral to secure the old notes was delivered to Furey, president, and by using the \$4,000 over the sums paid out on secured claims the corporation ran along with the hope of continuing. About August, 1917, 550 acres of the lands of the corporation, valued at about \$93,000, were transferred by Furey, as president, to one Brown. Furey turned over to Brown the stockholders' note for \$84,500, with interest, which was owned by Furey, to enable Brown to turn the note into the company as a payment for the 550 acres of land.

Tyler, as the holder of all the notes, immediately brought foreclosure proceedings in the United States district court, alleging that the company had not paid the interest on the mortgage, or taxes on its property. Very soon thereafter, September 13, 1917, a voluntary proceeding in bankruptcy was initiated by the secretary by direction of a majority of the trustees. Afterwards, at a stockholders' meeting held October 4, 1917, the action of the trustees in directing petition for bankruptcy was fully ratified. Furey protested.

After the trustee in bankruptcy was elected, and after the mortgage given to Tyler had been questioned by Furey and others, an order upon Tyler was issued to show cause why the property should not be held by the trustee in bankruptcy free and clear of the lien of his mortgage. Tyler appeared and propounded his claim. Objections were made by certain creditors and by the water company; the contention of the creditors being that the mortgage

(257 Fed. 497.)

was preferential, and not given for a valuable consideration, while the water company claimed rights under its contract as superior to Tyler's mortgage.

It was also found that at the time the loan in question was made, and the mortgage was given to secure the same, the corporation was insolvent; that the mortgage was given to secure the money then loaned to the corporation, and was not for any antecedent indebtedness; that Green was an officer of the corporation at the time the loan was made, and knew of its insolvent condition; that, after the disbursement of the fund raised by the loan, the debts remaining unpaid were not pressing for payment, and that the stockholders and directors were fully advised of the purpose of the loan, the apparent necessity therefor, and of the affairs and financial condition of the company; and that the corporation continued its usual course and conduct of business for approximately nine months after the loan, when the conveyance of the 500 acres heretofore referred to was made.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Messrs. Carroll B. Graves and R. S. Ludington, for appellant:

A corporation is insolvent within the meaning that it may not prefer a given creditor when it has a general inability to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit.

National Bank v. Sprague, 21 N. J. Eq. 538; Skirm v. Eastern Rubber Mfg. Co. 57 N. J. Eq. 184, 40 Atl. 769.

A corporation cannot prefer its own shareholders and stockholders over its outside creditors, for the reason that they are in substance and in sense its proprietors.

Washington Mill Co. v. Sprague Lumber Co. 19 Wash. 165, 52 Pac. 1067; Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 576, 62 N. E. 701; Goodell v. Verdugo Canon-Water Co. 138 Cal. 308, 71 Pac. 354; Cook, Corp. 6th ed. § 727; Howe, B. & Co. v. Sanford Fork & Tool Co. 44 Fed. 231; Spencer v. Smith, 120 C. C. A. 75, 201 Fed. 652; Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916; Twin Lick Oil Co. v.

Marbury, 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688; 7 R. C. L. p. 579, § 775.

Messrs. Ira Bronson and J. S. Robinson, for appellee:

Where the testimony is conflicting, and findings of fact of the referee and the district judge are the same, the facts will not be inquired into by an appellate court unless there is plain error.

Re Dorr, 116 C. C. A. 112, 196 Fed. 294; Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159; National Bank v. Shackelford, 239 U. S. 81, 60 L. ed. 158, 36 Sup. Ct. Rep. 17; Baker v. Schofield, 243 U. S. 114, 61 L. ed. 626, 37 Sup. Ct. Rep. 333; Re Turpin Hotel Co. 160 C. C. A. 165, 248 Fed. 25; Wilson v. Continental Bldg. & L. Asso. 147 C. C. A. 18, 232 Fed. 824; Henderson v. Morse, 149 C. C. A. 64, 235 Fed. 518; Aller-Wilmes Jewelry Co. v. Osborn, 146 C. C. A. 103, 231 Fed. 907; Re Kaplan, 148 C. C. A. 464, 234 Fed. 866; Carroll v. Stern, 139 C. C. A. 253, 223 Fed. 723; Deupree v. Watson, 132 C. C. A. 543, 216 Fed. 483; Re Sweeney, 94 C. C. A. 90, 168 Fed. 612; Salsburg v. Blackford, 122 C. C. A. 624, 204 Fed. 438; Sheinberg v. Hoffman, 149 C. C. A. 475, 236 Fed. 343; Schmid v. Rosenthal, 145 C. C. A. 128, 230 Fed. 818; Collier, Bankr. 11th ed. p. 604.

The mortgage was executed by the proper officers pursuant to due authority, and neither the company nor its stockholders are in a position to question its validity.

Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916; 10 Cyc. 1261; 5 Thomp. Corp. ¶ 6200, 6201, pp. 1038-1042; Cook, Corp. p. 692; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 496; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 31 L.R.A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; Harle-Haas Drug Co. v. Rogers Drug Co. 19 Wyo. 35, 113 Pac. 791, Ann. Cas. 1913E, 181.

Mr. H. B. Jones also for appellee.

Hunt, Circuit Judge, delivered the opinion of the court:

The contention of the trustee is that majority directors and stockholders of an insolvent corporation, having knowledge of insolvency, cannot take a mortgage on all of the property, assets, and income of the corporation, and thus prefer

themselves; that the mortgage in question was made by the directors and officers with intent to prefer their claims; that the mortgage was used by the directors and officers to secure themselves upon a prior obligation which they had assumed with the Bank of Commerce; that Tyler could not propound and prove the mortgage and secured notes as the real owner of the claims, because one Backus owned \$40,000 worth of notes, and Green owned \$20,000 worth thereof, and that these interests had not, in any manner, been transferred to Tyler; and that Green, one of the mortgagees, had never assigned his interest in the mortgage.

The question of the condition of the corporation and of the good faith of the directors and officers at and about the time of the transactions under investigation being most important, we have carefully considered the whole record, with the principle in mind that the mortgagees were bound by those rules of conscience and fairness which courts of equity have laid down in disposing of transactions, where directors of corporations are dealing with the subject-matters of their trust and with the party whose interests are within their care. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688.

It is evident that the loan to the corporation was made after Tyler and Green were urged to lend the money and after the failure of earnest efforts to obtain money from outside sources. It was evident that the corporation would fail unless it could procure money to meet its pressing obligations, but it was believed by stockholders and directors that if funds could be borrowed operation could be continued, and the immediate necessities could be met, and the company could work through its difficulties. Two courses seemed open: The directors could stop business and close up the affairs, or, in good faith, they could lend it money, thus enabling business to go on for the apparent benefit of the

corporation. The directors and stockholders chose the latter plan, and, while disaster eventually came, it has been found that good faith on the part of the directors characterized their conduct. We find no foundation for the argument that the money loaned by Green and Tyler was to enable the company to pay its antecedent debt. The advances were present ones, to be used by the corporation to pay its pressing debts, and to enable it to extricate itself from immediate embarrassment, and in the expectation that it could continue in business and meet its obligations.

Under such circumstances the mortgage was not in-  
 Mortgage—by corporation to director—validity.

valid, though made to an officer of the corporation. 7 R. C. L. § 775; *Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 16 Sup. Ct. Rep. 621.

*Strohl v. Seattle Nat. Bank*, 25 Wash. 28, 64 Pac. 916, cited by appellant, was a case where the security was given for an antecedent debt. The decision is not authority for holding that a mortgage given by an insolvent corporation for a present advance is not  
 —by insolvent corporation—validity.

valid. It is referred to in 10 Cyc. 1261, as sustaining the validity of such mortgages, and *Thompson on Corporations*, vol. 5, § 6200, makes the following comment upon it and other like cases: "It must be noted that the cases make a very clear distinction between the fact of securing a director for money loaned or advanced to the corporation and the fact of giving a director a preference by way of security for any claim that he may have against the corporation. There is no reason why even an insolvent corporation, in need of funds and ready cash, may not borrow the amount needed from a director or other officer of the corporation, and secure him by a lien on its property or a transfer of its assets."

See also *Twin-Lick Oil Co. v. Marbury*, supra; *Illinois Steel Co. v.*



O'Donnell, 156 Ill. 624, 31 L.R.A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; Cook, Corp. § 692. Of course, if there had been fraud or action by the mortgagees to secure an undue advantage to themselves, by endeavoring to acquire all of the assets of the corporation under mortgage, a different question would be presented. But the findings are against such conclusions. It is true that a prior indebtedness of \$110,000 existed, and was secured by contracts for sales, and that the new mortgage by the corporation was for \$120,000 and covered the land, and it may be that the security was excessive. However, when it is considered that the property would have to be sold on judicial sale, that the bidding would be open to all, and that a sale would be subject to redemption,

and that the mortgagees would only be entitled to receive the amount of the mortgage indebtedness, it is not to be held that undue advantage was being taken by the mortgagees in taking all the assets as security.

As to all other material matters, it is sufficient to say that the findings of the referee, affirmed by the District Court, are supported, and will not be set aside in this court. *Re Dorr*, 116 C. C. A. 112, 196 Fed. 292.

We think that the lower court was right in holding the mortgage to be valid. The court went no farther, and by its decision did not adjudicate questions of the claim of the water company to a superior lien.

The order appealed from is affirmed.

### ANNOTATION.

#### **Right of insolvent corporation to secure officers, directors, or stockholders for a contemporaneous loan to the corporation.**

According to the view held by a majority of courts, a corporation, though insolvent, may, where it has possession and control of its property and in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property, or by a mortgage sale, assignment, or otherwise (7 R. C. L. 755); the corporation has been held entitled thus to prefer a creditor, although the creditor is a shareholder, director, or managing officer of the corporation (7 R. C. L. 758; 10 Cyc. 1252 et seq.). It is apparent that a logical application of this theory sustains the right of an insolvent corporation to secure directors or stockholders for a contemporaneous loan.

In some jurisdictions the right of an insolvent corporation to prefer one creditor over another is denied (7 R. C. L. 757); at least, a corporation cannot prefer the debt of its stockholders or officers (7 R. C. L. 759; 10 Cyc. 1255). It does not logically follow from this view that the corporation cannot secure its shareholders, di-

rectors, or other officers for a contemporaneous loan made to it to enable it to continue business. A distinction exists between securing a past indebtedness and giving security for a contemporaneous loan. "There is a marked difference," says the court in *Illinois Steel Co. v. O'Donnell* (1895) 156 Ill. 624, 31 L.R.A. 265, 47 Am. St. Rep. 245, 41 N. E. 185, "between a case where a mortgage or other preference is given by an insolvent corporation to a director or officer to secure a pre-existing indebtedness, and a case like this, where the corporation, though in fact insolvent [that is, in the sense that its liabilities exceeded its assets], is a going corporation that is seeking to accomplish the objects of its incorporation, and the security is given to directors for moneys actually and in good faith loaned at the time the security is given to such embarrassed corporation, and for its benefit."

According to the practically uniform opinion, in the absence of a statutory restriction, a corporation may,

although insolvent, secure a director or other officer for a contemporaneous loan made to it fairly and in good faith. *Twin-Lick Oil Co. v. Marbury* (1875) 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688; *RE LAKE CHELAN LAND CO.* (reported herewith) ante, 557; *Harts v. Brown* (1875) 77 Ill. 226, 4 Mor. Min. Rep. 1; *Illinois Steel Co. v. O'Donnell* (Ill.) supra; *Clay v. Towle* (1886) 78 Me. 86, 2 Atl. 852; *Singer v. Salt Lake Copper Mfg. Co.* (1898) 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024. The decision in *Callahan v. Pioneer Nurseries Co.* (1917) 49 Utah, 541, 164 Pac. 873, supporting such security given to a shareholder, seems to be limited to such a case, and would not sustain a security given to a director or other officer.

It is held in *Sanford Fork & Tool Co. v. Howe, B. & Co.* (1894) 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621, that a corporation may give a mortgage to its directors who have lent their credit to it, to induce a continuance of the loan of that credit and obtain renewals of maturing paper, at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending and expecting to continue its business.

In *Converse v. Sharpe* (1900) 161 N. Y. 571, 56 N. E. 69, in which security given upon a loan by directors was sustained, the directors believed the corporation to be solvent, although it was in fact insolvent.

In *Harle-Haas Drug Co. v. Rogers Drug Co.* (1910) 19 Wyo. 35, 113 Pac. 791, Ann. Cas. 1913E, 181, where a chattel mortgage given to a director upon a loan made by him to the corporation was sustained, the fact as to insolvency of the corporation at the time of giving the mortgage is not clearly decided, but the fact that the corporation was a going concern is emphasized.

In *Hogsett v. Columbia Iron & Steel Co.* (1902) 203 Pa. 148, 52 Atl. 179, an agreement by the directors of a company, with one who apparently was the president of the company, that if he would at once furnish the funds and credit to operate the corporate plant

and give its business his active personal attention he should be secured by a first judgment, and execution whenever he might think it desirable, for such amount as he might then be liable for on the company's account, and also for the salary due him, was held valid, so that upon the closing down of the corporate business and the giving of the president of a judgment note, on which judgment was entered and the corporate property sold, the president was held entitled to the proceeds thereof, where it appeared that the money advanced by him and the obligations indorsed by him amounted to a great deal more than the proceeds.

A mortgage given directors and shareholders to secure an indebtedness by the corporation to them, in pursuance of a resolution, adopted at the time the indebtedness was incurred, that the shareholders and directors should have a lien in the nature of a first mortgage upon all the corporate property, was sustained in *Webster v. Ypsilanti Canning Co.* (1907) 149 Mich. 489, 113 N. W. 7, but this decision rests largely upon the general theory that the corporation may prefer directors and shareholders.

In *Converse v. Sharpe* (N. Y.) supra, where the directors at the time of making the loan believed the corporation to be solvent, when in fact it was insolvent, the argument was made that the directors, being the managing agents of the company, were chargeable with the knowledge of the condition of the company, and therefore were bound to know its hopelessly insolvent condition, and that they had no right, by loaning money, to protect the insolvent condition of the company and to create new and different liabilities which would enable them to become creditors and appropriate the company's assets, but that as trustees for its creditors and stockholders, upon its insolvency, it was the duty of the directors and the policy of the law to have its affairs promptly wound up. In answer to this argument, the court states that "no case is cited in support of the argument that this ar-

rangement by which persons who were directors of the company loaned moneys to it upon the pledge of securities, in order to preserve its credit and to tide over its difficulties, was against public policy, and I am unable to agree with it. To the contrary, the adjudged cases support such a transaction between the directors and the company, provided it was fair and in good faith." The court, after expressing in general an approval of the doctrine that the directors can transfer property to secure an honest bona fide debt of corporate officers, said: "Nor should the distinction be lost sight of that the assignment of the directors in pledge to the plaintiff was to secure present loans agreed to be made upon the faith of the pledge, and that it was in no wise to secure the payment of some precontracted debt, which might entail the condemnation of the law as a transfer of corporate property for the purpose of giving a preference to certain of its creditors;" and the court concludes that it is unable to perceive how any policy of the law is violated by upholding this transaction.

A purchase by the director to whom a mortgage was thus given, upon a sale by the trustees of the mortgage, was sustained in *Twin-Lick Oil Co. v. Marbury* (1875) 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688.

But an assignment of book accounts by an insolvent corporation to a creditor who had knowledge of such insolvency, and who undertook to finance the corporate business by furnishing the corporation from time to time raw material for manufacture on his own

credit, and advancing cash to pay for labor as required, was held fraudulent and a preference void as against the trustee in bankruptcy, in *Re Gottlieb & Co.* (1917) 245 Fed. 139, affirmed in (1919) 257 Fed. 72. The creditor in this case was a stockholder and at all times familiar with the company's business, and this is stated to have placed him in a different class from ordinary creditors. It was found as a fact that he had knowledge of the company's insolvency at the time the agreement for the assignment of accounts was entered into. The assignment was intended to secure him not only for advances afterwards to be made, but also for antecedent debts. It seems to have been held invalid, however, as to the debts of both classes.

Some statutes provide that an insolvent corporation, or one whose ordinary business is suspended for want of funds, shall not "sell, convey, assign, or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements, nor . . . make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors." Under such a statute an insolvent corporation cannot mortgage its property to secure an issue of bonds which were purchased by its directors, and a mortgage given for such purpose is void as against nonconsenting creditors. *Central Electric Co. v. Socorro Electric Co.* (1913) 126 C. C. A. 356, 209 Fed. 534. W. A. E.

PEOPLE OF THE STATE OF ILLINOIS EX REL. WILLIAM F. DOWNS  
v.

L. F. BROWN et al., Appts.

*Illinois Supreme Court — December 19, 1917.*

(281 Ill. 390, 118 N. E. 67.)

**Mandamus — to compel payment of salary — absence of funds.**

1. Mandamus will not lie to compel payment of money by a public officer, if there is no fund out of which payment can be legally made.

[See note on this question beginning on page 572.]

**Evidence — judicial notice — public laws.**

2. Public laws need not be offered in evidence since the court takes judicial notice of them.

[See 15 R. C. L. 1064 et seq.]

**Mandamus — effect of lapse of appropriation.**

3. Under constitutional provisions that no money shall be drawn from the treasury except in pursuance of an appropriation, and that each general assembly shall provide appropriations for expenses for government until the expiration of the first fiscal quarter after adjournment of the next annual session, public officials cannot be compelled by mandamus to approve a pay roll and draw a warrant for payment of the salary of a public employee after the appropriation has become inert because of expiration of such first fiscal quarter, after adjournment

of the succeeding legislature without continuing the appropriation.

[See 18 R. C. L. 227-229.]

**—duration on reinstatement before lapse.**

4. Where a discharged public employee, who is ordered reinstated by the Public Service Commission before lapse of the appropriation which the legislature has made for his salary, takes no steps to compel payment of such salary until after the appropriation has lapsed, the auditor has no reason to retain the amount of his salary until determination of the question whether or not he will be entitled to it, and therefore, if the auditor turns the unexpended money back into the general fund of the state after the appropriation has lapsed, mandamus will not lie subsequently to compel payment of the salary.

**APPEAL** by defendants from a judgment of the Circuit Court for Sangamon County (Smith, J.) in favor of relator in a proceeding for a writ of mandamus to compel payment of back salary alleged to be due him.  
*Reversed.*

The facts are stated in the opinion of the court.

Messrs. Edward J. Brundage, Attorney General, and Clarence N. Boord, Assistant Attorney General, for appellants:

The writ of mandamus should never be awarded unless the relator shows a clear legal right to have the thing sought by him done; nor unless he shows that it is the clear legal duty of the respondents to do the thing he seeks to have done.

McGann v. People, 194 Ill. 526, 62 N. E. 941; People ex rel. Rinne v. Blocki, 203 Ill. 363, 67 N. E. 809; Swift v. Klein, 163 Ill. 269, 45 N. E. 219; People ex rel. Greenwood v. Madison County, 125 Ill. 334, 17 N. E. 802.

The petition does not aver that there was any money in the hands or control of the respondents, or any of them, which was available for the payment of the claim for salary sought to be enforced.

Hall v. People, 57 Ill. 307; People ex rel. Woodbury v. Pavey, 137 Ill. 585, 27 N. E. 697; Martin v. Union Drainage Dist. 150 Ill. App. 402; State Commission v. Welch, 20 Cal. App. 624, 129 Pac. 974; Shawnee County v. State, 42 Kan. 327, 22 Pac. 327; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397; State ex rel. Lisk v. Otoe County, 10 Neb.

19, 4 N. W. 25; State ex rel. Coleman v. Smith, 8 S. C. 127.

The proof does not show that there was any money in the hands or control of the respondents, or any of them, out of which the payment of the claims could be made.

Hall v. People, 57 Ill. 307; People ex rel. Woodbury v. Pavey, 137 Ill. 585, 27 N. E. 697; High, Extr. Leg. Rem. § 345; Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797; Chicago v. People, 210 Ill. 84, 71 N. E. 816; State ex rel. Bryson v. Daniel, 52 S. C. 201, 29 S. E. 633; McCaslan v. Major, 64 S. C. 41, 41 S. E. 893; Dunten v. State, 172 Ind. 59, 87 N. E. 733; Monroe County v. State, 156 Ind. 550, 60 N. E. 344; People ex rel. Atty. Gen. v. Reis, 76 Cal. 269, 18 Pac. 309; State ex rel. Booth v. Bryan, 26 Or. 502, 38 Pac. 618.

There was no money in the hands or control of the respondents, or any of them, out of which the payment of the salary sought to be enforced could be legally made. The only possible appropriation out of which the said salary of the relator could ever have been paid lapsed before the commencement of this action.

People ex rel. Caton v. Needles, 96 Ill. 575; People ex rel. Brinkerhoff v.

Swigert, 107 Ill. 494; People ex rel. Freeman v. Lippincott, 64 Ill. 256; People ex rel. Harts v. Lippincott, 72 Ill. 578; State ex rel. Bullock Mfg. Co. v. Babcock, 22 Neb. 33, 33 N. W. 709; State ex rel. Dales v. Moore, 36 Neb. 579, 54 N. W. 866; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; Hill v. Rae, 52 Mont. 378, L.R.A.1917A, 495, 158 Pac. 826, Ann. Cas. 1917E, 210; State v. Medbery, 7 Ohio St. 522; Bosworth v. Shuck, 118 Ky. 458, 81 S. W. 240; State ex rel. Morotz v. Rickards, 17 Mont. 440, 43 Pac. 504.

The writ of mandamus will not be issued where the court can see that it would be ineffective or useless.

People ex rel. Bruce v. Dunne, 258 Ill. 441, 45 L.R.A. (N.S.) 500, 101 N. E. 560; People ex rel. Molchan v. Streator, 258 Ill. 273, 101 N. E. 599; Ohio & M. R. Co. v. People, 120 Ill. 200, 11 N. E. 347; Cristman v. Peck, 90 Ill. 150; 19 Am. & Eng. Enc. Law, 2d ed. 756; 26 Cyc. 147; Spelling, Inj. & Extr. Rem. 2d ed. § 1377; High, Extr. Leg. Rem. 2d ed. §14.

The writ of mandamus will not be issued to compel an act which is prohibited by the Constitution or law.

People ex rel. Thatcher v. Hyde Park, 117 Ill. 462, 6 N. E. 33; Knopf v. Corcoran, 112 Ill. App. 320; State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 95 Pac. 698; 25 Cyc. 150; Spelling, Inj. & Extr. Rem. 2d ed. § 1378; High, Extr. Leg. Rem. § 40; People ex rel. Sherwood v. State Canvassers, 129 N. Y. 360, 14 L.R.A. 646, 29 N. E. 345; Chicot County v. Kruse, 47 Ark. 80, 14 S. W. 469; Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771; United States v. Clark County, 95 U. S. 769, 24 L. ed. 545.

Mr. B. L. Catron for appellee.

Mr. Justice Cartwright delivered the opinion of the court:

The relator, William F. Downs, filed in the circuit court of Sangamon county his petition for a writ of mandamus directed to the board of live stock commissioners, the civil service commission, the auditor of public accounts, and the state treasurer, commanding the board of live stock commissioners to certify a pay roll for the salary of the relator as messenger of the board at the rate of \$70 per month, from the time of his discharge by the board

on February 1, 1914, to May 1, 1916, the date on which he was certified by the civil service commission to the position of messenger of the state mining board, and commanding the civil service commission to approve such pay roll, the auditor to issue a warrant for such salary, and the state treasurer to countersign and pay the warrant. The defendants answered the petition, and a replication having been filed, the cause was heard by the court without a jury, and a writ of mandamus was awarded for payment of the salary from the 1st day of February, 1914, to June 30, 1915, inclusive. The defendants appealed from the judgment. The facts are as follows: The relator, William F. Downs, was, on and prior to July 1, 1911, an employee of the state under the classified civil service as a messenger in the office of the state board of live stock commissioners, and was so employed on January 27, 1914, at a salary of \$840 per year, payable in monthly instalments of \$70. On January 27, 1914, the board notified him that his services would be dispensed with after February 1, 1914, and the next day the president of the board filed charges of general incompetency against him. On February 1, 1914, the board removed him from his position, and refused to permit him to further perform its duties. Thereafter a hearing was had before W. M. Allen, an investigator of the civil service commission, who made a report that the charge of general incompetency was not sustained, and that, while the errors committed by the relator would justify an investigation and temporary suspension, they did not justify a dismissal, and he recommended a reinstatement. On June 30, 1914, the civil service commission sent to the relator a card admitting him to an efficiency examination for the position of messenger, to be held on July 3, 1914. The relator attended and took the examination, but failed to pass, his general average being 63.06 per cent. On September 29, 1914, the civil service commission

passed a resolution reciting the hearing before Allen, the swearing of witnesses and taking of testimony, and found that the charges were proved, and discharged the relator from the position of messenger in the office of the board of live stock commissioners. On May 27, 1915, the relator applied for a rehearing of the charges, and the rehearing was had before Frank Trutter, an investigating officer of the civil service commission, who found that the charge of general incompetency was not sustained by the proof, and that, while the errors committed justified an investigation, and perhaps a reprimand of the relator, they did not justify dismissal. On September 16, 1915, the civil service commission passed a resolution reciting the investigation, and finding that the charge was not proved, and ordering the name of the relator to be placed on the preferred reinstatement list for the position of messenger without allowance of pay for the time of suspension. The name of the relator was placed on the preferred reinstatement list, and remained there until May 1, 1916, when he was certified to the position of messenger in the office of the state mining board.

The several steps which the relator asked the court to compel the defendants to perform were for the purpose of withdrawing from the state treasury the amount necessary to pay the relator a salary, and the conditions under which that may be done are fixed by the Constitution, § 17, art. 4, of the Constitution provides: "No money shall be drawn from the treasury except in pursuance of an appropriation made by law and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution." Section 18 provides as follows: "Each general assembly shall provide for all the appropriations necessary for

the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two thirds of the members elected to each house, not to exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the state treasury, from funds belonging to the state, shall end with such fiscal quarter."

The act of the general assembly of 1913 appropriated \$840 per annum for the position held by the relator until the expiration of the first fiscal quarter after the adjournment of the next regular session, and ended at that time. The general assembly in 1915 made no appropriation for the salary of a messenger of the state board of live stock commissioners nor any appropriation from which the salary of the relator could be paid. This suit was begun on May 8, 1916, and there was then no money in the treasury, nor in the hands or under the control of the defendants, or any of them, out of which the payment of the relator's salary could be legally made. It does not appear that the acts of the general assembly making appropriations in 1913 and 1915 were offered in evidence, nor that the constitutional provisions were presented to the circuit court, but those acts were public laws, of which the courts had judicial knowledge, and it was not necessary to offer them in evidence. Both the supreme law and the public laws of the state are judicially noticed by the courts. *People use of Peoria County v. Hill*, 163 Ill. 186, 36 L.R.A. 634, 46 N.E. 796; *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N.E. 807; *People v. Braun*, 246 Ill. 428, 92 N.E. 917, 20 Ann. Cas. 448; 1 Chamberlayne, Ev. § 605. If there is no fund in the control of the officer or

Evidence—  
judicial notice—  
public laws.

body sought to be coerced to pay money, out of which the payment can be legally made, the writ of

**Mandamus—to compel payment of salary—absence of funds.**

mandamus will be denied, for the obvious reason that courts, in administering the law, will not command an act to be done which is contrary to law. Want of funds, being a complete answer to a petition to compel an officer to pay warrants drawn upon him, is necessarily a complete answer to a petition to

**—effect of lapse of appropriation.**

compel an officer to make or approve a pay roll, or to draw a warrant for such payment. *People ex rel. Caton v. Needles*, 96 Ill. 575; *People ex rel. Brinkerhoff v. Swigert*, 107 Ill. 494; *People ex rel. Woodbury v. Pavey*, 137 Ill. 585, 27 N. E. 697; *Chicago v. People*, 210 Ill. 84, 71 N. E. 816; *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797, 18 R. C. L. 227; 19 Am. & Eng. Enc. Law, 2d ed. 795; 26 Cyc. 319; *Dunten v. State*, 172 Ind. 59, 87 N. E. 733; *McCaslan v. Major*, 64 S. C. 188, 41 S. E. 893; *People ex rel. Atty. Gen. v. Reis*, 76 Cal. 269, 18 Pac. 309; *State ex rel. Booth v. Bryan*, 26 Or. 502, 38 Pac. 618.

Counsel for appellee regards the decisions in *People ex rel. Chatterton v. Secretary of State*, 58 Ill. 90, and *People ex rel. Harts v. Lippincott*, 72 Ill. 578, as sustaining the judgment, but that is a misapprehension. In *People ex rel. Chatterton v. Secretary of State*, a petition for writ of mandamus was filed in this court to compel the auditor of public accounts and the state treasurer to countersign and pay a warrant for printing paper sold and delivered to the state by the relator. A contract for paper for the use of the state, in pursuance of law, had been awarded to the relator and partly performed. The general assembly had attempted to rescind the contract, and the secretary of state refused to accept any more paper, and the auditor refused to draw a warrant for the amount due. The answers showed that there was no

money in the treasury to pay for the paper, and the court said that if the petition was to compel payment, alone, the answer would be a bar to relief; but where the state had received services or property of an individual under a contract made in pursuance of law, it was the duty of the auditor to draw a warrant, and the treasurer to countersign it and deliver it to the person entitled to receive it, whether there was money in the treasury or not for its payment, and it should be paid when there were funds for the payment of the claim. The contract was made pursuant to law, and the material question was whether the contract was binding so far as it had been performed before repudiation. Vouchers were payable by the Act of 1849, out of "any moneys in the treasury not otherwise appropriated." There was no question of the lapsing of an appropriation.

*People ex rel. Harts v. Lippincott*, supra, was also a petition for a writ of mandamus commanding the auditor to issue his warrant for \$60, the price of ten volumes of the reports of the decisions of this court. The only question submitted for decision was whether § 18 of article 4 of the present Constitution abrogated all laws in regard to appropriations for the payment by the state for the opinions of this court, or whether the appropriations would not expire until the end of the first fiscal quarter after the adjournment of the next regular session of the general assembly. The decision was that §§ 3 and 4 of the Act of 1849, relating to incidental expenses of state officers and the mode of defraying the same, were in the nature of standing appropriations, which did not expire until the period fixed by the present Constitution. That they were standing appropriations was again stated in *People ex rel. Stuckart v. Day*, 277 Ill. 543, 115 N. E. 732, and being such, it was held that the relator's claim should be paid whenever there were funds in the treas-

ury which might be lawfully used for that purpose. The Lippincott Case was cited in *People v. Swigert*, supra, in support of the doctrine that all appropriations, whether general or special, when otherwise unlimited, will continue in force and be available for the purposes for which they were made until the expiration of the first fiscal quarter after the adjournment of the next regular session of the general assembly, at which time all appropriations must lapse and cease to be of any validity.

The finding of the civil service commission that the charge against the relator was not proved, and the order to place his name on the preferred reinstatement list, was on September 16, 1915, before the lapse of the appropriation from which his salary could have been paid, but he took no action until the commencement of this suit, and permitted the

appropriation to lapse. The auditor, therefore, had no reason to retain the amount claimed by the relator until it should be judicially determined whether he was entitled to it or not, and by virtue of the Constitution the appropriation came to an end, and any unexpended balance was turned back into the general funds of the state.

The Circuit Court erred in awarding the writ, and the judgment is reversed.

#### NOTE.

The subject of mandamus to compel payment of salary of public officer or employee is treated in the annotation following *Mattox v. Board of Education*, post, 572. For the point involved in the reported case (*PEOPLE EX REL. DOWNS v. BROWN*, ante, 563), see subd. II. a, of that annotation.

### J. H. MATTOX

v.

### BOARD OF EDUCATION OF LIBERTY COUNTY.

*Georgia Supreme Court—November 16, 1918.*

(148 Ga. 577, 97 S. E. 532.)

#### **Mandamus — to pay salary.**

1. Where a county board of education, having wrongfully paid the salary incident to the office of county superintendent of education to the de facto officer, refuses payment to the de jure officer upon the establishment of his right, a money judgment against the board of education would be of no practical benefit to such de jure officer, and mandamus would be the proper remedy.

[See note on this question beginning on page 572.]

#### **Officer — de facto — payment — effect.**

2. Where the government in good faith pays the salary incident to an office to a de facto officer holding by color of title, it cannot be compelled to pay the salary a second time to the officer de jure when he has recovered the office; and the de jure officer, upon establishing his right to the office, would have to look to the de facto officer for the moneys so received by him. Where

the action of the government through its authorized board is arbitrary, and not in good faith, the contrary rule would apply.

[See 22 R. C. L. 541-545.]

#### **—salary paid to de facto officer — remedy.**

3. The remedy of a de jure officer whose salary has in good faith been paid to a de facto officer is by action against the latter.

[See 22 R. C. L. 545, 546.]

Headnotes 1 and 2 by GILBERT, J.

(Atkinson, J., dissents in part.)



**CERTIFICATION** by the Court of Appeals for the determination by the Supreme Court of questions arising upon error to review a judgment sustaining a demurrer to and dismissing a petition filed to recover the amount of salary alleged to be due plaintiff as county superintendent. *Questions answered.*

The questions upon which the court of appeals requested instructions from the supreme court were as follows:

"J. H. Mattox was, on the first Wednesday in October, 1910, regularly elected superintendent of education of Liberty county for the term of four years beginning May 7, 1912; and, after his election had been declared by the proper authorities, his commission of office was duly forwarded by the governor to the ordinary of Liberty county, with direction that it be delivered to Mattox upon presentation by him of a proper bond approved by the board of education of that county and his taking the oath of office. By act of the general assembly, passed in 1912 (Acts 1912, p. 162), the term of office for which he had been elected was extended to January 1, 1917. Prior to the commencement of the term for which he had been elected, he executed and presented to the board of education a bond conditioned upon the faithful performance of his duty under the law, the amount and sufficiency of which have not been questioned. The board of education refused to approve the bond, basing the refusal upon alleged misconduct of the plaintiff before his election to office, and his qualifications in respect to previous citizenship in the county for a certain period. The plaintiff applied for the writ of mandamus to compel the board to approve his official bond, and, in response to the rule nisi issued upon the petition, the board filed a demurrer and an answer. The demurrer was sustained, and this was reversed by the supreme court. *Mattox v. Jones*, 141 Ga. 649, 81 S. E. 861. The case was then tried and a verdict returned in favor of the plaintiff, and, on exceptions by the board to the overruling of its motion for a new trial, the judgment was affirmed by

the supreme court. See *Jones v. Mattox*, 146 Ga. 629, 92 S. E. 202. Before the last decision of the supreme court, the plaintiff filed the present suit against the board of education in their official capacity, for a part of the salary which he claimed was due him as county superintendent of education, and later, by amendment, after his term of office had expired, sued for the amount of the fixed salary for the entire term of four years and eight months; it being alleged in the petition that the defendant had illegally elected another person to fill the office, and had illegally been paying to that person the plaintiff's salary since the 1st of May, 1912. The defendant filed a general demurrer, on the ground that 'said petition is not sufficient in law.' The court sustained the demurrer and dismissed the petition, and to that ruling the plaintiff excepts. It is contended by counsel for the defendant in error that the court properly sustained the demurrer, because 'there is no authority of law for suing the county board of education of Liberty county, Georgia,' and 'the petitioner shows that the salary has been paid to a de facto officer; and, when so paid, the de jure officer cannot maintain an action for the same against the county authorities.'

"(1) Would the rule as stated in *Morel v. Sylvania & G. R. Co.* 134 Ga. 687, 68 S. E. 588, that 'a de jure officer cannot recover from the government or its subordinate corporations, the amount of salary paid to a de facto officer while the latter occupied the office and discharged its duties, although he was subsequently ousted at the instance of the de jure officer, have application in the present case, where the issue as raised was not between the two officials themselves, but where the contest was entirely between the de jure officer and the governing authority,

and where the alleged officer de facto came into office solely by the illegal act of the governing authority itself?

"(2) If the rule indicated does not preclude a recovery by the plaintiff as against the governing authority, does the fact that the claim does not arise out of any contractual relation between the parties (and thus might be distinguished from suits such as have been recognized in the case of *Board of Education v. Palmer*, 134 Ga. 662, 68 S. E. 583), but is intended to compel the board to pay a salary fixed and established by law, make mandamus the proper and exclusive remedy?"

Mr. H. H. Elders for plaintiff in error.

Messrs. Parker & Parker and W. B. Stubbs, for defendant in error:

A county or municipality which has paid a salary to a de facto officer, who performs the duties of the office under color of title while the right to it was in litigation, cannot be held liable therefor again to another who may thereafter establish his title to the office.

*Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308; *State ex rel. Greeley County v. Milne*, 36 Neb. 301, 19 L.R.A. 689, 38 Am. St. Rep. 724, 54 N. W. 521; *Walden v. Headland*, 156 Ala. 562, 47 So. 79; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Kessel v. Zeiser*, 102 N. Y. 114, 55 Am. Rep. 769, 6 N. E. 574; *Kreitz v. Behrensmeier*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983; *Demerest v. New York*, 147 N. Y. 203, 41 N. E. 405; *Leonard v. Terre Haute*, 48 Ind. App. 104, 93 N. E. 872.

Gilbert, J., delivered the opinion of the court:

1. Where the government in good faith pays the salary incident to an office to a de facto officer holding by color of title, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer de jure when he has recovered the office. Where, however, the govern-

ment, through its authorized board, does not act in good faith, but arbitrarily and illegally deprives the de jure officer of his office, and pays the salary incident thereto to one who performs the duties of the office by virtue only of the illegal acts of the board, the de jure officer is entitled to recover his salary.

The excerpt from the decision of *Morel v. Sylvania & G. R. Co.* 134 Ga. 687, 68 S. E. 588, in the first question propounded by the court of appeals, was not an adjudication by this court, and did not rule upon the question herein involved. That case involved a suit between an individual and a railroad company; and while the court, in the opinion, stated a principle that had been held in other jurisdictions, it also stated that "the present case does not involve a governmental corporation, but a case of an ex-president and ex-officials of a railroad corporation remaining in possession and causing salaries to be paid to themselves without authority of the company. . . . The rights of the public in dealing with de facto officers are not involved."

The statement of the rule as between the public and de facto officers was obiter. The quoted extract from the opinion was used merely as an illustration and by way of argument. The principle involved in the first question propounded is one of first impression in this state. The necessity of orderly government and for the remuneration of those who carry out the duties of government forms the basis for the rule that has been adopted, rendering the government immune from the further payment of salaries where it has, in good faith, paid to a de facto officer holding under color of title. In such a case the de jure officer who afterwards establishes his right to the office must look to the de facto officer to recover the salary wrongfully paid to the latter. Governmental boards and agents cannot be allowed to arbitrarily and

officer de facto—  
payment—effect.

—salary paid  
to de facto  
officer—remedy.

illegally prevent one rightfully entitled to a public office from discharging the duties thereof, and deprive him of the salary incident thereto; otherwise a governmental board constituted for ministerial purposes might deprive the people themselves of their right to select their own public officers. For the reason above stated, we think the correct rule is dependent upon the good faith of the action of the board in depriving the de jure officer of his office and the payment of the salary to the de facto officer. "The salary of an official position belongs to the officer occupying such position as an incident to the office, and does not depend upon his performance of the duties of the office." *Leonard v. Terre Haute*, 48 Ind. App. 104, 93 N. E. 872; *Throop*, Pub. Off. § 516.

Upon the various phases of this question, the courts of this country are in direct conflict, and present a variety of rules. For a thorough consideration of the different rules and opinions entertained, reference is made to *Mechem*, Pub. Off. §§ 332 et seq.; *Throop*, Pub. Off. §§ 513-516; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 226, 50 Atl. 1025. The case of *Coughlin v. McElroy*, cited above, is a thoroughly considered case, citing many decisions from the courts of many states upon the question. The facts of that case show that the de facto officer was the incumbent who failed of re-election, but, believing that he had been re-elected, retained the office until the supreme court decided against him. In the meantime the city of Bridgeport continued to pay him the fees of the office, and it appeared that neither the municipality nor the de facto officer had any reason to believe that the re-election of the incumbent was in doubt. The bona fides of the transaction were, therefore, fundamental.

2. The salary due a county superintendent of education is paid out of public funds when approved by the county board of education. The county board is not the custodian of public funds. It is not a body

corporate with authority to sue and be sued in the ordinary sense. Section 1525 (d) of Park's Anno. Pol. Code, cited by counsel for plaintiff, is not operative in Liberty county. It is a part of the act of the general assembly of 1912, which was intended to have the effect of a general law, but with local application. Park's Anno. Pol. Code, § 1525 (a). A money judgment against the board of education for salary due the superintendent would be of no practical benefit to the latter, as it could subject nothing to levy and sale; therefore, a suit at law of this character affords the officer no remedy. Mandamus is

the remedy to compel a public officer

Mandamus—to pay salary.

or a county board to perform a duty imposed by law. It is the remedy in this case, because it is the only adequate and specific remedy at law. It is available only when it is exclusive. Civ. Code, 1910, § 5440; *Shannon v. Reynolds*, 78 Ga. 760, 3 S. E. 653; *Gamble v. Clark*, 92 Ga. 695, 19 S. E. 54; *West v. Hancock County*, 103 Ga. 737, 30 S. E. 573; *Clark v. Eve*, 134 Ga. 790, 68 S. E. 598 (6a). "The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ belongs only to those who have legal rights to enforce, who find themselves without an appropriate legal remedy. In this sense mandamus may be regarded as a dernier resort, to be used when the law affords no other adequate means of relief. And whenever the conditions above noticed coexist, the right to the extraordinary aid of a mandamus may be regarded, as to that extent, *ex debito justiciæ*. To warrant the relief, however, the right whose enforcement is sought must be a complete and not merely an inchoate right." *High*, Extr. Leg. Rem. 3d ed. § 10. For a collection of the decisions of this court with reference to the availability of mandamus as a remedy, see 9 Mich.

Enc. Dig. (Ga.) 163, 164; *Eureka Pipe Line Co. v. Riggs*, Ann. Cas. 1918A, 995, and note (75 W. Va. 353, 83 S. E. 1020).

All the Justices concur (*Fish, Ch. J.*, specially), except *Atkinson, J.*, who dissents as to the first division of the opinion.

## ANNOTATION.

### Mandamus to compel payment of salary of public officer or employee.

#### I. General rule:

- a. Rule stated, 572.
- b. Necessity of demand, 574.
- c. Existence of other adequate remedy, 574.
- d. Nature of duty to be enforced:
  1. Ministerial duty to pay, 576.
  2. Effect of discretion as to payment, 578.

#### *I. General rule.*

##### *a. Rule stated.*

Where the duty to pay the salary of a public officer or employee is purely ministerial, involving no element of discretion, and there is no adequate legal remedy whereby payment may be enforced, mandamus is ordinarily the proper remedy to compel payment.

**Alabama.**—*Nichols v. Comptroller* (1833) 4 Stew. & P. 154; *Reynolds v. Taylor* (1869) 43 Ala. 420; *State ex rel. Moniac v. Brewer* (1878) 62 Ala. 215. See also *McKinney v. Reynolds* (1870) 44 Ala. 660.

**Arkansas.**—*Byrd v. Conway* (1844) 5 Ark. 436.

**California.**—*Ward v. Forkner* (1897) 5 Cal. Unrep. 806, 50 Pac. 713. See also *Quigg v. Evans* (1896) 121 Cal. 546, 53 Pac. 1093; *Stevens v. Truman* (1899) 127 Cal. 155, 59 Pac. 397; *Scott v. Boyle* (1912) 164 Cal. 321, 128 Pac. 941; *Galeener v. Honeycutt* (1916) 173 Cal. 100, 159 Pac. 595; *Gibson v. Civil Service Commission* (1915) 27 Cal. App. 396, 150 Pac. 78.

**Colorado.**—*Flower v. Casey* (1919) — Colo. —, 181 Pac. 193.

**Florida.**—*State ex rel. Weeks v. Gamble* (1870) 13 Fla. 9; *State ex rel. Baas v. McKinnon* (1914) 68 Fla. 548, 67 So. 77.

**Idaho.**—*Jeffreys v. Huston* (1911) 23 Idaho, 372, 129 Pac. 1065; *Ward v. Holmes* (1913) 26 Idaho, 602, 144 Pac. 1104.

**Illinois.**—*People ex rel. Mosby v. Stevenson* (1915) 272 Ill. 215, 111 N.

#### II. Defenses:

- a. Absence of appropriation or funds, 579.
- b. Title in dispute, 581.
- c. Salary in dispute, 582.
- d. Payment to third person, 583.
- e. Laches, 583.

**E. 595.** See also *Chicago v. O'Hara* (1871) 60 Ill. 413; *Ward v. Cook* (1898) 78 Ill. App. 111.

**Indiana.**—*State ex rel. McGregor v. Coopridner* (1884) 96 Ind. 279.

**Kentucky.**—*Page v. Hardin* (1848) 8 B. Mon. 648. See also *Auditor v. Adams* (1852) 13 B. Mon. 150; *Judge & Justices of Hickman County Ct. v. Moore* (1867) 2 Bush, 108; *Hemphill v. Coulter* (1902) 23 Ky. L. Rep. 2387, 67 S. W. 3; *O'Connor v. Weissinger* (1911) 142 Ky. 452, 134 S. W. 1127; *Schmitt v. Dooling* (1911) 145 Ky. 240, 36 L.R.A.(N.S.) 881, 140 S. W. 197, Ann. Cas. 1913B, 1078.

**Louisiana.**—*State ex rel. Merchant v. Thompson* (1876) Man. Unrep. Cas. 78. See also *State ex rel. Elmore v. Jumel* (1880) Man. Unrep. Cas. 225; *Shaw v. Howell* (1866) 18 La. Ann. 195; *State ex rel. Samuel v. Jumel* (1878) 30 La. Ann. 339; *State ex rel. Young v. Capdevielle* (1914) 135 La. 669, 65 So. 890.

**Michigan.**—*People ex rel. Bristow v. Macomb County* (1855) 3 Mich. 475; *Boyd v. Detroit Bd. of Health* (1905) 140 Mich. 306, 103 N. W. 605. See also *People ex rel. Schmittiel v. Board of Auditors* (1865) 13 Mich. 233; *McBride v. Grand Rapids* (1881) 47 Mich. 236, 10 N. W. 353; *Granger v. French* (1908) 152 Mich. 356, 125 Am. St. Rep. 416, 116 N. W. 181.

**Mississippi.**—*Swann v. Buck* (1866) 40 Miss. 268.

**Missouri.**—*State ex rel. Vail v. Draper* (1871) 48 Mo. 213; *Sanford v.*

**Kansas City** (1879) 69 Mo. 466. See also *State ex rel. Vail v. Draper* (1872) 50 Mo. 353; *State ex rel. Hawes v. Mason* (1899) 153 Mo. 23, 54 S. W. 524; *State ex rel. Mermod v. Heege* (1890) 39 Mo. App. 49; *State ex rel. Harvey v. Gilbert* (1909) 163 Mo. App. 679, 147 S. W. 505.

**Montana.**—*State ex rel. Thompson v. Kenney* (1890) 9 Mont. 223, 23 Pac. 733. See also *State ex rel. Rotwitt v. Hickman* (1890) 9 Mont. 370, 8 L.R.A. 403, 23 Pac. 740.

**Nebraska.**—*Moore v. State* (1903) 4 Neb. (Unof.) 235, 93 N. W. 986.

**New Jersey.**—*Apgar v. School Dist.* (1870) 34 N. J. L. 308. See also *State ex rel. Knight v. Ocean County* (1886) 48 N. J. L. 70, 3 Atl. 344; *Thompson v. Board of Education* (1895) 57 N. J. L. 628, 31 Atl. 168; *State ex rel. Crahe v. Shoenthal* (1908) 76 N. J. L. 378, 69 Atl. 972; *Schwarzrock v. Board of Education* (1917) 90 N. J. L. 370, 101 Atl. 394.

**New Mexico.**—*State ex rel. Stephens v. State Corp. Commission* (1918) — N. M. —, P.U.R.1919B, 889, 176 Pac. 866.

**New York.**—*People ex rel. Morris v. Edmunds* (1853) 15 Barb. 529; *People ex rel. Walsh v. Smith* (1879) 77 N. Y. 347; *People ex rel. Nugent v. Police Comra.* (1889) 114 N. Y. 245, 21 N. E. 421; *People ex rel. Cronin v. Coffey* (1892) 131 N. Y. 569, 30 N. E. 64, affirming (1891) 62 Hun, 86, 16 N. Y. Supp. 501; *People ex rel. Bedford v. McWilliams* (1905) 56 Misc. 296, 106 N. Y. Supp. 459; *People ex rel. Schneider v. Prendergast* (1916) 94 Misc. 481, 159 N. Y. Supp. 574, reversed on other grounds in (1916) 172 App. Div. 215, 158 N. Y. Supp. 615.

**North Carolina.**—*Robinson v. Howard* (1881) 84 N. C. 151; *Koonce v. Jones County* (1889) 106 N. C. 192, 10 S. E. 1038.

**Ohio.**—*Case v. Wresler* (1855) 4 Ohio St. 561; *State ex rel. Olds v. Franklin County* (1870) 20 Ohio St. 421; *State ex rel. Miller v. Massillon* (1902) 24 Ohio C. C. 249.

**Oklahoma.**—*Guthrie v. Territory* (1889) 1 Okla. 188, 21 L.R.A. 841, 31 Pac. 190; *Ryan v. Humphries* (1915)

50 Okla. 343, L.R.A.1915F, 1047, 150 Pac. 1106.

**Panama.**—*Smith v. Jackson* (1917) 154 C. C. A. 449, 241 Fed. 747.

**Pennsylvania.**—*Com. ex rel. Hepburn v. Mann* (1843) 5 Watts & S. 403; *Renshaw v. Blankenburg* (1873) 28 Pa. Dist. R. 651.

**South Carolina.**—*State ex rel. Marshall v. Starling* (1880) 13 S. C. 262.

**Tennessee.**—*Burch v. Baxter* (1873) 12 Heisk. 601; *Morley v. Power* (1880) 5 Lea, 691. See also *Arrington v. Cotton* (1872) 1 Baxt. 316; *State ex rel. Kercheval v. Nashville* (1885) 15 Lea, 697, 54 Am. Rep. 427.

**Texas.**—*Pickle v. McCall* (1893) 86 Tex. 212, 24 S. W. 265; *Denman v. Coffee* (1906) 42 Tex. Civ. App. 78, 91 S. W. 800.

**Utah.**—*Kendall v. Raybould* (1896) 13 Utah, 226, 49 Pac. 1034. See also *State ex rel. Bache v. Richards* (1897) 15 Utah, 477, 49 Pac. 532.

**Washington.**—*State ex rel. Dudley v. Daggett* (1902) 28 Wash. 1, 68 Pac. 340; *State ex rel. Roe v. Seattle* (1915) 88 Wash. 589, 153 Pac. 336. See also *State ex rel. Beach v. Olsen* (1916) 91 Wash. 56, 157 Pac. 34.

**West Virginia.**—*State ex rel. Hall v. Monongalia County Ct.* (1918) 82 W. Va. 564, 96 S. E. 966.

**Canada.**—See *Rex v. Justices of Niagara* (1826) Taylor, K. B. 394; *Re Fergus* (1859) 18 U. C. Q. B. 341; *Re Derby* (1889) 19 Ont. Rep. 51; *Cape Breton County v. McKay*, 18 Can. S. C. 639; *Ex parte Carter* (1895) 33 N. B. 6.

Thus, in *State ex rel. McGregor v. Coopridger* (1884) 96 Ind. 279, it was said: "If from any cause a school township shall become indebted to anyone for past tuition, it seems to us that any tuition funds of such township, then on hand or thereafter received, would be applicable to the payment of its past-due indebtedness for tuition purposes; and that it would be the duty of the trustee of such township to apply such funds, when received, to the payment of any such past indebtedness. Where such official duty exists, we need not argue for the purpose of showing that the perform-

ance of such duty, by the proper officer charged therewith, may be enforced by writ of mandate."

So, in *Swann v. Buck* (1866) 40 Miss. 268, the court said: "That the right of a public officer to receive a warrant for the salary attached by law to his office belongs to the class of cases to which the writ of mandamus is applicable was expressly adjudged in *Page v. Hardin* (1848) 8 B. Mon. (Ky.) 648, by the supreme court of Kentucky, and has been recognized in several cases by this court. And it may be observed generally that in all cases where the right of the party and the amount he is entitled to receive from the state are clearly ascertained by law, leaving no discretion to the auditor, and there is an existing appropriation for its payment, the duty to issue the warrant may be regarded as purely ministerial, and as one, the performance of which, in a case in other respects proper, may be enforced by mandamus."

#### *b. Necessity of demand.*

It has been held that demand of payment and a refusal, express or implied, are prerequisite to mandamus to compel the payment of the salary of a public officer or employee. *Shirley v. Cottonwood School Dist.* (1892) 3 Cal. Unrep. 605, 31 Pac. 365; *State ex rel. Hull v. Davis* (1871) 17 Minn. 429, Gil. 406. See also *State ex rel. Lindabury v. Ocean County* (1885) 47 N. J. L. 417, 1 Atl. 701.

Thus, in *Shirley v. Cottonwood School Dist.* (Cal.) *supra*, it appeared that a public school-teacher was prevented by the board of trustees from completing her contract. She was at all times ready and willing to fulfil her part of the contract, but did not make a demand for her salary for the period when she was prevented from teaching. The court said that it was an imperative rule of the law of mandamus that, previous to the making of the application to the court for a writ to command the performance of any particular act, a demand must have been made by the claimant, and this must have been met by an express or implied refusal to pay.

In *State ex rel. Hull v. Davis*

(Minn.) *supra*, the petitioner for a writ of mandamus to compel the treasurer of a school district to pay her salary as a school-teacher did not prove a demand therefor. The court said that a demand was essential, and that, as mandamus would not be granted unless a clear right thereto was shown, the writ must be denied.

#### *c. Existence of other adequate remedy.*

Mandamus, being an extraordinary remedy, will not issue to compel the payment of the salary of an officer or public employee, if there is an adequate remedy by action.

**Alabama.**—*Sessions v. Boykin* (1884) 78 Ala. 328.

**Arizona.**—*Dorrington v. Yuma County* (1902) 8 Ariz. 4, 68 Pac. 541.

**California.**—*Williams v. Bagnelle* (1903) 138 Cal. 699, 72 Pac. 408.

**Georgia.**—*MATTOX v. BOARD OF EDUCATION* (reported herewith) ante, 568.

**Indiana.**—*State ex rel. Starry v. Warren County* (1893) 136 Ind. 207, 35 N. E. 1100. See also *Johnson county v. Hicks* (1851) 2 Ind. 527.

**Kansas.**—*State ex rel. Bradford v. Hannon* (1888) 38 Kan. 593, 17 Pac. 185.

**Maine.**—*Baker v. Johnson* (1856) 41 Me. 15.

**Michigan.**—*Goodson v. Board of Health* (1897) 114 Mich. 345, 72 N. W. 185.

**Nebraska.**—*State ex rel. Roberts v. Lincoln* (1876) 4 Neb. 260.

**New York.**—*Ex parte Lynch* (1841) 2 Hill, 45; *People ex rel. Harnett v. Inspectors of Common Schools* (1873) 44 How. Pr. 322. See also *People ex rel. Lynch v. New York* (1841) 25 Wend. 680; *People ex rel. Perry v. Thompson* (1857) 25 Barb. 73; *People ex rel. Bagley v. Green* (1874) 1 Hun, 1, 3 Thomp. & C. 90; *People ex rel. Golden v. Roosevelt* (1897) 24 App. Div. 17, 48 N. Y. Supp. 1043; *People ex rel. Ajas v. Board of Education* (1905) 104 App. Div. 162, 93 N. Y. Supp. 300; *People ex rel. Farley v. Winkler* (1911) 146 App. Div. 314, 130 N. Y. Supp. 691.

**Texas.**—*Plummer v. Gholson* (1898) — Tex. Civ. App. —, 44 S. W. 1.

**Washington.**—*State ex rel. Brown v.*

McQuade (1905) 36 Wash. 579, 79 Pac. 207.

Canada.—*Re Whitaker* (1889) 18 Ont. Rep. 63.

In *Sessions v. Boykin* (1884) 78 Ala. 328, the claim of the petitioner was for compensation out of a specific fund. It was held that an action against the treasurer, or on his bond, while affording pecuniary compensation, was not adequate to enforce the specific duty to pay from that fund, and therefore mandamus was allowed.

But in *Dorrington v. Yuma County* (1902) 8 Ariz. 4, 68 Pac. 541, mandamus to compel the auditing and allowance of a claim for salary was denied, the court holding that an adequate remedy was afforded by a statute which provided that a dissatisfied claimant might sue within six months, and obtain judgment against the county. A further provision required the board to allow and pay such judgment.

In *Williams v. Bagnelle* (1902) 138 Cal. 699, 72 Pac. 408, mandamus was granted to compel a county superintendent of schools to draw a requisition for the payment of the salary of a teacher, the school trustees having issued a warrant therefor. It was held that a statute providing for an appeal by a teacher to the state superintendent, where salary was "withheld," applied only to a withholding by the board of trustees, and did not afford an adequate remedy in case of a withholding by the county superintendent.

But in *Plummer v. Gholson* (1898) — Tex. Civ. App. —, 44 S. W. 1, it was held that the remedy by appeal to the superintendent must be exhausted before a school-teacher could obtain mandamus to enforce the payment of his salary.

In *MATTOX v. BOARD OF EDUCATION* (reported herewith) ante, 568, where in a superintendent of schools sought a mandate against the board of education for his salary, it was held that a suit against the board would not give adequate relief, as there could be no levy or sale.

In *State ex rel. Starry v. Warren County* (1898) 136 Ind. 207, 35 N. E. 1100, it appeared that the petitioner for mandamus had served 150 days

as trustee of the township. The compensation fixed by statute was \$2 per day. The auditing board, however, refused to allow claimant more than \$200 for his services, although there did not appear to be a dispute as to the number of days. The court held that a mandate should issue compelling the board to allow the full amount, no other adequate legal remedy then existing.

In *Baker v. Johnson* (1856) 41 Me. 15, it was held that there was no right of action by a sheriff for fees allowed to him by order of court, and that, therefore, mandamus to compel their payment was proper.

In *State ex rel. Roberts v. Lincoln* (1876) 4 Neb. 260, it was held that an ordinary civil action afforded an adequate remedy to enforce the right of a city officer to arrears of salary.

In *Ex parte Lynch* (1841) 2 Hill (N. Y.) 45, it appeared that an associate justice of the court of general sessions was refused payment of his salary, whereupon he applied for a mandate to compel the common council to pay the amount. The court held that the writ would not issue, since the parties might have their rights adjudicated in an ordinary legal action.

In *People ex rel. Harnett v. Inspectors of Common Schools* (1873) 44 How. Pr. (N. Y.) 322, it appeared that the petitioner, a school-teacher, had a valid claim for salary due and owing. On an application for a mandate to compel payment, it was held that the petitioner might bring an ordinary action, hence the mandate was denied.

In *State v. McQuade* (1905) 36 Wash. 579, 79 Pac. 207, it was held that a school-teacher might require payment of his salary by mandamus, that being his only remedy.

In *Goodson v. Board of Health* (1897) 114 Mich. 345, 72 N. W. 185, the court refused to issue mandamus to compel payment for extra services rendered by a clerk employed by a municipal board of health, saying: "The proper remedy is by a suit at law."

In *State ex rel. Bradford v. Hannan* (1888) 38 Kan. 593, 17 Pac. 185, it was held that the payment of the salary of a police officer could be enforced by

action, and that therefore mandamus would not lie to compel payment.

*d. Nature of duty to be enforced.*

*1. Ministerial duty to pay.*

If the right of an officer or public employee to the payment of his salary is so far fixed that the duty to pay is ministerial, mandamus will lie to compel its performance.

**United States.**—*Brashear v. Mason* (1847) 6 How. 92, 12 L. ed. 357; *United States ex rel. Goodrich v. Guthrie* (1854) 17 How. 284, 15 L. ed. 102.

**Arkansas.**—*Black v. Auditor* (1870) 26 Ark. 237.

**California.**—*Fowler v. Peirce* (1852) 2 Cal. 165; *Puterbaugh v. Wadham* (1912) 162 Cal. 611, 123 Pac. 804. See also *Scott v. Boyle* (1912) 164 Cal. 321, 128 Pac. 941; *Pipher v. Superior Ct.* (1906) 3 Cal. App. 626, 86 Pac. 904.

**Colorado.**—*Lowell v. Bonney* (1900) 14 Colo. App. 230, 60 Pac. 830.

**District of Columbia.**—*United States ex rel. Warfield v. Boutwell* (1870) 7 D. C. 64.

**Florida.**—*State ex rel. Weeks v. Gamble* (1870) 13 Fla. 9.

**Indiana.**—*Ellis v. State* (1915) 183 Ind. 641, 109 N. E. 910.

**Louisiana.**—See *State ex rel. Longstreet v. Johnson* (1876) 28 La. Ann. 982.

**Maryland.**—*Thomas v. Owens* (1853) 4 Md. 189. See also *Robey v. Prince George's County* (1900) 92 Md. 150, 48 Atl. 48.

**Michigan.**—*Lachance v. Auditor General* (1889) 77 Mich. 563, 43 N. W. 1005.

**Minnesota.**—*State ex rel. Clark v. Jack* (1914) 126 Minn. 367, 148 N. W. 306.

**North Dakota.**—*State ex rel. Wiles v. Albright* (1901) 11 N. D. 22, 88 N. W. 729.

**New York.**—*People ex rel. Beck v. Buffalo* (1896) 18 Misc. 533, 42 N. Y. Supp. 545.

**Oregon.**—*Shattuck v. Kincaid* (1897) 31 Or. 379, 49 Pac. 758.

**Panama.**—*Smith v. Jackson* (1917) 154 C. C. A. 449, 241 Fed. 747.

**Pennsylvania.**—*Runkle v. Com.* (1881) 97 Pa. 328. See also *Flick v. Harpham* (1889) 3 Pa. Dist. R. 568.

**Texas.**—*Harkness v. Hutcherson* (1897) 90 Tex. 383, 38 S. W. 1120. See also *Orr v. Davis* (1895) 9 Tex. Civ. App. 628, 30 S. W. 249.

Thus, in *Brashear v. Mason* (1847) 6 How. (U. S.) 92, 12 L. ed. 357, it was held that mandamus does not lie to the Secretary of Navy to compel payment of the salary of a naval officer. Frequently, it was said, such duties are not merely ministerial, but require the exercise of judgment and discretion on the part of such official; hence the court cannot substitute itself for such discretion, and compel action in a certain direction.

In *United States ex rel. Goodrich v. Guthrie* (1854) 17 How. (U. S.) 284, 15 L. ed. 102, it was held that mandamus extends only to acts which are purely ministerial, that is, in regard to which an officer has no judgment or discretion in the performance of his duties. It appeared that the claim advanced rested first in the discretion of the Auditor, then it was passed on by the Comptroller, and finally carried before the Secretary of the Treasury for his approval. Therefore, the act in question was held not to be ministerial, and mandamus was refused.

In *Black v. Auditor* (1870) 26 Ark. 237, it appeared that the salaries of the circuit judges were fixed by law, and an appropriation had been made to pay such salaries, part of which remained unexpended. Mandamus was held to be the proper remedy by which one of the circuit judges could compel the state auditor to pay a sum claimed to be due as his salary. The court held this duty to be a ministerial one, and in stating the rule said: "It is a well-settled principle that mandamus will lie against the heads of departments of the Federal and state governments to compel them to perform a mere ministerial act imposed upon them by law, though not in those acts requiring the exercise by them of judgment and discretion."

In *Fowler v. Peirce* (1852) 2 Cal. 165, mandamus was held to be the proper remedy. A member of the assembly petitioned the court for a writ to the state comptroller, requiring him



to audit and allow his account, which consisted of items of compensation. In passing on the question of ministerial duty, the court said: "It is true that courts cannot compel judicial or other officers vested with legal discretion to act otherwise than in the exercise of that discretion. In the present case, it is the duty of the comptroller to audit the appellant's account. The nature and amount of the services are ascertained (or not disputed), and the law has fixed the compensation. The comptroller, who is bound to know the law by which he is required to act, has no discretion in such case. Nothing remains to be ascertained. He must audit the account according to the law in force; and it will be no sufficient answer to a mistake or refusal on his part to say he acted according to his discretion. The act of auditing an account, under circumstances like these, becomes merely ministerial, and can be enforced by mandamus."

Mandamus is proper to compel payment of salary of a public officer or employee, where the amount is fixed by law, and the proper officer is petitioning in a regular manner, thus making payment a purely ministerial duty. *Puterbaugh v. Wadham* (1912) 162 Cal. 611, 123 Pac. 804.

In *State ex rel. Weeks v. Gamble* (1870) 13 Fla. 9, it appeared that the salary of the lieutenant governor was fixed by the legislature. Title to the office had previously been determined by quo warranto. The court held the duty of the state comptroller to be purely ministerial, and that mandamus would lie to compel him to issue a warrant.

In *Ellis v. State* (1915) 183 Ind. 641, 109 N. E. 910, it appeared that a mayor, having been duly elected, presented his claim for salary to the city council. The claim was allowed and a warrant was issued, properly signed and executed, to the city treasurer for payment. The court held that a mandate would lie to compel the treasurer to pay the warrant, since his duty was purely a ministerial one.

In *Thomas v. Owens* (1853) 4 Md. 189, it was held that the duty of a  
5 A.L.R.—37.

treasurer was merely ministerial, since his duty was only to "count out the money." Therefore, a writ of mandamus would issue to compel the performance of this duty.

In *Lachance v. Auditor General* (1889) 77 Mich. 563, 43 N. W. 1005, it was held that mandamus would issue compelling the auditor to draw his warrant, where the fees of a justice of the peace had been allowed by the circuit court. The court said that the auditing of a claim was not in the nature of a suit, but was an administrative function; that the auditor was given no appellate power over other auditing bodies, and that his duty in issuing a proper warrant was purely a ministerial one.

In *State ex rel. Clark v. Jack* (1914) 126 Minn. 367, 148 N. W. 306, it appeared that the plaintiff was a school-teacher, and that payment of a portion of her salary was refused. She brought mandamus to compel the clerk of the district to draw an order on the treasurer for the amount. The clerk contended that the claim must first be passed on by the school board. A statute provided that it was the duty of the clerk to draw the order, on the salary becoming due. The court held that no discretion was vested in the clerk, and that his duty was purely ministerial, and ordered a mandate to issue.

In *People ex rel. Beck v. Buffalo* (1896) 18 Misc. 533, 42 N. Y. Supp. 545, it was held that mandamus would lie to direct the board of aldermen to issue a warrant for the payment of salary. It appeared that the petitioner had been duly appointed to fill the position of building inspector, and salary in the amount of \$41.66 was due and owing him. The board of public works certified to the board of aldermen to the amount, and recommended that a warrant be drawn. On the refusal of the aldermen to do so, the court issued the writ, regarding it as one to compel the performance of a ministerial duty.

Mandamus is the proper remedy to compel the auditor of the Panama canal to issue a warrant for the payment of the salary withheld from a

judge of the district court of the canal zone. *Smith v. Jackson* (1917) 154 C. C. A. 449, 241 Fed. 747, affirmed in (1918) 246 U. S. 388, 62 L. ed. 788, 38 Sup. Ct. Rep. 353.

In *Harkness v. Hutcherson* (1897) 90 Tex. 383, 38 S. W. 1120, it appeared that the petitioner, who applied for a mandate to compel payment of his salary as school-teacher, held a claim against the trustees, and sought to recover the same on the theory that they were public officers on whom a ministerial duty was imposed. It seems that the debt had, at that time, been prosecuted to judgment. The court held that it was a proper case for mandamus, and the writ was ordered to issue.

### 2. *Effect of discretion as to payment.*

Since mandamus issues only to enforce a positive duty, it will not lie to compel the payment of a salary, where there is any discretion vested in the officer whose action is sought to be compelled.

**Colorado.**—*Keefe Mfg. & Invest. Co. v. Board of Education* (1905) 33 Colo. 513, 81 Pac. 257.

**Missouri.**—*State ex rel. Sweaney v. Gentry* (1905) 112 Mo. App. 589, 87 S. W. 68.

**Nevada.**—*State ex rel. Mighels v. Eggers* (1913) 36 Nev. 364, 136 Pac. 104.

**New Jersey.**—*State ex rel. Shumar v. Applegate* (1888) 51 N. J. L. 117, 16 Atl. 59.

**New York.**—*People ex rel. Wilson v. Albany County* (1815) 12 Johns. 414. See also *Ex parte Farrington* (1823) 2 Cow. 407; *People ex rel. Thomson v. Warren County* (1845) 1 How. Pr. 116; *People ex rel. Baldwin v. Livingston County* (1857) 26 Barb. 118; *People ex rel. Ryan v. French* (1881) 24 Hun. 263, reversed in (1883) 91 N. Y. 265.

**Ohio.**—*Selby v. State* (1900) 63 Ohio St. 541, 59 N. E. 218.

**Pennsylvania.**—*Com. v. Philadelphia County* (1813) 5 Binn. 536; *Com. ex rel. Walton v. Lyndall* (1868) 2 Brewst. 425.

**Utah.**—*State ex rel. Davis v. Edwards* (1908) 33 Utah, 243, 93 Pac. 720.

**Virginia.**—*Simons v. Military Board* (1901) 99 Va. 390, 39 S. E. 125.

**Washington.**—*State ex rel. Banks v. Snohomish County* (1897) 18 Wash. 160, 51 Pac. 368. See also *State ex rel. Egbert v. Blumberg* (1907) 46 Wash. 270, 89 Pac. 708.

In *State ex rel. Mighels v. Eggers* (1913) 36 Nev. 364, 136 Pac. 104, it appeared that the plaintiff was duly appointed secretary of the State Industrial Commission, but that an appropriation had not been made for his salary, the fixing of which rested in the discretion of the Commission. The court held, on a petition for mandamus to compel the state comptroller to draw a warrant for the amount of his salary, that, while mandamus in general was the proper remedy by which to compel payment of salary of public officers, the fact that the duty imposed on the defendant was uncertain or discretionary precluded its issuance.

In *State ex rel. Shumar v. Applegate* (1888) 51 N. J. L. 117, 16 Atl. 59, mandamus was denied to compel the auditor to allow claims for the salary of a justice of the peace. It appeared that the auditor of that county was specially clothed with authority to use his discretion in regard to claims presented to him for payment.

In *Runkle v. Com.* (1881) 97 Pa. 328, it appeared that the city clerk, having a claim for salary, presented his bill to the city comptroller, who refused to countersign the warrant. On the return for a writ of mandamus he defended his action on the ground that he was exercising the discretion vested in him by virtue of his office. The court held that the comptroller was not a ministerial officer, and that mandamus would not lie to compel him to pay the salary.

In *State ex rel. Wiles v. Albright* (1901) 11 N. D. 22, 88 N. W. 729, it was held that mandamus would not issue in favor of the county superintendent of public schools, to compel the county auditor to audit his claim for salary, where the facts warranted a doubt as to the validity of the claim, the duties of the auditor not appearing to be purely ministerial.

In *United States ex rel. Warfield v.*

Boutwell (1870) 7 D. C. 64, the court held that mandamus would not lie where the defendant was vested with a discretion as to what class of individuals was entitled to an increase in salary. The right to mandamus to officers of the government is limited to cases where the duties to be performed are strictly ministerial.

In *People ex rel. Wilson v. Albany County* (1815) 12 Johns. (N. Y.) 414, it was held that a constable could not invoke the aid of mandamus to require the board of supervisors to allow his claims for fees in a certain amount. In passing on the question, the court said: "He [petitioner] has no right to any money for the services performed but such as the supervisors shall, in their discretion, judge him entitled to. Had they refused to hear his application, and to examine and pass on his account, a mandamus would have been proper to compel them to do so. . . . Certainly not to allow any specific sum; that would be taking upon ourselves a discretion which the legislature has vested in the supervisors; we could only command them to examine the applicant's accounts, and, in the words of the statute, allow him for his services such sum as they shall judge he reasonably deserves to have; and this has been already done."

Mandamus has been denied to a school-teacher to compel payment of her salary, where it appeared that a discretion was vested in the county commissioners as to the issuance of orders for the payment of salaries. *Com. v. Philadelphia County* (1813) 5 Binn. (Pa.) 536, wherein the court said: "The law has vested the commissioners with the power of approving or disapproving of the account, and we cannot take it away from them. The act is defective in not pointing out some mode of decision, in case of a difference of opinion between the master and the commissioners. I take it for granted that, upon this defect being made known, the legislature will remedy it by a new act. But as in this instance the commissioners have disapproved of the account, we cannot order a mandamus."

In *Com. ex rel. Walton v. Lyndall*

(1868) 2 Brewst. (Pa.) 425, it was held that a writ of mandamus would not be used to take away the discretion vested in the comptroller in respect to the auditing of the salary of a school-teacher.

In *State ex rel. Banks v. Snohomish County* (1897) 18 Wash. 160, 51 Pac. 368, a justice of the peace, seeking to compel payment of his salary by mandamus, was met by the defense that a discretion was vested in the board of commissioners. The court held that to be a good defense, and denied the writ.

## II. Defenses.

### a. Absence of appropriation or funds.

In several jurisdictions, it has been held that the absence of an appropriation is a good defense to an application for mandamus to require the payment of the salary of a public officer or employee.

*Arkansas*.—*Ex parte Tully* (1842) 4 Ark. 220, 38 Am. Dec. 83.

*Illinois*.—*PEOPLE EX REL. DOWNS v. BROWN* (reported herewith), ante, 563. See also *Fitzsimmons v. O'Neill* (1905) 214 Ill. 494, 78 N. E. 797.

*Louisiana*.—In *State ex rel. Moss v. Jumel* (1879) 81 La. Ann. 142. Compare *State ex rel. Mentz v. Clinton* (1876) 28 La. Ann. 47.

*Michigan*.—*People ex rel. Allen v. Frink* (1875) 32 Mich. 96.

*Missouri*.—*State ex rel. Murray v. Brown* (1897) 141 Mo. 21, 41 S. W. 911.

*Montana*.—*State ex rel. Donovan v. Barret* (1904) 30 Mont. 203, 81 Pac. 349.

*New York*.—*People ex rel. Miller v. Green* (1874) 46 How. Pr. 367; *People ex rel. Daly v. York* (1901) 66 App. Div. 453, 73 N. Y. Supp. 331, affirmed in (1902) 171 N. Y. 627, 63 N. E. 1120. Compare *People ex rel. Satterlee v. Board of Police* (1878) 75 N. Y. 38, reversing (1878) 12 Hun, 653.

*South Carolina*.—*McCaslan v. Major* (1902) 64 S. C. 188, 41 S. E. 893. See also *State ex rel. Buchanan v. State Treasurer* (1904) 68 S. C. 411, 47 S. E. 683.

In an application by a circuit judge for mandamus to the auditor of pub-

lic accounts, the granting of the writ was contested on the ground that there was then no appropriation unexpended in the treasury for payment of the justices' salaries. This contention was upheld, the Constitution prohibiting any money to be drawn from the treasury except in consequence of an appropriation by law, and mandamus was denied. *Ex parte Tully* (1842) 4 Ark. 220, 38 Am. Dec. 33.

In *PEOPLE EX REL. DOWNS v. BROWN* (reported herewith), ante, 563, it appeared that the petitioner for mandamus had been unlawfully dismissed from a position under the civil service, and his pay withheld for a period of nearly two years subsequent to his discharge. The defense set up was want of funds and that the appropriation for plaintiff's salary had lapsed. It was held that this was a sufficient answer to the petition, and mandamus would not issue in case of lack of appropriation.

In *State ex rel. Moss v. Jumel* (1879) 31 La. Ann. 142, the relator applied for a writ of mandamus and was met with the defense that there was no appropriation out of which the salary could be paid. The court held this to be a good defense.

In *People ex rel. Allen v. Frink* (1875) 32 Mich. 96, an application was made for a mandate to compel an assessor to pay a warrant drawn on him in favor of a school-teacher. The defendant showed a want of funds, but did not question the correctness of the warrant. The court held this to be a good defense, and denied the writ.

In *State ex rel. Murray v. Brown* (1897) 141 Mo. 21, 41 S. W. 911, it appeared that a retired policeman petitioned the court for a writ of mandamus to compel the auditor to pay him his salary. The defense was no appropriation. The court held that this was a good defense, and that the writ should not issue.

In *State ex rel. Donovan v. Barret* (1904) 30 Mont. 203, 81 Pac. 349, a state employee sought to compel the state treasurer to pay him his salary. The defense was a lack of appropriation. The court held that mandamus

would not lie to compel the treasurer to pay, where there were no funds.

In *People ex rel. Daly v. York* (1901) 66 App. Div. 453, 73 N. Y. Supp. 331, affirmed in (1902) 171 N. Y. 627, 63 N. E. 1120, it appeared that an undisputed amount of salary was owing a police officer, which he sought to recover by way of mandamus directed to the commissioner of police. There was no appropriation out of which petitioner's salary was payable. The court held that the fact that there was no appropriation was a defense, and that a mandate should not issue.

In *McCaslan v. Major* (1902) 64 S. C. 188, 41 S. E. 893, it appeared, on an application for a mandate to compel payment of the petitioner's salary, that there were no funds in the county treasury out of which the claim was payable. The court held that mandamus should not issue under those circumstances.

In *People ex rel. Miller v. Green* (1874) 46 How. Pr. (N. Y.) 367, it was held that, in case no appropriation had been made for any specific salary, mandamus would not lie to compel the comptroller to pay the amount. However, it appearing that the plaintiff was entitled to a portion of his salary, it was ordered that a mandate issue to the auditor to compel him to audit and adjust the claim, but that the writ be denied as to the comptroller.

But in *State ex rel. Mentz v. Clinton* (1876) 28 La. Ann. 47, a mandate compelling the auditor of the state to issue a warrant on the treasurer for salary was granted. The defense was that there was no appropriation out of which the salary was payable. The court held that this was no defense, and that the auditor's duty was to draw warrants on the treasury for money, as he was not custodian of the state's money.

In *People ex rel. Satterlee v. Board of Police* (1878) 75 N. Y. 38, reversing (1878) 12 Hun, 653, it appeared that the plaintiff sought by mandamus to the board of police, to command them to draw their requisition on the comptroller for the amount of his salary as police surgeon. A defense was interposed that there were no funds in

the hands of the comptroller with which payment might be made. The court held that so long as the claim was legal the board was not excused from making the necessary requisition.

In *Gilbert v. Moody* (1891) 8 Idaho, 3, 25 Pac. 1092, the plaintiff applied to the court for a writ of mandamus to compel the auditor to issue a warrant to the treasurer for his salary. The auditor, as a defense, alleged that there had been no appropriation for the salary of the petitioner. The court held that the fact that no funds were in the hands of the treasurer did not excuse the auditor from drawing his warrant, and ordered that the writ of mandamus issue.

*b. Title in dispute.*

In some jurisdictions, mandamus has been granted to compel the payment of salary, though title to the office was incidentally involved. *McKannay v. Horton* (1907) 151 Cal. 711, 13 L.R.A. (N.S.) 661, 121 Am. St. Rep. 146, 91 Pac. 598; *Bannerman v. Boyle* (1911) 160 Cal. 197, 116 Pac. 732; *Re Pringle* (1915) 22 Haw. 557. See also *Bryan v. Cattell* (1864) 15 Iowa, 538; *McDowell v. Burnett* (1911) 90 S. C. 400, 73 S. E. 782; *Williams v. Clayton* (1889) 6 Utah, 86, 21 Pac. 398. Compare *Meredith v. Sacramento County* (1875) 50 Cal. 433.

In *McKannay v. Horton* (1907) 151 Cal. 711, 13 L.R.A. (N.S.) 661, 121 Am. St. Rep. 146, 91 Pac. 598, it appeared that there were two persons each claiming to be mayor de jure. Each had appointed a secretary, and both secretaries presented claims for salary for the same period of time. The auditor could approve one claim only, and hence stood in the position of a stakeholder. The court, acting on the theory that there was no other adequate and speedy remedy, proceeded to determine the question who was the secretary, and, incidentally, who was mayor de jure. On determination of this question mandamus was ordered to the auditor, directing him to pay the salary.

However, in *Meredith v. Sacramento County* (1875) 50 Cal. 433, it was held that the right to fees and emoluments of a public office cannot be determined

by the court until a clear title to the office is shown, and a mandate was denied to a petitioner who sued to establish his de jure title and to compel the board to allow him his salary.

It has been held that, though the acts of an officer de facto are valid as to third persons, when he sues to recover fees personally due him by virtue of his office he must show that he is an officer de jure, and his title to office may thus be put in issue. *Re Pringle* (1915) 22 Haw. 557.

In *McDowell v. Burnett* (1911) 90 S. C. 400, 73 S. E. 782, it appeared, on an application for mandamus to require the defendant to pay the petitioner the salary attached to the office of city magistrate, that the applicant was not in possession of the office. The facts were not in dispute as to the title to office, and the question of who was the de jure officer was purely one of law. The court held that under the circumstances the adverse claimant should be brought in, and the question as to the title, as well as of the salary, adjudicated.

In *Williams v. Clayton* (1889) 6 Utah, 86, 21 Pac. 398, it appeared that the plaintiff held the office known as "territorial superintendent," and later was "commissioner of schools" and discharged the duties incident thereto. The comptroller refused to draw his warrant on the treasurer for the salary of the office, claiming that one Nuttall held the office of commissioner of schools and had received the salary therefor. The court held that as Nuttall was not in possession of the office quo warranto would not lie, and mandamus was the only adequate and effective remedy to try the questions of title, and, incidentally, the right to the salary.

But the weight of authority is to the effect that a good title is absolutely essential to the granting of mandamus to compel the payment of salary. *Reynolds v. McWilliams* (1873) 49 Ala. 552; *Chicago v. People* (1904) 210 Ill. 84, 71 N. E. 816; *Hartwig v. Manistee* (1903) 134 Mich. 615, 96 N. W. 1067; *Coffin v. Board of Education* (1897) 114 Mich. 342, 72 N. W. 156; *McQueen v. Detroit* (1898) 116 Mich.

90, 74 N. W. 387; *State ex rel. Jackson v. Moseley* (1864) 34 Mo. 375; *Winston v. Moseley* (1864) 35 Mo. 146; *State ex rel. Simmons v. John* (1881) 81 Mo. 13; *People ex rel. Dolan v. Lane* (1873) 55 N. Y. 217; *People ex rel. Lane v. Case* (1892) 46 N. Y. S. R. 219, 19 N. Y. Supp. 625; *Briggs v. McBride* (1889) 17 Or. 649, 5 L.R.A. 115, 21 Pac. 878.

In *Chicago v. People* (1904) 210 Ill. 84, 71 N. E. 816, it was held that mandamus did not lie to compel the payment of a policeman's salary, where he had been suspended from duty and had not been reinstated.

In *Hartwig v. Manistee* (1903) 134 Mich. 615, 96 N. W. 1067, it appeared that the petitioner was suspended from his office of street commissioner, pending an investigation of a charge of incompetency against him, for a period of three months. On his application for a mandate to compel the payment of his salary for this period, the court held that if he wished to show his title to the office after his suspension he must proceed by quo warranto. Title to the office was said to be absolutely essential to the granting of the writ.

In *State v. Moseley* (1864) 34 Mo. 375, it appeared that the petitioner was formerly a circuit court judge, but that another person had been commissioned as judge of the same circuit. Both claimed title to the office. On an application for mandamus to the auditor to compel him to pay the salary to the petitioner, the court held that mandamus did not lie, since the auditor had no power to inquire as to who held the office *de jure*.

Likewise, in *Winston v. Moseley* (1864) 35 Mo. 146, it was held that title to office could not be tried as a collateral issue to mandamus, and, it appearing that two persons claimed title to the office of commissioner, mandamus whereby one of them sought to compel payment of his salary was denied.

In *People ex rel. Dolan v. Lane* (1873) 55 N. Y. 217, it appeared that the petitioner had been excluded from the office of assistant clerk of the district court, and another person in-

stalled therein. It was held that mandamus would not lie where the title to office was in dispute.

In *People ex rel. Lane v. Case* (1892) 46 N. Y. S. R. 219, 19 N. Y. Supp. 625, it appeared that a petitioner for mandamus to compel the board of town auditors to audit his claim for services had been previously refused an allowance, on the ground that he did not hold title to the office. Mandamus was therefore denied, as the petitioner had not shown a clear right to recovery.

*c. Salary in dispute.*

It has been uniformly held that a dispute as to the amount of salary will defeat an application for mandamus to compel payment thereof. *Johnson v. Reynolds* (1870) 44 Ala. 586; *Smith v. Kenfield* (1880) 57 Cal. 138; *Kennedy v. Normal* (1908) 145 Ill. App. 523; *Davis v. Jewett* (1904) 69 Kan. 651, 17 Pac. 704; *Adams v. Hampden County* (1860) 16 Gray (Mass.) 41; *Hicks v. Auditors* (1893) 97 Mich. 611, 57 N. W. 188. See also *Sherman v. Sanilac County* (1890) 84 Mich. 108, 47 N. W. 513.

Thus, in *Kennedy v. Normal* (1908) 145 Ill. App. 523, mandamus was denied, it appearing that the amount of salary was in dispute, and that the town authorities did not refuse to act, but were willing to pay whatever amount was actually due. The court said that such differences of opinion should be submitted to a jury or to the ordinary process of the courts.

In *Davis v. Jewett* (1904) 69 Kan. 651, 17 Pac. 704, a school-teacher petitioned for a mandate to compel payment of her salary. The amount of compensation was in controversy. The court held that mandamus was not proper, because there was imposed no definite duty of payment.

Likewise, in *Adams v. Hampden County* (1860) 16 Gray (Mass.) 41, it appeared that a keeper of the county jail had been allowed a certain sum as compensation by the county commissioners. He, being dissatisfied with the amount, applied to the court to have an adjustment, and also applied for mandamus to compel payment of the sum already allowed. The court

held that while the amount was in litigation mandamus would not lie, as the two remedies were inconsistent.

In *Hicks v. Auditors* (1893) 97 Mich. 611, 57 N. W. 188, mandamus was denied to compel defendant to pay for services alleged to have been rendered as assistant visitor of schools, on the ground that the compensation of petitioner had not been determined.

*d. Payment to third person.*

In some jurisdictions, it has been held that payment to a de facto officer is a complete defense to an application of the de jure officer for mandamus to compel the payment of salary. *Re Grady* (1897) 15 App. Div. 504, 44 N. Y. Supp. 578; *State ex rel. Cronin v. Eshelby* (1866) 1 Ohio C. D. 592, 2 Ohio C. C. 468. And see *MATTOX v. BOARD OF EDUCATION* (reported herewith) ante, 568. Compare *People ex rel. Dennis v. Brennan* (1866) 30 How. Pr. (N. Y.) 417.

In *Re Grady* (1897) 15 App. Div. 504, 44 N. Y. Supp. 578, it appeared that the petitioner for a writ of mandamus was the de jure sealer of weights and measures of the city of Brooklyn. The amount of the salary incident to the office had already been paid to a person claiming the office de facto, and this was set up as a defense to the application. The court held that mandamus would not issue.

In *State ex rel. Cronin v. Eshelby* (1866) 1 Ohio C. D. 592, 2 Ohio C. C. 468, it was held that a public wharfmaster could not obtain a writ of mandamus compelling the city authorities to pay him his salary, where the salary had already been paid to a de facto officer. This was decided on the theory that the public interest should come first, and also because, under the Ohio statute, the de jure officer, on proof of his title, might recover the salary from the de facto incumbent.

But in *People ex rel. Dennis v. Brennan* (1866) 30 How. Pr. (N. Y.) 417, it was held that the fact that a comptroller had paid the salary of the deputy tax commissioner to a person claiming the office de facto was no defense to a petition for mandamus to

compel him to pay the salary to the de jure commissioner.

In other jurisdictions, however, a contrary rule has been laid down to the effect that a de jure officer may recover his salary, regardless of the fact that it has already been paid to one claiming de facto. *People ex rel. Blachly v. Coffin* (1917) 279 Ill. 401, 117 N. E. 85; *State ex rel. Worrell v. Carr* (1891) 129 Ind. 44, 13 L.R.A. 177, 28 Am. St. Rep. 163, 28 N. E. 88.

In *People ex rel. Blachly v. Coffin* (Ill.) supra, the petitioner prayed for a writ of mandamus to compel his reinstatement in a position under the civil service, and also to compel payment of salary from the time of his dismissal to that of his reinstatement. It appeared that another person had held the office during this period, and had received the salary. The court held that since the salary was incident to the office, and the petitioner was a de jure officer, he was entitled to his salary, regardless of whether the de facto officer had received salary.

In *State ex rel. Worrell v. Carr* (Ind.) supra, it appeared that the plaintiff was appointed chief of the bureau of statistics, and subsequently confirmed his title against an adverse claimant by quo warranto. He discharged the duties of his office and was recognized as a de jure officer. In a mandamus proceeding to compel the payment of his salary, the only defense was that the auditor had already paid part of the salary to the de facto claimant. The court held that this was not a defense, and that mandamus would lie to compel payment of the entire salary.

*e. Laches.*

An application for mandamus to compel the payment of salary may be defeated by the laches of the applicant. *Pennycook v. Boyle* (1915) 26 Cal. App. 301, 146 Pac. 895; *Walcott v. Jackson* (1883) 51 Mich. 249, 16 N. W. 393.

In *Walcott v. Jackson* (Mich.) supra, wherein the petitioner prayed for a mandate to compel payment of his salary and it appeared that the claim had accrued eleven years before this

application was made, it was held that the delay constituted laches, and that mandamus would not lie.

In *Pennycook v. Boyle* (Cal.) *supra*, it appeared that the petitioner was suspended from his post for neglect of duty, which charge was finally dismissed and the petitioner reinstated after the lapse of over eleven months. Within two months after reinstatement,

the petitioner instituted mandamus to compel the payment of his salary during the time of his suspension. The defense was laches on the part of the applicant. The court held that the petitioner was entitled to the writ, as he was not guilty of laches, since it would have been impossible for him to succeed in such a proceeding until after his reinstatement. J. E. W.

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THOMAS W. WILEMAN, Impleaded, etc., Appt.,

v.

JULE V. KING.

*Mississippi Supreme Court, Division B — June 30, 1919.*

(— Miss. —, 82 So. 265.)

**Payment — check — failure to present — garnishment — effect.**

1. Failure of a creditor to present a check tendered in payment of the debt without any agreement that it shall be accepted as payment, whether good or bad, for ten days on account of illness, does not satisfy the indebtedness if, when the check is presented for payment, the maker's account has been garnished by another creditor.

[See note on this question beginning on page 587.]

**Check — as assignment.**

2. A check does not operate as an assignment pro tanto of the funds on deposit to the credit of the maker in

the bank, so as to enable the payee to claim the fund against an attachment of it by another creditor.

[See 5 R. C. L. 488 et seq.]

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**APPEAL** by defendant Wileman from a decree of the Chancery Court for Prentiss County (McIntyre, Ch.) in favor of complainant in a suit to enjoin the foreclosure of a certain deed of trust executed by him in favor of defendant as beneficiary. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Cunningham & Cunningham for appellant.

Messrs. Robins & Thomas for appellee.

Stevens, J., delivered the opinion of the court:

Appellee exhibited his bill of complaint against appellant T. W. Wileman, and one Green, trustee, seeking to enjoin the foreclosure of a certain deed of trust which King executed in favor of Wileman as beneficiary, to secure a note of \$75. The bill for injunction was answered, and the cause set down for hearing on bill, answer, and proof, and from

the decree, declining to overrule the injunction, appellant prosecutes this appeal.

In April, 1916, Wileman loaned King \$75, and took a note and deed of trust on certain crops of corn, cotton, and other agricultural products raised during the year 1916, and also on certain live stock. In the fall, and before the maturity of the note, King was carrying to market in the town of Boonville a bale of cotton. On the way he met his creditor, Wileman, and stated that he was carrying the cotton to be sold and desired to pay his note



out of the proceeds. There is some conflict in the testimony between the parties as to what was said on this occasion; King contending and testifying that Mr. Wileman told him to sell the bale of cotton and to deposit the proceeds to his (King's) account, and that King might give him a check for the full amount of the indebtedness. King sold the cotton and deposited approximately \$10 in the bank, and used the balance of the money in paying some other debts. King, however, already had on deposit in the Bank of Booneville \$79.50, which, together with the \$10, made an amount sufficient to pay the secured note and interest. The next day King went to Mr. Wileman to take up his note and deed of trust, and executed his check in settlement. When this transaction was had, Wileman was at home ill, and for this reason did not go to town to present the check until after the lapse of about ten days. In the meantime another creditor of King had sued out an attachment against King and garnished the bank. This attachment and garnishment were made returnable to the justice's court, and the bank, in answering, suggested that appellant had an assignment of the funds, and claimed an interest therein. It does not appear, however, that appellant was summoned to appear in the justice's court and propound his claim.

When King tendered his check for the indebtedness, appellant inquired if the money was in the bank, and King responded that it was. There was something also said as to whether the amount of \$81 would fully cover the note and interest, and in this conversation King remarked that "if that was not all right he would make it all right." Appellee contends that this statement referred alone to the amount of the check, while appellant contends that it had a broader meaning. The statement thus far is according to King's version of the facts. On the trial of the case appellant contended, and so testified, that he directed King to sell the bale of cotton, de-

posit the proceeds to Wileman's account, and bring him the deposit slip; that although this had not been done he did accept King's check, but upon the assurance that the money was in the bank, and that, if everything was not all right, King would make it all right. The chancellor ruled that the note and deed of trust had been paid and satisfied by the execution and delivery of the check. The learned chancellor incorporated in the record his written opinion, in which, among other things, he says: "I am of the opinion that when Mr. Wileman indorsed this check he owed it, at least, to King to try and secure this money, and at least file his claim with the justice's court. While my opinion is not binding upon the justice's court, yet I am of the opinion that his claim was good, and, that being the case, there is nothing to do, except make the injunction perpetual."

Appellee's contentions in this case are not supported by the law or the facts. There is no controversy about the fact that appellant held a valid promissory note, and that this note was amply secured. The debtor upon his own initiative harvested and sold a bale of cotton and tendered his creditor a check for the amount of the secured claim. When the check was presented for payment it was dishonored, and that through no fault, fraud or collusion of the creditor, the holder of the check. There is no proof justifying the inference that appellant suggested or inspired the prosecution of the attachment suit, or knew anything about the funds having been garnished until the check had been presented. It affirmatively appears that when the check was presented the funds of the depositor had been impounded by a valid garnishment proceeding. Thereupon appellant tendered the check back to appellee, and demanded a return of his note and deed of trust. Appellee declined to give up the note and trust deed, and, to employ his own language, responded: "I just told him I did not care about ex-

changing the note." There is no evidence of a definite and special agreement to the effect that appellant accepted the check in full payment and discharge of the secured indebtedness. It was one of the usual transactions of business, where the debtor in the usual way executed and delivered a check upon his bank, and the check, through no

**Payment—  
check—failure  
to present—  
garnishment—  
effect.**

fault of the holder, was dishonored. Under such circumstances the general rule is applicable,

and the check is not payment.

In *Citizens' Bank v. Kretschmar*, 91 Miss. 608, 44 So. 930, our court, by Mayes, J., gave utterance to the well-known rule of law that "a check is not payment unless the check is paid, unless it is specially agreed by the parties that the check, whether good or not, shall have that effect; and the burden of proof always rests on the party asserting it to show that the check was to have that effect. The presumption is against its being so received, and this presumption can only be overcome by clear proof to the contrary."

Our court cited with approval *Wadlington v. Covert*, 51 Miss. 631, a case which, though it deals with the acceptance of an order in the nature of a bill of exchange, discusses the rule of law here applicable, and especially upon the point, hereinafter referred to, as to whether the check constituted an assignment pro tanto of the funds to the depositor's credit in the bank. Any further reference to the substantive law that a check ordinarily does not constitute payment is unnecessary. The general rule is conceded.

The facts do not, in our opinion, show, but on the contrary rebut, any special agreement that the check was accepted as payment, whether it was good or bad. The case at bar does not present an instance where the check or negotiable instrument of a third party is assigned and accepted in settlement of a prior indebtedness, and there has been a delay prejudicial to the rights of

any of the parties to the instrument. This is a transaction solely between the creditor and debtor. Any delay, therefore, in the presentment of the check for payment, has caused no one a loss. We assume that the attachment was properly sued out and the funds lawfully garnished. If so, the money in the bank has been appropriated for the payment of appellee's lawful indebtedness. Appellee lost nothing. There is evidence, however, tending to show that appellant was delayed in presenting the check on account of illness.

We proceed, then, to a consideration of the thought, reflected by the chancellor's opinion, that appellant had an interest in the funds and was privileged to propound his claim thereto in the justice's court. This position is untenable. Whatever may be the minority rule as reflected by certain decisions of other states, the great weight of authority is to the effect that a check does not operate as an assignment pro tanto, of the funds on deposit to the credit of the depositor in

**Check—as  
assignment.**

a banking institution. Note in 35 L.R.A. (N.S.) 1.

Our court fell in line with the great majority of the courts of the Union in the case of *Bush, R. & Co. v. Foote*, 58 Miss. 5, 38 Am. Rep. 310. It is different if the instrument is a mere order, to be paid out of a special fund. *Wadlington v. Covert*, supra. But further discussion of the authorities on this point is unnecessary, because of the enactment by our legislature of the Uniform Negotiable Instruments Law. Chapter 244, Laws of 1916. By § 189 of this act (*Hemingway's Code*, § 2767) it is expressly provided: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

It follows that appellant could not

have propounded successfully any claim to the funds garnished, and had no interest, legal or equitable, in the money on deposit in the Bank of Booneville to appellee's credit. Equity demands that his promissory note and deed of trust be restored to him. The secured indebtedness has not been paid. The injunction was

wrongfully sued out, and should have been dissolved. The decree of the learned Chancellor will be reversed, and decree entered here dissolving the injunction, and remanding the cause for the assessment of any damages which appellant has sustained by reason of the wrongful issuance of the writ.

### ANNOTATION.

#### Rights of holder of check as affected by garnishment of drawer's bank account.

In *Honingford v. Vehmann* (1894) 2 Ohio S. & C. P. Dec. 151, where the holder of a check indorsed the same to one who failed to present it until after the account of the drawer had been garnished by other creditors, it was held that, the indorsee having failed to present the check within a reasonable time, the indorser was not liable, but it is stated obiter that the drawer of the check is still liable. This

obiter statement is in accord with the decision in the reported case (*WILEMAN v. KING*, ante, 584). It will be observed that the reported case refuses to regard the enforced and involuntary payment of the drawer's debt to a third person consequent upon the delay in presenting the check, as a legal damage or injury to him which will relieve him of liability to the holder.  
W. A. E.

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#### CITIZENS' NATIONAL BANK of Glenwood Springs, Colorado, Plff. in Err., v.

#### FIRST NATIONAL BANK of Portland, Oregon.

*Colorado Supreme Court — May 5, 1919.*

(— Colo. —, 182 Pac. 12.)

#### Garnishment — liability on accepted check.

1. Where, by statute, liability on accepted negotiable paper is not subject to garnishment until it is due, the liability of a bank on an accepted or certified check is not so subject until it is presented for payment.

[See note on this question beginning on page 589.]

#### Check — when liability on matures.

2. Liability on an accepted or certified check is not due until the check is presented for payment.

[See 5 R. C. L. 502.]

which it has certified by notifying the holder to present it at once for payment so as to subject it to garnishment, as against the rights of a subsequent assignee in due course for value.

[See 12 R. C. L. 779, 792.]

#### On Rehearing.

#### Garnishment — maturing certified check.

3. A bank cannot mature a check

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ERROR to the District Court for Garfield County (Cavender, J.) to review a judgment in favor of plaintiff in a suit to hold defendant liable on a check accepted or certified by it. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. W. Dollison, John L. Noonan, J. W. Bell, and E. L. Clover for plaintiff in error.

Messrs. Hughes & Dorsey, E. L. Thayer, and Berrien Hughes for defendant in error.

Denison, J., delivered the opinion of the court:

The Portland bank brought suit against the Glenwood bank upon a check accepted or certified by the defendant, and had judgment. The case was brought here on error and supersedeas denied.

One Kingsbury on July 15, 1914, drew the check in question on the defendant bank, payable to Mrs. C. F. Morrow. July 16th she presented it for certification, and the bank wrote on its face:

Accepted July 16, 1914, payable at Citizens' National Bank, Glenwood Springs, Colorado.

[Signed] A. J. Wirth, A. Cashier.

July 21, 1914, and for some months following, various suits were brought in Garfield county, Colorado, against Morrow, and judgments were rendered therein against the Glenwood bank as garnishee.

September 21, 1915, she deposited the check with the Portland bank in her checking account, received credit therefor, and checked out the money. The Glenwood bank refused to pay the check, and suit was brought accordingly. The judgments in garnishment, some of which have been satisfied by the garnishee, constituted the defense.

The question before us is whether the liability of the Glenwood bank upon such a check was garnishable.

The great weight of authority is that the liability upon a negotiable instrument before maturity is not garnishable, and some

**Garnishment—  
liability on  
accepted check.**

cases hold that it is not after maturity. In this state, however, the matter is controlled by statute: "No person shall be liable as a garnishee by reason of having drawn, accepted, made or indorsed any negotiable instrument, when the same

is not due, in the hands of the defendant at the time of service of the garnishee summons or the rendition of the judgment." Rev. Stat. 1908, § 3804.

This is both just and in accord with commercial necessity. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 647, 648, 19 L. ed. 1019. That the acceptance was not due until presentation for payment seems clear from the authorities. 2 *Michie, Banks & Bkg.* 1181, § 145; *Nolan v. Bank of New York Nat. Bkg. Asso.* 67 Barb. 24; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 300; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 647, 19 L. ed. 1008, 1019; *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N. Y. 106.

**Check—when  
liability on  
matures.**

It was not presented for payment until plaintiff presented it.

The judgment should be affirmed.

*Garrigues, Ch. J., and Scott, J., concur.*

A motion for rehearing having been filed, Denison, J., on July 7, 1919, handed down the following additional opinion:

The motion for rehearing urges two points:

(1) That the defendant bank notified the holder of the check, before she negotiated it, that it would not be paid until so ordered by the court, and demanded that it be presented at once for payment; that the check thereby became due, and so was subject to the subsequent garnishments.

(2) That if we adhere to our former opinion certified checks will be used to conceal assets and defraud creditors.

As to the first point: No transaction between the acceptor and holder of a negotiable instrument can advance its maturity as against a subsequent holder in

**Garnishment—  
instrument can ad-  
mature certified check.**

due course, even though it was negotiated after such transaction. If it could, the safety of negotiable paper would be destroyed, and the law merchant nullified. When a certified check is presented for payment, the debtor bank, if it has a defense against the holder, can protect itself by marking the face of the paper so as to destroy its negotiability.

As to the second point: The ready currency of negotiable paper is more

important in business than the increased ease in collecting debts which would result from hampering it. Certified checks are a substitute for money, and it would be a severe blow to commerce to throw a doubt upon their validity. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 647, 648, 19 L. ed. 1008, 1019.

The motion for a rehearing is denied.

### ANNOTATION.

#### Garnishment of bank in suit against the payee or other holder of a check upon the bank.

It seems clear that before the bank has accepted the check it cannot be garnished in a suit against the holder, and this has been held. In *Janney v. Bank of Missouri* (1849) 12 Mo. 583, a bank which was a depository for the Federal government was held not liable to garnishment in a suit against one to whom the government had given a draft upon the bank, before the bank had accepted the draft; the fact that the bank had impliedly agreed to accept all drafts of this kind was held not to change the rule. In discussing the effect of this implied agreement, the court states: "The bank had not accepted the draft when she was garnisheed. She had by her previous course of dealing in relation to these drafts impliedly agreed to accept all drafts of the kind—but when, and for whose benefit? Certainly, when properly presented, and for the benefit of the holders at the time of presentment. At the time she was garnisheed she was not the debtor of [the principal defendant]. She was apprised that they were the holders of a government draft which she was bound to accept when presented—but she was bound to accept in favor of the holder who presented it. This is all the implication that the previous dealings of the parties were calculated to create; in fact, the conduct of the bank at the time the bill was presented by Lewis [a subsequent holder] was an obvious indication of intention to pay the bill

to the holders at the time of presentment." From this decision there is a dissenting opinion which takes the view that whatever legal or equitable interest the holder of the draft had in the fund was properly open to his creditors by way of garnishment.

Under statutes making debts and credits due a defendant subject to garnishment, the view has been taken contrary to that in the reported case (*CITIZENS' NAT. BANK v. FIRST NAT. BANK*, ante, 587, that the principal obligor on a negotiable security is subject to garnishment before it is due, and under this view it has been held that a bank which has issued a certified check is liable to garnishment in a suit against the holder. *Bills v. National Park Bank* (1882) 89 N. Y. 343, approved on subsequent appeal in (1885) 98 N. Y. 87. The facts in this case were peculiar in that the drawer of the check, a railroad company, made the check payable to the order of its assistant treasurer who had charge of its deposit in the bank. The check thus drawn was certified and delivered to the assistant treasurer. It was admitted or found as a fact that the property in the check was that of the railroad company, and the check itself continued in the possession of the treasurer. Subsequent to the attachment, and after the assistant treasurer had been informed thereof, he individually and in his own behalf opened an account with the bank, and then

and there deposited to his individual credit, and as being his property, the certified check and other negotiable securities which belonged to the railroad company. It thus appears that the principal defendant occupied a double relation with reference to the bank, that is, it was the holder of a certified check and also a depositor. In discussing the liability of the bank to garnishment as the certifier of the check, the court states that "the bank was indebted to the railroad company when it certified the check. That certification did not absolutely pay and discharge the deposit account. It did so only sub modo, in the same way that a debt is paid by the promissory note of the debtor. . . . But regarding, as we should, the certified check as a negotiable security issued by the bank to the railroad company, and payable to any bona fide holder thereof who should present the same, yet the debt evidenced by such security was liable to be attached in a suit against the railroad company as its property, and could be attached by service of the attachment upon the bank in the manner in which this attachment was served. It is generally the law in this country, under statutes like those which existed in this state, that a debt evidenced by a negotiable security can be attached, and the following rules may be deduced from adjudged cases: While the negotiable security is held by the attachment debtor it may be attached by the service of an attachment upon the maker, provided the negotiable security is past due. If the security be not past

due at the time the attachment is served, but thereafter remains in the hands of the attachment debtor until it becomes due, then the attachment is effectual. Where a debt evidenced by a negotiable security is thus attached, the attachment is effectual against everybody except a bona fide taker of the security after the attachment. The care and purpose of the courts in such cases is to protect the maker of the security against double payment, and when that can be accomplished the attachment can be made effective. If the security is not due, then there must be proof that it was in the hands of the attachment debtor when the attachment was served, and in the absence of proof that will not be presumed; in other words, it must be shown that it was in such a condition as to be liable to the attachment. . . . Before the debt can be enforced against the maker under the attachment, the sheriff must obtain possession of the security so that upon the trial he can surrender it to the maker, or he must show that it has already got into the hands of the maker, or that for some other reason it could not be enforced against the maker by any other person." It appearing in this case that the certified check was in the hands of the principal defendant at the time of the attachment, and was paid by the bank to the principal defendant, and thus came into the hands of the bank, the bank was held garnishable in the action and liable to the garnishing creditors for having paid the amount to the debtor.

W. A. E.

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BERTIN & LEPORI, Appt.,

v.

N. MATTISON et al., Respts.

*Oregon Supreme Court — May 9, 1916.*

(80 Or. 354, 157 Pac. 153.)

**Judgment — in favor of principal — effect on surety.**

1. A surety upon a note who, under the Negotiable Instruments Law, is primarily liable thereon, is not entitled to judgment non obstante veredicto where the jury find against him and in favor of the principal

and other sureties on the note in an action by the payee, where the statute permits judgment for or against one or more of several defendants.

[See note on this question beginning on page 594.]

—non obstante veredicto — pleadings.

2. Judgment non obstante veredicto cannot be rendered upon a construction of the evidence, where the statute pro-

vides for it only when the defect appears from the pleadings.

[See 15 R. C. L. 607.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Clatsop County in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Burnett, J.:

The Bertin & Lepori corporation declares against N. Mattison, Martin Franciscovich, and Paul Bakotich to the effect that they executed their promissory note whereby they agreed to pay the plaintiff a certain amount of money with interest and attorney's fee; that the note has not been paid, and so much is due; and that a specified amount is a reasonable attorney's fee. Except the corporate character of the plaintiff, all the complaint is denied by the answer filed by Franciscovich and Bakotich. They further say in substance that about March 12, 1909, the defendant Mattison was indebted to plaintiff in the sum of \$579.60; that at that time one Cordano represented to them that it would aid him in settling up some business on his part with the plaintiff if the answering defendants would sign, as sureties only, a certain promissory note which had been executed by Mattison in favor of plaintiff in the sum mentioned; and that if they would do so, he would guarantee not to deliver it to the plaintiff, but would, in any event, return it to them. They conclude by saying that the instrument there described is the one sued upon, and that it was never delivered to the plaintiff.

The reply traverses all the new matter in the answer. As the result of a jury trial the following verdict was rendered: "We, the jury duly impaneled and sworn in the above-entitled case, hereby find for the plaintiff, Bertin & Lepori, and against the defendant, Martin Franciscovich, in the sum of \$194.60, with interest thereon at the rate of

6 per cent per annum from the 12th day of March, 1909, and for the further sum of \$50 attorney's fee."

The defendants Bakotich and Mattison moved for and were allowed judgment in their favor against the plaintiff, dismissing the action and for costs, on the ground that, legally construed, the verdict was in favor of themselves. Upon the allowance of this motion, Franciscovich moved the court for judgment in his favor and against the plaintiff, notwithstanding the verdict of the jury, alleging as grounds, in substance, that the testimony at the trial revealed that he was only a surety upon the note with the defendant Bakotich, upon which Mattison was the principal, the two latter of whom having been discharged, he himself was released as a matter of law. The court allowed this motion and rendered judgment likewise for the defendant Franciscovich non obstante veredicto. The entry of this judgment is the only error assigned on the appeal which is prosecuted by the plaintiff.

Messrs. M. B. Meacham and C. W. Mullins, for appellant:

By statute, the common-law rule that on a joint contract the recovery must be against all or neither of the defendants has been modified so as to authorize a judgment for or against one or more where it turns out upon the trial that only one or more in such joint action is liable, without subjecting the plaintiff to the necessity of bringing a new action.

Tillamook Dairy Assn. v. Schermerhorn, 31 Or. 312, 51 Pac. 438.

A motion for judgment non obstante veredicto should be determined from an inspection of the pleadings, only.

*Friendly v. Lee*, 20 Or. 208, 25 Pac. 396; *United States v. Gardner*, 66 C. C. A. 663, 133 Fed. 288; *Baltimore & O. R. Co. v. Nobil*, 85 Ohio St. 180, 97 N. E. 374, Ann. Cas. 1913A, 1021; *Kirk v. Salt Lake City*, 32 Utah, 143, 12 L.R.A.(N.S.) 1021, 89 Pac. 458.

Mr. G. C. Fulton for respondents.

Burnett, J., delivered the opinion of the court:

The verdict was a possible one according to the pleadings. Under the general issue it may have been that the plaintiff failed to prove the signatures of Mattison and Bakotich, but succeeded in establishing that of Franciscovich. On the controversy between the new matter of the answer and the reply, it is plausible that Cordano made the representations mentioned to Bakotich, but not to Franciscovich. Under those circumstances it was allowable for the jury to find against the defendant, who was shown to be liable, and in favor of the others. Section 61, L. O. L. reads thus:

"When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

"1. If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendant served, and if they are subject to arrest, against the persons of the defendants served; or,

"2. If the action be against the defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants;

"3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant, or defendants, if the ac-

tion had been against them, or any of them alone."

Sections 180 and 181, L. O. L. here follow:

"Judgments may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."

These enactments superseded the common-law rule that, in an action on an alleged joint contract, recovery must be had against all the defendants or none, so that in such litigation the plaintiff may now recover from those defendants against whom he is able to establish his case, although he is compelled to loose his hold upon the others from whom he seeks to recover: *Hamm* Judgment—in favor of principal—effect on surety. *v. Basche*, 22 Or.

513, 30 Pac. 501; *Tillamook Dairy Asso. v. Schermerhorn*, 31 Or. 312, 51 Pac. 438; *Hayden v. Pearce*, 33 Or. 89, 52 Pac. 1049. In *Stivers v. Byrkett*, 56 Or. 565, 572, 109 Pac. 387, Mr. Justice Eakin, reviewing the authorities, says: "It is not necessary to review or cite these cases here, but we find that the great weight of authority and the better reasoning is that the judgment against joint or joint and several debtors, if void as to one, is not necessarily void as to those judgment debtors who were within the jurisdiction of the court,"—citing authorities.

The opinion speaks also of some precedents holding that such a determination is merely erroneous, and would be reversed on appeal as to all the defendants, and others that it would be reversed only as to the party over whom the court had no jurisdiction. But the statute sets



the matter at rest, so that by legislative authority a plaintiff may recover judgment against those whom he has shown to be liable, while others he sought to charge may escape.

It will be noted that the motion of Franciscovich was not for a new trial, but for judgment notwithstanding the verdict. Issue had been joined between him and the plaintiff, and the jury, after hearing the testimony, had decided the fact against him. Section 202, L. O. L. reads thus: "When it appears from the pleadings that the court has not jurisdiction of the subject of the action or the person of the defendant, or that the facts stated in the pleadings of the plaintiff or defendant, as the case may be, do not constitute a cause of action or defense thereto, and that such objection had not been taken by demurrer or answer, on motion the judgment entered shall be set aside at the motion of plaintiff or defendant, as the case may be, and another judgment rendered accordingly, as the case may require."

Before the legislation of 1907, requiring the judgment to be entered immediately upon the reception of the verdict, the section read as follows: "When it appears from the pleadings that the court has not jurisdiction of the subject of the action or the person of the defendant, or that the facts stated in the pleadings of the plaintiff or defendant, as the case may be, do not constitute a cause of action or defense thereto, and that such objection has not been taken by demurrer or answer, on motion judgment shall be given for the plaintiff or defendant, as the case may be, notwithstanding the verdict or decision." B. & C. Comp. § 202.

The remedy allowed by this section in either form is based solely upon the state of the pleadings, and not upon the construction of the evidence. The question was considered in *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L.

ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029. Mr. Justice Van Devanter quotes with approval Smith's Action at Law, 12th ed. page 147, thus: "A motion for judgment non obstante veredicto is one which is only made by a plaintiff. . . . It is given when, upon an examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has taken issue on some point, which, though decided in his favor by the jury, still does not at all better his case. A motion 'in arrest of judgment' is the exact reverse of that for judgment non obstante veredicto. The applicant in the one case insists that the plaintiff is entitled to the judgment of the court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the court, although a verdict has been delivered in his favor. Like the motion for judgment non obstante veredicto, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings."

It is said in *Houser v. West*, 39 Or. 392, 395, 65 Pac. 84: "A motion for judgment notwithstanding the verdict must necessarily be based upon the pleadings."

It will not do to say that because the answering defendants signed as sureties, the release of one will discharge the other, because, having thus executed the note, they are, so far as the plaintiff is concerned, primarily liable for the same under the Negotiable Instruments Law. *Cellers v. Meachem* (Sellers v. Lyons) 49 Or. 186, 10 L.R.A. (N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 977; *Lumbermen's Nat. Bank v. Campbell*, 61 Or. 123, 121 Pac. 427; *Murphy v. Pantner*, 62 Or. 522, 125 Pac. 292. Even supposing they had written the word "surety" after their names, they are none the less primarily and jointly liable to the payee, and like any other parties thus bound may be treated in the manner provided for in the sections of the Code above quoted. Under such circumstances

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pleadings.

the matter of suretyship affects only the relations between themselves and the principal debtor. As to the payee they are all liable as principals, and he may recover from any one or less than the whole number of them against whom he may be able to prove his claim. The court was in error in disregarding the verdict of the jury and assuming to render the judgment entered.

The action of the Circuit Court is reversed and the cause remanded, with directions to enter a judgment in favor of the plaintiff and against the defendant Franciscovich. We do not decide whether it was a mistake to enter judgment for the other defendants, for that is not within the assignment of error.

Moore, Ch. J., and Benson and Harris, JJ., concur.

## ANNOTATION.

### Right to judgment against surety where action fails against principal.

- I. Introductory, 594.
- II. Majority rule:
  - a. Rule stated, 594.
  - b. Application of rule, 594.
- III. Minority rule, 597.

#### *I. Introductory.*

The question to which this note is confined, the right to recover from a surety after an action against the principal has failed, depends in part on doctrines of suretyship and in part on the rules relative to the effect of a judgment in favor of one of several joint obligors. The latter question is fully discussed in the note to 3 A.L.R. 124, and resort to that note should, in particular, be had for a general consideration of statutes similar to that referred to in the reported case (*BERTIN & LEPORI v. MATTISON*, ante, 590), permitting a several recovery against one of several persons jointly bound.

#### *II. Majority rule.*

##### *a. Rule stated.*

In accordance with the well-settled doctrine of suretyship, that the extent of liability of a surety is measured by the liability of the principal, it is established by the weight of authority that, where an action against the principal fails, the surety is ipso facto discharged. *Norris v. Pollard* (1885) 75 Ga. 358; *Patterson v. Gibson* (1888) 81 Ga. 802, 12 Am. St. Rep. 356, 10 S. E. 9; *Schlitter v. Deering Harvester Co.* (1907) 3 Ga. App. 86, 59 S. E. 342; *Savannah Bank & T. Co. v. Purvis* (1909) 6 Ga. App. 275, 65 S. E. 35;

*Gartrell v. Johns* (1914) 15 Ga. App. 671, 84 S. E. 175; *Marietta Fertilizer Co. v. Gary* (1918) 22 Ga. App. 604, 96 S. E. 711; *Logan v. Burr* (1878) 3 Ill. App. 458; *Rutherford v. Moore* (1865) 24 Ind. 311; *Johnson v. Planters' Bank* (1843) 4 Smedes & M. (Miss.) 165, 43 Am. Dec. 480; *Muenster v. Tremont Nat. Bank* (1899) 92 Tex. 422, 49 S. W. 362; *Woldert v. Durst* (1896) 15 Tex. Civ. App. 81, 38 S. W. 215; *Douthit v. Martin* (1897) 15 Tex. Civ. App. 559, 39 S. W. 944; *Moore v. Belt* (1918) — Tex. Civ. App. —, 206 S. W. 225.

In *Johnson v. Planters' Bank* (1843) 4 Smedes & M. (Miss.) 165, 43 Am. Dec. 480, the rule was expressed as follows: "The general rule is that the obligation of the surety becomes extinct by the extinction of the obligation of the principal debtor."

##### *b. Application of rule.*

In *Logan v. Burr* (1878) 3 Ill. App. 458, a suit on a promissory note against the principal and two sureties, it appeared that service was properly made on the principal and one of the sureties. In a trial of the issue by a jury as to the surety served, there was a judgment against him alone, there being no default as to the principal, no assessment of damages, in fact, no action of the court as to him. It was held to be error to render judgment against the surety alone.

In *Patterson v. Gibson* (1888) 81 Ga. 802, 12 Am. St. Rep. 356, 10 S. E. 9, it was held that if the principal on a bond is relieved from liability on

the ground of duress, the surety is likewise relieved.

In *Norris v. Pollard* (1885) 75 Ga. 358, it was said: "It is at least doubtful if the judgment awarded by the court against one of the joint defendants while the suit was pending and undetermined upon the pleas filed by his codefendant, for whom he was only surety, was not void. . . . The plaintiff chose to treat the contract as joint, and there was nothing in the case authorizing or justifying the severance of the defendants; both of them had been served; they were both in life, and both within the jurisdiction of the court. There was no defense set up here that would not have been as available to the complainant as to his codefendant in the common lawsuit, considering the relation they bore to each other and to the plaintiffs in that suit, that of principal and surety. That the respondent owed a duty to this complainant as the surety of his principal debtor, and that he was bound to act toward him in the utmost good faith, will not be questioned, and it is equally clear that the surety is liable for no greater amount than is found to be due from the principal; his liability cannot be extended beyond that of his principal. This follows from the very nature of the contract. . . . The complainant was at least entitled to have the execution of the judgment restrained until the termination of the suit against his principal, in order to ascertain by that final judgment the extent to which he was liable, as his undertaking was only collateral to, and his liability commensurate with, that of the other defendant in the common lawsuit. If, for any cause, he failed to set up this defense, and judgment went against him, he was not precluded by that judgment, under our Code, § 2149, from showing this fact and protecting himself, at least to this extent."

That holding was followed in *Gartrell v. Johns* (1914) 15 Ga. App. 671, 84 S. E. 175, where the proposition was succinctly stated in the official syllabus as follows: "The obligation of the surety is accessory to that of his principal; and if the obligation of

the principal becomes extinct, that of the surety ceases of course. Civ. Code, § 3539. Hence, the balance due by a principal on a contract of suretyship must determine the amount due by the surety thereon. *Norris v. Pollard* (1885) 75 Ga. 358."

In *Marietta Fertilizer Co. v. Gary* (1918) 22 Ga. App. 604, 96 S. E. 711, a statute (Ga. Civ. Code 1910, § 3539) is quoted as follows: "The obligation of the surety is accessory to that of his principal, and if the latter from any cause becomes extinct, the former ceases of course, even though it be in judgment." Applying that act, it was held that a verdict in favor of the principal, discharging him from liability, extinguishes ipso facto the obligation of the sureties, under the well-recognized doctrine of the law of suretyship, that whatever discharges the principal also discharges the surety. The court added: "This holding is not in contravention of the rule of law to the effect that, where a bond is joint and several, suit may be brought upon it against the sureties without joining the principal, . . . since in those cases [cited] there had been no adjudication of nonliability on the part of the principal."

In *Schlitter v. Deering Harvester Co.* (1907) 3 Ga. App. 86, 59 S. E. 342, the suit was on two promissory notes, against the maker as principal and the appellants as indorsers. The jury found a verdict in favor of the principal on an answer alleging failure of consideration. A judgment for the full amount against the appellants as indorsers was held to be error.

But in *Savannah Bank & T. Co. v. Purvis* (1909) 6 Ga. App. 275, 65 S. E. 35, suit was brought on three promissory notes, against the maker and the indorsers. Before the time of the trial the maker of the notes died, and on motion his name was stricken from the record. Judgment was then rendered against the indorsers. The court said: "We hold that there was no error in the court's action in allowing the suit to be discontinued as to W. R. Purvis, and to proceed against the other defendants. This course is expressly authorized by the Civil Code,

§ 5041. The plaintiff has an option, under the Civil Code, § 5014, of making the personal representative of the deceased defendant a party, but he is not bound to do so."

In *Rutherford v. Moore* (1865) 24 Ind. 311, suit was instituted on three several bonds, against one Maynes as principal and the appellant as surety, and judgment was entered against the surety alone. The appellate court, in reversing this judgment, said: "The last error assigned is that the judgment is against the appellant, when it ought to have been against Maynes and Rutherford. For this error the judgment must be reversed. The bonds were the joint obligations of Maynes and Rutherford, and were so treated by the appellee in bringing suit thereon. The defendants below both appeared and pleaded to the action, the finding of the court was for the plaintiff, and judgment should have followed against both defendants. The judgment is reversed, with costs, and the cause remanded to said court, with instructions to render judgment on the finding, against both defendants."

In *Muenster v. Tremont Nat. Bank* (1899) 92 Tex. 422, 49 S. W. 362, it appeared that the sheriff had levied on personal property as belonging to the appellant, but which was claimed by one Heidenheimer, who filed a claim bond executed by himself as principal, and with two sureties. On the trial of the main issue the death of Heidenheimer was suggested, and the suit was dismissed as to him. The appellee thereupon asked for judgment against the sureties on the claim bond, and, no appearance having been entered for them, the court entered judgment. In reversing, the appellate court said: "The only ground for failure chargeable to the sureties in this case is that the claimant was dead at the time of the trial, and therefore could not appear, and the sureties themselves failed to make appearance. It cannot be said that a man who is dead 'fails' to establish a right which is litigated and determined after his death; therefore, the failure of Heidenheimer to establish his right is not maintained by the facts recited in the

record. The sureties were not parties to the suit except in the limited sense that they were subject to the same judgment which might be rendered against their principal. They were not charged with the duty of making the defense. . . . It is claimed by counsel for defendant in error that it was proper to dismiss the case as to Heidenheimer upon the suggestion of his death, and to proceed against his sureties under article 1257, Revised Statutes. But that article applies to the class of cases wherein the action is founded on a contract made by the principal and the sureties, and to enforce an obligation which rests upon the sureties as well as the principal, independent of the suit; but in this case the sureties have agreed to do nothing except to make good the failure of their principal in prosecuting the claim made by him to the property. We conclude that the articles of the Revised Statutes which authorize a discontinuance as to a principal debt or and a prosecution of the suit against sureties do not apply to actions in which the sureties are not really parties, but simply answerable for whatever judgment may be entered against their principal. If the judgment in this case be sustained, the sureties would have the right, under article 5310, Revised Statutes, to discharge it, by returning the property and paying for the use and hire of it, damages, and costs. This is a part of their obligation and their right under the law; but it could not be exercised in this case, because the property is in the hands of the heirs or legal representatives of Samson Heidenheimer, against whom no judgment was entered; the sureties could not take possession of the property and return it, or compel the heirs or legal representatives to surrender it, because there has been no adjudication of their right to it. Such proceeding would deprive the sureties of a valuable right in the manner of satisfying the judgment. If the sureties were to pay this judgment and proceed against Heidenheimer's estate, it would not be binding upon the estate, which might defeat recovery upon the ground that Heiden-

heimer was in fact the owner of the property. We would have the anomalous condition of forcing the sureties to pay a judgment that they could not enforce against the estate of their principal, although it is founded alone upon his liability and acts. The district court erred in entering judgment against the sureties, no judgment being at the same time entered against the principal, his heirs, or legal representatives, and the court of civil appeals erred in affirming it."

In *Woldert v. Durst* (1896) 15 Tex. Civ. App. 81, 38 S. W. 215, suit was brought against one as principal and another as surety to recover on a note, both alleged to be residents of the same county. The surety was properly served, but there was an irregular service as to the principal, and it was held that, as the court was not in a position to render a judgment against the principal, it was improper to enter judgment against the surety.

Similarly, in *Douthit v. Martin* (1897) 15 Tex. Civ. App. 559, 39 S. W. 944, wherein it appeared that there was no service as to the principal, and judgment was entered against the surety, the court said: "It is insisted by plaintiff in error that no legal judgment was or could have been rendered against McMahon, the principal, who was not served with citation, and therefore it was error to render judgment against plaintiff in error as surety. Both of these propositions must be sustained. . . . There was no averment in the petition that the principal was dead, beyond the jurisdiction of the court, insolvent, nor any fact that would permit judgment against the surety without also taking judgment against the principal."

In *Moore v. Belt* (1918) — Tex. Civ. App. —, 206 S. W. 225, an action on three promissory notes, against the maker and the representatives of the estate of the deceased surety, suit was dismissed as to the principal, and judgment entered against the estate. In reversing that decision, the court said: "It appears from the fact of the petition that R. C. Burns is the principal obligor, and J. J. Reynolds is secondarily liable, and none of the

facts which might, under the provisions of Rev. Stat. art. 1843, authorize judgment against the parties secondarily liable, without also securing judgment against the principal, were alleged. Any judgment enforcing liability against those secondarily liable was therefore unauthorized. Rev. Stat. arts. 1842, 6336, 6337; *Elliott v. First Nat. Bank* (1913) 105 Tex. 547, 152 S. W. 808."

### III. Minority rule.

Contrary to the general rule, it has been held, in a few instances, that judgment may be entered against the surety alone, notwithstanding the failure of action against the principal, and his release from liability. The decisions supporting this view are founded upon a liberal interpretation of statutes modifying the common-law doctrine as to the liability of joint obligors. *Kuhn v. Abat* (1824) 2 Mart. N. S. (La.) 168; *Moffett v. Bickle* (1871) 21 Gratt. (Va.) 280; *Bush v. Campbell* (1875) 26 Gratt. (Va.) 403; *Muse v. Farmer's Bank* (1876) 27 Gratt. (Va.) 252. And see the reported case (*BERTIN & LEPORE v. MATTISON*, ante, 590).

In *Moffett v. Bickle* (1871) 21 Gratt. (Va.) 280, the action was on a negotiable note, against the maker and four indorsers. The jury found that the note and all the indorsements except the last were usurious, but that the last was free from usury. It was held that a judgment in favor of the principal and the three first indorsers, and against the last indorser, was proper. The court said: "It is a rule of the common law that, upon a joint contract, the action must be against all the joint contractors, and, as a general rule, the judgment must be against all or none of them. But that is not a universal rule. Where a defendant in such an action pleads matter which goes to his personal discharge, such as bankruptcy, infancy, or any matter that does not go to the action of the writ, or pleads or gives in evidence a matter which is a bar to the action as against him only, and of which the other could not take advantage, judgment may be given for such defendant, and against the rest. 1

Rob. Pr. old ed. pp. 400-402, and the cases there cited, viz.: *Cole v. Pennell* (1823) 2 Rand. (Va.) 174; *Wamsley v. Lindenberger & Co.* (1824) 2 Rand. (Va.) 478; *Tooker v. Bennett* (1805) 3 Caines (N. Y.) 4; *Hartness v. Thompson* (1809) 5 Johns. (N. Y.) 160; *Morton v. Croghan* (1822) 20 Johns. (N. Y.) 106. Such was the common law when the act was passed authorizing an action of debt to be brought against the drawer and indorsers of a foreign bill of exchange, jointly, or against either of them separately. 1 Rev. Code 1819, p. 485, § 2. This act was extended from time to time to all bills or notes negotiable at banks or their offices of discount and deposit, or the place of business of a savings institution or bank, etc., until it assumes the form in which it now stands in our Code of 1860, chap. 144, § 11, p. 629. The remedy given by this act, as Judge Green well remarked in *Taylor v. Beck* (1825) 3 Rand. (Va.) 316, 328, was perfectly novel in all respects, since it authorized a joint action upon several contracts; and such an action of debt, even against one only, as was not known to the common law. 1 Rob. Pr. old ed. 48. Though the contracts of the drawer and indorsers are several, yet, where the action is brought against them jointly, the parties are subjected to all the consequences flowing from the settled rules of the common law governing joint actions. One of these consequences is that the judgment also must be joint; and that a failure as to one of the defendants is a failure as to all of them. This rule is applicable to a joint action upon a joint and several bond, as to any other action; and of course it equally applies to a joint action against the drawer and indorsers of a foreign bill of exchange, etc. *Taylor v. Beck* (Va.) *supra*. There are some cases, as before stated, in which a judgment may be given for one, an against another, defendant, in a joint action, as where a verdict is found for one defendant upon a plea of infancy, or other matter which goes to his personal discharge, without affecting the liability of the other. But cases of this kind

constitute exceptions to the general rule. Opinions in same case by Greene, J., p. 384, and Cabell, J., p. 360; 1 Rob. Pr. 49. Such was the state of the common law as modified by the act aforesaid, when the provision contained in the Code, chap. 177, § 19, p. 733, was enacted, . . . which is in these words: 'In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he would have been entitled to recover if he had sued them only.' . . . Now, the section we are considering gets rid of the difficulty which . . . arose from the nature of the remedy, by a joint action. Why should the plaintiff be turned around to a new action, when one is already pending, in which perfect justice may be done without injuring anybody? The legislature thought he should not be so turned around, and therefore enacted the section aforesaid to provide for this and other like cases. Formerly, the practice was, when one of several joint contractors was discharged on the ground of infancy, to require the plaintiff to discontinue his action, and bring a new one against the adult defendants. But the good sense of courts, without the aid of legislation, has long since changed the rule, and now the practice is to proceed to judgment in the same action in which the infant is discharged, against the adult defendants. . . . The case proved is precisely the case stated in the declaration. The note was in fact drawn and indorsed as therein charged. But it was proved, and the jury found that the note and all the indorsements but the last were usurious, and that the last was free from usury. Judgment was therefore rendered against the last indorser, but in favor of the prior indorsers and the maker. Here the latter were discharged upon a ground of defense personal to them, and not extending to the last indorser. It did not go to the foundation of the entire contract. The action, though joint in form, is in fact founded, as we have seen, on

several contracts, and it is found that, while all of these contracts were in fact made as averred, only one of them is valid, and the others void. Where is the difficulty in rendering judgment against the defendant who is bound by the valid contract? If the statute does not apply in this case, it is difficult to conceive one to which it will apply, and the statute will be of no value. There is no need of applying it to the case of a joint action or contract against several defendants, one of whom is entitled to his personal discharge on the ground of infancy, bankruptcy, etc. Cases of this kind, we have seen, constituted exceptions to the general rule, requiring judgment to be rendered against all or more of the defendants in a joint action *ex contractu*."

In *Bush v. Campbell* (1875) 26 Gratt. (Va.) 403, construing the provisions of the same statute, the court said: "It may not be amiss, however, to consider briefly some of the mischiefs which will result from a contrary interpretation. These may throw some light upon the design of the legislature in passing the statute. In the first place, the rule requiring a plaintiff in an action *ex contractu* against several defendants, to prove the contract as to all, is a mere rule of the common law. Like many other of the common-law rules, it is purely technical in its nature, in many instances producing great delay and much inconvenience, without any corresponding advantages. The defendants very rarely derive any real substantial benefit from it. Whether one or many be sued, the parties soon understand by the pleadings the real matter of controversy, and come prepared to meet it. On the other hand, the plaintiff often encounters difficulties, not only as to the form of action, but also in determining the proper parties defendant. A person in possession of a written obligation as obligee or assignee, signed, or purporting to have been signed, by several, and honestly believing they are all liable, brings his suit against all. He is met on the trial with a plea of *non est factum* by one or more of the defend-

ants. A verdict is rendered in his favor, bills of exception are taken, writ of error allowed, a reversal by the appellate court; other trials are had, and finally a verdict for the defendants upon these pleas. And then, after years of fruitless litigation and expense, the plaintiff is compelled to start out upon a new expedition against the other defendants, who are confessedly liable, and who never had a shadow of defense. And all this because the plaintiff had sued five defendants, when he ought to have sued four or a less number."

Thus, in *Muse v. Farmers Bank* (1876) 27 Gratt. (Va.) 252, a judgment against a surety notwithstanding the failure of the action against the principal was sustained. In that case, an action was brought on a promissory note against four defendants, two of whom were sued as principals and two as sureties. One of the principals appeared and filed a plea of *nil debet*, and on motion of plaintiff's attorney the cause was discontinued as to him. None of the other parties appearing, there was judgment by default against them. The court said: "This judgment has been assailed by the learned counsel for the plaintiff in error upon various grounds. In respect to the principal ground of objection, it is sufficient to say it is the same urged before this court in the case of *Bush v. Campbell* (Va.) *supra*. There the action was upon a bond purporting to have been executed by several persons. Three of the defendants filed separate pleas of *non est factum*; and upon that issue verdict and judgment were rendered in their favor. The defendant *Bush* filed a plea of usury, which was tried at a subsequent term, and a verdict found against him. The question was whether judgment could be given against him on the verdict. This court held it could be so given under the provisions of the 19th section of chapter 177, Code of 1860, which provides that an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against

whom he would have been entitled to recover if he had sued them only. According to the view taken by this court, this statute changed essentially the rule of the common law, requiring in actions on joint or joint and several contracts one final judgment for or against all the defendants. The effect of that change is to relieve a plaintiff who proves a good cause of action against part of the defendants, but not against the others, from being put to the expense and delay of a new action against those who are bound. If, therefore, the plea of one of the defendants is of such character that the plaintiff might have recovered against the others, had he sued them only, he is entitled to judgment in the pending action against those who are liable. This is the construction given by the New York courts to a statute from which ours was probably taken, and is very similar in its provisions. *Blodget v. Morris* (1856) 14 N. Y. 487. . . . The plaintiff may have been satisfied that the defendant Finney did not sign the note, nor authorize anyone else to sign it for him; or that the partnership had been dissolved

before the note was executed by Muse. Either of these matters was sufficient for the discharge of Finney, without affecting the liability of the other defendants."

In *Kuhn v. Abat* (1824) 2 Mart. N. S. (La.) 168, an action on an auctioneer's bond, both principal and sureties were named as defendants. The action originated in the district court, but was transferred to the parish court, in consequence of proceedings being then carried on by the obligor as an insolvent debtor. Judgment was rendered against the sureties only. On appeal it was said: "It would seem from the record that the suit was originally instituted against the principal debtor and the sureties. The judgment of the parish court is only against the latter. This, we suppose, was in consequence of the failure of the former, and in that view is correct, as further pursuit against him would have been evidently useless, and probably illegal, as the benefit of discussion was lost to the sureties by the insolvency of the principal debtor."

W. M. C.

**TOM BANKS, Appt.,**

**v.**

**STATE OF TEXAS.**

*Texas Court of Criminal Appeals — April 2, 1919.*

(— Tex. Crim. Rep. —, 211 S. W. 217.)

**Homicide — shooting into railroad train — absence of malice.**

1. One who deliberately shoots into a railroad train cannot avoid liability for the resulting homicide by disclaiming malice.

[See note on this question beginning on page 603.]

— murder — necessity of malice.

2. Specific malice towards the victim is not necessary to constitute murder.

[See 13 R. C. L. 740.]

— malice — when exists.

3. Malice as an element of murder may be towards a group of persons and may exist without former grudges or antecedent menaces.

[See 13 R. C. L. 740.]

— doing of wrongful act.

4. The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice.

[See 8 R. C. L. 63; 13 R. C. L. 740.]

**Evidence — introduction by state — binding effect.**

5. The state is bound by a statement



of accused which it introduces in evidence only when there is no other evidence upon which the jury may base a rejection of any part of such statement.

— weight — contradiction.

6. The jury may reject the state-

ment of one accused of murder by shooting into a moving train that he, using a 38-caliber pistol, shot into the ground while his companion, using a 45-caliber pistol, shot into the train, if the death was caused by a 38-caliber bullet.

**APPEAL** by defendant from a judgment of the District Court for Polk County (Manry, J.) convicting him of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. C. M. McKinnon for appellant.

Mr. E. A. Berry, Assistant Attorney General, for the state.

Lattimore, J., delivered the opinion of the court:

In this case appellant was convicted in the district court of Polk county of the offense of murder, and his punishment fixed at death.

On his appeal but one question is presented, and but one question was contained in the motion for new trial, namely, that the evidence does not show appellant guilty of that character of homicide which should be punished by the extreme penalty of death.

It appears from the record that on the night of the homicide, and while at his post of duty on a moving railroad train one Hawkins, a negro brakeman, was shot and killed by some member of a party of negroes who were walking along a dirt road near to the railroad track. No reason is assigned for such shooting, and it does not appear that appellant or any member of the party was acquainted with any of the parties on the train, and that any specific malice could be directed toward the deceased, but under our law the same is not necessary.

One who deliberately uses a deadly weapon in such a reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from the consequences

of his acts by disclaiming malice.

Malice may be toward a group of persons as well as toward an individual. It may exist without former grudges or antecedent menaces. The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice. In the instant case the appellant admits his presence and participation in the shooting which resulted in the death of the deceased. His written statement, introduced in evidence, is as follows:

State of Texas, County of Polk.

The following is a voluntary statement of Tom Banks, Jr., made to me, John McLeod, on this the 3d day of October, A. D. 1918, after having first been warned by me, John McLeod, that he did not have to make any statement at all, and that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is herein made.

On last Sunday night, September 29th, in company with John L. Davis and Garnett Davis, I was going from New Willard to Leggett, Texas, and was walking the dirt road that runs parallel with the railroad track, and just a short way from New Willard we saw a train coming south on the H. E. & W. T. track, and just before the engine passed us, John L. Davis said, "Less shoot into that train," and I said, "No, less don't do that," and then Garnett Davis said, "Yes, less shoot into it," and just before the engine passed us John L.

Davis handed me his pistol and said, "Here, take this, and you can burn it," and I said, "No," but I took the pistol and just as the train passed I shot into the ground by the wire fence, and looked around, and I saw Garnett Davis shoot into the engine, and as the caboose passed I shot again into the ground, and Garnett Davis shot into the caboose, and we walked on by the side of the road a little in the bushes, and soon we met two automobiles, and I said, "Less shoot into these cars," and John L. said, "No, you have all shot enough," and I said, "Yes, but I did not hit anybody, for I shot into the ground." We then crossed the dirt road and through the wire fence and onto the railroad, and while we were walking along, both Garnett and John L. took the empty shells out of their guns. We all walked the railroad until we came to the place where Garnett left the railroad, and there we separated, and John L. and myself walked on to Leggett, and I never saw Garnett any more until Tuesday, and I went to his house, and we talked about the shooting, and he told me he had not heard of the man being killed until Monday at dinner time. I told him then that I did not shoot at the train, but that I shot at the ground, and he said, "I shot at the gangway," and he asked me not to say anything about it, and I told him I would not unless they put me in jail and made me tell it, and then I was going to tell the truth. The gun I shot was the gun that John L. Davis had with him that night, and was a 38 long, and the gun Garnett was shooting was a 45 caliber. John L. Davis did not shoot at the train, and the shooting was done by myself and Garnett Davis. Garnett and myself were close together when we did the shooting, and John L. was a little behind us.

[Signed] Tom Banks, Jr.

Witnessed by R. B. Davis.

V. B. Jinson.

F. W. Young.

An examination of this statement shows a deliberate, unprovoked shooting into a moving train, an act

which could reasonably result in the destruction of human life. No excuse or justification is pleaded, or shown in the evidence for the act. It is true that appellant says that he shot each time that his companion shot, but that he fired into the ground, which gives rise to the contention here that the state, having introduced this declaration, is bound by it; but the rule applicable is that the state is only bound when there is no other evidence upon which the jury may base their rejection of any part of such statement. In this case the proof shows that two pistols were used, and appellant so states in his statement above, and also he therein says that the pistol he used was a 38 caliber, and the one used by his companion was a 45 caliber. It was conclusively shown by the other evidence that the bullet which

*Evidence—  
introduction by  
state—binding  
effect.*

*—weight—  
contradiction.*

killed deceased at the front end of the moving train, and also the one which entered the caboose at the rear of the same train, were 38-caliber bullets. This evidence negatives the fact that the fatal shot was fired by appellant's companion, and fully justified the jury in concluding that the portion of appellant's statement in which he says that he fired into the ground was untrue, and also fully sustained the conclusion of the jury that his were the shots which took the life of deceased. Nor can we see that the jury was not justified in assessing the extreme penalty of the law. That man who can coolly shoot into a moving train, or automobile, or other vehicle in which are persons guiltless of any wrongdoing toward him or provocation for such attack is, if possible, worse than the man who endures insult or broods over a wrong, real or fancied, and then waylays and kills his personal enemy. The shame of the world recently has been the unwarranted killing of persons who were noncombatants, and who were doing nothing, and were not capable of inflicting injury upon their slayers. Of

kindred spirit is he who can shoot in the darkness into houses, crowds, or trains, and recklessly send into eternity those whom he does not know and against whom he has no sort of reason for directing his malevolence.

The only contention here being that the evidence does not support the verdict, with which we are un-

able to agree, and there being no errors shown in the charge of the court or otherwise, we direct that the judgment of the lower court be affirmed.

The judgment of the lower court is affirmed.

Petition for rehearing denied, April 30, 1919.

## ANNOTATION.

**Homicide by wanton or reckless use of firearm without express intent to inflict injury.**

### I. Introductory, 603.

#### II. Intentional discharge of firearm:

##### a. As constituting murder:

1. Firing into crowd, 603.
2. Firing into dwelling house, 605.
3. Firing into train, 606.
4. Other instances, 606.

##### b. As constituting manslaughter, 607.

#### I. Introductory.

The purpose of this note is to present those cases wherein the courts have decided the degree of criminality which is involved in a homicide arising from the wanton or reckless use of a firearm, in the absence of a specific intent to inflict injury. The note embraces cases both of intentional and of unintentional discharge of a firearm under these circumstances. It excludes, however, those cases in which homicide has resulted from mere carelessness in the handling of weapons in a manner not necessarily dangerous to others, and likewise those cases in which the killing arose during the commission of a felony.

#### II. Intentional discharge of firearm.

##### a. As constituting murder.

##### 1. Firing into crowd.

It is well settled that where a person intentionally discharges a firearm into a crowd of people, with a disregard of consequences, and a death results therefrom, he is guilty of murder. *Bailey v. State* (1901) 133 Ala. 155, 32 So. 57; *Pool v. State* (1891) 87 Ga. 526, 13 S. E. 556; *Holt v. State*

#### III. Unintentional discharge of firearm:

##### a. As constituting murder, 610.

##### b. As constituting manslaughter:

1. Manslaughter generally, 610.
2. Voluntary manslaughter, 614.
3. Involuntary manslaughter, 617.

(1892) 89 Ga. 316, 15 S. E. 316; *Clark v. State* (1903) 117 Ga. 254, 43 S. E. 853; *Smith v. State* (1905) 124 Ga. 213, 52 S. E. 329; *Hamilton v. State* (1907) 129 Ga. 747, 59 S. E. 803; *Golliher v. Com.* (1865) 2 Duv. (Ky.) 163, 87 Am. Dec. 493; *Brown v. Com.* (1891) 13 Ky. L. Rep. 372, 17 S. W. 220; *State v. Edwards* (1879) 71 Mo. 312; *Lopez v. State* (1877) 2 Tex. App. 204; *State v. Young* (1901) 50 W. Va. 96, 88 Am. St. Rep. 846, 40 S. E. 334.

In *Bailey v. State* (Ala.) supra, there was evidence showing that the defendant had recklessly fired his gun into a crowd of negroes, the act resulting in the death of a white man standing near by. The court, affirming a judgment of murder in the second degree, held that the perpetration of such an act, greatly dangerous to the lives of others, evidenced a depraved mind regardless of human life, and constituted murder in the first degree, although there was no preconceived purpose to deprive any particular person of life.

In *Pool v. State* (1891) 87 Ga. 526, 13 S. E. 556, the evidence tended to show that, while the defendant was handling his pistol in such a careless

manner as to make it dangerous to the bystanders, it was discharged, killing the deceased. In grading the homicide a question arose whether the pistol had been recklessly fired with criminal indifference to the consequences. This court, reversing a judgment of murder for errors of the trial judge, stated: "If the shooting was intentional, but simply negligent, and resulted in the death of another, which was not intended, it could not be more than involuntary manslaughter. On the other hand, if the shooting was intentional, and was done so carelessly and recklessly that the law would imply an actual intention to kill from the mere wantonness of the act, and death resulted, it would be murder."

Where it was shown that the defendant had handled a pistol in a reckless manner, pointing and snapping it at several persons, and then, without provocation, had deliberately pointed it at the deceased and fired the shot causing his death, the court affirmed a verdict of murder, although the defense claimed that the shooting was accidental. *Holt v. State* (1892) 89 Ga. 316, 15 S. E. 316.

Where it appeared that the accused had intentionally, and with disregard of the consequences, fired his pistol into a crowd of people, causing the death of the deceased, the court affirmed a judgment of murder. *Clark v. State* (1903) 117 Ga. 254, 43 S. E. 853.

In *Smith v. State* (1905) 124 Ga. 213, 52 S. E. 329, wherein it appeared that the accused had recklessly fired a pistol into a crowd of people, thus causing the death of a person, the court upheld a conviction of murder, saying: "The court very properly charged the jury that should they find the accused fired a pistol into a crowd of persons engaged in a difficulty in a house where a dance was going on, and the shot struck a person and killed him, notwithstanding the accused may have fired at no particular person, but fired for some reason of his own to stop the difficulty, recklessly and without regard to human life, and with a disregard as to whom he should kill, the shooting would be an unlawful

one, and he would be guilty of murder."

Where a jury might have found that the accused shot at a crowd of people and killed one of them, it was held proper to charge in part that "if a man feloniously, with reckless disregard for human life, takes a loaded weapon and deliberately points into a crowd and fires and kills a member of the crowd, why, the law would hold him accountable for murder, independently of whether he intended to kill any individual member of that crowd or not." *Hamilton v. State* (1907) 129 Ga. 747, 59 S. E. 803.

In *Golliher v. Com.* (1865) 2 Duv. (Ky.) 163, 87 Am. Dec. 493, it appeared that the accused entered a church in which a crowd of people were collected, declaring his intention to kill someone. His gun was discharged while he was carrying it over his shoulder. On appeal from a judgment of murder for the death of a person who was struck by the bullet from the gun of the accused, the court reversed the judgment for errors committed by the trial court, but stated that if the accused had voluntarily and recklessly discharged his gun with malicious design, thus unintentionally killing the deceased, the offense would be murder.

In *Brown v. Com.* (1891) 13 Ky. L. Rep. 372, 17 S. W. 220, wherein there was some question as to whether the defendant had any feeling of malice toward the person killed by a shot fired in a crowded room, the court, in affirming a conviction of murder, disposed of the question of malice as follows: "If we are mistaken as to there being evidence of appellant's malice towards the deceased in particular, it is clearly established that the appellant, without lawful excuse, intentionally fired the pistol in a room crowded with persons. If he did this, not with the design of killing anyone, but for his diversion merely killed one of the crowd, he is guilty of murder. For such conduct establishes 'general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty, and fatally bent

on mischief. And whenever the fatal act is committed deliberately or without adequate provocation,' the jury has a right to presume it was done with malice."

In *State v. Edwards* (1879) 71 Mo. 312, on an appeal from a conviction of murder in the second degree, it appeared that the defendant, while in an intoxicated condition, fired a pistol into a crowd of people collected in a public park. There was a question as to the defendant's intention to kill anyone in particular, and the trial court gave an instruction as follows: "Although the jury may believe from the evidence that the defendant, at the time he shot into the crowd of people mentioned by the witnesses in their testimony, did not intend to kill or murder any particular person, yet if they find from the testimony that the defendant, . . . did purposely and intentionally shoot into said crowd or assemblage of people, with a certain revolver loaded with gunpowder and leaden ball, and that by reason of the wound so inflicted by said ball, the said [deceased] did then and there die, then they will find the defendant guilty of murder in the second degree." The court held that there was no error in this charge.

In *Lopez v. State* (1877) 2 Tex. App. 204, it appeared that the defendant, while on horseback, had ridden around a tent in which an entertainment was going on, firing four or five shots into the tent at different points. One of the bullets struck and killed a person therein. The defendant was convicted of murder in the second degree, and on appeal this judgment was affirmed.

In *State v. Young* (1901) 50 W. Va. 96, 88 Am. St. Rep. 846, 40 S. E. 334, it appeared that the accused, without provocation, had fired his gun into a crowd, killing a person. The evidence established that the shooting was intentional and in reckless disregard of the injury which might result. The court, affirming a judgment of murder, said: "He recklessly fired his gun into the crowd, not caring who might suffer from it. A more wicked and malicious act could hardly be conceived. The fact that an innocent man

was the victim of his unlawful conduct makes his act the more reprehensible, for it is entirely beyond the bounds of palliation or excuse. Maliciously to fire into a crowd, regardless of consequences, is murder if death results therefrom."

In *People v. Venckus* (1917) 278 Ill. 124, 115 N. E. 880, it appeared that the accused fired a shot toward a crowd of people standing on a public highway, with the avowed purpose of driving them away, but without any intent to injure them. The court, in affirming a judgment of manslaughter, said that the defendant was very fortunate that he was not convicted of murder, as he would clearly be guilty thereof, "if he pointed the revolver at the crowd generally, and with malice fired his revolver with recklessness and without concern as to the consequences, and killed the deceased, although he may not have intended, in fact, to shoot or injure any person."

### *B. Firing into dwelling house.*

If a person intentionally discharges a firearm into a dwelling house in which he has reason to believe there are people living, thereby killing a person therein, he is guilty of murder, though he had no intention to kill or injure anyone. *Washington v. State* (1877) 60 Ala. 10, 31 Am. Rep. 28, 3 Am. Crim. Rep. 171; *State v. Capps* (1904) 134 N. C. 622, 46 S. E. 730; *Russell v. State* (1898) 38 Tex. Crim. Rep. 590, 44 S. W. 159.

In *Washington v. State* (Ala.) *supra*, wherein it appeared that the defendant fired a pistol at night through the window of a lighted house and caused the death of one of the occupants, it was held that a conviction of murder in the first degree was proper, though the defendant maintained that his only purpose in firing the shot was to frighten the inmates of the house, with whom he was on familiar terms. The court said: "Sport does not usually employ such dangerous methods as were resorted to in this case; and before the jury are justified in inferring the less wicked motive, . . . they should be affirmatively convinced that there was

not the depraved mind which the recklessness of the act tended to show."

In *State v. Capps* (1904) 134 N. C. 622, 46 S. E. 730, the defendant, convicted of murder in the court below, based an appeal on an alleged error of the trial judge in charging that in no view of the evidence could a verdict of manslaughter be returned. It appeared that the defendant had deliberately fired through the door of a house into a room where he knew there were several people, the shot causing the death of a small boy therein. The court held that there was no error in the instruction complained of, and stated that the malice necessary to constitute murder would be implied from the wanton nature of the act.

In *Russell v. State* (Tex.) *supra*, it appeared that the accused was one of a party of three who were sent by the city marshal to arrest a certain negro. In the belief that the negro was staying at the house of a white woman, they approached the place and knocked on the door. It was midnight at the time, and there was no light in the house. Receiving no response, the accused, holding his pistol in his hand, kicked the door open, and immediately the pistol fired, causing the death of the woman. The trial judge, instructing the jury as to the crime of murder, said that if the defendant intentionally discharged his pistol into the house where the woman and her two children were living, without intending to injure any particular person, but knowing that the shot might kill or injure some one of the occupants, and the shot caused death, then the killing would be murder in the first or second degree. On appeal from a judgment of murder in the second degree, the court held that the instruction was correct.

#### 3. Firing into train.

One who intentionally discharges a firearm into a railroad train is guilty of murder if a death results therefrom, though the shot was fired without any express intent to injure any person. *Aiken v. State* (1881) 10 Tex. App. 610. And see the reported case of *BANKS v. STATE*, ante, 600.

In the reported case (*BANKS v.*

*STATE*) it appeared that the defendant discharged a gun into a passing train without provocation or express malice toward any individual thereon, but merely in the perpetration of a malicious design. The court affirmed a judgment of murder, inferring the necessary malice from the intentional doing of a wrongful act which necessarily endangered human life.

In *Aiken v. State* (Tex.) *supra*, wherein it appeared that the defendant fired his pistol into the window of a passenger train in which he knew there were passengers, and the bullet struck and killed the deceased, the court, in affirming a judgment of murder, second degree, quoted Mr. Wharton to the effect that "where an action unlawful in itself is done with deliberation and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder."

#### 4. Other instances.

Where a firearm is intentionally discharged without a specific intent to inflict injury, but under such circumstances as to evince a heart regardless of social duty, and the act naturally tends to destroy human life, it is murder. *Wiley v. State* (1918) 19 Ariz. 346, L.R.A.1918D, 373, 170 Pac. 869; *Studstill v. State* (1849) 7 Ga. 2; *Quinn v. Com.* (1889) 11 Ky. L. Rep. 615, 12 S. W. 672; *Gordon v. State* (1901) — Miss. —, 29 So. 529.

In *Wiley v. State* (Ariz.) *supra*, it appeared that the accused, a peace officer, fired his pistol at an automobile which had refused to stop at his command. He claimed that his intention was to puncture a tire of the machine, but the bullet struck and killed an occupant of the automobile. The court, in affirming a judgment of murder in the second degree, held that since the act of shooting at the car in such a reckless and heedless manner was unlawful in itself, the accused was properly convicted for the consequences of the unlawful act.

In *Quinn v. Com.* (1889) 11 Ky. L. Rep. 615, 12 S. W. 672, it appeared that the defendant was one of a crowd of

lawless men who had attended a religious meeting with a view to settling their personal differences. Their passions were inflamed by whisky, and they soon began an indiscriminate firing of pistols, endangering the lives of all within range. A person riding along a near-by road was killed by one of the shots. Although it was possible that the shot which caused his death was fired by another than the accused, the court held that a judgment of murder was proper.

In *Studstill v. State* (1849) 7 Ga. 2, it appeared that the defendant, his brother, and one other were together when the deceased, a boy with whom they were familiar, appeared some distance off. The defendant's brother had an old gun which he gave to the third person, both of the brothers stating that the gun would not hit a beef at fifteen steps, and telling him to shoot at the boy. The gun was fired, causing the death of the boy. The court, on an appeal from a judgment of murder in the second degree, recited the provisions of the Penal Code of Georgia that, "where such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, the offense shall be deemed and adjudged to be murder," and held that as the act to which the defendant was an accomplice was one naturally tending to destroy life, the judgment of murder should not be arrested.

In *Gordon v. State* (1901) — Miss. —, 29 So. 529, it appeared that the accused, who had been drinking, began to fire a pistol indiscriminately about a room in which there were several persons, and then, rushing out on the back porch, fired toward a woman, causing her death. He was found guilty of murder, although he claimed that he did not see the woman at the time he fired the fatal shot. The court held that an instruction that "if appellant in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, without a premeditated design to kill [the deceased], shot and killed her, he was

guilty of murder," was warranted by the evidence, and not inconsistent with a previous instruction as to a killing with malice aforethought.

But in *State v. Cross* (1896) 42 W. Va. 253, 24 S. E. 996, the court held that a claim by the accused that the killing was accidental was a denial of all criminal intent, and cast on the prosecution the burden of proving such intent beyond a reasonable doubt. And on the failure of the state to make such proof a verdict of murder was reversed.

*b. As constituting manslaughter.*

In other instances, where it has appeared that a firearm was intentionally discharged without a specific intent to inflict injury, but in a manner which might reasonably be expected to endanger life, the courts have held the offense to be manslaughter.

*United States.*—*Roberts v. United States* (1903) 61 C. C. A. 427, 126 Fed. 897, rehearing denied (1904) 62 C. C. A. 134, 127 Fed. 818.

*Iowa.*—*State v. Vance* (1864) 17 Iowa, 138; *State v. Warner* (1912) 157 Iowa, 111, 137 N. W. 466.

*Kentucky.*—*Sparks v. Com.* (1867) 3 Bush, 116, 96 Am. Dec. 196.

*Michigan.*—*People v. Stubenvoll* (1886) 62 Mich. 329, 28 N. W. 883.

*New York.*—*People v. Fuller* (1823) 2 Park. Crim. Rep. 16.

*South Carolina.*—*State v. Badgett* (1910) 87 S. C. 543, 70 S. E. 301.

*Texas.*—*Saye v. State* (1907) 50 Tex. Crim. Rep. 569, 99 S. W. 551.

*England.*—*Reg. v. Weston* (1879) 14 Cox, C. C. 346.

In *Roberts v. United States* (Fed.) *supra*, it appeared that the defendant, an attorney, had obtained a warrant for the arrest of a debtor for a debt which he owed to a firm of which the defendant was a partner. He personally arrested the debtor, but subsequent to his apprehension the latter broke away. The defendant ran a few steps in pursuit, and then fired his pistol in the direction of the retreating figure, it being quite dark at the time. The bullet struck and killed the debtor. There was evidence tending to show that the defendant had fired his gun toward the ground with the sole in-

tention of scaring the fugitive. In his charge to the jury, the trial judge, after defining manslaughter at common law, said: "In the definition of manslaughter contained in the statute, the killing must be done unlawfully and wilfully. . . . The term 'wilfully' here means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty; and, while the act must be done with evil design and knowingly, as herein stated, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another—such killing would be wilfully done, as the term is herein defined." The court affirmed a judgment of manslaughter, holding that the instruction as given was correct.

In *Sparks v. Com.* (Ky.) *supra*, wherein it appeared that the accused, while walking down a public street, deliberately fired his pistol over his shoulder, and the shot struck and killed another, the court, affirming a judgment of manslaughter, said that the acts of the accused "manifest such recklessness and want of caution as to indicate not only an entire absence of every precaution to prevent the pistol from firing, but impresses the mind that he did recklessly and intentionally so fire it; and whether he intended thereby to wound or kill anyone, it was so highly disregarding of law, order, and the personal rights and safety of others, who may have been in the streets, as to make him criminally responsible for its results. If a man, contrary to law and good order and public security, fire off a pistol in the streets of a town, and death be thereby produced, he must answer criminally for it."

In *State v. Vance* (Iowa) *supra*, it appeared that the defendant, having heard that some persons were in his melon patch, seized a gun, and, proceeding to the place, fired off the gun with no intention to wound or kill, but for the purpose of scaring away the trespassers. It seems that the gun

was unknowingly pointed at one of them, and its discharge caused his death. The court, affirming a judgment of manslaughter, said: "If one fires a gun recklessly or heedlessly, he will not be excused, and his offense will be at least manslaughter, though the weapon was pointed in the range of the deceased by accident, with no design or intention to wound or kill. If the act is attended with probably mortally dangerous consequences to the deceased, or persons generally, and death should ensue, the crime is murder or manslaughter, depending upon the degree of deliberation."

In *State v. Warner* (Iowa) *supra*, the evidence showed that the accused had recklessly pointed his gun toward another, apparently aiming at the latter's hat. On the discharge of the gun the bullet took effect in the head of the person aimed at, causing his death. The court, affirming a judgment of manslaughter, said: "Where one engaged in an unlawful act, not amounting to a felony, unintentionally kills another, or, if one recklessly and needlessly fires a gun and thereby kills another, he will not be excused; but his offense will be manslaughter, though the weapon was pointed in the direction of the deceased by accident, with no design to wound or kill."

Where the accused, who was chasing a boy down a highway, fired his pistol in the air for the purpose of scaring him, and the bullet took effect in the boy's body, causing his death, the court held that a judgment of manslaughter was proper. *People v. Stubenvoll* (1886) 62 Mich. 329, 28 N. W. 883.

In *People v. Fuller* (1823) 2 Park. Crim. Rep. (N. Y.) 16, wherein it appeared that the defendant had discharged his gun into the public highway about 9 o'clock at night, when it was quite dark, thereby unintentionally causing the death of a person a short distance down the highway, the court affirmed a judgment of manslaughter, characterizing the act as one of gross carelessness, calculated to endanger the lives of all persons passing along the street.

Likewise, where the defendant en-



tered a house and commenced shooting promiscuously about, not intending to injure anyone, and a person in the house followed him, and in attempting to hold down his pistol arm was shot and killed, the court held that a judgment of manslaughter was properly returned. *State v. Badgett* (1910) 87 S. C. 543, 70 S. E. 301.

It has been said, in Texas, that there must have been an apparent danger of causing the death of the person killed, to predicate thereon the crime of negligent homicide in discharging the firearm. *Saye v. State* (1907) 50 Tex. Crim. Rep. 569, 99 S. W. 551. In that case the evidence tended to show that the deceased was killed by a shot fired by the defendant for the purpose of scaring him, in an attempt to make his arrest. The trial judge charged the jury that if they believed the facts recited, and, further, that there was no intention to kill or injure the deceased, but a failure to exercise reasonable care and caution, then they should find the defendant guilty of negligent homicide in the first degree. On an appeal from such a judgment, the court, in reversal, pointed out, among other errors, that the charge as to negligent homicide in the first degree should have informed the jury that in the act of handling the pistol there must have been an apparent danger of causing the death of the person killed.

And see *Reddick v. State* (1898) — Tex. Crim. Rep. —, 47 S. W. 993, where, on an appeal from a judgment of murder in the second degree, the appellant claimed that the fatal shot was fired for the purpose of frightening the person killed, the court said: "If deceased was not endangering appellant's life or person, at the time he was shot, by any act he was then doing, and appellant shot with no intention of hitting him, but merely to frighten him, this would not be manslaughter, but would be negligent homicide of the second degree."

In *Reg. v. Salmon* (1880) L. R. 6 Q. B. Div. (Eng.) 79, the evidence showed that the three defendants had placed a target in a tree near a house, and were firing at it with a rifle. It

5 A.L.R.—39.

appeared that the gun would probably have been effective at any distance up to a mile, and that the path of the bullet would cross three highways. Four or five shots were fired, one of which struck and killed a boy in a tree in his father's garden, nearly 400 yards from the target. *Stephens, J.*, concurring with the court in the affirmation of a judgment of manslaughter, said: "I am of opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of everyone to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger."

But where a killing arose from misfortune or chance, and the shooting was not *malum in se*, the court held that no criminal liability would attach. *Dixon v. State* (1913) 104 Miss. 410, 45 L.R.A.(N.S.) 219, 61 So. 423. It appeared in that case that the defendant, while in a drunken condition on the highway, fired his pistol into the ground, but the bullet struck a tin can and glanced off, killing a woman seated on a near-by porch. The trial court instructed the jury to find the accused guilty of manslaughter, if they believed that he had fired the shot while drunk, and shooting in a public highway in violation of statute. This the jury did, but on appeal the judgment was reversed, this court holding that the fact that the accused was committing various misdemeanors added nothing to the case; and saying, further, that "when a man, in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished—in that case, if the act he was doing was lawful, or merely *malum prohibitum*, he shall not be punished for the act arising from misfortune or chance; but if *malum in se* it is otherwise."

Likewise in a case where it appeared that the accused discharged firearms

on his own premises, it was held that he was not guilty of manslaughter for an unintentional homicide caused by the discharge. Thus, in *Martin v. State* (1904) 70 Ohio St. 219, 71 N. E. 640, where it appeared that the accused had fired a gun from his yard at nighttime for the purpose of frightening away some boys who were making noises near by, and he unintentionally shot and killed another boy on an adjacent hill, the court reversed a judgment of manslaughter. It was held that since the accused was engaged in a lawful act at the time, the offense of manslaughter could not be predicated on the accidental and unintentional result of the act.

### III. Unintentional discharge of firearm.

#### a. As constituting murder.

It seems that where a death results from the unintentional discharge of a firearm while in the commission of an unlawful act which naturally tends to destroy human life, the offense is murder. *Josey v. State* (1912) 137 Ga. 769, 74 S. E. 282; *State v. Kelly* (1865) 1 Nev. 224; *Charles v. State* (1883) 13 Tex. App. 658.

In *Josey v. State* (Ga.) supra, it appeared that the accused, on trial for the alleged murder of his wife, maintained that the firing of the pistol which caused her death was accidental. By the Penal Code of Georgia, the pointing of a pistol at another is made a crime, and the trial court charged as follows: "If you believe that the defendant killed his wife without intending to kill her, but that it was done in the commission of an unlawful act which, in its consequences, naturally tends to destroy a human being, then the offense would be murder." In affirming a judgment of murder, the court held that the charge as given was correct.

In *State v. Kelly* (1865) 1 Nev. 224, the court sustained as a correct statement of the law the following instruction: "If the jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died . . . within a few days thereafter, caused by a shot from a pistol

in the hands of defendant, and that said pistol was discharged accidentally; yet if they find that defendant exhibited said pistol in a rude, angry, and threatening manner, and not in necessary self-defense, and that such act in its consequences naturally tended to destroy the life of a human being, then they may find defendant guilty of murder."

In *Charles v. State* (Tex.) supra, the court affirmed a judgment of murder in the second degree, it appearing that the defendant, while in a drunken condition, had recklessly struck the counter of a saloon bar with the side of his pistol while the muzzle was pointed at another, whose death was caused by the resulting discharge of the gun.

See also *Meyers v. State* (1898) — Miss. —, 23 So. 428, wherein it appeared that a trusty, guarding other prisoners, intentionally pointed a gun at one of them, when it was accidentally discharged, causing his death. The court held that from these facts the defendant might well have been convicted of murder.

#### b. As constituting manslaughter.

##### 1. Manslaughter generally.

In general, every unintentional killing of a human being arising from a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evincing a heart devoid of a sense of social duty, is manslaughter. In some cases the courts have designated the offense as "manslaughter," without drawing the distinction of the common-law writers between voluntary and involuntary manslaughter.

United States.—*United States v. Meagher* (1888) 37 Fed. 880.

Delaware.—*State v. Goodley* (1889) 9 Houst. 484; *State v. Taylor* (1913) 5 Boyce 99, 90 Atl. 880.

Iowa.—*State v. Hardie* (1878) 47 Iowa, 647, 29 Am. Rep. 496, 2 Am. Crim. Rep. 326; *State v. Tippet* (1895) 94 Iowa, 646, 63 N. W. 445.

Michigan.—*People v. Sauer* (1906) 143 Mich. 308, 106 N. W. 866.

Missouri.—*State v. Emery* (1883)

78 Mo. 77, 47 Am. Rep. 92; *State v. Morrison* (1891) 104 Mo. 638, 16 S. W. 492; *State v. Grote* (1891) 109 Mo. 345, 19 S. W. 93.

**Nebraska.**—*Ford v. State* (1904) 71 Neb. 246, 98 N. W. 807.

**Nevada.**—*State v. Kelly* (1865) 1 Nev. 224.

**North Carolina.**—*State v. Vines* (1885) 93 N. C. 493, 53 Am. Rep. 466; *State v. Turnage* (1905) 138 N. C. 569, 49 S. E. 913; *State v. Stitt* (1908) 146 N. C. 643, 17 L.R.A. (N.S.) 308, 61 S. E. 566; *State v. Limerick* (1908) 146 N. C. 649, 61 S. E. 568; *State v. Lance* (1908) 149 N. C. 551, 63 S. E. 198; *State v. Coble* (1919) — N. C. —, 99 S. E. 339.

**Texas.**—*Brittain v. State* (1896) 36 Tex. Crim. Rep. 406, 37 S. W. 758.

**Wyoming.**—*Hollywood v. State* (1911) 19 Wyo. 493, 120 Pac. 471, 122 Pac. 588, Ann. Cas. 1913E, 218.

**England.**—*Rampton's Case* (1708) J. Kelyng, 41, 84 Eng. Reprint, 1078; *Reg. v. Skeet* (1866) 4 Fost. & F. 931; *Rex v. Campbell* (1869) 11 Cox, C. C. 323; *Reg. v. Salmon* (1880) L. R. 6 Q. B. Div. 79, 14 Cox, C. C. 494, 45 J. P. 270, 50 L. J. Mag. Cas. N. S. 25, 43 L. T. N. S. 573, 29 Week. Rep. 246.

It has been said by the United States circuit court that the distinction used by the common-law writers in defining voluntary and involuntary manslaughter is now obsolete, and that any unlawful and wilful killing of a human being without malice is manslaughter; adding that manslaughter can be predicated on a homicide arising from the negligent use of such dangerous agencies as firearms. *United States v. Meagher* (Fed.) *supra*.

So, where one person, in a jesting mood, pointed a pistol at another, and it was accidentally discharged, killing the latter, the court held that if the jury should find that the pointing was intentional a verdict of manslaughter would be justified. *State v. Goodley* (Del.) *supra*.

And where the defendant claimed that he had fired his rifle towards another in the belief that the shot would not carry over the intervening distance, and merely to frighten away

a trespasser on his property, the court held that a verdict of manslaughter was proper, saying: "The reckless use of firearms is entirely too common with very many people. The law recognizes this fact, and hence the statute which makes it unlawful for any person to point a pistol or gun at another, in jest or otherwise, at any time or place. For such an offense the penalty is manslaughter if death results, and the killing does not amount to murder. This statute is, in our opinion, a most excellent and necessary one, and we are strongly inclined to believe it had much to do with the verdict rendered in your case." *State v. Taylor* (Del.) *supra*.

In *State v. Hardie* (Iowa) *supra*, it appeared that the defendant, for the purpose of scaring his wife, had pointed at her an old revolver, which was accidentally discharged, causing her death. The defendant was indicted for murder, but convicted of manslaughter. In instructing the jury as to the crime of manslaughter, the trial court said: "I instruct you that if the defendant used a dangerous and deadly weapon in a careless and reckless manner, by reason of which instrument, so used, he killed the deceased, then he is guilty of manslaughter, although no harm was in fact intended." This charge was objected to, but on appeal it was held to embody the correct rule as to criminal carelessness in the use of a deadly weapon, and the judgment was affirmed.

Where it appeared that one person picked up a revolver which he knew to be out of order and likely to go off unexpectedly, and recklessly pointed it at another, causing his death by its accidental discharge, the court held that a conviction of manslaughter was properly returned. *State v. Tippet* (Iowa) *supra*.

In *People v. Sauer* (Mich.) *supra*, wherein it appeared that the accused accidentally discharged a gun while attempting to frighten away a constable, and such discharge caused the death of the latter, the court affirmed a judgment of manslaughter, although it appeared that the gun was not intentionally pointed at the constable.

In Missouri, the courts have held that the unintentional killing of a human being through the handling of a pistol in a manner indicating recklessness incompatible with human life is manslaughter in the fourth degree. In *State v. Emery* (1883) 78 Mo. 77, 47 Am. Rep. 92, it appeared that the accused, while flourishing a loaded revolver in his saloon, and after being warned of the danger of such actions, accidentally discharged it, killing a bystander. The court affirmed a judgment of manslaughter in the fourth degree, and held to be correct the following instruction to the jury: "In order to find a person guilty of manslaughter in the fourth degree, it is sufficient to show that the shooting, though unintentionally done, was the result of negligence in handling the firearm, indicating on the part of such person a carelessness or recklessness incompatible with a proper regard for human life."

In *State v. Morrison* (1891) 104 Mo. 638, 16 S. W. 492, wherein it appeared that the accused pointed a loaded shotgun at another and discharged it in the mistaken belief that it was not loaded, thus causing her death, the court sustained the following instruction to the jury: "If you further believe from the evidence that said shooting was not intentionally done by defendant, but was the result of his negligence in handling the gun, and of a recklessness and carelessness on his part incompatible with a proper regard for human life, then you will find defendant guilty of manslaughter in the fourth degree." Likewise, in *State v. Grote* (1891) 109 Mo. 345, 19 S. W. 93, sustaining a judgment of manslaughter in the fourth degree, where it appeared that the accused had drawn and pointed his pistol at another, whose death was caused by the subsequent accidental discharge of the weapon, the court reiterated the Missouri doctrine that "the unintentional killing of a human being, through the negligent handling of a pistol in a way indicating recklessness incompatible with human life, is manslaughter in the fourth degree."

In *Ford v. State* (1904) 71 Neb. 246,

98 N. W. 807, it appeared that the accused was flourishing a gun around when a bystander told him to be careful, as he had his finger on the trigger. At this admonition the accused pointed the gun at the bystander and said he wanted to show him how it worked, and almost immediately the weapon was discharged, causing his death. The court, affirming a judgment of manslaughter, said: "Although the plaintiff had no intention or desire to injure the deceased, and although the shot was accidental, yet he was in the commission of an unlawful act, and the result of the shooting, together with this fact, clearly rendered him guilty of the crime of manslaughter."

In *State v. Kelly* (1865) 1 Nev. 224, the court held to be correct the following instruction: "If the jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died . . . within a few days thereafter, caused by a shot from a pistol in the hands of defendant, and that said pistol was discharged accidentally; yet if they find that defendant was exhibiting said pistol in a rude, angry, and threatening manner, and not in necessary self-defense, —then they may find the defendant guilty of manslaughter."

In *State v. Vines* (1885) 93 N. C. 493, 53 Am. Rep. 466, it appeared that while the defendant was using a pistol in a reckless and unlawful manner, it was discharged, killing another. The court upheld a charge that even if the defendant "did not intend to kill the deceased, and the discharge of the weapon was unintentional, still the killing was manslaughter, because in any view of his conduct he used the dangerous weapon carelessly, recklessly, and unlawfully. It is clear that where one engaged in an unlawful or dangerous sport kills another by accident, it is manslaughter."

In *State v. Turnage* (1905) 138 N. C. 569, 49 S. E. 913, the court, while reversing a judgment of manslaughter for an error in charging the jury, repeated the rule that "any unjustifiable and reckless use of a gun which jeopardizes the safety of another is unlaw-

ful, and if death ensues therefrom it is manslaughter."

In *State v. Stitt* (1908) 146 N. C. 643, 17 L.R.A.(N.S.) 308, 61 S. E. 566, it appeared that the defendant, while presenting a gun at another, had pulled the trigger in the mistaken belief that the gun was not loaded. The defendant was convicted of manslaughter. On an appeal, the court, stated the rule to be well established that "if one causes the death of another by reason of culpable negligence, or by an unlawful act which amounts to an assault on the person, he is guilty at least of the crime of manslaughter."

But where it appeared on the trial of an indictment for murder that the killing was caused by the accidental discharge of a gun in the hands of the accused, and the trial judge charged the jury that in the most favorable light of the evidence the defendant was guilty of manslaughter, the court held that this was reversible error, there being no evidence that the defendant had intentionally pointed the gun, saying: "If the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. . . . But neither of these positions necessarily or as a matter of law arises from the testimony, and the question of the prisoner's guilt or innocence must be left for the jury to determine on the facts as they shall find them." *State v. Limerick* (1908) 146 N. C. 649, 61 S. E. 568.

In *State v. Lance* (1908) 149 N. C. 551, 63 S. E. 198, the evidence tended to show that the accused had fired his pistol from a moving train, for the purpose of scaring a girl who stood on a near-by embankment. The shot struck the girl, causing her death. The jury was instructed: "If you

should find from the evidence, and beyond a reasonable doubt, that the defendant fired the shot that killed the girl, and that it was done recklessly, but without intention to kill, it would be manslaughter." On appeal, the court stated that this instruction was fully supported by the authorities, and said: "In general, to cause death by wilfully doing an act calculated to endanger life or cause great bodily harm will be murder, although there is no specific intent to kill. But if the intention, although unlawful, was not to cause death or great bodily injury, and death accidentally or unexpectedly resulted, the offense is not murder, but manslaughter. The negligence or unlawfulness may be sufficient to make the act criminal, although not sufficient to show malice aforethought."

In *State v. Coble* (1919) — N. C. —, 99 S. E. 339, it appeared that a gun in the hands of the accused had been discharged accidentally, or otherwise, causing the death of another. The accused was convicted of manslaughter, from which conviction he appealed. The court sustained the following instruction: "Manslaughter may be committed . . . if a person by the careless, negligent use of a firearm, and in the presence of other persons, either through carelessness or recklessness, wanton, reckless disregard of the safety of other persons, points a firearm at them, and handles it in such reckless, negligent manner as that it is exploded and causes the death of another. That would be manslaughter, although no death may have been intended or injury intended." The court held that this charge was correctly stated.

In *Brittain v. State* (1896) 36 Tex. Crim. Rep. 406, 37 S. W. 758, it appeared that death was caused by the accidental discharge of a pistol in the hands of the defendant. The trial court, in applying the law to the facts, charged the jury that if the defendant, for the purpose of amusement, had rudely displayed and waved his pistol about in a manner calculated to disturb the people assembled near him, and under these circumstances

he had negligently discharged the pistol, thus unintentionally killing another, he was guilty of negligent homicide in the second degree. A majority of the court held that this was a correct application of the law to the facts.

Where it appeared that the accused was attempting to disarm the deceased by the display of a loaded gun, and the latter, in attempting to push it aside, was killed by the discharge of the gun, a judgment of manslaughter was affirmed. The court held that since the accused was engaged in an unlawful act at the time of the homicide, the fact that the killing was accidental could not be a defense. *Hollywood v. State* (1911) 19 Wyo. 493, 120 Pac. 471, 122 Pac. 588.

At common law one who levels a gun at another, in the absence of a necessity therefor, is guilty of manslaughter if it goes off accidentally and kills the other. Thus, in *Reg. v. Weston* (1879) 14 Cox, C. C. (Eng.) 346, wherein the jury found that the prisoner had leveled a gun at another, unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally, causing his death, the court instructed that this constituted manslaughter, and a verdict was so returned.

In *Rampton's Case* (1708) J. Kelyng (Eng.) 41, 84 Eng. Reprint, 1073, it was shown that the accused, having found a soldier's pistol in the street, and believing it to be unloaded, had held the muzzle toward his wife and pulled up the hammer, whereupon the pistol was discharged, causing her death. The court held that this was manslaughter, and not a mere misadventure.

In *Reg. v. Skeet* (1866) 4 Fost. & F. (Eng.) 931, wherein it appeared that the defendant's gun went off accidentally in a scuffle with a gamekeeper, killing the latter, he was found guilty of manslaughter.

In *Reg. v. Campbell* (1869) 11 Cox, C. C. (Eng.) 323, it appeared that the accused had killed another by leveling and firing a gun at him. The question before the jury was whether the accused knew at the time that the gun

was loaded. The court instructed as follows: "If he fired it at the deceased, or anyone, knowing it to be loaded, the intent is to be presumed, and from the intention to kill the malice aforethought is implied in law. If you are satisfied the prisoner did not know the gun was loaded, then he cannot be convicted of murder, and the question will be one of manslaughter. As to that, I direct you that if a man take a gun, not knowing whether it is loaded or unloaded and using no means to ascertain, and fires it in the direction of any other person, and death ensues, he is guilty of manslaughter."

## 2. Voluntary manslaughter.

In a few jurisdictions the courts seem to distinguish between voluntary and involuntary manslaughter. In these states, manslaughter of the former class is committed where a homicide results from the accidental discharge of a firearm while being used unlawfully, in a manner dangerous to human life. *Henderson v. State* (1892) 98 Ala. 35, 13 So. 146; *Austin v. State* (1906) 145 Ala. 37, 40 So. 989; *Murphy v. Com.* (1893) 15 Ky. L. Rep. 215, 22 S. W. 649; *Smith v. Com.* (1909) 133 Ky. 532, 118 S. W. 368; *Hawkins v. Com.* (1911) 142 Ky. 188, 133 S. W. 1151; *Hunn v. Com.* (1911) 143 Ky. 143, 136 S. W. 144; *McGeorge v. Com.* (1911) 145 Ky. 540, 140 S. W. 691; *Pash v. Com.* (1912) 146 Ky. 390, 142 S. W. 700; *Speaks v. Com.* (1912) — Ky. —, 149 S. W. 850.

In *Henderson v. State* (Ala.) supra, the court held that if the defendant pointed a gun at another and it was accidentally discharged, or if the defendant believed it was not loaded, it was an unlawful act under the statute, and where such act caused the death of the other, a judgment of voluntary manslaughter was proper.

And in *Austin v. State* (1906) 145 Ala. 37, 40 So. 989, a conviction of voluntary manslaughter was affirmed, where it appeared that the accused, while pointing a gun at another, had accidentally discharged it, causing the death of the latter.

But see *Fitzgerald v. State* (1895) 112 Ala. 34, 20 So. 966, wherein the

evidence for the state tended to show that the deceased was admiring two pistols lying on a shelf back of a saloon bar, when the barkeeper picked up one of them and, remarking that he was a "crackerjack" with them, pointed it at the deceased, whereupon it was discharged, causing his death. The testimony for the defendant was that he was handing the pistol over to the deceased when it accidentally went off, and he maintained that, while he did not exercise the highest degree of care, still he was not guilty of criminal carelessness. For failure to instruct the jury on this phase of the evidence, a conviction of manslaughter was reversed, the court explaining the rule of criminal intent as follows: "Our own adjudications . . . always predicate criminality, not upon mere negligence or carelessness, but upon that degree of negligence or carelessness which is denominated 'gross,' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which, in some offenses, takes the place of criminal intent."

Where it appeared that the person killed met his death by reason of the wanton and reckless use of a pistol by the accused, the following instruction was held to be correct: "Even if the jury believe from the evidence that the shooting and killing of [deceased] was accidental, yet if they believe that said accidental shooting and killing was the result alone of the recklessly careless use of a loaded pistol in the hands of defendant, they should find the defendant guilty of voluntary manslaughter." *Murphy v. Com.* (1893) 15 Ky. L. Rep. 215, 22 S. W. 649.

In *Smith v. Com.* (1909) 133 Ky. 532, 118 S. W. 368, the evidence showed that the killing had occurred while the accused and his father were struggling for the possession of a gun, the discharge of which killed the latter. The son claimed that the shooting was accidental. Reversing a conviction of murder because the jury had

not been correctly instructed as to voluntary and involuntary manslaughter, the court said: "It is essential to the commission of voluntary manslaughter, that the homicide should have been wilfully and intentionally committed . . . or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator. . . . On the other hand, if the homicide resulted from the careless and unintentional discharge of the gun by appellant in the doing of an unlawful act, such as struggling with his father to retain the gun, when the latter was holding it to prevent him from wrongfully shooting [another], the act was involuntary manslaughter."

In *Hawkins v. Com.* (1911) 142 Ky. 188, 133 S. W. 1151, the defendant, appealing from a judgment of murder, secured a reversal for errors of the trial court in instructing the jury. It appeared from the evidence that the shooting was either reckless or accidental, but the trial judge had charged the jury only as to murder and involuntary manslaughter. The court held that instructions as to voluntary manslaughter and accidental killing should have been given, and stated that if the defendant had killed deceased by reason of his recklessness in handling the gun, but without malice aforethought, he should have been found guilty of voluntary manslaughter.

In *Hunn v. Com.* (1911) 143 Ky. 143, 136 S. W. 144, wherein it appeared that the accused had snapped a fully loaded revolver at another four times, and on the fifth pull of the trigger it went off, causing his death, the court, in affirming a judgment of voluntary manslaughter, said: "In any event, there was abundant evidence to authorize the verdict for voluntary manslaughter, upon the ground that the death of deceased was caused by appellant's reckless and grossly careless handling and shooting of the pistol, with knowledge on his part that it was dangerous to life to so handle it."

In *McGeorge v. Com.* (1911) 145 Ky. 540, 140 S. W. 691, wherein there

was a question as to the grade of homicide involved in the discharge of a pistol in the hands of the accused, causing the death of his wife, it was held correct for the court to instruct the jury as to murder, voluntary manslaughter, involuntary manslaughter, and accidental killing. As to manslaughter it was held to be proper to charge as follows: "If he shot and killed her without malice aforethought, . . . by the reckless or grossly careless handling or discharge of the pistol, when he knew it was dangerous to life if used in the way he used it, he was guilty of voluntary manslaughter. If he was not reckless or grossly careless in handling the pistol, but intentionally pointed it at her, and in thus doing permitted it to be discharged, although believing it would not go off, nor intending to shoot her, and not having reason to apprehend that it would go off, he was guilty of involuntary manslaughter."

In *Pash v. Com.* (1912) 146 Ky. 390, 142 S. W. 700, wherein a similar question arose as to the grade of homicide involved in a shooting, the court quoted the foregoing language of *McGeorge v. Com.* (Ky.) *supra*, as being the Kentucky law applicable to the crime of manslaughter.

In *Speaks v. Com.* (1912) 149 Ky. 393, 149 S. W. 850, it appeared that the accused had accidentally killed another while snapping a pistol at him. The court stated that a correct charge as to voluntary manslaughter should be, in substance, that if the jury believed from the evidence that the accused had killed the deceased without malice aforethought, by the reckless or grossly careless handling of a pistol which he had reason to know was dangerous to life, in the way he used it, then they should find the accused guilty of voluntary manslaughter, though he did not intend to kill.

But see the earlier Kentucky decision of *Chrystal v. Com.* (1873) 9 Bush (Ky.) 669, wherein no distinction was made between voluntary and involuntary manslaughter. In that case there was some doubt as to whether the fatal shot was fired intentionally, and the court, affirming a

judgment of manslaughter, held that it was correct for the trial judge to charge as follows: "Even if the jury believe from the evidence that the shooting and killing of [deceased] was accidental, yet if they believe that said accidental shooting and killing was the result alone of the recklessly careless use of a loaded deadly pistol by defendant, they should, notwithstanding the accident, find defendant guilty of manslaughter."

Likewise in *York v. Com.* (1884) 82 Ky. 360, the court, affirming a judgment of manslaughter returned against the defendant, a deputy sheriff, for a homicide resulting from the reckless and wanton use of a gun by the latter while making an arrest, said: "There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief, and the party committing them and causing death by such conduct will be guilty of manslaughter."

In *Minton v. Com.* (1881) 79 Ky. 461, wherein the evidence might have warranted the jury in finding that the fatal shot was accidentally fired by the accused while the pistol was being held merely as a weapon of defense, the court said that if "the pistol was accidentally fired, resulting from the recklessly careless use of it by the defendant, in view of the facts of this case, he was guilty of manslaughter, but not of murder, and the jury should have been so instructed."

### 3. Involuntary manslaughter.

Involuntary manslaughter has been defined as the killing of a human being without any intention to do so, where a person is doing an unlawful act, but in a manner not necessarily endangering human life. Involuntary manslaughter results from that reckless use of firearms which might be termed gross negligence. *Johnson v. State* (1891) 94 Ala. 35, 10 So. 667; *Sanders v. State* (1894) 105 Ala. 5, 16 So. 635; *Barnes v. State* (1900) 134 Ala. 36, 32 So. 670; *McDaniel v. State* (1908) 156 Ala. 40, 21 L.R.A.(N.S.) 678, 130 Am. St. Rep. 74, 46 So. 988; *Bynum v. State* (1913) 8 Ala. App. 79, 62 So. 983; *Cook v. State* (1893) 93



Ga. 200, 18 S. E. 823; *Austin v. State* (1900) 110 Ga. 748, 78 Am. St. Rep. 134, 36 S. E. 52; *Leonard v. State* (1909) 133 Ga. 435, 66 S. E. 251; *Irvin v. State* (1911) 9 Ga. App. 865, 72 S. E. 440; *Clonts v. State* (1916) 18 Ga. App. 707, 90 S. E. 373; *Siberry v. State* (1897) 149 Ind. 684, 39 N. E. 936, 47 N. E. 458; *Minton v. Com.* (1881) 79 Ky. 461; *Smith v. Com.* (1909) 133 Ky. 532, 118 S. W. 368; *McGeorge v. Com.* (1911) 145 Ky. 540, 140 S. W. 961; *Speaks v. Com.* (1912) 149 Ky. 393, 149 S. W. 850. Compare *Anderson v. State* (1871) 3 Heisk. (Tenn.) 86.

Thus, where it appeared that the defendant snapped a pistol at his child, and again at his wife, on which latter occasion it went off, killing her, the court held that a judgment of involuntary manslaughter was proper. The killing was not a misadventure, for the accused was performing an unlawful act at the time. *Johnson v. State* (Ala.) *supra*.

In *Sanders v. State* (1894) 105 Ala. 5, 16 So. 635, it appeared that the defendant, on trial for murder, had maintained that the fatal shot was fired accidentally, and requested the court to charge that, if the jury had a reasonable doubt whether the shooting was accidental, he should be acquitted. The trial judge refused so to charge, and on appeal the court held that the refusal to charge as requested was proper, since, although the jury might have found that the shooting was accidental, they might still have believed that the shot was fired in the course of the unlawful act of presenting a gun at the person of another, in which event they could have found the defendant guilty of involuntary manslaughter.

In *Leonard v. State* (1909) 133 Ga. 435, 66 S. E. 251, wherein the evidence for the state made out a case of murder, and that for the accused seemed to show an accidental shooting, a charge of the trial judge that if the killing was done while the accused was unlawfully pointing a pistol at another, although the discharge was accidental, he would, if not guilty of

murder, be guilty of involuntary manslaughter, was held proper.

In a case arising under a statute which made it a misdemeanor for any person to present at another any firearm, the court stated that if the defendant intentionally pointed the pistol at another, and, without any intention to take her life, accidentally discharged it, producing her death, a conviction of involuntary manslaughter would be proper. *Barnes v. State* (1900) 134 Ala. 36, 32 So. 670.

In *McDaniel v. State* (1908) 156 Ala. 40, 21 L.R.A.(N.S.) 678, 130 Am. St. Rep. 74, 46 So. 988, involving the same statute, the jury found that the defendant had raised his gun and pointed it at another, in which position it was accidentally discharged. The court, although remanding the cause for an error of the trial judge, stated that the return of a verdict of involuntary manslaughter would be proper on the finding of facts recited.

In *Bynum v. State* (1913) 8 Ala. App. 79, 62 So. 983, where there was a question whether the defendant was guilty in any degree of homicide, the court stated the law as follows: "If defendant was intentionally pointing the gun at deceased, and while doing so it was unintentionally fired, resulting in the death of deceased, defendant would be guilty of at least involuntary manslaughter, because, though intending no harm to deceased, he was yet engaged in an unlawful act when pointing a gun at her, and the law holds him criminally responsible for the consequences of such an act."

In *Irvin v. State* (1911) 9 Ga. App. 865, 72 S. E. 440, wherein it appeared that the defendant in a scuffle had playfully snapped a revolver at another several times, until a loaded cartridge was reached which fired and killed the other, the court, affirming a judgment of involuntary manslaughter, said that although the accused at the time of the homicide was engaged in the unlawful act of pointing a revolver at another, still, since he did not intend to kill the other, the homicide was involuntary, and a verdict of involuntary manslaughter proper.

In *Clonts v. State* (1916) 18 Ga.

App. 707, 90 S. E. 373, the court, affirming a judgment of involuntary manslaughter, said that where the killing occurred while the accused was pointing a gun at another in a playful manner, with no intent to injure him, such a verdict was proper.

In *Cook v. State* (1893) 93 Ga. 200, 18 S. E. 823, it appeared that the defendant, a boy under fourteen years of age, was using a pistol in a reckless manner, snapping it at several persons, in spite of their remonstrances. He presented the pistol at another, and it was discharged, causing the death of the latter. The boy claimed that the discharge was accidental. The court affirmed a verdict of involuntary manslaughter.

In *Austin v. State* (1900) 110 Ga. 748, 78 Am. St. Rep. 134, 36 S. E. 52, it appeared that while a woman had hold of the barrel of a gun in the hands of the defendant, and was attempting to take the gun from the latter, it was discharged, causing her death. The defendant was convicted of murder, but the judgment was reversed for errors in charging the jury. The court stated the principle governing homicide from the unintentional discharge of a gun, as follows: "Where death results to one from the discharge of a gun in the hands of another, and there was no intention to kill nor an intention to discharge the gun, the person in whose hands the gun was held would not be guilty of murder, although the gun may have been handled in a careless and negligent, even reckless, manner. In such a case the slayer would be guilty of involuntary manslaughter only, and the particular grade of that crime would depend upon whether it was lawful or unlawful for the slayer to be in possession of a deadly weapon at the time and place of the killing."

In *Siberry v. State* (1897) 149 Ind. 684, 39 N. E. 936, 47 N. E. 458, it appeared that the defendant picked up a revolver and pointed it at his wife, and on her remarking that he could not scare her, he snapped the weapon three or four times, when it was discharged, causing her death. The court held that the jury was warranted in

returning a verdict of involuntary manslaughter on the facts as stated.

In the earlier case of *Surber v. State* (1884) 99 Ind. 71, the court did not specify the grade of manslaughter involved. It appeared therein that a person was killed by the accidental discharge of a revolver presented at him by the defendant, and the court, affirming a judgment of manslaughter, said: "Our statutes are intended to require all persons to be exceedingly cautious and careful in the use and handling of firearms, and one who purposely draws upon another a gun or pistol does an unlawful act, and is guilty of felonious homicide if death results from the act, unless, indeed, the act of pointing the weapon is justifiable or excusable upon some legal ground."

In *Speaks v. Com.* (1912) 149 Ky. 398, 149 S. W. 850, the court reversed a judgment of voluntary manslaughter, where it appeared that the accused had accidentally killed another while snapping a pistol at him, but added: "One who points a pistol at another and snaps it cannot, in the eyes of the law, be guilty under the theory of accidental killing. Such conduct indicates such a careless and reckless use of a deadly weapon as to make the defendant at least guilty of the offense of involuntary manslaughter."

See also the decisions in *Smith v. Com.* (1909) 133 Ky. 532, 118 S. W. 368, and *McGeorge v. Com.* (1911) 145 Ky. 540, 140 S. W. 961, which are set out under subdivision III. b, 2, wherein the court charged as to both voluntary and involuntary manslaughter.

In a case where there was a question whether the gun which the defendant was pointing at another was discharged by accident or design, the court reversed a conviction for voluntary manslaughter founded on a charge of the trial court that the mere use of a deadly weapon, followed by homicide, presumes an intention to take life. It was held that the defendant might have been innocent of intent to fire the pistol, in which case the degree of homicide would have been involuntary manslaughter. An-

derson v. State (1871) 3 Heisk. (Tenn.) 86.

See also Nelson v. State (1878) 6 Bart. (Tenn.) 418, wherein it appeared that the accused had approached a woman, presented a pistol at her, and demanded that she kiss him. On her refusal, the pistol was discharged, causing her death, although it appeared to have been loaded only with a paper wad. The accused expressed great astonishment at the killing. He was convicted of voluntary manslaughter and, on appeal, the court stated that as in their opinion the pistol was fired for the purpose of frightening the woman, and without intent to injure her, the proof would not sustain a conviction of voluntary manslaughter. The court refrained from

expressing an opinion as to whether the offense was involuntary manslaughter.

But, in Robertson v. State (1879) 2 Lea (Tenn.) 239, 31 Am. Rep. 602, 3 Am. Crim. Rep. 207, wherein it appeared that the defendant had been flourishing a pistol about in a playful mood for several minutes, supposing it to be unloaded, and then without criminal design had pointed it at another, and saying, "I am going to shoot you," had pulled the trigger, causing his death, it was held that a conviction of manslaughter was unwarranted. The court stated that negligence alone, in the absence of an intent to do harm, and under the belief that no harm was possible, was not sufficient to constitute a crime. R. E. B.

B. M. BLISS, Guardian of Phillippa R. Spencer, and as Admr., etc., of  
S. H. Bliss, Deceased, and Mrs. P. B. Bliss, Deceased,

v.

PHILLIPPA R. SPENCER, by Next Friend.

*Virginia Supreme Court of Appeals—June 12, 1919.*

(— Va. —, 99 S. E. 593.)

**Guardian and ward — expenditures from corpus of estate — what will be approved.**

1. The court, in passing upon the allowance of expenditures made by a guardian in excess of the ward's income, is governed by whether they were judicious and proper from the standpoint of the interest of the ward.

[See note on this question beginning on page 682.]

**Appeal — disallowance of administrator's commissions.**

2. Disallowance of commissions to an administrator, based upon a commissioner's report to which no exceptions were taken and which does not appear on the face of the report, cannot be considered on appeal.

[See 2 R. C. L. 92.]

**Guardian and ward — supervision of expenditures — duty.**

3. A guardian who permits his ward to fix the amount of his expenditures without supervision, except expostulation when the bills are rendered, cannot escape responsibility for injudicious and unreasonable disbursements, if they are in excess of the income and

without authority of the instrument under which he acts.

[See 12 R. C. L. 1157.]

**— what expenditures will be allowed.**

4. The test of whether or not there will be an allowance to a guardian of credit for expenditures for his ward is whether they are such as the court would have authorized had application been previously made to it.

**— what considered by court.**

5. In passing upon the question of allowance of expenditures of a guardian for his ward in excess of income, the court is not bound by expressions of opinion of even the ward's witnesses.

**— good faith of guardian.**

6. Actions in good faith by the guardian, in making expenditures of

the whole of the ward's income for the benefit of the ward, is the test of whether or not there will be an allowance of such expenditures in the guardian's account.

—unexpended income.

7. Unexpended income of a ward for a year may go into the fund which may be expended by the guardian for the ward's benefit in the succeeding year.

Executor and administrator — money paid to widow — credit.

8. Money paid by an administrator in good faith to the widow as her share of her husband's estate before discovery of a will should be credited to him in the statement of his account.

[See 11 R. C. L. 179.]

Guardian and ward — allowance of commissions.

9. A court having statutory authority to allow commissions to a guardian who fails to present his annual account within the specified time, and is therefore deprived of his regular commissions, will allow them only to the extent that he gives a reasonable excuse for his default.

[See 12 R. C. L. 1157.]

—time for crediting commissions.

10. The commissions to which a guardian is entitled should be credited as of the rest day at the end of each yearly settlement of his accounts.

—interest on dividends.

11. A guardian should be charged with dividends received on securities belonging to his ward's estate during each current year, the interest thereon to be debited by charging interest on the yearly balances found in the guardian's hands.

Executor and administrator — commission on unconverted assets.

12. One seeking an accounting by an administrator on the theory that he converted stock into cash cannot deprive him of commissions, on the theory that he distributed the stock in kind without converting it.

—assets not converted.

13. A guardian cannot be held chargeable for the money value of assets coming to his ward from an estate, if they were never converted into money and the guardian never charged himself with its receipt.

—commissions on assets distributed in kind.

14. An administrator is not entitled to commissions on assets not converted into money, but distributed in kind.

Guardian and ward — interest on small expenditures.

15. A guardian is not entitled to interest on small individual items of expenditures from date of expenditure in his yearly statement.

**APPEAL** by defendant from a decree of the Circuit Court for Prince Edward County in favor of plaintiff in a suit to compel an accounting by defendant for all income which he may have received from plaintiff's estate, coming into his hands from the personal estates of her grandfather and grandmother. *Reversed in part.*

Statement by Sims, J.:

The appellee, a ward of the appellant, was plaintiff in the court below, and instituted this suit to compel an accounting by the guardian for all income he may have received from the estate of his ward which came, or should have come, into his hands as guardian, from the personal estates of the grandfather and of the grandmother of the ward.

The grandfather, S. H. Bliss, died on May 23, 1910, leaving surviving him his widow, Mrs. P. B. Bliss, the grandmother aforesaid, his son, B. M. Bliss, the appellant, and Philippa R. Spencer, the appellee, the granddaughter and ward aforesaid, and a personal estate consisting of

twenty shares of Farmville Mill stock valued in the record at \$10,000, and certain debts due the estate, which his administrator promptly collected, and money in bank, and a horse sold by his administrator, which estate, other than the mill stock, aggregated the gross amount of something over \$6,000 which came as money into the hands of such administrator.

At the time of the death of S. H. Bliss it was thought that he had died intestate, and all of his personal estate came into the possession of and was taken in charge by his son, the appellant, B. M. Bliss; and the latter, on June 1, 1910, qualified as administrator of such decedent. Be-

ing satisfied that there were practically no debts or demands against the estate, the administrator, in June and July, 1910, acting in good faith and with ordinary prudence, paid over to the said widow certain sums, and in October, 1910, paid for her certain other sums, on account of her supposed share of the personal estate as distributee under the statute. These payments, according to the record, aggregated the net amount of \$176.49 in excess of what the widow would have been entitled to receive as income on the life estate passing to her under the will presently to be mentioned.

On October 31, 1910, the said widow died intestate, leaving surviving her the appellee, her grandchild and only distributee under the statute. The said B. M. Bliss was not her son, but a stepson, being a son of S. H. Bliss by a prior marriage. Such widow left a small separate estate of her own, which consisted of twelve shares of Planters' Bank stock, appraised at the value of \$696; five shares of Planters' Warehouse Company stock, appraised at the value of \$250; a sewing machine and certain jewelry, appraised at the value of \$149; and \$30 in currency,—the total appraised value of her estate aggregating \$1,125. All of this estate came into the possession of said B. M. Bliss and was taken in charge by him upon the death of the widow, and he qualified as her administrator in December, 1910; the precise date of such qualification not appearing in evidence. B. M. Bliss, however, acted as administrator of said widow from the time of her death, paid her funeral expenses, nurse for services during last illness of deceased, doctor's bill, some debts of the latter of trifling amounts, expenses of qualification, etc., which, exclusive of commissions as administrator, by July, 1911, aggregated something over \$200. During this time B. M. Bliss, as administrator of the widow, collected certain dividends on the said Planters' Bank stock and Planters' Warehouse stock, did not

sell such stock or any of the personal property of her estate to meet the disbursements made by him as aforesaid, but appropriated to himself, to pay the balance due him on such account, two shares of said Planters' Bank stock and two shares of said Planters' Warehouse stock at their appraised value, aggregating \$226.

On September 22, 1911, B. M. Bliss qualified as guardian of his said ward. The record shows, however, that he acted as if he were such guardian from September 1, 1910. The ward, in fact, lived with him in his home, and was in his actual custody and control from the death of the said widow, October 31, 1910, until December, 1913, after which she lived with an aunt and her husband, R. W. Garnett, in the same town as that in which the guardian lived, namely, Farmville, Virginia.

On or shortly before December 4, 1911, the said B. M. Bliss exhibited before the commissioner of accounts of his county statements of his accounts as administrator of S. H. Bliss, deceased, and also of the said widow, with vouchers for his disbursements. The first-named statement covered the period from May 1, 1910, to November 1, 1910, and the latter statement covered the period from November 11, 1910, to November 1, 1911. The commissioner of accounts, in December, 1911, and January, 1912, respectively, made his reports of the ex parte settlements of the accounts of such administrator of both of such estates, based on such statements and vouchers, and, there being no exceptions thereto, they were in due course confirmed according to law.

In the ex parte settlement of the account of B. M. Bliss as administrator of S. H. Bliss, deceased, the said Farmville Mill stock was treated as having been converted into money, and the administrator was charged with having received \$10,000, as the value thereof. He is credited in such settlement with 5 per cent commissions on such amount, along with the same per-

cent of commissions on his other receipts. He is also credited with the amounts he paid the widow above mentioned, aggregating \$243.91 gross, but being only \$176.49 net amount as aforesaid. Further, B. M. Bliss, as administrator, is credited in such settlement, and B. M. Bliss, as guardian of his said ward, is charged therein, not with any part of said Farmville Mill stock specifically, but with certain amounts of money as paid to B. M. Bliss, guardian of his said ward, in her right as the only distributee of the said widow.

Thus was the Farmville Mill stock treated by the said B. M. Bliss, both in his capacity as administrator and guardian, as having been converted into money.

In the ex parte settlement of the account of B. M. Bliss as administrator of said widow, the residue of the bank and warehouse stock aforesaid left after the appropriation by the administrator of two shares each thereof to pay the balance due him as aforesaid, to wit, ten shares of Planters' Bank stock, three shares of Planters' Warehouse stock, and said jewelry and sewing machine, together aggregating \$879 in value as per the appraisement thereof, is not treated as converted into money, but as "delivered to" and held by the said B. M. Bliss as guardian of his said ward.

Such ex parte settlement allowed the administrator 5 per cent commissions on said \$879 value of said property, although it was not treated by him nor by such settlement of accounts as having been converted into money.

There are some departures in both of said ex parte settlements from the settled rules governing the subject of charging and crediting interest on the debit and credit items of the accounts, but they do not amount to very much as affecting the result of the account, and no issue was made before the court below, or is made before us, on this subject, so that we need make no further reference thereto.

After the death of said widow, and either before said statements were laid before the commissioner of accounts, as aforesaid, for said ex parte settlements, or while they were pending before him, and certainly before either of the reports aforesaid was made as aforesaid, it was discovered that S. H. Bliss, deceased, had left a will. That will was duly probated on December 19, 1910, and is as follows:

This is my will. I give my wife  $\frac{1}{2}$  her life, then to go to my granddaughter Phillipia, also Phillipia, \$1,000, balance to my son.

[Signed] S. H. Bliss.

Notwithstanding the discovery and probate of said will, the said B. M. Bliss did not seek to have the commissioner of accounts change the statements of said accounts in said ex parte settlements in any particular, and did not except to said reports, but allowed them to be confirmed in due course, as aforesaid.

The guardian subsequently, and prior to this suit, laid his accounts as such before the commissioner of accounts for settlement on three occasions only, namely: On September 23, 1912, covering the period from September 1, 1910, to September 23, 1912; on September 23, 1913, covering the period from September 23, 1912, to September 23, 1913; and on December 20, 1916, covering the period from September 23, 1913, to September 23, 1916. The commissioner of accounts made reports dated respectively July 25, 1912, March 12, 1914, and January 1, 1917, of ex parte settlements of such accounts of the guardian as based on his statements of such accounts and vouchers, which, after lying in the clerk's office for over thirty days without exception, were confirmed in due course according to law.

It is material to say here only the following concerning these ex parte settlements of accounts of the guardian:

(a) They charged the guardian with only \$1,000 as received from the estate of S. H. Bliss, deceased, and with interest thereon from Sep-

tember 23, 1911, to September 23, 1912. They omitted to charge the guardian with the share of his ward of the money value of the Farmville Mill stock, which was \$3,333.33, and omitted also to charge the guardian with some \$1,665.49, with which he was further chargeable as receipts from the estate of S. H. Bliss, deceased, under the will of the latter. And the commissioner of accounts in the first two guardianship settlements reports that the guardian has in hand, as such, six shares of the Farmville Mill stock. But the value of the latter was only \$3,000 as per the value of this stock shown by the record. And the last guardianship settlement aforesaid charges the guardian with dividends on such six shares of stock collected in 1914 (for 1913 and 1914) and for 1915 and 1916. No dividends on such stock are accounted for for the years 1910, 1911, or 1912, and it would seem from the record that none were declared on this stock by the Farmville Mill Company for those years.

It thus appears from the record that the guardian, subsequently to his own election to treat the Farmville Mill stock as converted into money as aforesaid, attempted to change his attitude in that matter.

(b) Such settlements show that the guardian never himself treated the ten shares of Planters' Bank stock, or the three shares of Planters' Warehouse stock, or the sewing machine or jewelry aforesaid, derived from the estate of said widow and aggregating \$879 appraised value, as having been converted into money, nor was any of it so treated in any of the ex parte settlements aforesaid.

(c) Such settlements show disbursements of the guardian for the support and education of the ward considerably in excess of the annual income from her estate in the hands of the guardian, which the latter received, together with that with which he was legally chargeable, and very greatly in excess of the income for which the guardian accounts in

such settlements as actually received; so much so, indeed, that such settlements show about half of the corpus of the estate of the ward as having been consumed in commissions and disbursements in the six years from September, 1910, to September 23, 1916.

The bill puts in issue the true construction of said will; is besides, in substance, a bill to surcharge and falsify the said administration and guardianship accounts; and in the latter connection seeks, amongst other things, the following:

(1) To hold the guardian accountable for the annual interest of 6 per cent on the share of his ward under said will in remainder after the life estate of her grandmother in the personal estate of S. H. Bliss, deceased, which is reported as cash or money received by B. M. Bliss as administrator, per said ex parte settlement of his accounts as such administrator, treating the twenty shares of Farmville Mill stock as converted into money, in addition to the annual interest of 6 per cent on the said \$1,000 legacy.

(2) To hold the guardian accountable also for the like interest on the amount reported by and charged the guardian on his first ex parte guardianship settlement aforesaid, as "Cash of Mrs. P. B. Bliss Est.," which the bill in substance alleges includes the money value of the twelve shares of Planters' Bank stock, the five shares of Planters' Warehouse stock, the jewelry and sewing machine, as per its appraised value as aforesaid.

(3) To have the claims of the guardian for expenditures on account of the support of the ward passed upon by the court, and all such expenditures disallowed thereby which were not judicious and proper and were in excess of the ward's annual income, and to obtain such other and general relief as the plaintiff may be entitled to in equity in the premises.

There was a master commissioner's report, of date June 3, 1917, made under decree of court. The

material portions of such report were as follows:

(a) The report stated that the net amount which the administrator of S. H. Bliss had, before the discovery of the will, paid the said widow as aforesaid, was \$176.49, but it did not allow him credit therefor in the settlement of his accounts as administrator of S. H. Bliss, deceased.

(b) The report, in substance, treated the twenty shares of Farmville Mill stock aforesaid as having been converted into money by the administrator; charged him with \$10,000 as the amount realized therefrom; allowed him 5 per cent commissions thereon, along with the same commissions on other receipts; and reported that, exclusive of the legacy, \$4,998.82 was the amount of that portion of the corpus of the estate of said ward with which the guardian was chargeable as coming from the estate of S. H. Bliss, deceased, under said will, should the court adopt the construction of such will which it afterwards adopted in the decree under review, and that to be added to this was the \$1,000 legacy aforesaid, making a total of such corpus of \$5,998.82 as derived from the estate of S. H. Bliss, deceased, as aforesaid, for which the guardian should account, and that he should be charged with annual interest thereon.

(c) The report allowed the appellant in the settlement of his accounts as administrator of said widow the \$176.49 net amount of the items of cash paid the latter before the discovery of the will as above mentioned.

It also allowed the appellant 5 per cent commissions on his receipts as per his ex parte settlement as administrator of said widow, including such commissions on said \$879 of specific property, amounting to \$43.95.

It did not charge the appellant with the above-mentioned total as cash received of Mrs. P. B. Bliss's estate, but only with the appraised value of the property of her estate above mentioned of \$1,125, allowed the appropriation by the appellant

of two shares each of the stock aforesaid to cover his excess of disbursements over receipts, and reported the remainder of such stock, the jewelry and sewing machine of the aggregate value of \$879, aforesaid, as constituting all of the ward's estate in the hands of the guardian coming from her grandmother's estate, and reported that the guardian was not chargeable with interest thereon, but only with such income therefrom as to the court should seem reasonable.

(d) That is to say, the report is to the effect that the whole of the estate of the ward in the hands of the guardian, if the construction of the will aforesaid were adopted, would be as follows:

Money on which he was chargeable with annual interest .....	\$5,998.82
The specific property aforesaid of which only the bank and warehouse stock yielded any income	879.00
<b>Total .....</b>	<b>\$6,877.82</b>

The report did not state any guardianship account, merely giving the basis therefor aforesaid.

The appellant filed no exceptions to such master commissioner's report.

The appellee filed certain exceptions to such report which need not be mentioned here, except to say they saved certain objections urged by the appellee against the decree under review which will be dealt with in the opinion below.

The decree under review held that the proper construction of the will of S. H. Bliss, deceased aforesaid, is that the debts of the estate and the costs of administration should first be paid; that one third of the estate then remaining passed to the widow for life, and at her death passed in remainder to said ward; that from the residue of the estate the \$1,000 legacy to the ward was to be deducted; and that the balance passed to the said B. M. Bliss. The decree approved and disapproved said master commis-



sioner's report in certain particulars, fixed the sum of \$250 per annum as a just and reasonable amount for the support and maintenance of the ward from September 1, 1910, to her entrance into the state normal school as a boarder, to wit, about September 1, 1916, and allowed him an expenditure of \$403.51 on said ward from September 1, 1916, to September 1, 1917, as just and reasonable. The decree referred to allows the appellant the said \$176.49 per annum paid the widow as aforesaid, and made certain other provisions with respect to the basis upon which the guardian should settle his accounts before a commissioner in chancery of the court, on which are based assignments of error and which raise the questions which are dealt with in the opinion below.

Other material matters of fact are mentioned in the opinion of the court.

Messrs. A. B. Armstrong and Watkins & Brock for appellant.

Mr. J. Taylor Thompson, for appellee:

The court in a plain case will sanction the expenditure of the principal fund, if proper and judicial, and such as it would have authorized had application to it been previously made, but the burden is on the trustee to show that the expenditure was proper and necessary, and if he fails to do so, he will not be allowed credit in his accounts for the amount paid out.

Sedgwick v. Taylor, 84 Va. 822, 6 S. E. 226; Barton v. Bowen, 27 Gratt. 849.

Defendant is not entitled to commissions for the management of the estate.

21 Cyc. 176; Snively v. Harkraker, 70 Va. 112; Ward v. Funsten, 86 Va. 369, 10 S. E. 415; Trevelyan v. Lofft, 83 Va. 141, 1 S. E. 901; Gregory v. Parker, 87 Va. 455, 12 S. E. 801.

Defendant was not entitled to charge the amount of \$76.77, as interest, on the payments made plaintiff.

1 Minor, Inst. p. 485.

Sims, J., delivered the opinion of the court:

There are five assignments of error by appellant. They will be considered in their order as stated below.

5 A.L.R.—40.

1. That the 5 per cent commissions which were allowed appellant in his ex parte settlement as administrator of S. H. Bliss, deceased, was disallowed by the decree under review; that "when the court came to enter said decree complained of, it took as a basis the whole amount of money and other personal property coming into petitioner's hands as administrator, and allowed no credit for said commissions."

The decree in this particular was based on the master commissioner's report, to which no exception was taken by appellant, and, as the disallowance of such commissions does not appear on the face of the report, this assignment of error comes too late under the well-established rule on the subject.

Appeal—  
disallowance of  
administrator's  
commissions.

But, if we look to the evidence in the record on which the master commissioner's report and decree were based, we find that there is an error of fact in this assignment of error. The decree under review held that \$5,998.82 was the amount of the estate of the ward which came into the hands of the guardian from the estate of S. H. Bliss, deceased. This was the net amount thus derived as per said ex parte settlement and as per the master commissioner's report mentioned in the above statement of the case, and was left in the hands of the appellant after allowing him 5 per cent commissions as administrator of S. H. Bliss, deceased, on all of his receipts, including 5 per cent on the \$10,000 value of the twenty shares of Farmville Mill stock.

Hence there is no merit in this assignment of error.

2. That the decree, while allowing appellant commissions as guardian, did not allow same until the end of the account in September, 1917, whereas such allowance should have been made at the beginning of the guardianship account, to wit, in the year 1911.

There is also an error of fact in this assignment of error. The decree expressly provides that the

guardian shall "be credited with 5 per cent on the \$5,998.82 received from the administrator as of September, 1911."

Hence there is no merit in this assignment of error. But—

It should perhaps be here stated that it will be seen below in this opinion that we have reached the conclusion, which is hereinafter set forth in detail, that the guardian has forfeited a part of such commissions, under the statute in such case made and provided.

3. This assignment of error is as follows: "Third. That the court by said decree has fixed the sum of \$250 per year as a reasonable and adequate one for the support and maintenance of your petitioner's ward during the years 1911 to 1916, inclusive. Your petitioner submits that the trial court seems to have arrived at these figures arbitrarily, since R. W. Garnett, on page 35 of the record, testifies that he considered \$40 the proper amount per month for the support and maintenance of said ward, and Mrs. M. T. Garnett, on page 25 of said record, states that she would say \$30 to \$35 per month was necessary for the support and maintenance of said ward; that both of these witnesses, uncle and aunt, respectively, of said Phillippa Spencer, were summoned in her behalf, and that theirs is the only evidence before the trial court, other than the evidence of this petitioner, which seeks to show the proper amounts necessary for the support and maintenance of said Phillippa Spencer; that, taking the lowest figures of Mrs. Garnett, the annual support for the said Phillippa Spencer would be \$360, and, taking the figures of Mr. Garnett, it would amount to \$480. Your petitioner claimed and introduced evidence to show that for a girl of the kind and station of his ward a sum per annum of something like \$600 on an average was not excessive, but necessary and proper; and that all his expenditures in her behalf were made in good faith and according to his best judgment."

There is no evidence in the record

which we have been able to find tending to show that for a girl of the kind and station in life of said ward a sum of something like \$600 per annum on an average was not excessive, except the testimony of the guardian to the effect that he made about that expenditure, and his testimony in one place to the effect that he considered such expenditures essential and necessary.

At other places in his testimony, however, the guardian shows that during the whole period from September 1, 1910, he did not exercise any control over such expenditures, except to remonstrate with his ward and at times with her uncle in law, Mr. Garnett; that he allowed the ward, a girl of twelve years of age in September, 1910, and who had only reached the age of eighteen years in 1916, to herself control the amount of her expenditures. As he testifies, "She did the buying; I did the paying."

It is true the guardian testifies that he had conversations with his ward, "I reckon a hundred times. I have told her she was spending too much and spending it too fast, and I also told her uncle, R. W. Garnett." But he made her no definite allowance to spend at any time; made no effort, after the first year from September, 1910, to keep her expenditures within her income, as he himself admits in his testimony, except to remonstrate, as aforesaid, after the bills were made and when or after he paid them. And during the first year from September 1, 1910, the expenditures were approximately \$500, and the next year approximately the same amount; so that it is apparent that the effort testified to by the guardian to restrict expenditures the first year of his guardianship was not substantially different from his action in that regard in succeeding years.

It should be said in justice to the guardian that there is no suggestion in the evidence of the existence of any bad faith or turpitude on his part in all of his transactions. But

the testimony of the guardian himself is to the effect that he did not himself regard the expenditures in excess of the income as judicious or proper. And the evidence plainly establishes the fact that he abdicated his authority and control over the estate of his ward and the income therefrom and over the conduct of the ward in the matter of expenditures. Such abdication may have been due to the very affection of the guardian for his ward, or to some other cause, but, to whatever cause due, it constituted a plain dereliction of the very duty which the office of guardian is created to perform, and no guardian can devolve such duty

Guardian and ward—  
supervision of  
expenditures—  
duty.

upon his ward, even with the consent of the latter, or upon any other person, or thus escape respon-

sibility for injudicious and unreasonable disbursements in excess of the income of the ward which are made without authority of the instrument under which he acts, if there be such, or, if there be none such, without previous authority of the court.

Touching the disbursements by a guardian for the support and maintenance and education of his ward in excess of the income from the estate, the test of whether there will be an allowance of credit therefor in the settlement of his accounts is well established under the statute in Virginia (Code § 2604), as expounded by the decisions of court. That test is not, as claimed by appellant,

—what expenditures will be allowed.

merely that the guardian has acted in good faith, but

that the disbursements are such as the court would have authorized had application been previously made to it. If they are such disbursements, they will be allowed, although made by the guardian without previous authority, but not otherwise. And the court, in acting on the subject, will be guided by its determination of whether the expenditures in excess of the annual income were actually made, and by its further de-

termination of whether they were judicious and proper from the standpoint of the interest of the ward. *Barton v. Bowen*, 27 Gratt. 849, 855; 1 Minor, Inst. 2d ed. 473, 474.

—expenditures from corpus of estate—what will be approved.

Therefore, on the question of whether there was error in the decree under review in its allowance of the expenditures aforesaid of only \$250 per year from September 1, 1910, to September 1, 1916, and \$403.51 from September 1, 1916, to September 1, 1917, we are of opinion that the evidence in the record sustains the conclusion that, under the facts and circumstances of this case, such expenditures were injudicious and improper, and should not be allowed to the extent that they annually exceed the annual income of the ward with which the guardian is chargeable.

It is true that one of the witnesses for appellee, Mrs. Garnett, stated that in her opinion \$30 or \$35 per month would be a fair amount to support the ward in keeping with the ordinary circumstances of her family, and Mr. Garnett testified that he thought that \$40 per month would be a reasonable amount for a young lady situated in the normal school and situated in life as is the said ward; but the testimony of the latter on this subject applies only to the period after September, 1916, and the testimony of both of these witnesses and of the guardian furnished evidence from which the learned and experienced chancellor of the court below was warranted in forming his own opinion in the premises, and he was not, nor are we, bound by the expression of opinion even of witnesses for appellee.

—what considered by court.

However, it is apparent from the facts mentioned in the statement preceding this opinion that the annual income of the ward for which the guardian is accountable amounted to over \$250 per annum. We are of opinion that, under section

2603 of the Code, a guardian acting in good faith has the discretion to expend the whole of the income of the estate of his ward for the "maintenance and education" of the latter. Action in good faith by the guardian in making expenditures for such purposes, or either of them, is the standard applicable to and is

—good faith of guardian. the test of whether there will be allowance of credit there-

for in the settlement of his accounts, so long as such expenditures are kept within the ward's income. It is only to the extent that the guardian, of his own authority, breaks in upon the corpus of the trust fund for the maintenance or education of his ward that the standard and test first above mentioned must be applied.

We are, therefore, of opinion that, so far as actually made, the expenditures in question for the respective years from September 1, 1910, to September 1, 1917, to the extent of the net annual income with which the guardian is chargeable for such years respectively, after deducting lawful charges of administration, should be allowed in the settlement of his guardianship accounts, but no farther. Of course, if there should be an excess of such income for any year over such actual expenditures,

—unexpended income. the surplus becomes a part of the principal for the succeeding

year under the well-settled rule on that subject.

The assignment of error under consideration is therefore partly well taken.

4. The fourth assignment of error by appellant is that the decree under review did not allow appellant commissions on the whole \$10,000 value of the twenty shares of Farmville Mill stock to which he was entitled, as administrator of S. H. Bliss, deceased.

The same remarks above made concerning the first assignment of error apply also to this.

Hence there is no merit in this assignment of error.

5. The fifth assignment of error by appellant is that the decree aforesaid did not allow the appellant the \$176.49 mentioned in the statement preceding this opinion, being the net amount paid by him in good faith to the said widow on account of her share of the estate of S. H. Bliss, deceased, as distributee of such estate

Executor and administrator—money paid to widow—credit.

prior to the discovery of the existence of the will of such decedent.

We are of opinion that this assignment of error is well taken.

Under the statute law of Virginia the personal estate (as is also the real estate) of a decedent is expressly made assets for the payment of his debts. And where there is sufficient personal estate to pay all debts, the administrator, although he may have no actual notice of their existence, takes the risk of personal liability for payment of debts if he distributes the personal estate before awaiting the twelve months' period allowed by statute in Virginia for presentation of debts, and before then obtaining protection from personal liability therefor by refunding bonds, or before such protection is afforded him by order of court under the statute law in such case made and provided, unless the creditor's laches or other conduct thereafter should bar the demand. Code, §§ 2706-2708; 7 Am. & Eng. Enc. Law, 318, 319, and note 1, and authorities there cited.

Whatever may be the true solution of the much-debated and centuries-old question of the nature and origin of the law of succession to property, —whether it be a natural right, or one which is the creature of "juri positivi merely," as it is regarded by Blackstone,—it is a right which all authorities agree may be regulated by the Sovereign and by virtue of the Statutes of Distribution (which have become well-nigh universal), wherever such statutes exist; it has become a right which is vested in the persons entitled to take upon the death of the intestate, subject to such conditions as the statute law

may impose upon the devolution of the title. 7 Am. & Eng. Enc. Law, 346 et seq., and authorities cited. And by the Statute of Distribution of Personal Estate (Code, § 2557), where a person dies intestate as to his personal estate, his distributees (which include his widow) are entitled to the property after the payment of taxes, expenses of administration, and debts of the decedent. It is true that there is no statute in Virginia placing any limitation of time upon the probate of a will. Nor, on the other hand, is there any provision of statute in favor of or saving any rights of persons taking personal property under an unknown and unrecorded will, as against distributees, as there is of the rights of persons taking real estate under an unknown and unrecorded will. By § 2547a of Pollard's Code of Virginia, such a saving of rights in real estate is made for a period of seven years. It is the duty of an administrator to distribute the personal estate after the payment of debts. 7 Am. & Eng. Enc. Law, 315. It is also his right so to do. 18 Cyc. 594. It is out of regard for creditors only that administrators cannot be "compelled" to make distribution of the estate within the year from their qualification. So that, where there are no creditors, there is nothing in our statute law to forbid an administrator from distributing the personal estate within the year. And the true policy of the law, in the absence of such a statute, would seem to favor a reasonably prompt distribution amongst those entitled under the Statute of Distributions, rather than a holding of the estate by the fiduciary for the year. Such holding in such a case as that we have under consideration would be for his own benefit alone; since it would not be for the payment of debts, because it is known that none exist, or the fiduciary is willing to take that risk, and not to await the possibility of the discovery of a will, since, as aforesaid, there is no statute fixing any period for the probate thereof,

were one discovered, and if that chance is to be eliminated, under the law in Virginia as it now stands, the fiduciary could never distribute the estate.

As we think, the duty of an administrator to distribute under statute is to distribute the estate with reasonable diligence; and with respect to distributing the estate notwithstanding the possibility of the existence of an undiscovered will, that possibility always exists; and if the administrator acts with reasonable diligence to ascertain whether a will exists, and, when acting with reasonable prudence in that regard, does not think and has no reasonable ground to think that a will exists, he may safely distribute the estate, so far as persons taking under a then unknown and unrecorded will are concerned, whether it be within the year of or after the expiration of the year from the qualification. Certainly such must be the rule after the expiration of such year; otherwise, as above indicated, no personal estate could ever be distributed without placing a liability of personal responsibility on such a fiduciary, which the measure of care and diligence on his part which is fixed by law (11 R. C. L. pp. 140-142) does not warrant; and we do not feel that there is any principle on which any different rule can be made applicable within the year.

We come now to consider certain assignments of error by appellee under rule 8 of this court, which is invoked in the reply brief for appellee. These assignments of error will be considered in their order as stated below.

6. Section 2679 of the Code is invoked by appellee against the allowance of any commissions to the guardian.

This statute, so far as material, is as follows: "If any fiduciary wholly fail to lay before such commissioner a statement of receipts for any year, within six months after its expiration, and though a statement be laid before the commissioner, yet if such

fiduciary be found chargeable for that year with any money, not embraced in the said statement, he shall have no compensation for his services during said year, nor commission on such money, *unless allowed by the court. . . .*" (Italics supplied.)

The italicized words were added to this statute in the enactment of 1867. Under the statute as it has since stood, the court will allow commissions to a fiduciary on receipts as to which he is in default under the statute, *Guardian and ward—allowance of commissions.* only to the extent that he gives a reasonable excuse for such default. See authorities cited to § 2679, 1 Pollard's Code 1904.

As appears from the statement preceding this opinion, the guardian laid before the commissioner of accounts statements of his receipts for the first three years of his guardianship and for the year, September 1915 to 1916, within six months after his qualification and after the expiration of such subsequent years, but that he failed to do this for the years, September 1913–1914, September 1914–1915, and that for the years he did settle his ex parte accounts as guardian he did not embrace in his statements some \$3,333.33, being the portion of his ward's estate derived from the Farmville Mill stock of S. H. Bliss's estate, and some \$1,665.49 derived from other assets of the latter estate. He accounted, however, in the ex parte settlements he did make, as it would seem from the record, for the dividends he received on six shares of such stock of the value of \$3,000 from September, 1910, up to September 23, 1916. This was done in good faith, as it would seem from the record, and, we think, furnishes a reasonable excuse, pro tanto, for the default of the guardian under consideration. But that leaves him still in default in not charging himself with \$333.33 of said \$3,333.33 and with said \$1,665.49, or an aggregate of \$1,965.49, of the receipts with which he is found chargeable;

and the record shows no reasonable excuse for this default or for the failure of the guardian to settle his ex parte accounts for the two years, September 1913–1914, and September 1914–1915, aforesaid.

We are, therefore, of opinion that the guardian in the settlements of his accounts should be allowed no commissions on \$1,965.49 of the said sum of \$5,998.82 with which he is chargeable as derived from the estate of S. H. Bliss, deceased, as aforesaid, and that he should be allowed no commissions on his receipts for the years, September 1913–1914, or September 1914–1915, aforesaid.

The commissions to which the guardian is entitled should, of course, be credited as of his rest day at the end of each yearly statement in the settlement of his accounts, which is to be made.

In this connection we will say that, since the fixing of a rest day of fiduciaries is within the reasonable discretion of the commissioner settling their accounts and of the court acting thereon, and since the appellant, as administrator of S. H. Bliss, deceased, treated the funds in his hands as distributable prior to the expiration of the year after his qualification as such, and since the qualification of a fiduciary will be treated as relating back to the beginning of his action as such, when such action antedates his qualification, we approve of the statement in the decree under review in its provisions fixing September 1, 1910, as the date for the beginning of the account of the appellant as guardian, and the latter, under the statutory rule on the subject (Code, § 2608), should be charged with interest on the \$5,998.82 above mentioned as received from the estate of S. H. Bliss, deceased, as aforesaid, from September 1, 1910. *Snavely v. Harkrader*, 29 Gratt. 112. As to the dividend on the ten shares of bank and three shares of warehouse stock derived from the estate of P.

B. Bliss, deceased, the guardian should be charged with his receipts of same during each current year of the yearly statements of his accounts, the interest thereon to be debited by charging interest on the yearly balances found in the guardian's hands.

7. The appellee invokes the rule applied in the case of Gregory v. Parker, 87 Va. 451, 12 S. E. 801, and the authorities therein cited, against the allowance of any commissions to appellant as administrator of S. H. Bliss, deceased, on the twenty shares of Farmville Mill stock, on the ground that the administrator had no authority to convert that stock into money, since it was not necessary to do so to pay debts of such estate, and that he did not in fact convert it into money, but retained it in kind and distributed it in kind between himself and his ward as distributees or devisees of that estate.

The rule invoked is well established, and is a sound and just rule in cases to which it is applicable. It does not permit of commissions being allowed to fiduciaries on unconverted assets which are distributed in kind, or which should have been so distributed. But the position taken by appellee in the bill in this cause makes such rule inapplicable therein. The bill insists upon the liability of the guardian for the money value of said stock as fixed by

Executor and administrator—  
commission on  
unconverted  
assets.

the decree under review, and which was also so fixed by the ex parte settlement of appellant as administrator of S. H. Bliss, deceased, and by the master commissioner's report in the cause. Appellee is bound to the theory that the stock has been converted into money by the position taken in the bill that the guardian is chargeable with such money value. The appellee, in insisting upon such theory and upon the guardian being so bound, cannot, when such position is sustained

by the court, insist that the guardian should not be allowed commissions on such value because of a different theory. A litigant may not be allowed to take different and inconsistent positions in the same proceeding, but must abide by his position taken and by the issues made by himself in the pleadings.

We conclude, therefore, that the assignment of error under consideration is not well taken.

It should be here noted that the bill also seeks to hold the guardian chargeable for the money value of the specific property which came into his hands in kind from the estate of the grandmother

of his ward. But the court below rightly declined to sustain such position of appellees. Such property was not only not in fact converted into money, but was never treated by the guardian or charged to him in his ex parte settlements as converted. Moreover, the rule aforesaid, applied in the case of Gregory v. Parker, was applicable in such case. The decree under review accordingly denied the guardian any commissions on such specific property, and was correct also in that regard.

—assets not  
converted.

—commissions  
on assets distributed in kind.

8. There remains but one other matter for our consideration. Appellee urges that certain interest appearing in the ex parte settlements of the guardian as allowed him on small items of disbursements, aggregating some \$76.77, were improper allowances, and that there should be no such allowance of interest to the guardian in the settlement of his accounts yet to be made.

This position is well taken. It does not appear, indeed, that there is anything in the decree under review which rules against appellee on this point, but, since the question is raised, we feel that we should not leave the subject unmentioned. The rule is well settled that a guardian is not entitled to interest from date

of expenditure on small individual items of disbursement in the yearly statements. It is only when a large sum is disbursed early in the year, and when, under the circumstances, it would work an unreasonable hardship upon the guardian not so to do, that interest will be allowed him on any item of disbursement from the date of payment. As to small

*Guardian and ward—interest on small expenditures.*

items of disbursement, no interest should be allowed during the year. 1 Minor, Inst. 3d ed. p. 496.

For the foregoing reasons, the decree under review will be reversed in part, and in part affirmed, and the cause will be remanded for further proceedings not in conflict with this opinion, with costs to the appellee as the party substantially prevailing.

Burks, J., absent.

### ANNOTATION.

#### Right of guardian to expend principal of ward's estate for maintenance and support.

##### I. General rules:

- a. In general, 632.
- b. Showing necessary to secure approval, 639.
- c. Rule denying right to expend principal, 641.

##### II. Right to collect from principal, advances made by guardian, 642.

##### III. Statutory rules:

- a. In general, 643.
- b. Statute authorizing the court to direct expenditures from principal upon proper showing, 645.
- c. Statute directing court to bind out ward when estate is insufficient, 645.

##### *I. General rules.*

###### *a. In general.*

In a great majority of jurisdictions, while it is recognized as desirable to confine expenditures for the ward's support and maintenance to the income of his estate, there is no hard and fast rule that it must be so confined, in the absence of a statute so providing; the guardian may in a proper case, and without a prior order of court, expend principal for this purpose, and such expenditures will be approved by the court.

Alabama.—*Stewart v. Lewis* (1849) 16 Ala. 734; *Montgomery v. Givhan* (1854) 24 Ala. 568; *Calhoun v. Calhoun* (1867) 41 Ala. 369; *Starling v. Balkum* (1872) 47 Ala. 314; *Bellamy v. Thornton* (1893) 103 Ala. 404, 15 So. 831; *Williams v. Williams* (1919) — Ala. —, 81 So. 41.

##### III.—continued.

- d. Statute directing guardian to apply income to support and maintenance, 647.

- e. Statute authorizing expenditure from principal, 647.

- f. Statute confining expenditures to income except upon order of court, 648.

##### IV. Power of court, 651.

- V. Right to anticipate income or expend income accumulated in previous years, 653.

##### VI. Duty to require ward to work, 654.

##### VII. Ability of parent to support, 654.

California.—*Re Boyes* (1907) 151 Cal. 143, 90 Pac. 454.

Florida.—*Osborne v. Van Horn* (1848) 2 Fla. 360.

Indiana.—*State ex rel. Druliner v. Clark* (1861) 16 Ind. 97.

Iowa.—*Ellis v. Soper* (1900) 111 Iowa, 631, 82 N. W. 1041.

Kentucky.—*Withers v. Hickman* (1845) 6 B. Mon. 292, approved in *Fielder v. Harbison* (1892) 93 Ky. 482, 20 S. W. 508; *Jones v. Shelly* (1895) 17 Ky. L. Rep. 278, 30 S. W. 994; *Griffith v. Bybee* (1902) 24 Ky. L. Rep. 666, 69 S. W. 767.

Massachusetts.—*Dawes v. Howard* (1808) 4 Mass. 97; *Strong v. Moe* (1864) 8 Allen, 125.

Michigan.—*Gott v. Culp* (1881) 45 Mich. 265, 7 N. W. 767; *Chubb v. Bradley* (1885) 58 Mich. 268, 25 N. W. 186; *Re Ward* (1889) 73 Mich. 220, 41 N.



W. 431 (obiter); *Re Hoag* (1903) 134 Mich. 361, 96 N. W. 439.

New Jersey.—*Re Barry* (1900) 61 N. J. Eq. 135, 47 Atl. 1052.

New York.—*Hyland v. Baxter* (1885) 98 N. Y. 610; *Re Wandell* (1884) 32 Hun, 545; *Re Klunk* (1900) 33 Misc. 267, 68 N. Y. Supp. 629; *Williams v. Clarke* (1903) 82 App. Div. 199, 81 N. Y. Supp. 381; *Re Putney* (1908) 61 Misc. 1, 114 N. Y. Supp. 556 (administratrix allowed expenditure in excess of income of estate for support of her children, the heirs, for whom no guardian had been appointed); *Voessing v. Voessing* (1880) 4 Redf. 360.

Ohio.—*Re Hough* (1894) 1 Ohio S. & C. P. Dec. 699.

Oregon.—*Re Wilson* (1902) 40 Or. 353, 68 Pac. 393, 69 Pac. 439.

Pennsylvania. — *Gilfillen's Estate* (1895) 170 Pa. 185, 50 Am. St. Rep. 760, 32 Atl. 585 (administrator treated as guardian); *Huffer's Appeal* (1856) 2 Grant, Cas. 341.

South Carolina.—*Prince v. Logan* (1842) 17 S. C. Eq. (Speers) 29; *Anderson v. Silcox* (1908) 82 S. C. 109, 63 S. E. 128. See *M'Dowell v. Caldwell* (1827) 7 S. C. Eq. (2 M'Cord) 43, 16 Am. Dec. 635; *Teague v. Dendy* (1827) 7 S. C. Eq. (2 M'Cord) 207, 16 Am. Dec. 643, and *Weathersbee v. Blanton* (1889) 31 S. C. 604, 9 S. E. 817, *infra*.

Tennessee.—*Roseborough v. Roseborough* (1874) 8 Baxt. 314 (guardian was asking permission to sell land to pay expenses incurred); *Owens v. Pearce* (1882) 10 Lea, 45; *Hobbs v. Harlan* (1882) 10 Lea, 268, 43 Am. Rep. 309.

Virginia.—*Barton v. Bowen* (1876) 27 Gratt. 849 (personal estate only involved).

England.—*Barlow v. Grant* (1684) 1 Vern. 255, 23 Eng. Reprint, 451. But see *Walker v. Wetherell* (1801) 6 Ves. Jr. 473, 31 Eng. Reprint, 1150.

Ireland. — *Carmichael v. Wilson* (1829) 3 Molloy, 84.

Canada. — *Goodfellow v. Rannie* (1873) 20 Grant, Ch. 425 (administrator allowed expenditures from principal); *Crane v. Craig* (1886) 11 Ont. Pr. Rep. 236 (mother of infant allowed for expenditures from principal).

See *Williams v. Bonner* (1901) 79 Miss. 664, 31 So. 207, *infra*, III. f.

In *Re Findlay* (1886) 55 L. J. Ch. N. S. (Eng.) 395, L. R. 32 Ch. Div. 221, where a court of Scotland had ordered the ward supported out of the principal of his estate, the English court ordered a sale of stock constituting the infant's estate, to comply with the order.

See North Carolina cases, *infra*, this subdivision.

*Re Hayden* (1905) 146 Cal. 78, 79 Pac. 588, in which the ward was an old lady, paralyzed, helpless, and needing the care of a nurse at all times, the court states that "she had plenty of property to support her; in fact, the income appears to have been sufficient for such purpose. In such case, it was the duty of the guardian and of the court to see that she had all the necessary comforts that could be supplied to her in her last days, even if it had taken the principal for such purpose. The court should not have allowed her to be deprived of suitable food, nursing, and medical attendance in order that the estate left might be larger, or that some distant relative might be benefited."

In Maine, it seems that, by statute, the principal of personal estate may be used in the support and maintenance of the ward. *Preble v. Longfellow* (1860) 48 Me. 279, 77 Am. Dec. 227.

A guardian was credited with an amount of the principal paid to the ward for completing his medical education, in *Smith's Appeal* (1858) 30 Pa. 397.

A physician who rendered services to an infant at the request of the guardian, in an emergency, was held entitled to recover the value of such services of the infant's estate, in *Potter v. Thomas* (1917) 164 N. Y. Supp. 923. It is stated by the court to have been the duty of the guardian to provide his ward with necessary medical attention, to the extent that the property under his control and properly applicable thereto would permit, and under stress of an emergency such as here existed, an encroachment upon the principal was permissible.

In *Dawes v. Howard* (1808) 4 Mass. 97, it is stated that in some jurisdictions guardians of infants are not permitted to trench on the principal of the fund belonging to their ward in any case, unless leave has first been given by the chancellor, upon application to him; but that the Massachusetts statutes have altered the law in this respect, and have even made the real estate of minors liable to be sold for their support and education, when the personal estate is insufficient. Accordingly, the guardian was allowed a sum of money for the support and maintenance which intrenched upon the principal.

It is stated in *Phillips v. Davis* (1855) 2 Sneed (Tenn.) 520, 62 Am. Dec. 472, that the law does not permit a guardian to expend more than the income of his ward's estate without the sanction of a chancery court. Whether the subsequent approval by the court is sufficient is not clear from this statement. In *Cohen v. Shyer* (1873) 1 Tenn. Ch. 192, it is stated that the general rule of equity is "that a guardian will not be permitted of his own accord to break in upon the capital of his ward. The express sanction of the court must be obtained, either in advance or in ratification of the act, upon proper proceedings showing clearly the necessity."

The court in *Beeler v. Dunn* (1859) 3 Head (Tenn.) 87, 75 Am. Dec. 761, did not express an opinion as to whether a guardian would ever be protected in expenditures from the principal without the order of a court, but holds that under the facts of that case (which are not fully set out) expenditures from the principal were unauthorized, and the guardian was held liable to account therefor. In Tennessee, the approval of such expenditures is held to be for the court of chancery; the probate court is held to have no jurisdiction. *Mitchell v. Webb* (1879) 2 Lea (Tenn.) 150.

In *M'Dowell v. Caldwell* (1827) 7 S. C. Eq. (2 M'Cord) 43, 16 Am. Dec. 635, it is stated to be "a well-settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under

peculiar circumstances." In approving of the *M'Dowell* Case, the court in *Teague v. Dendy* (1827) 7 S. C. Eq. (2 M'Cord) 207, 16 Am. Dec. 643, states that "before the court will permit a guardian, trustee, executor, or administrator to break in upon the capital for subsistence, it will require them to show clearly and distinctly its necessity." In *Weathersbee v. Blanton* (1889) 31 S. C. 604, 9 S. E. 817, where the guardian of an infant, who was the daughter of a testator who expressed the desire that his infant daughter should be well educated according to her degree and circumstances in life, expended part of the principal of the estate on her maintenance and education, the court sustained and approved the expenditure. But see *Villard v. Robert* (1848) 21 S. C. Eq. (2 Strobb.) 40, 49 Am. Dec. 654, *infra*, IV.

The expenditure involved in *Gross v. Rubey* (1918) — Mo. App. —, 206 S. W. 413, was of the principal of the ward's estate, although no point is made of this fact; the court states generally that the guardian may make expenditures without any previous order of court, but in such a case the burden rests upon him to show to the court that such expenditures were in fact necessary and proper, in order to be allowed therefor.

In *Hooper v. Royster* (1810) 1 Munf. (Va.) 119, it is stated that money advanced by the guardian for clothes, schooling, and other necessary expenses should be allowed out of the profits of the ward's estate, if sufficient for that purpose; "but if those profits, during that period of the ward's infancy when she was too young to be bound out as an apprentice, shall prove insufficient to compensate the guardian for such just, reasonable, or necessary disbursements, the balance ought to be made good out of the principal of her estate. But for advancements subsequent to that period no allowance beyond the profits of the ward's estate ought to be made, unless it shall appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part

of the guardian, in which case the same ought to be allowed out of the principal of the ward's estate (if the profits thereof shall be found insufficient), with interest on the same from the end of each year." See subsequent cases under statutes in this state, *supra*, III. f.

The theory on which the courts proceed in approving expenditures of principal best appears in the language of the opinions. In *Gott v. Culp* (1881) 45 Mich. 265, 7 N. W. 767, it is stated that "a guardian whose ward's estate is sufficient to furnish an income that will, with economy, maintain and educate her suitably, should not exceed it without adequate reason. But in this country, while it is prudent to obtain leave in advance, it is not necessary if circumstances justify the excess. But the rule is always to be applied with some discretion. The guardian is justified by the authorities in looking not merely at present and actual income, but at future and probable resources. If the income is narrow, he should also look to the future welfare and standing of his ward, which may in his eyes, as in those of a judicious parent, render it wise to secure desirable results by a sufficient outlay. In many, if not in most, cases in this country, it is not possible to secure a regular and reliable revenue which will not, at times, fail or be delayed. And when the infant's property is too small for the income to furnish reasonable nurture and support, the principal must necessarily be drawn upon." In *Chubb v. Bradley* (1885) 58 Mich. 268, 25 N. W. 186, it is stated that "if it is thought reasonable and proper, in order to give a child more advantages than the income of the estate will furnish, there is no inflexible rule which will prevent resorting to the use of the principal, and it may be true economy and duty to do so." It was accordingly held in this case that the guardian could not recover the principal of his ward's estate, which he had paid to one who assumed the custody of the ward, where there was nothing to show that the arrangement between the guardian and custodian was im-

proper or excessive. In *Re Wandell* (1884) 32 Hun (N. Y.) 545, it is stated to be the settled and sound doctrine of the law "that the income from a fund, held by a guardian belonging to his ward, is the primary fund from which to give support and maintenance to the latter, and the expenditures and disbursements so to be made will generally be limited to the income from the fund. But where the fund is small, and more means are necessary to the due maintenance of the ward than can be derived from the income, the capital may be broken in upon, only, however, to the extent necessary to answer the just and proper demands of the ward, having in view the amount of the fund and the situation, circumstances, and condition of the ward in a particular case. The burden of showing an encroachment upon the principal fund to be necessary and proper rests upon the guardian on his accounting, either by the production of an order of the court giving the right, or by furnishing undoubted proof fully establishing the fact." In *Re Wilson* (1902) 40 Or. 353, 68 Pac. 393, it is stated that "the usual, and no doubt better, practice, is to obtain an order authorizing the expenditure, and as a general rule a guardian cannot encroach upon the principal without such order; but it is believed this rule is not inflexible, so that, if the income is not sufficient and the ward's welfare requires it, the guardian may resort to the principal, and if he has in fact used a part of it for the support and maintenance of his ward without authority of the court, it may and will, in a proper case, ratify such expenditures. If, however, he has taken this responsibility, he is required to make out as clear a case to obtain the order ratifying the expenditure as if he had applied for authority in advance. The true criterion in such case would seem to be whether the court would have antecedently authorized the expenditure." In *Re Hough* (1894) 1 Ohio Dec. 699, a decision by the probate court, it is stated that "while the courts have held that the safer rule in such matters is to have obtained from this court an order to

pay from the principal, having extinguished the income, yet, where the guardian in the course of his duties has found it necessary to use the principal, the courts have held that when such expenditure was had in good faith and for necessary purposes, even the payment of the principal, extinguishing entirely the same, has been justified when applied to the payment of debts made necessary by the care, education, and maintenance of the wards." But in *Re Carter* (1862) 2 Ohio Dec. Reprint, 655, it is stated that, "when chancery takes jurisdiction of these accounts, allowances for support, maintenance, and repairs will be limited to the income of an estate unless made under an order of the chancellor, or unless very peculiar circumstances exist when such claims may be made a charge on the principal of an estate." It is further stated in *Re Carter* (Ohio) *supra*, that in principle there can be no difference "between the allowance of claims accruing prior to or during guardianship, since both must rest on the same broad principles of equity and require the strongest circumstances to justify their allowance, especially if they exceed the income of the estate."

That the guardian may be allowed for expenses incurred prior to the guardian's appointment is held in *Re Besondy* (1884) 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366. See also *Rolfe v. Rolfe* (1854) 15 Ga. 451, *infra*, III. c, as to expenses incurred prior to guardianship.

In *Huffer's Appeal* (1856) 2 Grant, Cas. (Pa.) 341, it is stated that if the "annual interest is sufficient to meet the payments which he is required to make for his ward, no part of the principal should be used for that purpose. If the interest exceeds the amount required for current expenses the excess should be reinvested, and if it is less than the amount required for the ward's support, the deficiency should be taken from the principal."

The court, in *Hobbs v. Harlan* (1882) 10 Lea (Tenn.) 268, 43 Am. Rep. 309, referring to the rule that expenditures from the principal without previous authority from the court

will not be allowed a guardian, states that it "is a hard and unreasonable rule, and could not be administered without shocking the sensibilities and sense of justice. There are many cases, and of frequent occurrence, in which great and gross injustice would be done to the parties most concerned, were it the rule. I shall refer to only a few of the many cases of frequent occurrence, such as a personal injury to the ward, involving the services of a surgeon; sickness of a protracted character, requiring expensive nursing and medical bills; death of the ward, requiring expenses for decent interment; marriage of a female ward; besides a large number of social and moral emergencies, necessitating instant action on the part of the guardian, involving pecuniary obligation. Such a rule looks alone to the pecuniary estate of the ward, and overlooks personal comfort, health, character, social standing, accidents, and emergencies. It regards nothing but 'the mint, anise, and cumin,' while neglecting weightier matters. The hardship and injustice of such an inflexible rule has been obvious to the courts, and they have softened its rigor by a modification of the principle; holding that 'expenditures in excess of income will not be allowed unless good reason is shown to the court why the court was not applied to for its sanction in advance.' *Cohen v. Shyer* (1873) 1 Tenn. Ch. 194, and cases cited therein. It is obvious that this modification of the general rule may meet and avoid many of the hardships enumerated. What would be the 'good reason' is still an open question. Expenditures beyond income, made upon emergencies requiring instant action, such as injuries to the person from accidents, or disease, or death, and all that class which admit of no delay, and certainly not of the 'law's delay,' would be covered by the rule as modified. It would not do for a guardian to wait until the chancery court convened, before he procured medical or surgical skill for his ward, or buried his remains, or sought an asylum for his lunatic ward. I mention these classes not as a limitation

of the rule, but merely as illustrations. There are and will be, doubtless, other classes and instances affording equally 'good reasons' for the failure to apply to the chancery court before incurring the expenditures or obligation, such as is claimed in this case, viz., that these transactions took place during the war, and when the courts were closed."

As appears in at least some of the foregoing opinions, it is deemed advisable in many cases to obtain prior authorization of court to the expenditure of principal. In *Re Barry* (1900) 61 N. J. Eq. 135, 47 Atl. 1052, however, the court of chancery refused to pass upon an application by a guardian for an order to use part of the principal of the ward's estate consisting of personal property, and an order for an allowance of a specified amount per month of the principal, on the theory that the question of the necessity of the expenditure of personal estate, both income and principal, rests in the judgment of the guardian. It is stated: "The general policy of the statutes and decisions in this state upon the question now presented has been to leave the question of the necessity of the expenditure of the personal estate, both income and principal, to the judgment of the guardian, in the first instance, subject to affirmance of the orphans' court on the settlement of his accounts, and in all ordinary cases this course (which has been followed for over a century) affords protection both to the guardian and the infant." It is further stated that in view of the power of the guardian to expend the principal of the personal estate, if needed for the ward's support, and to be allowed such expenditures in his final account, and in view of the convenient, expeditious, and inexpensive methods provided by the statute for bringing the question of the propriety of the expenditure before the orphans' court, in the frequent settlement of accounts, "the jurisdiction of the court of chancery to make an order in advance, fixing the expenditure of principal, should be guardedly exercised, even if it exists in these cases."

But in *Pfefferle v. Herr* (1909) 75 N. J. Eq. 219, 138 Am. St. Rep. 518, 71 Atl. 689, a case involving a trustee, it is stated that "a trustee may, in a proper case, apply for and obtain the protection of an order to meet such encroachment in behalf of his ward." But in this case, also, the power of a trustee to make expenditures out of the income without an order of court is recognized.

An order of court authorizing expenditures from the principal is not necessary to authorize such expenditures, under a statute providing that "if any minor who has a father living has property which is sufficient for his maintenance and education, in a manner more expensive than his father can reasonably afford, . . . the expenses of the education and maintenance of such minor may be defrayed out of the income or principal of his own property in whole or in part as shall be judged reasonable, and shall be directed by the probate court and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian." *Re Hoag* (1903) 134 Mich. 361, 96 N. W. 439.

The right of the guardian to expend in excess of the income is affected by the provisions of wills in some instances. In *Smith v. Bixby* (1881) 5 Redf. (N. Y.) 196, where the principal of the infant's estate, which was sought to be charged with expenditures made by the guardian, consisted of a fund in the hands of an executor of an ancestor, and held by the executor under a will providing that the income might be used for the support of the ward, and the principal paid to her on attaining her majority, the court refused to allow the guardian to charge this principal, stating it to be clear that the court had no power to require a violation of the provisions of the will.

While, in North Carolina, a guardian has been credited with expenditures of principal without authority of court, the guardian is there bound by strict rules in determining upon the propriety of such expenditure. In *Long v. Norcom* (1842) 37 N. C.

(2 Ired. Eq.) 354, where the court credited the guardian with expenditures from the principal made by him in educating the ward, who was of a feeble constitution, the court states it to be obvious that if in any case the expenditures from the principal can be credited to the guardian, the "present is a proper one in which to exercise the power. It is nearly as strong as any that can be conceived. The ward was supported by the guardian for the greater part of his minority, without any charge for clothing or board, doubtless from fraternal affection. But being totally disqualified by nature from any employment requiring bodily labor, there was actually a physical necessity for greater expenses than the income would meet; that is, regarding income as made up of annual profits in money. . . . If he [the guardian] chooses to advance beyond the income, he must not, in general, look to the court for assistance, but must depend on the sense of honor and justice of the ward, and his living to come of age. But we think the court ought to sustain such expenditures when they were demanded by such circumstances, amounting indeed to physical necessity, as would have compelled every court to authorize them without a moment's hesitation." The court then points out that by not selling the principal of the ward's estate, which consisted of a slave, there was an increase in the value of such principal through children which the slave had, and the guardian was accordingly allowed for the expenditure. In *Johnston v. Coleman* (1857) 56 N. C. (3 Jones, Eq.) 290, the court refused to credit a widow with expenditures from the principal, where with the utmost care and economy it was impossible for her to maintain herself and family without going into debt. The court treats the widow as a guardian or trustee for the children; at least, states that in this respect she cannot be regarded in a more favorable light than if she had been expressly constituted guardian or trustee for the children, and, in discussing the instances in which a guard-

ian or trustee may expend the income of his *cestui que trust*, states that "the court will reimburse the guardian out of the estate of his ward when the expenditures were demanded by such circumstances, amounting indeed to physical necessity, as would have compelled any court to authorize them without a moment's hesitation. The cases of physical necessity alluded to were those of minors who could not be entitled to maintenance as paupers, who could not be maintained from the profits of their property, and who, from mental imbecility or want of bodily health, could not be put out as apprentices to be maintained by their masters. There is no pretense that the children in the present case come within the principles of this exception to the general rule." In *Caffey v. McMichael* (1870) 64 N. C. 507, there were held to be no circumstances to take the case out of the general rule prohibiting a guardian from expending in excess of the income, where the money was used in purchasing a horse, buggy, and harness for the ward; but as the ward retained the property thus purchased, used it for some time after he became of age, and finally sold and received the money for it, he was held to have ratified the transaction, and the guardian was held to be entitled to be credited by the amount which the plaintiff agreed to pay for the property. The rule announced in *Long v. Norcom* (N. C.) *supra*, was approved and followed in *State ex rel. Pharrington v. Pharrington* (1888) 99 N. C. 118, 5 S. E. 414.

In *Duffy v. Williams* (1903) 133 N. C. 195, 45 S. E. 548, a guardian was allowed expenditures from the principal, where the amount expended was necessary to maintain the wards and to give them that degree of education necessary to their station in life. The court states that the wards "could not be sent to the charitable institutions of the county for support, because the wards owned a large amount of property, and under such circumstances as appear in the case, if it has ever been held by the courts of this state that a ward should be put out as an apprentice, then we think

the rule should be modified and altered. If the wards, then, should not have been put out as apprentices, and could and would not have been received for support by the county as paupers, then, the income of the estate not being sufficient to furnish maintenance for the wards, the guardian had no choice but to use a reasonable amount of the capital for such support and maintenance."

Long v. Norcom and State ex rel. Pharrington v. Pharrington (N. C.) supra, are construed in the subsequent case of Duffy v. Williams (1903) 133 N. C. 195, 45 S. E. 548, as laying down the general rule "that the courts will show less favor to the guardian who has already made such expenditures of his own, before he had asked the authority of the court to do so."

In Johnston v. Haynes (1873) 68 N. C. 514, a guardian was refused credit for expenditures beyond the income of his ward's estate, without any recital as to circumstances.

A stranger who furnished necessities to an infant who had a guardian, in excess of the income, was denied recovery therefor in Hussey v. Roundtree (1852) 44 N. C. (Busbee, L.) 110; but this decision seems to deny any recovery, and not to depend upon the fact that the expenditure was above the income.

See Shaw v. Coble (1869) 63 N. C. 377, *infra*, III. a.

It thus appears that expenditures of principal without a previous order of court have been allowed; such expenditures, however, have been stated to be at the peril of the guardian. Stewart v. Lewis (1849) 16 Ala. 734; Osborne v. Van Horn (1848) 2 Fla. 360; Hyland v. Baxter (1885) 98 N. Y. 610, quoted with approval in Browne v. Bedford (1886) 4 Dem. (N. Y.) 304. See Byzee v. Tharp (1843) 4 B. Mon. (Ky.) 313, and Davis v. Roberts (1843) Smedes & M. Ch. (Miss.) 543, *infra*, I. c. Even under statutes requiring an order of court for the expenditure of principal, it has been held, in some instances, that expenditure without such order may be approved. See *infra*, III. f.

*b. Showing necessary to secure approval.*

When the guardian may expend principal for the ward's support and maintenance without a precedent order of court, and be allowed therefor, is variously stated. It has been stated that the guardian will be credited with expenditure of principal if it was necessary, and such as the court would have ordered, if applied to before made.

Alabama.—Stewart v. Lewis (1849) 16 Ala. 734; Montgomery v. Givhan (1854) 24 Ala. 568; Calhoun v. Calhoun (1867) 41 Ala. 369; Starling v. Balkum (1872) 47 Ala. 314; Bellamy v. Thornton (1898) 103 Ala. 404, 15 So. 831.

Florida.—Osborne v. Van Horn (1848) 2 Fla. 360.

Kentucky.—Withers v. Hickman (1845) 6 B. Mon. 292; Griffith v. Bybee (1902) 24 Ky. L. Rep. 666, 69 S. W. 767; Overfield v. Overfield (1895) 17 Ky. L. Rep. 813, 30 S. W. 994.

New York.—Hyland v. Baxter (1885) 98 N. Y. 610; Re Klunck (1900) 33 Misc. 267, 68 N. Y. Supp. 629; Re Putney (1908) 61 Misc. 1, 114 N. Y. Supp. 556; Browne v. Bedford (1886) 4 Dem. 304.

Oregon.—Re Wilson (1902) 40 Or. 358, 68 Pac. 393, 69 Pac. 439.

South Carolina.—Prince v. Logan (1842) 17 S. C. Eq. (Speers) 29; Anderson v. Silcox (1908) 82 S. C. 109, 63 S. E. 128.

Tennessee.—Roseborough v. Roseborough (1874) 3 Baxt. 314; Owens v. Pearce (1882) 10 Lea, 45.

Virginia.—Barton v. Bowen (1876) 27 Gratt. 849.

Ireland.—Carmichael v. Wilson (1829) 3 Molloy, 84.

For example, in Calhoun v. Calhoun (1867) 41 Ala. 369, it is stated that "if reasonable charges for boarding, clothing, and expenses incurred in educating a ward should exceed the interest or annual profits arising from the estate, still, if under the circumstances such charges were necessary and such as a court of chancery would have decreed, they should be allowed." It has been stated that in such a case the guardian must make out as clear a case as he would have been required to do

had he applied in advance for authority. *Oakley v. Oakley* (1884) 3 Dem. (N. Y.) 140. See *Duffy v. Williams* (1903) 133 N. C. 195, 45 S. E. 548, *supra*, I. a.

The opinion is expressed in *Cohen v. Shyer* (1873) 1 Tenn. Ch. 192 (cited with approval in *Hobbs v. Harlan* (1882) 10 Lea (Tenn.) 268, 43 Am. Rep. 309), that expenditures from the principal of the ward's estate will not be allowed after they have been made, unless good reason is shown why the court was not applied to for its sanction in advance, but this rule was not followed in this case, because of a previous adjudication to the contrary.

Some cases state that a guardian who has made expenditure of principal without an order of court is, in order to be credited therewith, bound to show a state of facts and circumstances justifying the expenditures. *Osborne v. Van Horn* (1848) 2 Fla. 360. The court here reviewed the financial condition of the estate, and concludes: "We think it very clear that, at least until 1838, there was a deficiency of means both of the widow and children, and that a court of equity, if applied to, would have allowed the capital to be broken in upon; and, there being no complaint of the exorbitance of the charges or mistake of the master in this respect, we see no reason for disturbing his report."

Other cases state that where the income is insufficient to support the ward, and the expenditures out of the principal are necessary and reasonable, and made in good faith, the guardian should be allowed the same. *Re Boyes* (1907) 151 Cal. 143, 90 Pac. 454; *Re Wandell* (1884) 32 Hun (N. Y.) 545. See *supra*, I. a. *Goodfellow v. Rannie* (1873) 20 Grant, Ch. (U. C.) 425.

The court will ratify expenditures of income made upon urgent necessity, or in cases such as could not have been foreseen and provided for. *Hobbs v. Harlan* (Tenn.) *supra*. The emergency should be great and the expediency manifest. *Prince v. Logan* (1842) 17 S. C. Eq. (Speers) 29. The guardian must show an emergen-

cy justifying expenditures from the principal. *Holmes v. Logan* (1849) 22 S. C. Eq. (3 Strobb.) 31.

Other cases stated that in the absence of a previous order of court a court of equity may, upon an accounting and "proper showing," allow for past support out of the principal. *Ellis v. Soper* (1900) 111 Iowa, 631, 82 N. W. 1041. In this case, where the guardian was the mother of the ward, the court holds that the guardian should not be allowed to encroach upon the principal for the ward's support unless the mother's own circumstances were such as to render her unable to furnish the support; the circumstances of the mother are then reviewed, and held to show an income of about \$1,600 a year for the support of herself and family of four children, and the encroachment upon the principal was accordingly denied. In *Des Moines Sav. Bank v. Krell* (1916) 176 Iowa, 437, 156 N. W. 858, an expenditure by the guardian, who was mother of her ward, out of the principal, which was approved by the probate court apparently after it had been made, was sustained by the supreme court after a review of all the circumstances in the case.

In *Strong v. Moe* (1864) 8 Allen (Mass.) 125, it is held that a guardian who has applied to the probate court for authority to sell real estate, for the purpose of investing the proceeds, cannot, subsequently to the granting of the license to sell and invest the proceeds, apply such proceeds toward the support and maintenance of the ward, unless it is made clearly to appear that, subsequently to the granting of the license to sell and invest the proceeds, the same became necessary for the ward's support, and that the ward was unable to support himself in a suitable and proper manner without expending such proceeds. There being no such showing, the guardian was held not entitled to credit for expenditures of the proceeds of the real estate, the credit being limited to the amount of the personal property of the ward and the income of the avails of the real estate thus sold.



As shown below, the right to encroach upon the principal is, in some instances, made dependent upon the inability of the ward to earn his support, or upon his inability to work without any interference with his acquisition of an education. In such a case the guardian is held entitled to expend the principal, but if this is done without a previous order of court "the court will exercise great caution and scrutiny in allowing such expenditures to be charged upon the infant's estate." *State ex rel. Druliner v. Clark* (1861) 16 Ind. 97. The allowance by a guardian to his ward, in a period of six and a half years, of an estate of \$170, while the ward, a girl, was between the ages of eleven and eighteen years, was sustained in *Karney v. Vale* (1877) 56 Ind. 542, although the ward was boarded, clothed, and schooled, during the continuance of the guardianship by her relatives. The court states that a guardian should be permitted to exercise some discretion in the allowances to his ward, and no abuse of the discretion was shown by the distribution above. There is no discussion of the right to consume principal.

In *Bellamy v. Thornton* (1893) 103 Ala. 404, 15 So. 831, it is stated that "if it should be clearly made to appear that the expenditure for which reimbursement is claimed was made, and that it was demanded by the necessities of maintenance and education of the children, and for their best interest, and that the father was unable or refused to provide such necessary maintenance and education and was unable to reimburse complainant, he, the complainant, should be reimbursed from the real estate of the children." In *Williams v. Williams* (1919) — Ala. —, 81 So. 41, it is stated that "a natural parent who is also the legal guardian may, in proper cases, maintain the child and ward out of the corpus of its estate if the interest or income thereof is not sufficient or adequate, and the parent is not financially able to maintain the child according to its station in life and necessities."

If the guardian is unable to show the necessity for such expenditures,

5 A.L.R.—41.

he, of course, is not entitled to credit therefor under this rule. *Oakley v. Oakley* (1884) 3 Dem. (N. Y.) 140; *Prince v. Logan* (1842) 17 S. C. Eq. (Speers) 29.

In some instances the court has refused to approve the expenditures of principal. In *Starling v. Balkum* (1872) 47 Ala. 314, where the court refused to credit a guardian with expenditures of the principal, the case is thus summed up: "The testimony clearly proves that the guardian paid little or no attention to his ward, and committed her entirely to the control of her aunt, who treated her with more or less severity and compelled her to labor for her beyond the ordinary assistance which might be supposed to have been voluntarily rendered. Her education was wholly neglected, while her time was spent in the services of another. She was a healthy child, and her guardianship continued from her eighth to her eighteenth year. This is not such a case as would justify any encroachment upon the capital of her estate, or any considerable allowance for her board." In *Oakley v. Oakley* (N. Y.) *supra*, the court, in denying its approval to expenditures by the guardian, states that they are denied, "not because the support and education sought to be thus provided for the infant were out of keeping with his social standing, but because they were beyond his means."

See *Ellis v. Soper* (1900) 111 Iowa, 631, 82 N. W. 1041, *supra*.

*c. Rule denying right to expend principal.*

The rule denying the guardian credit for expenditures from the principal in a proper case, without a precedent order of court, is almost wholly a creature of statute. The statutory rules are discussed in subd. III. *infra*. In several cases, however, it is stated, without referring to any statute so providing, that the guardian is limited to the income unless he has obtained an order of court previous to the expenditure of principal authorizing the same. *Villard v. Robert* (1848) 21 S. C. Eq. (2 Strobb.) 40, 49 Am. Dec. 654 (but see *M'Dowell v. Caldwell* (1827) 7 S. C. Eq. (2 M'Cord) 43, 16

Am. Dec. 635; *Teague v. Dendy* (1827) 7 S. C. Eq. (2 M'Cord) 211, and *Weatherbee v. Blanton* (1889) 31 S. C. 604, 9 S. E. 817, *supra*, I. a, and *Anderson v. Silcox* (1908) 82 S. C. 109, 63 S. E. 128, *supra*, I. b); *Chapline v. Moore* (1828) 7 T. B. Mon. (Ky.) 150. See *Phillips v. Davis* (1855) 2 Sneed (Tenn.) 520, 62 Am. Dec. 472, *supra*, I. a; but see also *Roseborough v. Roseborough* (1874) 3 Baxt. (Tenn.) 314, *supra*, I. a, and later Tennessee cases which allow such expenditures in a proper case. While the court in *Bybee v. Tharp* (1843) 4 B. Mon. (Ky.) 313, approves of the rule confining expenditure to income, there is seemingly a failure to adhere rigidly thereto, for it is stated that the law will not allow the guardian, but "at his own peril," to expend upon the ward more than the income of his or her estate. In *Withers v. Hickman* (1845) 6 B. Mon. (Ky.) 292, *supra*, I. a, the general rule is adopted. And see statutory rules, *infra*, III. e. Without referring to a statute, it is stated in *Davis v. Roberts* (1843) *Smedes & M. Ch. (Miss.)* 543, that a guardian who expends more money upon his ward than the income of the ward's estate does so at his peril; that it is well settled that a guardian cannot trench upon the principal property of his ward by exceeding his income, without authority for that purpose from the appropriate tribunal. See statutes involved in subsequent cases in this state, *infra*.

See *supra*, I. a, for other cases stating expenditures in excess of income to be at the peril of the guardian.

In *Whitledge v. Callis* (1829) 2 J. J. Marsh. (Ky.) 403, the court refused to allow a guardian for supporting, clothing, and educating his wards, more than the amount of the annual profits which their estate yielded.

In *Walker v. Wetherell* (1801) 6 Ves. Jr. 473, 31 Eng. Reprint, 1150, where an executor was claiming an allowance for maintenance, education, and advancement of an infant, beyond the income from the estate, the court states that the "rule has been never to permit trustees of their own authority to break in upon the capital. I am not aware that the court has ever sanc-

tioned that conduct in a trustee. It very rarely has occurred that the court itself has broken in upon the capital for the mere purpose of maintenance . . . though frequently for the purpose of putting the child out in life; but as to mere maintenance, I doubt it, even upon a petition presented. . . . But whatever might be done upon particular circumstances, it is impossible to sanction a trustee in breaking in upon the capital. There are no particular circumstances in this instance, upon the one side or the other; it is not shown that there were expectations of fortune which made it necessary to provide a suitable education. The capital might be exhausted in a few years. On the other hand, no particular extravagance upon the part of the executor appears."

In *Donnell v. Dansby* (1916) — Okla. —, 159 Pac. 317, it is stated that if the father could not reasonably afford to maintain and educate his children, for whom he was guardian, he might, under the direction of the county court, defray the expense of such maintenance and education from the income of their individual property. A statute is referred to in this connection, and it is stated that the authority given by the statute does not authorize the payment thereof from the corpus of the estate. It seems, however, that the court was referring to the authority conferred by a particular section of the statute, for in *Cox v. Fisher* (1916) — Okla. —, 161 Pac. 171, it is stated that, where the father is unable to support his minor children, he may apply to the county court for an order to apply the income of the minor to his support, or "the court, where the necessity arises, might order the land of the minor sold for his education and support; but in no case could the father create a lien against the estate of the minor, or fix a charge against the proceeds of the sale thereof, in the absence of specific authorization therefor by the county court."

## II. Right to collect from principal, advances made by guardian.

Where the guardian has made proper advances for the support and maintenance of his ward, they may be re-

paid out of the principal of the ward's estate, if the income is insufficient. *Hooper v. Royster* (1810) 1 Munf. (Va.) 119. See *Long v. Norcome* (1842) 37 N. C. (2 Ired. Eq.) 354, *supra*, I. a. In a proper case, where a guardian has advanced money from his own funds in excess of the income of his ward, equity will reimburse him out of the ward's lands after his guardianship has terminated, either by a sale of all or a portion of the lands, or by renting the same and applying the rents on the guardian's claim, whichever method is the most practical and advantageous. *Bellamy v. Thornton* (1893) 103 Ala. 404, 15 So. 831. Compare with *Little v. West* (1916) 145 Ga. 563, 89 S. E. 682, *infra*, IV. Such an allowance may be made in a suit by the ward upon the guardian's bond. *State ex rel. Druliner v. Clark* (1861) 16 Ind. 97.

The right to reimbursement out of the ward's real estate for advances is denied by express statute in some jurisdictions. In accord with the provisions of the statute, such reimbursement has been denied. *Dixon v. Hosick* (1897) 101 Ky. 231, 41 S. W. 282; *Bates v. Hall* (1898) 20 Ky. L. Rep. 573, 47 S. W. 216; *Fidelity Trust Co. v. Butler* (1906) 28 Ky. L. Rep. 1268, 91 S. W. 676; *Wilson v. Fidelity Trust Co.* (1906) 30 Ky. L. Rep. 263, 97 S. W. 753; *Baker v. Lane* (1909) — Ky. —, 118 S. W. 963; *Preble v. Longfellow* (1860) 48 Me. 279, 77 Am. Dec. 227; *Brown v. Grant* (1886) 29 W. Va. 117, 11 S. E. 900. The contrary decision in *Jarret v. Andrews* (1870) 7 Bush (Ky.) 311, to the effect that a guardian who had expended money belonging to himself for the support of his ward is entitled to subject the real estate of the ward to the payment of such amount, where the expenditure was proper, and was made at the time of the Civil War, when the court could not easily be applied to for authority to make the expenditures, is overruled by the foregoing cases. In *Dixon v. Hosick* (1897) 101 Ky. 231, 41 S. W. 282, the court refused to allow a guardian, who was the stepfather of his ward, to recover from the ward's land advancements made by him for

the support and education of the ward. The case of *Jarret v. Andrews* (Ky.) *supra*, is referred to, and explained by the peculiar facts, and it is stated that "the opinion of the court in that case is in conflict with the plain provisions of the statute, and with repeated adjudications of this court in passing upon this question before and subsequently to the date of that opinion, and it is now overruled." What is said in *Dixon v. Hosick* is said with reference to charging real estate, and not personal property, such as was involved in *Campbell v. Golden* (Ky.) *infra*, a case which is not referred to in the *Dixon* Case. The statute to which reference is made provides that "no disbursement shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by deed or will under which the estate is derived.

. . . When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition and the court upon settlement of the accounts shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be made liable for any such disbursements."

Under some statutes advancements by the guardian may be paid out of the principal of the ward's personal estate, where judiciously and properly made. *Campbell v. Golden* (1881) 79 Ky. 544; *Com. v. Lee* (1905) 120 Ky. 433, 86 S. W. 990, 89 S. W. 731; *James v. Buchanan* (1884) 6 Ky. L. Rep. 446; *Fidelity Trust Co. v. Rudtloff* (1905) 28 Ky. L. Rep. 152, 89 S. W. 119; *Preble v. Longfellow* (1860) 48 Me. 279, 77 Am. Dec. 227. This may be done, even though the personal estate is the income of real estate. *Fidelity Trust Co. v. Rudtloff* (1905) 28 Ky. L. Rep. 152, 89 S. W. 119.

### III. Statutory rules.

#### a. In general.

While, as shown above, the rule denying credit to the guardian for expenditures from the principal has been announced in some cases without referring to statute, the rule confining

the guardian to the principal of his ward's estate is almost wholly a creature of statute. In some cases the statute is not clearly set out. See *Barnes v. Ward* (1852) 45 N. C. (Busbee, Eq.) 93, 57 Am. Dec. 590, *infra*, IV. Whether the statute referred to in *Barnes v. Ward* was in force at the time of the decision in *Shaw v. Coble* (1869) 63 N. C. 377, is not clear. In the latter case a guardian who advanced money for his ward over and above the income of his estate, in order to set him up in business or for other purposes, without applying to the court for leave, is held not entitled to charge his ward for it.

Ordinarily, such statutes limit expenditures to income unless an order of court is obtained authorizing payments from the principal. *Myers v. Wade* (1828) 6 Rand. (Va.) 444; *Broadus v. Rosson* (1831) 3 Leigh (Va.) 12. It seems that such a statute governed the decision in *Foteaux v. Lepage* (1858) 6 Iowa, 123, to the effect that the guardian will not be permitted, without an order of court, to encroach upon the principal; at least, "without the order of the court, the guardian will not be allowed to keep the ward in idleness and ignorance, and expend the whole of his little patrimony in payment for his board and clothing." It is further stated in this case that, when the estate of the ward is insufficient "for his nurture and education, the ward must either be bound out as an apprentice to learn a trade, or application must be made to the court of probate for permission to encroach upon the principal of his estate." But see *Ellis v. Soper* (1900) 111 Iowa, 631, 82 N. W. 1041, where the general rule was followed. See *supra*, I. a.

In *Jackson v. Jackson* (1844) 1 Gratt. (Va.) 143, the court, however, states that the allowance to guardians for the support, maintenance, and education of infants is limited to the income of the estate of the infant, "unless under very special circumstances." But it is held that this principle does not operate so as to exclude all allowance for permanent improvements put up by the guardian or

quasi guardian on the real estate of the infant, or limit such allowance to the amount of the income. The principal of the estate "may, under circumstances, be applied in making such improvements, and if they be suitable and obviously for the benefit of the infant," the expenditure may be defrayed out of the principal of the estate.

In some jurisdictions no debts can be incurred that can thereafter be charged against the ward's real estate; authority to sell the real estate and use the proceeds for maintenance of the ward must be obtained in advance; but it seems that the personal estate may be appropriated by the guardian without a previous order of court. *Preble v. Longfellow* (1860) 48 Me. 279, 77 Am. Dec. 227. And see Kentucky cases, *supra*.

Some statutes require all expenditures to be made under the direction of the court. It has been held, in a case governed by such a statute, that the courts of chancery have a right in peculiar cases, to allow a guardian for indispensable expenses incurred on account of his ward, although they may break in upon the principal estate, and no previous order of the court has been obtained; but that this will only be done in very extraordinary cases, where a strong necessity for the expenditures is shown and a satisfactory reason given why a previous order was not obtained. *Davis v. Harkness* (1844) 6 Ill. 173, 41 Am. Dec. 184. This rule is approved in *Bond v. Lockwood* (1864) 33 Ill. 212. In *Davis v. Harkness* (Ill.) *supra*, where a person, not the regularly appointed guardian, obtained possession of the infant's estate, and acted as such, but without ever rendering any account of his guardianship, such expenditure was not allowed.

The statute involved in *Ex parte George* (1835) 63 Miss. 143, prohibited all expenditures by the guardian of a minor who has a father or mother, without the order of court. It seems that the expenditures involved in that case were, in part at least, of the principal of the estate, but this fact is unimportant, in view of the statute.

There having been no order of court, the mother, who was the guardian, was held not entitled to credit for the same. A will which authorized the widow to dispose of any of the property of the testator without any order of the chancery court was held not to authorize the widow to spend the money for the support and maintenance of her wards, without authority from the chancery court as directed by the statute.

The statute governing *Moore v. Cason* (1834) 1 How. (Miss.) 53, is stated not to authorize the guardian to create debts or make expenditures at his own discretion.

*b. Statute authorizing the court to direct expenditures from principal upon proper showing.*

A statute which merely directs that, when upon the representations of the guardian the income of the ward's estate appears to be insufficient for his maintenance and education, the probate judge may direct a sale of the estate for such purpose, has been held not to take from the probate court power to approve expenditures without an order. *Bellamy v. Thornton* (1893) 103 Ala. 404, 15 So. 831. The full provisions of the Alabama statute, set out in *Bellamy v. Thornton*, were that, "when upon the representation in writing of the guardian of a minor it is made to appear to the satisfaction of the probate judge that the rents and profits of the estate of the ward are insufficient for his maintenance and education, the judge of probate may direct a sale of such portion of the estate, real and personal, of the ward as may be necessary for that purpose." The court referred to the rule in some jurisdictions that the guardian, to justify expenditures of the principal and to claim reimbursement, must obtain the proper order in advance, but stated that in Alabama the rule has been adopted of ratifying, in such cases, that which would clearly have been previously authorized, at least, to the extent of allowing credit to the guardian upon the settlement of his account, for sums paid out for maintenance and education from the principal of the estate, beyond the income realized by him.

In *Sparling v. Balkum* (1872) 47 Ala. 314, it is stated that, if the income of the estate is insufficient for the maintenance and education of the ward, it must be so made to appear to the satisfaction of the probate court, and its order for the use of the principal obtained, and a statute is cited in this connection. It is further stated, however, that where a guardian, with the care and consideration of a parent, "is mindful of his ward's mental and moral culture and encroaches upon the corpus of the small estate in the proper education and training of the ward, the court should be more disposed to sanction his expenditures than where he leaves her to grow up in ignorance, committing her perhaps to the care of unsuitable persons, and not seeing her for several years at a time. It is within the authority of the probate court to protect the expenditure when it exceeds the income, in such a case as the court would have ordered it."

*c. Statute directing court to bind out ward when estate is insufficient.*

An early statute in Georgia made it the duty of the court, upon it being made to appear that the annual profits of the estate of an orphan were not sufficient for the education and maintenance of the orphan, to bind out such orphan to some person who would undertake to clothe, maintain, and educate him. Under this statute, a guardian is held entitled to credit for expenditures from the principal of the ward's estate, after proper report to the ordinary and his refusal to act. In *Rolfe v. Rolfe* (1854) 15 Ga. 451, an action by a ward against his guardian for an account, in which the guardian defended on the ground that the whole of the ward's estate had been expended in the maintenance and education of the ward, the court states that under this statute, in cases in which the annual profits of the estate of an orphan "are not sufficient for his education and maintenance, it is the duty of his guardian: First, to report that fact promptly to the court of ordinary; second, to abstain from applying any part of the estate to the use of the orphan, except such as may be necessary for his mere mainte-

nance, until the court, after receiving the report, has failed or refused to bind out the orphan, if it should fail or refuse so to do; in which case, the guardian from thenceforth need no longer abstain from applying the estate of the orphan to his education and maintenance."

No special report need be made to the ordinary to call his attention to the fact that the income of the estate is insufficient. The general return of the guardian, showing the condition of the estate, is sufficient notification *Rolf v. Rolf* (1856) 20 Ga. 325.

And it has been held that where the annual returns show that the expenses exceed the income, the guardian may expend the principal. *Smith v. Hilly* (1859) 29 Ga. 582. In this case, an action by the guardian to recover certain sums paid and expended by him over and above his receipts as guardian, the court, in holding that there was a right of recovery, states that "in this case the guardian has made annual returns showing that for several years the expenses of the maintenance and education of his ward have exceeded her income; and the only question is whether this excess ought to be allowed him in his account. Our Statute of 1799 . . . directs that guardians shall be allowed all 'reasonable disbursements suitable to the circumstances of the orphan,' and then declares that, when it shall appear to the court of ordinary that the income is not sufficient for the education and maintenance of the orphan, it shall be the duty of the court to bind out the orphan in order to secure the education and maintenance in that way. The work of education and maintenance is to go on, whether the child be bound out or not. The guardian must go on with it till he is stopped by the court. He must furnish to the court information of the condition of the estate, as was done in this case, by his annual returns, and then proceed with the work of education and maintenance, taking care not to exceed 'reasonable' limits in his outlays for this purpose, until the court gives him notice that the work is to be done in another mode, that is, by

binding out the ward. All of the charges in this case were admitted to be true and proper unless they were rendered improper by the single fact that they exceeded the income. We do not think this fact rendered them improper in this case, because the court, by leaving work in the hands of the guardian after notice of that fact from him, must be considered as having authorized him to disregard that fact."

The theory of these decisions was adhered to under a Code provision, subsequently enacted, that "the expenses of maintenance and education must not exceed the annual profits of the estate except by the approval of the ordinary, previously granted," and it was held that the approval need not precede the act of disbursing, although it must precede the allowance on final settlement. The court states that the Code provision introduced "no exclusive mode by which the ordinary's consent is to be expressed, and that one of the legal modes still is by approving the regular annual returns of the guardian when the returns show on their face that the expenses have exceeded the income." *Cook v. Rainey* (1878) 61 Ga. 452.

In *Dowling v. Feeley* (1884) 72 Ga. 557, a case dealing with an administrator who had usurped the functions of a guardian, the court recognizes the rule as laid down in the foregoing cases, but states that there should be no further relaxation of the restraint placed upon expenditures in excess of income. These rules were again approved in *Poullain v. Poullain* (1886) 76 Ga. 420, 4 S. E. 92. The rule of these cases is somewhat limited in *Williams v. Adams* (1894) 94 Ga. 270, 21 S. E. 526, where the court states that the foregoing cases do, in effect, hold that, by approving the regular annual returns of the guardian showing on their face that the expenses of maintaining and educating the ward have exceeded the income of the estate, the ordinary consented to the expenditure of more than the annual profits for these purposes. A careful examination of these cases "will show that the money expended by the guardian in

each instance was directly disbursed by him for the ward's maintenance and education. In other words, the returns showed unequivocally on their faces that the money of the ward was, in fact, used by the guardian for these identical purposes. These cases and others like them have gone quite far enough in holding that a guardian will be protected in encroaching upon the corpus of the ward's estate under these circumstances, and we are not disposed to extend it further."

In *McQueen v. Fisher* (1918) 22 Ga. App. 394, 95 S. E. 1004, an action by one to whom the guardian had intrusted the care, schooling, and maintenance of the ward, agreeing to pay therefor a stipulated sum, a judgment in favor of the plaintiff was reversed, where an execution thereunder might have been levied on the principal of the estate, and where there had been no approval of the ordinary, previously granted, to the making of the contract, the court stating that, "in the absence of the approval of the ordinary of any encroachment upon the corpus of the ward's estate, only the profits could be used to pay for the maintenance and schooling of the ward, and we think that, in order to sustain the verdict and judgment rendered, it would, at least, have been necessary to show that there were such profits."

Expenditures by the ward prior to the appointment of the guardian, for necessities, were held not to be governed by the statute providing that the guardian might pay debts incurred for such necessities without taking the action above prescribed under the statute. *Rolfe v. Rolfe* (1854) 15 Ga. 451.

See *Re Carter* (1862) 2 Ohio Dec. Reprint, 655, supra, I. a, as to expenses prior to guardianship.

*d. Statute directing guardian to apply income to support and maintenance.*

An Illinois statute provides that "the guardian shall manage the estate of his ward frugally, and without waste, and apply the income and profit thereof so far as the same may be necessary to the comfort and suitable support and education of his ward." In *Hazelrigg v. Pursley* (1896) 69 Ill.

App. 467, the language of this statute is held to exclude the idea that the principal can be so used without authority of the court, and the court, in refusing to credit the guardian with expenditures of principal, where the guardian had failed to loan the money as the statute provided and to make full and specific reports showing the items of expenditure, stated: "Had this been done annually, the court would have been able to ascertain whether it was necessary to expend more than the income, and in view of the evidence in this record it is probable that upon a full hearing it would have been found that the income from interest and the ward's services would have equaled, and perhaps exceeded, all necessary outlays for nurture and education. Having failed to pursue this course, the guardian should not be permitted, now, to take credit for more than what the money would have produced, if loaned as the law required, nor more than he is able to show was actually expended, in addition to the fair value of the board furnished by himself, less what the ward's services were reasonably worth."

*e. Statute authorizing expenditure from principal.*

The statute in Kentucky authorized expenditures from the principal of the ward's personal estate for his board and tuition when such expenditures were best for the ward, and the court upon settlement of accounts shall deem such expenditures to have been judicious and properly made. And in *James v. Buchanan* (1884) 6 Ky. L. Rep. 446, it is held that the guardian may go upon the principal of the ward's personal estate where it is necessary to do so in order to maintain and educate the ward in a manner suited to the ward's present condition and prospect in life. It has been stated, however, that a guardian can never be allowed for expenditures beyond the income of the ward's estate, except in the instances specified by statute. *Chapeze v. Bowman* (1883) 4 Ky. L. Rep. 624; *Hedges v. Hedges* (1903) 24 Ky. L. Rep. 2220, 73 S. W. 1112. When credit for an expenditure

of income is sought by the guardian, the burden is on him to show that he is entitled thereto under the statute. *Hedges v. Hedges* (Ky.) *supra*.

Expenditures by the guardian of money received by his ward from the Federal government as a pension to children of deceased soldiers may be spent upon the maintenance and education of the ward, under this statute. *Franklin v. Embry* (1903) 25 Ky. L. Rep. 1075, 76 S. W. 1086. The court states that it was not the purpose of the government that an estate should be accumulated for the use of the ward after he arrived at mature years, but to take care of him and educate him when he was presumably unable to take care of himself.

See *Anderson v. Steddum* (1917) — Tex. Civ. App. —, 194 S. W. 1133, *infra*, III. f.

*f. Statute confining expenditures to income except upon order of court.*

Some of the statutes limiting expenditures to income expressly declare that the guardian shall not exceed the income of the ward unless allowed to do so by order of court. Failure to obtain the order of court precludes an allowance for expenditures of principal. *Austin v. Lamar* (1851) 23 Miss. 189; *Brown v. Mullins* (1852) 24 Miss. 204; *Frelick v. Turner* (1853) 26 Miss. 393; *Gilbert v. McEachen* (1860) 38 Miss. 469; *Sample v. Lane* (1871) 45 Miss. 556 (obiter); *Wiggle v. Owen* (1871) 45 Miss. 691; *Dalton v. Jones* (1875) 51 Miss. 585; *Boyd v. Hawkins* (1882) 60 Miss. 277. See Georgia statute involved in *Cook v. Rainey* (1878) 61 Ga. 452, and subsequent cases in this state, *supra*; see also Michigan statute involved in *Re Hoag* (1903) 134 Mich. 361, 96 N. W. 439, *supra*, I. a.

Other statutes of this kind expressly provide that, unless an order of court is obtained to expend more than the income of the ward's estate, the guardian shall not be allowed in any case, for the maintenance and education of the ward, more than the income of the estate. Failure to comply with the requirements of this statute by obtaining an order of court prevents the guardian being credited with expend-

iture in excess of income. *Campbell v. Clark* (1897) 63 Ark. 450, 39 S. W. 262; *Hudson v. Newton* (1907) 83 Ark. 223, 103 S. W. 170; *Smythe v. Lumpkin* (1884) 62 Tex. 242; *Jones v. Parker* (1886) 67 Tex. 76, 3 S. W. 222; *De Cordova v. Rogers* (1903) 97 Tex. 60, 75 S. W. 16; *Eastland v. Williams* (1898) — Tex. Civ. App. —, 45 S. W. 412, affirmed as to this point in (1898) 92 Tex. 113, 46 S. W. 32; *Freedman v. Vallie* (1903) — Tex. Civ. App. —, 75 S. W. 322; *Nicholson v. Nicholson* (1910) 59 Tex. Civ. App. 357, 125 S. W. 965; *Davis v. White* (1919) — Tex. Civ. App. —, 207 S. W. 679; *Dallas Trust & Sav. Bank v. Pitchford* (1919) — Tex. Civ. App. —, 208 S. W. 724; *Rinker v. Streit* (1880) 33 Gratt. (Va.) 663 (statute limited to principal, which is real estate); *Cumming v. Simpson* (1881) — Va. —, 1 S. E. 657; *Whitehead v. Bradley* (1891) 87 Va. 676, 13 S. E. 195; *Harkrader v. Bonham* (1891) 88 Va. 247, 16 S. E. 159. See *Barton v. Bowen* (1876) 27 Gratt. (Va.) 849, *supra*, I. a. And see Virginia cases, *supra*, III. a.; *Brown v. Grant* (1886) 29 W. Va. 117, 11 S. E. 900; *Windon v. Stewart* (1897) 43 W. Va. 711, 28 S. E. 776; *Campbell v. O'Neill* (1911) 69 W. Va. 459, 72 S. E. 732.

In other jurisdictions it is provided by Code that a guardian cannot claim against the estate of his ward beyond the revenues, where the advances were not authorized by a decree of court rendered on the advice of a family meeting. *Moore v. Nicholls* (1833) 5 La. 488. *Barbarin v. Barbarin* (1848) 3 La. Ann. 263; *Hubbell v. Hubbell* (1850) 5 La. Ann. 524; *Payne v. Scott* (1859) 14 La. Ann. 773; *Samuel's Succession* (1869) 21 La. Ann. 15; *Mahony v. Mahony* (1889) 41 La. Ann. 135. This Code provision has been held to apply to expenditures made in the management and preservation of the ward's estate. *Payne v. Scott* (1859) 14 La. Ann. 773 (action by one who had furnished supplies to the guardian, to recover therefor); *Mahony v. Mahony* (La.) *supra*. It has been held in Louisiana that expenditures cannot be charged against the principal without the advice of a



family meeting, nothing being said as to the necessity of an order of court. *McWilliams v. McWilliams* (1860) 15 La. Ann. 88; *Crane's Tutorship* (1895) 47 La. Ann. 896, 17 So. 431; *Sims v. Billington* (1898) 50 La. Ann. 968, 24 So. 637; *Watson's Tutorship* (1899) 51 La. Ann. 1641, 26 So. 409.

Expenditures from the principal, authorized by a family meeting invoked by the tutor, seem to have been allowed in *Watson's Tutorship* (La.) *supra*.

In *Webre's Succession* (1884) 36 La. Ann. 312, the guardian of an insane person was denied credit for charges made which encroached on the capital of the estate, where the charges were not authorized by the family meeting. This holding was made, notwithstanding the ward required great care and attention on the part of the guardian, at whose house he lived during that time, and the court admitted that the refusal of the allowance worked a considerable hardship, but it is stated that the law is imperative and must be obeyed.

In *Deblanc v. Levasseur* (1874) 26 La. Ann. 541, where the tutor obtained the individual consent of persons who had composed a family meeting on a previous occasion, to make use of the capital of the minor's estate as he did, the court disallowed the expenditure. Whether this was because the individual consent was not a sufficient consent of the family meeting, or whether it was because of the absence of an order of court, is not clear.

In *Randlett v. Gordy* (1880) 32 La. Ann. 904, an action by the vendor against the guardian of a minor for whom the guardian had purchased land, it was held that minors are not bound by debts contracted by their tutors, even when acting under the advice of homologated family meetings, where they arise from purchases or investments made on credit, and where the means of the minors do not justify the contraction of such debts, or where such investments are not of the surplus of their revenue, nor required for their maintenance, education, or support.

It follows from the rule that the

guardian cannot exceed the income of his ward's estate, that he cannot, by contract, bind the estate beyond the income, and this has been held. *Dalton v. Jones* (1875) 51 Miss. 585. But in *Williams v. Bonner* (1901) 79 Miss. 664, 31 So. 207, a physician who had rendered services to the ward at the request of the guardian, in time of great emergency, was allowed to recover from the estate of the ward, although the value of the services exceeded the income, the court stating that the doctrine relating to the duty of a trustee in common law (and in this category the guardian stands for his ward) requires him, when the life of the cestui que trust is put in competition with the expenditure of his property, to sacrifice the latter, if need be, for the former.

A mortgage given on the ward's estate cannot be enforced. *Sample v. Lane* (1871) 45 Miss. 556 (mortgage given in management of ward's estate).

The Virginia statute which required a previous order in case of real estate only was held, in *Whitehead v. Bradley* (1891) 87 Va. 676, 18 S. E. 195, to apply to the proceeds of real estate which had been sold by the guardian under an order of court, upon a petition asking for the sale and investment in interest-bearing stock, the guardian, after the sale and receipt of the proceeds, having expended part of it in the maintenance of his ward. That the proceeds of real estate cannot be spent by a guardian without an order of court is held also in *Cumming v. Simpson* (1887) — Va. —, 1 S. E. 657.

Such a statute applies to principal which is money as well as to that which is property. *Austin v. Lamar* (1851) 23 Miss. 189.

Pension money received by the ward from the Federal government is not income within the meaning of the Texas statute, and therefore the guardian cannot pay out the same without an order of court. *Anderson v. Steddum* (1917) — Tex. Civ. App. —, 194 S. W. 1133. A guardian was allowed to charge for the support and maintenance of his ward out of mon-

ey received as a pension from the Federal government, in *Re Besondy* (1884) 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366, without any question as to the use of principal. See *Franklin v. Embry* (1903) 25 Ky. L. Rep. 1075, 76 S. W. 1086, *supra*, III. e.

An increase in slaves was held not to be income, and therefore not to be considered in determining the expenditures that a guardian might properly make, in *Anderson v. Thompson* (1840) 11 Leigh (Va.) 439.

The expenditures will be allowed the guardian although in excess of the income of the property in his hands, if not in excess of the income of the entire property, part of which is in the hands of an administrator of the estate of an ancestor. *Foreman v. Murray* (1836) 7 Leigh (Va.) 412.

It is immaterial under this statute that the expenditure was made by a third person. *Dallas Trust & Sav. Bank v. Pitchford* (1919) — *Tex. Civ. App.* —, 208 S. W. 724.

In *Logan v. Gay* (1906) 99 *Tex.* 603, 90 S. W. 861, 92 S. W. 255, the Texas statute was held not to apply to expenditures for the ward's support by a third person prior to guardianship; but it is held that the court may approve of such a charge. The contrary opinion expressed in *De Cordova v. Rogers* (1903) 97 *Tex.* 60, 75 S. W. 16, is disapproved.

There can be no credit to the guardian for expenditures from the income for necessities, on the theory that if the necessities had been furnished by a stranger the price could have been recovered in a suit against a minor. *Boyd v. Hawkins* (1882) 60 *Miss.* 277.

The approval by the court of annual accounts of the guardian showing expenditures in excess of income does not amount to an allowance of expenditures from the principal and cure the want of a previous order. *Gilbert v. McEachen* (1860) 38 *Miss.* 469. But see Georgia decisions, *supra*, III. c.

A mere verbal direction by the court is not a sufficient order for such expenditures. *Jones v. Parker* (1886) 67 *Tex.* 76, 3 S. W. 222. The order

must be a specific one, entered of record. *Blackwood v. Blackwood* (1899) 92 *Tex.* 478, 49 S. W. 1045.

Under a statute providing that the court may direct a guardian to expend a specific sum for the education and maintenance of his ward, although such sum may exceed the income of the ward's estate, the court cannot authorize the expenditure of any portion of the principal of the ward's estate for his education and maintenance, without fixing a specific amount to be expended; this statute clearly and explicitly places upon the court the duty and responsibility of determining what amount shall be deemed sufficient for the proper maintenance and education of the ward, and unless a specific sum is fixed by the court for such purpose the guardian can only expend the income of the estate. *Wheeler v. Duke* (1902) 29 *Tex. Civ. App.* 20, 67 S. W. 909.

Such statutes as are under consideration in this subdivision are held to take from the probate court the discretion to approve expenditures in excess of income, where made without a precedent order of court. *Campbell v. Clark* (1897) 63 *Ark.* 450, 39 S. W. 262, approved in *Thomas v. Thomas* (1917) 126 *Ark.* 579, 191 S. W. 227, and *Diffie v. Anderson* (1919) — *Ark.* —, 208 S. W. 428; *Austin v. Lamar* (1851) 23 *Miss.* 189; *Smythe v. Lumpkin* (1884) 62 *Tex.* 242; *De Cordova v. Rogers* (1903) 97 *Tex.* 60, 75 S. W. 16; *Eastland v. Williams* (1898) — *Tex. Civ. App.* —, 45 S. W. 412, affirmed as to this point in (1898) 92 *Tex.* 113, 46 S. W. 32; *Rinker v. Streit* (1880) 33 *Gratt. (Va.)* 663; *Whitehead v. Bradley* (1891) 87 *Va.* 676, 13 S. E. 195.

But in *Frelick v. Turner* (1853) 26 *Miss.* 393, the right of the court to approve expenditures from the principal is assumed, although the court refused to allow such expenditures in that case. It is stated: "It is only in very special cases such as could not be foreseen that the court ought under any circumstances to sanction a charge of this kind, not previously authorized by the court. It is no answer to say that the charge is not

unreasonable or such as the court would or might have previously given the guardian authority to make. He has taken upon himself to disregard the plain and statutory provisions of the law, and to substitute his own judgment about a matter which could only be regulated by the judgment of the court." In the subsequent case of *Williams v. Bonner* (1901) 79 Miss. 664, 31 So. 207, the principal of the estate of a ward was held bound for medical services, for which the guardian had contracted in a time of emergency, without an order of court. The court states that "the general rule undoubtedly is that a guardian may not ordinarily exceed the income of the ward in his maintenance and education, without a previous order of court therefor. But there are exceptions to the rule, and in a case where the court, if it had foreseen the event, would have made an allowance therefor, though exceeding the income of the estate, there the guardian of his own authority, and without previous authorization, may make the necessary expenses." Accordingly, the physician who had rendered the services was held entitled to recover the value thereof from the estate of the ward. In *Myers v. Myers* (1900) 47 W. Va. 487, 35 S. E. 868, expenditures by a guardian from the principal of the ward's estate were sustained, where the same had been approved by the court and no appeal taken, the question arising in a subsequent action by the ward against the guardian. The court, referring to the statute requiring an order of court for the expenditure of principal, states: "This law was never intended in all its strictness to apply to estates of small or inconsiderable value, or in cases of emergency or necessity. . . . It is the duty of a court of chancery having jurisdiction of such matters to so construe it as to make it operate with justice and equity." The court, in sustaining its judgment that the expenditures could be allowed without a previous order of court, does so on the theory that the articles furnished by the guardian were necessities, and that a guardian has

the same right to furnish necessities to his ward as any other individual, and may hold the ward personally responsible therefor. In *Campbell v. O'Neill* (1911) 69 W. Va. 459, 72 S. E. 732, the court, referring to this statute, states: "Notwithstanding this statute, however, a court of equity may, upon the principles of the Virginia cases cited and *Myers v. Myers* (W. Va.) *supra*, where it has the entire matter before it for settlement, reimburse a guardian out of the principal of the ward's personal estate for disbursements which the law regards for necessities. The general rule, however, is that, where expenditures of this kind have been made without a previous order of the court, some good excuse must be furnished to the court why application was not made to the court for the authority before doing so." In *Campbell v. O'Neill*, a part of the expenditures were for a college education, and it is held that expenditures for this purpose cannot be regarded as expenditures for necessities, within the meaning of the *Myers* Case.

#### IV. Power of court.

While this note does not deal generally with the power of a court over payments out of the principal of the ward's estate, it may be stated in passing that it has been held that the court may authorize expenditures of the principal. *Chapline v. Moore* (1828) 7 T. B. Mon. (Ky.) 150; *Moore v. Cason* (1834) 1 How. (Miss.) 53; *Stephens v. Howard* (1880) 32 N. J. Eq. 244; *Re Bostwick* (1819) 4 Johns. Ch. (N. Y.) 100; *Hart v. Czapski* (1883) 11 Lea (Tenn.) 151; *Ex parte Green* (1820) 1 Jac. & W. 253, 37 Eng. Reprint, 372. But see *Walker v. Wetherell* (1801) 6 Ves. Jr. 473, 31 Eng. Reprint, 1160, *supra*, I. c.; *Re Adkins* (1915) 33 Ont. L. Rep. 110, 7 Ont. Week. N. 654.

And see cases cited *infra*, in this subdivision, as to when the court will exercise this discretion.

In *Little v. West* (1916) 145 Ga. 563, 89 S. E. 682, an action involving a sale of real estate by a guardian to pay for improvements made thereon, it is stated in the headnotes that "(a)

primarily the income, and not the corpus of a ward's property, is to be resorted to for the purpose of education, maintenance, and making necessary repairs on the ward's property.

(b) The ordinary may in his discretion allow the corpus of a ward's estate, in whole or in part, to be used for the education and maintenance of the ward. (c) But a guardian is not authorized to sell or encumber the property of his ward for the purpose of erecting permanent improvements on it, or, if he erects permanent improvements on it with his own money, he cannot obtain a legal order of the ordinary, or court of ordinary, to sell it to reimburse himself."

In *Long v. Norcom* (1842) 37 N. C. (2 Ired. Eq.) 354, it is stated to be "the general rule that the court will not go beyond the income of the child's estate for maintenance and education, and much less is the court inclined to authorize the guardian, of his own head, to encroach on the capital of the ward's property for those purposes. But we conceive it is wrong to say that those rules are so positive and strict as to admit of no exceptions."

The court is empowered by statute in some jurisdictions, to authorize expenditures from principal. *Austin v. Lamar* (1851) 23 Miss. 189; *Scott v. Porter* (1870) 44 Miss. 364; *Dalton v. Jones* (1875) 51 Miss. 585; *Re Paton* (1894) 7 Misc. 377, 28 N. Y. Supp. 160.

And see *supra*, III. generally.

Under a statute providing "that the court shall have full power and authority from time to time upon the application of the guardian or next friend of such infant or infants to order and decree the proceeds of such sale or sales [of the infant's property] to be disposed of and appropriated in such manner as may appear to them most consistent with equity and the welfare and interest of such infant or infants," it is held that the chancellor may, upon proper application and in the exercise of a sound and prudent discretion, direct from time to time the disbursements of portions of the principal fund for the necessary and economical maintenance, support, and

education of the infant, even to the consumption of the whole amount. *Withers v. Hickman* (1845) 6 B. Mon. (Ky.) 292.

A statute referred to in *Stewart v. Lewis* (1849) 16 Ala. 734, authorized the court to direct the sale of real estate for the maintenance and education of the ward, where the personal estate and the income of the real estate were insufficient for such purpose.

The fact that the guardian and ward are nonresidents does not prevent the court from authorizing an expenditure of principal. *Hart v. Czapski* (1883) 11 Lea (Tenn.) 151.

Some statutes deny the power to the court to authorize expenditures of principal, under certain circumstances. Thus, it is held in *Brodess v. Thompson* (1828) 2 Harr. & G. (Md.) 120, that the orphans' court has no authority to direct a guardian to use the principal of personal property in making improvements on the ward's real estate, under the Maryland statute. The statute under which this decision was made authorized the guardian to apply a part or whole of the personal estate of the ward to his education, upon the order of the orphans' court. Expenditure of the principal for no other purpose was provided for, and the court held that there was no authority for expending the principal for other purposes, and accordingly the orphans' court, which was a court of limited jurisdiction, had no authority to authorize such expenditure.

Whatever may be the power of a court as to authorizing expenditures from principal, it has been repeatedly stated that such expenditures will not be authorized, except in an urgent case. The court in *Chapline v. Moore* (1828) 7 T. B. Mon. (Ky.) 150, thus discusses the power of the court: "A court of equity never sanctions the conduct of a guardian to break in upon the capital of the infant's estate, by his own authority; the court may be applied to under extraordinary circumstances, and has rarely permitted by its own order a reduction of the capital; the circumstances must be cogent and extraordinary to induce

the court to assent to break in upon the capital; the income may be anticipated under suitable circumstances, but, for the mere purpose of maintenance of a child in health and infancy, a court of equity will not permit a sinking of the capital. Cases of hardship may occur where the estate of the ward is not sufficient for maintenance and education out of the yearly profits or interest, but it is better that an individual should suffer such a hardship than to break through a general rule, to the endangering the interests of all infants." The court, in *Villard v. Robert* (1848) 21 S. C. Eq. (2 Strobb.) 40, 49 Am. Dec. 654, after stating that a guardian will not be permitted to expend upon the maintenance and education of his ward more than the income of the estate, without the sanction of the court, continues: "The court itself, on an application proper as to time, would proceed with the utmost degree of caution, and would withhold its sanction except in a case of strong necessity, or advantage to the ward, very clearly made out. In a case where the ward had considerable expectancies, or his estate had not yet been reduced to possession, or he was likely to suffer for the common necessities of life, or, exhibiting fine talents, it was desirable to expend his small estate in his education, with a view to his future advancement in life, in these and similar instances of necessity or advantage to the ward, the court would authorize the expenditure of the capital of his estate." In this case expenditures by an administrator of an estate in which the minor was interested, to whom the rules applicable to guardians are applied, expenditures of the principal for an expensive education, a piano, harp, wardrobe, etc., that were unsuited to the condition and estate of the infant, were disallowed. The court in *Davis v. Harkness* (1844) 6 Ill. 173, 41 Am. Dec. 184, states this to be a general rule of the common law: "That the expenses of the infant, or ward, shall be kept within the income or produce of his estate, although the court of chancery or other proper court has

frequently in cases of strong necessity, upon proper application, ordered a portion of the principal to be appropriated in that way; but in doing this, they have always proceeded with great caution, and have only done it in urgent cases." In *Barnes v. Ward* (1852) 45 N. C. (Busbee, Eq.) 93, 57 Am. Dec. 590, a statute is cited to the effect that a guardian, in maintaining his ward, cannot exceed the annual income from the ward's property, but it is stated that a court of equity under peculiar circumstances may apply a portion of an infant's property to his maintenance as a matter of necessity.

In *Otte v. Becton* (1874) 55 Mo. 99, the court refused to allow for the past maintenance of infants by their mother and stepfather, where the estate of the infants was not more than sufficient for their future education.

See *Cox v. Fisher* (1916) — Okla. —, 161 Pac. 171, supra, III. c.

A court will not authorize an expenditure for the maintenance of the ward that would consume the ward's estate, in order that the ward may indulge in the pleasures and luxuries of life. *Collins v. Slaughter* (1880) 1 Ky. L. Rep. 261.

It has been held that the court cannot direct the expenditure of principal while interest remains uncollected. *Re Plumb* (1889) 52 Hun, 119, 4 N. Y. Supp. 31, an action to remove the guardian, in which the surrogate's court directed some expenditures for the school tuition and expenses of the ward, it is stated that the learned surrogate "should not have authorized the support of the infant out of what may be the principal of the estate, while its income is uncollected. We do not think that there is any power in the court to exhaust the principal for support and maintenance, while interest remains uncollected and the debtors are solvent."

*V. Right to anticipate income or expend income accumulated in previous years.*

It is the doctrine of some cases that income accumulated from the ward's estate when the expenses of the ward are low may be expended when the expenses of the ward rise. *Freeman*

v. Tucker (1856) 20 Ga. 6 (obiter); Speer v. Tinsley (1875) 55 Ga. 89; Bybee v. Tharp (1843) 4 B. Mon. (Ky.) 813; Fidelity Trust Co. v. Rudtloff (1905) 28 Ky. L. Rep. 152, 89 S. W. 119; Oakley v. Oakley (1884) 4 Dem. (N. Y.) 140. In Freeman v. Tucker (Ga.) *supra*, it is stated that "there can be no doubt that the guardian would be justified in expending properly in the advance, education, etc., of his ward, the annual profits of the ward's estate, accumulated when she was young and the expenses of her maintenance and education were inconsiderable. But then it should not be expended because it is on hand. There should be a necessity and propriety for the expenditure."

If in a given year the guardian has expended more than the income of that year, but during the entire time of the guardianship the principal was not intrenched upon, the guardian is not chargeable, if such income was expended reasonably and suitably to the circumstances of the ward. Speer v. Tinsley (1875) 55 Ga. 89. In other words, income may be anticipated. Carmichael v. Wilson (1829) 3 Molloy (Ir.) 84.

A contrary opinion seems to have been in the mind of the court in De Cordova v. Rogers (1903) 97 Tex. 60, 75 S. W. 16, where it is stated that "the income and expenditures for education and support should run concurrently, and when the income for the period covered by a claim of that nature has been applied to such claim, the balance appearing to be due upon it should be held of no effect, there being no fund belonging to the estate from which it can be paid."

#### *VI. Duty to require ward to work.*

The right of a guardian to expend the principal for the support and maintenance of his ward is, in some instances, made to depend upon the inability of the ward to work. It is held to be the duty of the guardian to keep the ward employed in earning his own support, rather than to permit him to consume in idleness the principal of his estate. State ex rel. Druliner v. Clark (1861) 16 Ind. 97;

Kelaker v. McCahill (1881) 26 Hun (N. Y.) 148.

But if the ward is physically unable to earn such support, or cannot do so without encroaching upon the time that should be devoted to acquiring an education, the guardian may and should, if necessary, encroach upon the principal. State ex rel. Druliner v. Clark (1861; Ind.) and Kelaker v. McCahill (N. Y.) *supra*; Campbell v. Golden (1881) 79 Ky. 544. A statute cited in the subsequent case of Dixon v. Hosick (1897) 101 Ky. 231, 41 S. W. 282, expressly provides that when "the ward is of such tender years or infirm health that he cannot be bound out as an apprentice or no suitable person will take him as such," an exception exists to the provision that no disbursement shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate. Apparently, this statute was in effect at the time of the decision in Campbell v. Golden.

Or, if no suitable person will take the ward as an apprentice, the principal of his estate may be used. Campbell v. Golden (1881) 79 Ky. 544 (this seems to have been a statutory provision; see comment, *supra*).

This is made the rule by express statute, in some jurisdictions. Com. v. Lee (1905) 120 Ky. 433, 86 S. W. 990, 89 S. W. 731; Collins v. Slaughter (1880) 1 Ky. L. Rep. 261. See Hooper v. Royster (1810) 1 Munf. (Va.) 119, *supra*, I. a.

It has been stated that, if the income of the ward's estate is not sufficient for his support and education, "the ward must either be bound out as an apprentice to learn a trade, or application must be made to the court of probate for permission to encroach upon the principal of his estate." Foteaux v. Lepage (1818) 6 Iowa, 123.

So long as the income of the ward's estate is sufficient to support the ward, it has been held that the guardian is under no duty to compel the ward to work for his support. Chapeze v. Bowman (1883) 4 Ky. L. Rep. 624.

#### *VII. Ability of parent to support.*

The right to encroach upon the principal of the ward's estate is made

dependent, in some cases, upon the inability of the parent to furnish support and maintenance. *Bellamy v. Thornton* (1893) 103 Ala. 404, 15 So. 831; *Williams v. Williams* (1919) — Ala. —, 81 So. 41; *Ellis v. Soper* (1900) 111 Iowa, 631, 82 N. W. 1041, see supra I. b; *Kelaker v. McCahill* (1881) 26 Hun (N. Y.) 148; *Donnell v. Dansby* (1916) 58 Okla. 165, 159 Pac. 317; *Cox v. Fisher* (1916) — Okla. —, 161 Pac. 171.

In *Davis v. White* (1918) — Tex. Civ. App. —, 207 S. W. 679, a guardian who was also trustee for his ward, and who had sufficient funds as trustee to

educate and maintain the ward, was held not entitled to spend any part of the guardianship fund without an order from the probate court.

See *Ex parte George* (1885) 63 Miss. 143, supra, III. a.

A sale of the ward's real estate, apparently for the purpose of using the proceeds thereof for the support and maintenance of the ward, was set aside in *Campbell v. Goodin* (1908) 128 Ky. 278, 108 S. W. 248, because the guardian, who was her father, had not disclosed any reason for not supporting his child, as the law required him to do. W. A. E.

J. B. LAUN et al., Appts.,

v.

B. A. KIPP, Respt.

*Wisconsin Supreme Court — January 13, 1914.*

(155 Wis. 347, 145 N. W. 183.)

#### **Trustee — failure to make disclosure — relief in equity.**

1. In case of a person sustaining the relation of trustee to another, he owes to such other the duty of making a full disclosure of all matters appertaining to the trust, and neglect to do so to such other's injury, knowing or having good reason to believe that silence will so result, is a fraudulent act, and the duty exists independently of inquiry in judicial proceedings, and failure of the trustee in that regard, persisted in in judicial proceedings, to the prejudice of such other and advantage to himself, may be regarded as fraud extrinsic under the rule in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, as well as fraud intrinsic.

[See note on this question beginning on page 672.]

#### **Pleading — sufficiency — test.**

2. In testing a complaint for sufficiency all facts expressly alleged and all reasonably inferable from the whole pleading as well, giving to the language thereof the most liberal construction in favor of the plaintiff which it will reasonably bear, and without necessary reference to the prayer, are to be regarded as stated; the ultimate question being, Does the pleading, viewed as indicated, show the rights of plaintiff to have been remedially invaded, or a wrong in that regard to be remedially threatened?

[See 21 R. C. L. 466, 527.]

#### **— allegation of fraud — sufficiency.**

3. The rule that fraud must be pleaded by a statement of the facts

constituting the fraud, and that an allegation that a particular act was fraudulent is not sufficiently precise and definite, is subordinate to the foregoing rule and the one that mere indefiniteness does not go to sufficiency.

[See 12 R. C. L. 416-420.]

#### **— inference of facts.**

4. If the term "fraudulent" or "fraudulently" is used in a pleading in such a way as to state facts in legal effect, so that with its context the subsidiary facts are reasonably inferable, the charge of fraud is to be regarded as sufficiently pleaded as regards a general demurrer, though the pleading may be open to a motion to make more definite and certain.

[See 12 R. C. L. 417.]

— use of word “fraudulently.”

5. Previous decisions to the effect that to allege an act to have been fraudulently done does not tender an issue of fact for want of precision and definiteness, but is a mere conclusion of law, must be restrained to the now recognized spirit of the Code requiring obvious matters of mixed law and fact when pleaded in their legal effect to be regarded as matter of fact, and all facts reasonably inferable from a pleading, resolving all reasonable doubts in favor of the pleader, to be deemed sufficiently stated, upon a challenge for insufficiency.

[See 12 R. C. L. 416 et seq.]

**Injunction — against enforcement of judgment.**

6. An independent action to prevent the enforcement of a judgment because of happenings after its rendition, by a practice so settled as to be regarded jurisdictional, cannot be maintained in the same or any other court, the remedy being confined to proceedings by motion in the original action.

**Equity — restraining enforcement of judgment — subsequent events.**

7. Equity having properly acquired jurisdiction to restrain the enforcement of a judgment upon the ground of its being unconscionable *ab initio*, it may deal with the subject of whether such judgment should not be enforced because of happenings subsequent to its rendition where the later wrong, perpetrated or threatened, is germane to that characterizing the judgment originally.

**Injunction — against judgment — grounds.**

8. As a general rule, any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party might have availed himself in the original action, but was prevented by fraud or accident unmixed with any fault or negligence of himself or his agents, will justify an application to a court of chancery to prevent such execution.

[See 15 R. C. L. 743.]

— scope of rule.

9. The rule above stated is one of judicial policy applicable to all ordinary situations, and not one of limitation of judicial power,—the power itself being as broad as the maxim, “There is no wrong without a remedy.”

— extent of relief.

10. The public policy requiring the

general rule to be as stated does not militate against the power of equity going further in exceptional situations where the ends of justice clearly require it.

— limits of power of court.

11. No rule can be formulated setting a definite boundary beyond which a court of equity cannot go as matter of power, or will not go under any circumstances, as matter of sound public policy, in preventing the enforcement of an unconscionable judgment.

**Judgment — attack for fraud — character.**

12. The fraud which will justify a court of equity in preventing the enforcement of an unconscionable judgment may be intrinsic as well as extrinsic,—the test being, not the nature of the fraud, but the injustice of wrongfully impoverishing one for the enrichment of another.

— intrinsic and extrinsic fraud — distinction.

13. Though equity may restrain enforcement of a judgment which is unconscionable because of fraud intrinsic as well as fraud extrinsic, whether the court should interfere in such cases being matter of wise administration rather than of power, fraud of the latter kind would call successfully for judicial interference in circumstances where fraud intrinsic would not.

[See 15 R. C. L. 763.]

**Trustee — power to secure personal advantage.**

14. Where a person occupies trust relations to another, it is his duty to speak whenever the interests of such other would otherwise be prejudiced; he cannot, legally or equitably, remain silent and secure to himself an advantage over such other.

[See 10 R. C. L. 769.]

**Evidence — to establish fraud in judgment.**

15. In case of a judicial remedy in equity being invoked to prevent the enforcement of a fraudulent judgment, the rule that facts relied upon for a recovery on the ground of fraud must be established by clear and satisfactory evidence applies and with considerable emphasis.

[See 12 R. C. L. 439, 440.]

**Attorney and client — relief from negligence of attorney.**

16. Where a party seeking an ac-



counting from a trustee uses ordinary care in the selection of attorneys to represent him, equity may relieve him

from the consequences of their infirmity or neglect.

[See 2 R. C. L. 965.]

APPEAL by plaintiffs from orders of the Circuit Court for Milwaukee County (Fritz, J.) sustaining a demurrer to the amended complaint and dissolving a temporary injunction restraining the enforcement and collection of a judgment. *Reversed.*

Statement by Marshall, J.:

Action to restrain enforcement of a judgment because of its being inequitable.

This is the substance of the complaint: In an action for specific performance, in the circuit court for Milwaukee county, Wisconsin, wherein the defendant herein was plaintiff, and the plaintiffs herein were defendants, it was decided, June 23, 1910, that the former contracted to sell to the latter, who agreed to buy from the former, the corporate stock, business, and property of the B. A. Kipp Company, giving therefor the fair value October 1, 1909, a specified inventory to be regarded prima facie proof thereof; that Mr. Kipp, who had been in possession of the subject of the transaction from the date of the contract, administered the same as trustee for plaintiffs; that it was necessary to measure the amount they should pay by the fair value of the subject October 1, 1909, and also that defendant should account as trustee. The questions of value and accounting were referred to John A. Harper, and Mr. Kipp was made receiver in the meantime; judgment to await confirmation of the report. In due course, a referee hearing was had; defendant offering in evidence only a statement of the financial condition of the B. A. Kipp Company, June 23, 1910,—nothing definitely showing administration by him as trustee subsequent to the date of the sale. The statement was not represented as a trustee's account nor supposed by plaintiffs or their attorneys to be such, nor did they suppose it would be considered such by the referee. It appertained to the relations between defendant and the B. A. Kipp

Company covering the period prior to October 1, 1909. Plaintiffs had no concern therewith, so waited for some disclosure of the transactions as trustee. They relied upon a report not being made without such a definite disclosure and opportunity to examine and contest it. The statement, viewed as a trustee disclosure, was grossly fraudulent, in that it omitted \$20,000, more or less, which should have been charged defendant as trustee and credited on the purchase price of the property in closing the litigation by judgment. The account, in the particular form, was exhibited to deceive plaintiffs, their attorneys, and the referee. The latter was deceived thereby. Without citing defendant to account as trustee, the receiver reported "that B. A. Kipp, as receiver in this action, has made and filed his report, dated July 16, 1910, which report is filed herewith and marked exhibit 6, and contains his accounts down to the 23d day of June, 1910, and there being no objection on the part of defendant to said report, the same is recommended for approval." Plaintiffs contested confirmation of such report upon the ground that there had not been any accounting as trustee. Defendant, however, by his counsel, fraudulently induced the circuit court to confirm the report, and thereafter prevented said plaintiffs from procuring any relief therefrom in the supreme court by representing that the circuit court could correct any error in such report upon the settlement of the account as receiver. The circuit court, in fact, confirmed the report, thinking that it did not include an accounting as trustee, and that the omission was without prejudice be-

cause the matter could be taken up later, as part of the accounting as receiver. Judgment, however, was rendered in form so as to cover the trustee period, although such period was in fact ignored by the court. The judgment was for the entire purchase price of the subject of the sale, undiminished by any receipts therefrom by defendant during the trust period.

Plaintiffs made an unsuccessful effort in the circuit court and also in the supreme court to have the judgment corrected, so as to give them the benefit, by a credit upon the purchase price of the property, of what defendant realized therefrom during the trustee period, but were prevented by the attitude of defendant's counsel, inducing the belief that the judgment would not preclude plaintiffs from obtaining redress from their alleged grievance at the accounting as receiver. Subsequent to the trustee period, defendant received from the property \$34,000, more or less, or more than the sum equitably due him.

Plaintiffs appealed from the judgment and it was affirmed without determining the amount due from defendant to them. Thereafter they petitioned the circuit court for an accounting during the trustee period and application of any sum chargeable to defendant upon the judgment. The court decided that there was no authority to change the judgment, which had become that of the supreme court, and suggested relief for the wrong complained of should be sought in an independent action.

Later the accounting by defendant as receiver was, in due course, taken up, but his attorney refused to go into his transactions during the trustee period. Thereupon it was stipulated, in open court, that the account covering the receivership period might be approved without prejudice to the right of plaintiffs to an accounting for the trustee period and to inquire into the correctness of the accounts upon the books of the company, or oth-

erwise, purporting to indicate the amount paid or unpaid upon the judgment. The circuit court directed an order to be drafted accordingly and that before entry it should be submitted to plaintiffs' attorneys. Nevertheless, an order was prepared for judicial approval without the saving clause suggested and the judge was fraudulently induced to sign it. As soon as plaintiffs' attorneys were informed thereof they called attention of the circuit court thereto, whereupon the judge directed the order to be vacated and one to be entered according to the decision. He died before that could be done.

Defendant fraudulently claims there is still due him on the judgment some \$17,000, "and fraudulently claims that he is not obliged to credit or apply upon said judgment the larger part, if not all, of said sums received and retained by him out of the assets and business of said B. A. Kipp Company" during the trustee period, "and fraudulently claims that said judgment," "together with said fraudulent order approving the account of said B. A. Kipp as receiver and discharging him, bars and prevents said plaintiffs from having any determination of the amount so received by him" during the trustee period. He has caused an execution to be issued on the judgment on that theory to enforce payment of the aforesaid sum, when, in fact, there is nothing equitably due him. Plaintiffs have no adequate legal remedy to redress such wrong. The judgment, as it stands, appears of record to be a lien on real estate owned by plaintiffs at the time of its entry and thus clouds the title thereto, to their prejudice.

On such facts plaintiffs asked for an accounting by defendant respecting his dealings with the property during the trustee period, to have the amount he received therefrom since he was succeeded as receiver applied on the judgment sought to be enforced, or any sum equitably so applicable, and for de-

fendant to be restrained from using such judgment to collect any sum in excess of the balance left after such accounting and application.

There was a demurrer, first, for want of jurisdiction of the defendant or of the subject of the action; second, because of another action pending between the parties covering the same subject-matter; third, for insufficiency. The demurrer was sustained, first, because the allegations of fraud were too general; second, for want of diligence in discovering the matters complained of and in bringing them to the attention of the court in the first action; third, for want of jurisdiction to restrain in a second action enforcement of the judgment in the first, on account of happenings subsequent to its entry.

Messrs. N. L. Baker and W. J. Zimmers, for appellants:

If the judgment is inequitable and unjust as rendered, and was induced by fraud or other circumstances in the proceedings leading up to its entry which will warrant equitable relief, that relief can be obtained only by a separate action.

Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Crowns v. Forest Land Co. 102 Wis. 97, 78 N. W. 433; Barber v. Rukeyser, 39 Wis. 590; Hiles v. Mosher, 44 Wis. 601; Coon v. Seymour, 71 Wis. 340, 37 N. W. 243; Nevil v. Clifford, 55 Wis. 161, 12 N. W. 419; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854; Balch v. Beach, 119 Wis. 77, 95 N. W. 132; Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537.

An issue determined in favor of the prevailing party solely by perjury amounts to such a fraud, where such perjury is as unconscionable as to secure a judgment secured against a party by keeping him away from court or by other corrupt means, and thereby preventing a fair trial upon the merits.

Marshall v. Holmes, 141 U. S. 589, 35

L. ed. 870, 12 Sup. Ct. Rep. 62; Tucker v. Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; Crowns v. Forest Land Co. 102 Wis. 97, 78 N. W. 433; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Johnson v. Huber, 106 Wis. 282, 82 N. W. 137; Balch v. Beach, 119 Wis. 77, 95 N. W. 132; Stowell v. Eldred, 26 Wis. 504.

Mr. Paul D. Durant, for respondent:

The accounting of the trustee must be had upon petition in the action out of which his appointment arose.

Remington v. Eastern R. Co. 109 Wis. 155, 84 N. W. 898, 85 N. W. 321; Endter v. Lennon, 46 Wis. 300, 50 Pac. 194; Platto v. Deuster, 22 Wis. 482; Orient Ins. Co. v. Sloan, 70 Wis. 611, 36 N. W. 388; Stein v. Benedict, 83 Wis. 603, 53 N. W. 891; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Jackson Mill. Co. v. Scott, 130 Wis. 267, 110 N. W. 184; Pleshek v. McDonell, 130 Wis. 445, 110 N. W. 269; Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447; Pickford v. Talbott, 225 U. S. 658, 56 L. ed. 1246, 32 Sup. Ct. Rep. 687.

An admittedly valid judgment of specific performance and for the payment of a fixed amount by the judgment debtors cannot be deprived of its enforcement through execution or other process, in an independent equitable action, upon the theory of its entire or partial payment, and the demand for an accounting on the part of the judgment plaintiff to the judgment debtor to determine the amount remaining unpaid.

Endter v. Lennon, 46 Wis. 300, 50 Pac. 194.

As analogous, see Remington v. Eastern R. Co. supra; Stein v. Benedict, 83 Wis. 610, 53 N. W. 891; Jackson Mill. Co. v. Scott, 130 Wis. 267, 110 N. W. 184; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Pleshek v. McDonell, 130 Wis. 446, 110 N. W. 269; Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447.

Fraud is merely alleged as a matter of conclusion, without alleging any acts or omissions warranting the pleader's conclusion. In this respect the allegations of the complaint are insufficient.

McDonald v. Sullivan, 135 Wis. 861, 116 N. W. 10; Riley v. Riley, 34 Wis. 372; Crowley v. Hicks, 98 Wis. 566, 74 N. W. 348; Herbst v. Land & Loan Co. 134 Wis. 502, 115 N. W. 119.

Marshall, J., delivered the opinion of the court:

Appellants' story, as related in the complaint, indicates that they have been the victims, to their loss in the sum of \$20,000 more or less, of a systematic course of deception, practised by respondent and his attorneys, of such subtle character as to impose upon the circuit and this court; securing and maintaining an unconscionable judgment.

The court below seems to have thought the complaint was barren of any statement warranting judicial relief from the judgment as originally inequitable, because of absence of specific allegations of fact respecting the acts constituting the alleged fraud, and because of absence of statements of fact showing, affirmatively, reasonable excuse for not discovering the fraud, if there were one, in time to have prevented respondent from prevailing, as he did, in the first action; and does not state any good ground for relief on account of circumstances occurring subsequent to the entry of judgment, since relief of that nature is only obtainable by proceedings in the court as well as the action where the judgment was rendered. Whether the complaint, in any event, states facts sufficient to warrant restraining respondent from enforcing his judgment, was not definitely passed upon below. That is probably the most important question in the case.

Whether the complaint sufficiently charges respondent with securing his judgment by fraud must be determined by those liberal rules of pleading which have been so many times proclaimed in recent years, and not by the technical rules which the Code makers purposed abolishing.

As has often been said, in the beginning, particularly in *Morse v. Gilman*, 16 Wis. 504, the design of the framers of the Code to abolish all old forms of action and substitute for use in all cases the civil action, with a complaint containing in simple, understandable language

the plaintiff's story, leaving it for the court to say, regardless of what relief the pleader supposed himself to be entitled to and regardless of the action by any particular name, whether such story calls for any form of judicial relief within the competency of the court to afford, looking at such story in all its parts, and in the whole, and taking all facts reasonably inferable from the specific allegations as well as those expressly stated,—was fully recognized and given its requisite vitality. But, later, for a time, that was somewhat lost sight of and the court came to test pleadings by something akin to the old rules. During that period expressions were used in legal opinions indicating that, under all circumstances, an allegation that an act was fraudulently done should be classed as a mere legal conclusion rather than as tendering an issue of fact. It must be appreciated that the Code, as regards the sufficiency of pleadings, has been substantially restored. Technical accuracy in statements of fact is not required. Facts need not, necessarily, be expressly alleged. No very narrow idea is to be indulged in as to what is a legal conclusion and what a matter of fact, or mixed law and fact. Whether the pleader had the right conception of his cause of action according to common-law classification is immaterial. Whether he had the right conception of the relief the facts pleaded entitled him to, or the right relief is covered by the prayer, are likewise immaterial. All reasonable doubts are to be resolved in favor of the pleader. All facts expressly stated and all reasonably inferable therefrom, giving to the language of the pleading the broadest meaning which it will reasonably bear, are to be regarded as sufficiently alleged to meet any challenge for insufficiency. If, viewing the pleading with that large measure of liberality, it discloses a situation warranting any kind of judicial relief, it contains a good cause of action therefor, though very different from that

Pleading—  
sufficiency—  
test.

which the pleader supposed himself entitled to.

In all that has been said in an endeavor to restore and intrench the Code beyond any possible danger of its not being permanently given its intended effect, the language of the court, spoken by Dixon, Ch. J., in *Morse v. Gilman*, supra, has not been improved upon. It has been quoted again and again and not too often. More and more it should be appreciated so as to prevent any possibility of a complaint being condemned by the ancient rules for testing it. Note the language of the early phrasing of the rule of the Code: "A complaint, to be overthrown by a demurrer or objection to evidence, must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their statement. Contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

That was broadened, if possible, by the illustrations given of its effect.

It is notable that *Morse v. Gilman*, supra, so dropped out of sight that it is found cited but once, and that shortly after it was decided, on the particular subject-matter, until *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869, which is the commencement of a series of some twenty-four citations, giving it the fullest practicable application. The following are but a few of the many illustrations: *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083; *State ex rel. Leiser v. Koch*, 138 Wis. 27, 34, 119 N. W. 839; *Emerson v. Nash*, 124 Wis. 369, 70 L.R.A. 326, 109 Am. St.

Rep. 944, 102 N. W. 921; *Bannen v. Kindling*, 142 Wis. 613, 617, 126 N. W. 5; *Hall v. Bell*, 143 Wis. 296, 299, 127 N. W. 967; *Bruheim v. Stratton*, 145 Wis. 271, 273, 129 N. W. 1092; *Schmidt v. Joint School Dist.* 146 Wis. 635, 639, 132 N. W. 583.

A few excerpts from the cases cited will emphasize the foregoing:

"The liberal rule, which to a very great extent promotes the administration of justice, doing away with the otherwise obstructive efficiency of technical, unmeritorious, and so unprejudicial defects, supplies in pleading all essential matters not expressly stated when, from the express statements, they may reasonably be supposed to exist and to have been intended by the pleader to be included in such statements.

. . . Reasonable doubts respecting the pleader's purpose as to matters which the adverse party is fairly entitled to have solved to enable him, with due consideration, to adopt a course of action in respect thereto, must be presented to the court, for the purpose of obtaining enlightenment, by motion to make more definite and certain, not by challenging the pleading for insufficiency. . . . The supreme test to be applied to a pleading as regards mere sufficiency is this: Will it reasonably admit of a construction which will sustain it, in the light of all facts alleged expressly or by reasonable inference, such inferable facts being regarded as alleged if their existence is reasonably suggested by the language used, and it being kept sufficiently prominent in applying such test that doubts are to be resolved in favor of the pleading rather than against it where that can fairly be done?" *Milwaukee Trust Co. v. Van Valkenburgh*, supra.

"If the facts stated, expressly and inferentially, upon any reasonable view, entitle respondent to any judicial relief in equity, . . . and regardless of mere indefiniteness of statement, it is sufficient on the challenge for insufficiency. . . . If this plain and valuable rule of

the Code were always kept in mind by members of the profession much useless expenditure of time of courts and counsel, to the detriment of public and private interest, would be avoided." *Bannen v. Kindling*, 142 Wis. 617, 126 N. W. 5.

"Matters of mixed law and fact, the ultimate of which is, in a broad sense, a fact, may be pleaded according to their legal effect. . . . Every fact necessary to entitle plaintiff to some judicial relief within the competency of the court to grant, which can reasonably be inferred from the language used, giving thereto, as a whole, the broadest meaning in favor of the pleading it will reasonably bear, must be considered as stated just as effectively as matters expressly and plainly alleged. In short, every reasonable intendment must be indulged in in favor of the pleading." *Schmidt v. Joint School Dist.* *supra*.

Thus it will be seen that the statements often met with in opinions

—allegation of  
fraud—  
sufficiency.

that an allegation that an act was fraudulently done does not tender an issue of fact must be reconciled with the broad principle of the Code, by restricting it so as not to mistake matter of mixed law and fact, which may be pleaded as fact, nor mere indefiniteness for insufficiency, nor as involving a mere legal conclusion where the charge of fraudulently acting is made under such circumstances as to, necessarily or reasonably, raise an inference as to the nature of the act rendering it fraudulent. *McDonald v. Sullivan*, 135 Wis. 361, 116 N. W. 10, cited to our attention and relied upon by counsel, comes far short of supporting the idea that the term "fraudulent" or "fraudulently" under all

—inference  
of facts.

circumstances involves a mere legal conclusion. There the court had under consideration a complaint depending upon a statutory remedy,—an act done with intent to defraud a prior or subsequent purchaser, under particular circumstances. It

was held that a mere charge that the act was fraudulently done did not satisfy the statute for there was nothing in connection with use of the term to suggest that the party charged had the specific intent of the statute.

In *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348, reliance was placed upon the text of *Bliss on Code Pleading*, § 211, *Cohn v. Goldman*, 76 N. Y. 286, and evident treatment of the term "fraudulently" under such circumstances as to render it a "meaningless epithet," not suggesting the existence of facts supporting it as a legal conclusion; moreover, not recognizing the very liberal rules which obtain under the Code. In the particular case, the term was referred to below as involving a "vague and unsatisfactory conclusion leaving it in uncertainty as to what his real purpose was." That is pregnant with the idea that had the statement been made so as to indicate with reasonable clearness what the purpose of the pleader was, it would not, necessarily, have been regarded as a pure legal conclusion; moreover, it was somewhat overlooked that mere "vagueness and uncertainty" as to the purpose does not necessarily involve insufficiency, but is an infirmity to be reached by motion to make more definite and certain. In *Riley v. Riley*, 34 Wis. 372, it was held that the charge of having "fraudulently taking advantage of the plaintiff's incapacity" and thus "procured the challenged act to be done," "falsely and fraudulently representing said writing to be a mere matter of form, or will and testament," was insufficient for want of precision and a statement of the means whereby the false representations were successful. That case went a great way,—farther probably than could be regarded as consistent with the now firmly established test for the sufficiency of pleadings. That seems plain when it is seen that the allegations were condemned for want of "precision and point in their averment." As

we have seen, "mere want of precision and point" in an averment does not go to sufficiency. Any mere indefiniteness and uncertainty may be reached by a motion to make more definite and certain. Now to require a definite, precise statement of the detail acts constituting the fraud would, in some cases, come pretty near to, if not more, require the pleading of evidence.

We must confess that there are expressions in opinions, particularly those of many years ago, tending to show that, in charging fraud, the specific acts relied upon as a basis for the charge should be definitely, expressly pleaded; but so far as they indicate an arbitrary universal rule, they must give way to the

-use of word  
"fraudulently." present state of the law as to liberality in construing pleadings and the competency to plead matter of mixed law and fact according to the legal effect, whenever from the nature of the charge, its context and the whole pleading, the underlying acts are, fairly or necessarily, inferable. That leaves the rule to stand so far as the substantial reason for it goes,—the right of the adverse party to know, reasonably, with what he is charged, and the competency of the court to pronounce the proper conclusion in case of the pleader's allegations being admitted, but shorn of the technical requirement of definiteness, which can readily be reached by a motion to make more definite and certain, or an examination under the statute to enable the adverse party to plead. The statutory right in the latter field affords a party such ample facilities for obtaining particulars that to adhere to the doctrine of technical accuracy and fulness of statement which has support in some textbooks and decisions of courts not working under as liberal system as ours, and perhaps in expressions in our own decisions, would afford ample opportunity to take advantage of a mere technical defect for the purpose of delay. Rarely does

a person tender another an issue in court on the subject of whether that other has wronged such person, without first demanding redress without action, and under such circumstances as to acquaint such other with the precise nature of the claim. Therefore when the ground of action is set forth in somewhat general language, the defendant cannot well avoid knowing with reasonable certainty with what he is charged, and courts should so administer remedies as to prevent needless delay in bringing the controversy to the point of judicial investigation.

Facing the foregoing, is there that fatal want of precision in the complaint found by the trial court? True, there is the word "fraudulent" and the word "fraudulently," used several times, but in connection with other language explanatory thereof and giving point thereto as matter of fact. "Said report and particularly the statement of liabilities of said company to said defendant Kipp," if understood as or intended to be any account of the acts and accounts of said B. A. Kipp as such trustee, or to determine in any manner the amount of such purchase price then unpaid, or the amount received by said defendant B. A. Kipp which should be applied and credited thereon, "was and is grossly false and fraudulent;" "it fails to take into account and properly credit the greater part of said sum of \$20,000 and more received by said defendant B. A. Kipp as aforesaid . . . and was offered in evidence, as plaintiffs are informed and believe, to deceive said referee and defraud said plaintiffs;" bristles, so to speak, with inferences of fact, and is accompanied by allegations to the effect that the fraudulent intent was accomplished to appellants' damage in the sum of \$20,000, more or less; and this: "Said defendant B. A. Kipp, by his attorney, fraudulently induced said referee to make and file as one of his findings a conclusion to the effect that the statement produced by

respondent before the referee contained his accounts during the trustee period, and that there being no objection thereto, it was recommended for approval. Then there is the allegation that the referee's report was fraudulently presented to the court, and it was fraudulently induced to confirm the same, in the face of appellants' protest that no accounting as trustee had occurred and demand for a reference, and, to complete the history, the statement that, after the return of the cause from this court, in proceedings to settle Mr. Kipp's account as receiver, it was agreed that an order should be entered saving whatever rights appellants had to impeach defendant's accounts on the books of the B. A. Kipp Company, purporting to indicate the amount due him, and without prejudice to an accounting by him for the trustee period; and that the order should contain proper provisions in that regard and be approved by appellants' counsel before being signed by the court, but that, nevertheless, his attorney fraudulently procured an order to be entered without any such provision, which later the circuit court determined should be vacated and a proper order entered, but he died before that could be accomplished.

The lower court dealt with the features of the complaint mentioned without giving effect to the circumstances under which the words in question were used. For illustration, quoting from the circuit judge's opinion: "Plaintiffs allege that the report of the referee was false and fraudulent; that the defendant fraudulently induced the referee to make and file certain findings; that defendant by his counsel fraudulently procured and caused to be entered a judgment and an order, and that the defendant wrongfully and fraudulently claims that a certain sum is due on the judgment." It is said that the particular words were used, all through, without specification of acts warranting the conclusion,

whereas, as it seems to us, they are used in connection with expressly or inferentially stated circumstances forming fair ground therefor. To illustrate: note the circumstances under which the final order was obtained. The allegation that the referee's report was false and fraudulent occurred in connection with allegations to the effect that respondent, by his attorney, when called upon by the referee to account, presented a financial statement of the company, which on its face did not, specifically, show that it included the result of his handling of the property during the trustee period, and which, in fact, omitted some \$20,000 received by him out of the property; that it was so offered to deceive the referee into the belief that it contained a full statement of his handling of the property as trustee and to thus deceive appellants, and that the referee was thereby deceived and induced to make the prejudicially untrue finding. The allegation as to the entry of the judgment being fraudulently procured occurs in connection with such a history of the transaction as to suggest, necessarily, that respondent, in the capacity of trustee, secured the entry of a judgment largely in excess of what it should have been, knowing that the court and referee had been deceived by his false and misleading statements into supposing that it contained a full disclosure of all his receipts as trustee, when, in fact, large sums, aggregating \$20,000, more or less, had been omitted. The whole complaint shows an evident purpose to relate the story, and does it pretty clearly, of respondent having been trustee for appellants of the Kipp Company property for a considerable period; that when they called upon him to disclose how he had administered the same, he presented a statement, not in the form of a trustee account, but that of a corporation financial statement, and of such ambiguous character that it might be taken, and for the purpose



of having it taken, as a trustee account, and that it was so taken to the knowledge of respondent, knowing that he had received some \$20,000 not accounted for therein. The charge of having fraudulently induced the referee to make the false report and induced the court to approve of it, by necessary inference includes the charge that respondent falsely and with intent to cheat appellants, falsely, expressly, or impliedly represented the financial statement produced before the referee to show all his transactions as trustee, and so represented the statement to the circuit court, or inferentially so represented, by failing to disclose its true character, when he knew of absence therefrom of any evidence of large sums of money with which he should be charged. The words "fraudulently induced the referee to make" the false finding and "fraudulently induced the circuit court to confirm" it, in connection with the whole story, means what we have indicated and could not well be taken to mean anything else. So all the facts which the circuit court supposed to be absent were present, by express or implied statement and permissible pleading of facts according to their legal effect.

The court below quoted the essentials of such a cause of action as appellants were supposed to have attempted to state from *Stowell v. Eldred*, 26 Wis. 504, without observing the limitations and explanations in subsequent decisions which will be hereafter referred to. It would be well to tie closely to the later cases than to rely on this broad language of the early case:

"Chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite

party unmixed with negligence or fault on his part."

Pointing to that rule the trial court found a fatal defect in the complaint, in that there was an absence of any statement of facts showing the requisite diligence to bring the matter complained of to the attention of the court, and to show that they could have discovered the fraud in time to have availed themselves of its existence in the first action. On this branch of the case it seems to have been overlooked that respondent occupied a fiduciary relation to appellants. They had a right to rely upon his performing his duty prior to and upon the hearing before the referee. He had no right to remain silent and challenge the proof, much less was he justified in placing a delusive statement before the referee and pretending, either expressly or impliedly, that it contained an exhibit of his transactions during the trustee period. When the fiduciary position of respondent is considered and that appellants had used due care to employ attorneys whom they had reasonable ground to suppose were competent to protect their interests, the complaint shows such reasonable excuse for not presenting the matter complained of before the referee that a court of equity should not refuse to open its doors to prevent the success of a wicked scheme to cheat because of neglect at this point.

It was respondent who should have been the moving party as regards the accounting. Appellants had a right to suppose that he would exhibit a true statement of his trustee transactions; that the referee would see that he did it, and that appellants' attorneys would keep an efficient oversight in respect to the matter. It may be that appellants' attorneys were too unsophisticated in the matter; even that they were negligent, or possibly incapable of coping with the particulars constituting the subtle deception said to have been practised by respondent; but where a party uses ordinary

care in the selection of attorneys to represent him in such matters, equity may relieve him from the consequences of their infirmity or negligence. *Wisconsin M. & F. Ins. Co. Bank v. Mann*, 100 Wis. 596, 76 N. W. 777. It would be a strange weakness in our system of equity jurisdiction if a court could not or would not lend its aid to prevent a party from being greatly wronged by reason of his attorneys, either through negligence or otherwise, being imposed upon by the adverse party. So there was no fatal laches up to the time the referee's report was filed in the circuit court.

The trial court seems further to have overlooked the fact that, according to the complaint, confirmation of the referee's report was opposed upon the ground that respondent's pretended disclosure of his transactions during the trustee period did not make such disclosure at all; that only a misleading, deceptive statement was made with intent to deceive the referee, and that, nevertheless, the report was confirmed and a re-reference refused because respondent's attorney persisted in urging upon the court the deceptive statement as containing a full disclosure of his trustee transactions, whereas his administration in that regard was wholly omitted, thereby keeping from the knowledge of the court the fact that he had received \$20,000, more or less, and converted the same to his own use. The whole history of the case shows that the trial court was wrong in holding that there was delay in discovering the facts in time to make them available in the first case. The trouble was, according to the complaint, that the deception indulged in before the referee was so persisted in that the court, from first to last, was so imposed upon that appellants, with all the aid their attorneys afforded, were unable to avoid having the fraud of respondent in suppressing the real facts prevail. This was not a case where

appellants failed to discover the fraud until after the first case was closed to them, but one where it was believed and alleged to exist and there was such industry exercised to bring the matter efficiently to the attention of the court as appellants were able to, relying upon their attorneys; but the latter, either through negligence or failure to comprehend the situation, failed to successfully cope with the deception of respondent.

So on this branch of the case the decision below was reached under a misconception of the effect of the history of the litigation detailed in the complaint. On the whole, giving the complaint the benefit of all reasonable inferences in appellants' favor, respondent designedly imposed upon the referee and the court until the first litigation was closed beyond opportunity for relief therein, to the impoverishment of appellants and the enrichment of himself to the extent of some \$20,000, more or less, received by him during the trustee period, which should have been applied upon the purchase price of the property before the final judgment was rendered; and, in addition, that he later received during the receivership, period, succeeding his receivership, large sums which should have been applied upon the judgment.

True, the last matter, standing alone, would not afford ground for an independent action; not because of any want of power of the court to so entertain the matter, but because, the practice having become so firmly settled that relief in such circumstances should be sought in the first action, that it is regarded as jurisdictional error to permit a second action therefor, either in the same or any other court. *Jackson Mill. Co. v. Scott*, 130 Wis. 267, 110 N. W. 184; *Pleshek v. McDonell*, 130 Wis. 446, 110 N. W. 269. That being a mere matter of practice which has been given such dignity as to be regarded as jurisdictional, in the

Attorney and client—relief from negligence of attorney.

Injunction—against enforcement of judgment.

sense of inexcusable use of judicial power, as distinguished from want of power, it does not go to the extent of rendering it improper to entertain such a matter where it is connected with events happening before the close of the first action, furnishing good ground for an independent action in equity to restrain plaintiff from enjoying the fruits of his unconscionable judgment. In such a situation the court, having properly taken jurisdiction to deal with the proper major subject, may deal with the other matters as germane thereto and entertain the entire subject of dispute as to whether plaintiff should be restrained from enforcing his judgment.

Equity—restraining enforcement of judgment—subsequent events.

There remains to be considered the question of whether a court of equity should exercise its jurisdiction in a case of this sort; one where it has once afforded the party complaining ample opportunity for redress and the time has gone by for any relief in the action instituted to that end, and where all the matters in controversy should have been forever set at rest.

There is no written law placing a limit upon the power of equity to remedy and redress wrongs, neither is there any want of power in that regard in the written law. It is the crowning merit of our system that, so far as power is concerned, it is as limitless as the capacity of man to wrong a fellow man. Courts may well proceed with great care in exercising their supreme authority outside of the field of ordinary judicial activity, but should never doubt or suggest want of power to deal with any situation where otherwise one person would be seriously injured by another in his person or property. The judicial arm of the people stands for its whole sovereign authority in that field, and so, in the very nature of things, must, in the final analysis, be limited only by the boundaries of justice and be taken

as infallible as regards what is just under all the circumstances of any particular situation. Thus the maxim, "There is no wrong, above infractions of mere moral obligations, without a judicial remedy," is vindicated, even in a situation where wrong from one viewpoint has prevailed. Sound judicial policy requires that litigation shall have a course to a final determination. The end sought is peace with justice; and when courts have given, and litigants have had, the benefit of judicial instrumentalities throughout such a course, the finality, whether right or wrong from a moral standpoint, should, in general, stand as an unimpeachable compact of peace between them and society. "Interest reipublicæ, ut sit finis litium." As also, "Nemo debet bis vexari pro una et eadem causa." Both maxims voice a policy firmly established in the law. Otherwise there would be no end to litigation, the mere mistakes, negligences, and falsehoods affecting the first result and persisting to the end of the course would still leave the aggrieved party free to attack such result in a second action, and again in a third action,—action after action,—making litigation over a single controversy and its incidents interminable. Obviously, that would be intolerable, and courts have wrought out, as matter of unwritten law, the principle that, except in special circumstances of limited character where litigation has run its full ordinary course, there is, as matter of sound and necessary public policy, as forceful as any written law could be, that presumed infallibility in the result which displaces the maxim, "Fraud vitiates everything," by estopping the party aggrieved from setting up fraud to avoid such result,—as it is said,—"closing the mouth on the one side and the ear on the other,"—creating a condition of lasting silence as to the matter closed by the judgment. Thus sometimes that may be right in law which is otherwise from a moral standpoint, since

there is no wrong in legal contemplation as to that upon which the law's instrumentalities have set the seal of right. "*Judicia sunt tanquam juris dicta, et pro veritate accipiuntur.*"

So in the further consideration of this case we must deal with the question of jurisdiction of the court to afford relief, but only in the sense of whether, by the mandate of the unwritten law, it should be exercised to grant relief under the circumstances disclosed. The distinction between that want of power which is substantive, so to speak,—excess of it would be usurpation and the result void regardless of the dignity of the particular tribunal,—and want of jurisdiction, which is a mere going beyond the boundaries which sound judicial policy has set for the exercise of power, but the result, nevertheless, in the finality, is as binding as any judicial determination can be and falls within the field of the quoted maxim. *Harri-gan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Cline v. Whitaker*, 144 Wis. 439, 140 Am. St. Rep. 1039, 129 N. W. 400; *Rice's Will*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778.

At an early day in the history of jurisprudence in this country, the court of highest dignity formulated a rule to mark the general limitations beyond which judicial remedies should not be afforded to question a final judgment after having passed beyond the reach of attention in the action where rendered. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362. True, there was no attempt to state precise limitations. That was impos-

Injunction—  
limits of power  
of court.

sible because every court would be free to make exceptions to fit the necessities of particular situations. The dominant principle was all the court sought to proclaim. That was stated in these words by Chief Justice Marshall: "Any fact

—against judg-  
ment—grounds.

which clearly proves it to be against conscience to execute a judgment, and of which the in-

jured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

In my judgment courts in general have kept pretty well within the principle so early laid down. It has been expanded somewhat here and there, in applying it to new situations, but the real gist of it, I think, has remained to this day substantially free from infractions. While bowing to the decision of the court in *Boring v. Ott*, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 866, I may be permitted to point to the discussion of this subject in my opinion in that case. I could not well add in writing for the court to what is there said as to the general limitations. Sometimes by circumscribing one's vision by the boundaries of a precedent and tying thereto for a solution of the controversy in hand because of similarity, or supposed similarity of facts, the real governing principle is lost sight of. By following that course as matter of practice, confusion is most certain to be created and the scope of judicial activity becomes so fenced about by precedents that jurisdiction is liable to turn thereon instead of on the legitimate final test. The crowning purpose of courts is to effect justice. Their jurisdiction must be likewise extensive and their paramount duty is to open their doors freely instead of reluctantly whenever, in an orderly way, appealed to, and the written law or sound public policy has not sealed them upon the theory that the public welfare at this point is of greater dignity than private right and requires it.

The sound public policy referred to must, necessarily, be somewhat elastic in order to be adaptable to special circumstances which may often present new conditions. There is the respect which must be given

—extent of  
relief.

to principle over precedent. So it is said: "There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found

—scope of rule. equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose." McGowan v. Paul, 141 Wis. 388, 396, 123 N. W. 256.

Recognizing the breadth of the judicial power as indicated, this court in *Stowell v. Eldred*, 26 Wis. 504, permitted an action to be maintained to prevent a party from enjoying the fruits of a judgment obtained by perjury. That, in my judgment, as maintained by me in *Boring v. Ott*, supra, was contrary to precedents, old and new, though probably not outside of a broad conception of the principle. The court, without referring to the initial case on the subject, decided by the Supreme Court of the United States, thus formulated the rule for this state: "Chancery will relieve against a judgment at law on the ground of its being contrary to equity, where the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part."

As a precedent, *Stowell v. Eldred* justified *Boring v. Ott*. Evidently the court did not intend to announce a new principle,—at most only to state, broadly, an old one showing that the case in hand fell within it, and that was affirmed in

*Boring v. Ott*. So it must be considered as settled in this state that fraud such as the commission of perjury in an action resulting in the wrongdoer obtaining a judgment constitutes a wrong which, if the party aggrieved acts seasonably and was without inexcusable negligence in the action, equity will remedy. In that the court declined to follow, strictly, the doctrine of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93. There, for the first time, the precise nature of the fraud which will render a judgment open to attack in an independent action in equity was thus stated: "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

That was approved in *Uecker v. Thiedt*, 133 Wis. 148, 113 N. W. 447, and *Scheer v. Ulrich*, 133 Wis. 311, 113 N. W. 661. But such approval, so far as inconsistent with *Boring v. Ott*, must yield thereto. So it must be considered that the broad rule as stated in *Stowell v. Eldred*, supra, is the law of this forum, leaving administration thereof sufficiently elastic to meet the necessities of such serious situations as require a remedy and sufficiently restrictive as not to invade the wise public policy to, as generally as practicable, terminate litigation as to a single controversy. The precedents in our own court go only to the extent of holding that a judgment secured by wilful perjury may, under some circumstances, be relieved against in equity. But that must not be considered as establishing an exclusive situation as to where fraud intrinsic, may be so dealt with. The real principle of the adjudications is that the power of equity to relieve against unconscionable judgments;

will not be strictly confined to such as are characterized by fraud extrinsic. Thus the rule of *Marine Ins. Co. v. Hodgson*, supra, is given a broad aspect, affording harmony with *Stowell v. Eldred*, supra, instead of following the restrictive exposition of the rule in *United States v. Throckmorton*, supra.

So the vital question to be determined in such a case as this is not, merely, whether the judgment was secured by fraud extrinsic, without inexcusable fault of the aggrieved party, but was it secured by fraud without such fault, and are the circumstances so serious that the doors of equity ought not to open to afford relief?

Thus the early rule is not so closely fenced about by technical lines but that wise administration can enable the court to redress serious wrongs of the nature of that here complained of. Doubtless whether the facts require judicial interference is largely matter of administration in a field where courts should exert their great power sparingly. In that respect, probably, fraud extrinsic would appeal successfully for such interference

where fraud intrinsic would not, but the mere nature of the fraud in that regard would not be an arbitrary test.

Can there be any fair doubt that the facts of this case appeal as strongly for a judicial remedy as one where a judgment is obtained by perjury? It is not a case where one may, by mere silence, permit a judgment to go in his favor which is unjust. In ordinary situations one may, legally if not morally, keep silent and profit by his adversary's ignorance. That is neither fraud intrinsic, as in case of perjury, nor fraud extrinsic, within the *Throckmorton* rule. But where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the im-

poverishment of the one to whom that duty is owing, there is a fraud of most serious nature, and, in a sense, both intrinsic and extrinsic. That view was taken of the early rule, and as a modification, if need be, of the *Throckmorton* exposition of it in *Maddox v. Apperson*, 14 Lea, 596. The court there said that if the term "extrinsic fraud," as distinguished from "intrinsic fraud," would bar relief where a judgment is obtained by suppressing evidence which the prevailing party is bound to disclose by reason of his relation to the adverse party, as in case of the existence of fiduciary relations, the court would not go that far.

Here the respondent, as before suggested, owed to appellants the active duty, independently of any litigation, to make a full disclosure of his transactions as trustee. That duty he owed, in a high degree, in the litigation, and also he owed the duty of making such disclosure to the court and to its referee. According to the complaint he not only failed in this respect, preventing thereby appellants from having the benefit thereof in the litigation, but palmed off on all parties a spurious deceptive paper as a disclosure, and thus secured the judgment complained of. If those facts can be established, they will make a case fairly within the *Throckmorton* rule and the broader rule in *Marine Ins. Co. v. Hodgson*. Chief Justice Marshall there guarded the doctrine proclaimed by prefacing with these words: "Without attempting to draw any precise line to which courts of equity will advance and which they cannot pass in restraining parties from availing themselves of judgments obtained at law, it may safely be said," etc., using the language before quoted. This court, in the *Stowell* Case, asserted that principle, vindicating the wisdom of the early declination to "draw any precise line to which

Trustee—power to secure personal advantage.

—failure to make disclosure—relief in equity.

equity will advance and which the court cannot pass" in cases of this sort, and again vindicated it in *Boring v. Ott*.

From the broad lines of the rule, as approved in the latter case, who can place any precise limitations upon it? As we have seen, the effort elsewhere to confine it, strictly, to matters "extrinsic," this court has deliberately refused to follow, preferring the liberty to do justice, found within the broad lines of its early declaration. However, there is little doubt but that, if it were followed, it would include the situation in hand because of the particular relations of respondent to appellants. In any event, this court would rather be compelled to retrace its steps than to advance in order to hold that the situation here is up against a bar which it either cannot or will not pass in order to afford appellants an opportunity to obtain redress, if they are able to satisfactorily establish what they claim to be the facts. Obviously, they will find, in the end, this litigation to be useless to them, unless

they can establish with more than mere reasonable certainty the facts upon which they rely,—prove them with that degree denominated "clear and satisfactory," which should be regarded with considerable emphasis in a case of this sort and up to the very border line, perhaps, of where no reasonable doubt remains.

The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

Timlin, J., concurring:

I concur in the decision reversing the order of the circuit court, which order sustained a demurrer to the complaint, and my concurrence rests upon the following grounds:

In *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418, this court affirmed a judgment of the circuit court which, among other things, provided for a reference and an accounting in this litigation. In the com-

plaint before us now it is sufficiently averred that the respondent, in making such account as a fiduciary, withheld and concealed evidence peculiarly within his knowledge relative to sums of money realized by him in the operation of the business and property purchased from him by Laun et al., and which he received while the litigation to enforce the contract was pending; that when this was brought to the attention of the circuit court upon the hearing of a motion after judgment in said cause it was shown to the circuit court that a further hearing in the cause and a further accounting would be necessary on account of such omitted items which would make a difference of about \$20,000 in favor of the appellants. The circuit court, relying upon arguments of respondent's counsel to that effect, held it had no power in that action to modify that portion of the decree confirming the referee's report, but suggested an independent action by Laun et al. against Kipp for relief. Counsel for the respective parties litigant then stipulated in open court that the account of Mr. Kipp as receiver (he having been appointed receiver ad interim) might be allowed and the receiver discharged without in any manner approving said account upon the point hereinbefore mentioned, and without prejudice to an accounting as to moneys received by said Kipp prior to his appointment as receiver, and directed that the order to be drawn should be submitted to counsel for Laun et al., and should contain a provision upon this subject satisfactory to them. The counsel for Kipp thereafter fraudulently and without submitting the same to the counsel for Laun et al. presented to the court and had signed an order not containing any such reservation, and upon this coming to the knowledge of the circuit judge he declared that such order should be vacated and a proper order drawn pursuant to the former stipulation and direction. But the

circuit judge died before this direction was carried into effect by proper judicial action.

Upon such facts, coupled with proper averments to entitle appellants to an accounting, the complaint states a good cause of action within the rule of United States v.

Throckmorton, 98 U. S. 61, 25 L. ed. 93; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Boring v. Ott, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N. W. 865; Uecker v. Thied, 133 Wis. 148, 113 N. W. 447; and Stowell v. Eldred, 26 Wis. 504,—either or all of them.

### ANNOTATION.

**Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment.**

As the court in the reported case (*LAUN v. KIPP*, ante, 655), says: "In ordinary situations one may, legally if not morally, keep silent and profit by his adversary's ignorance. That is neither fraud intrinsic, as in case of perjury, nor fraud extrinsic, within the Throckmorton rule (see citation of the Throckmorton Case in next paragraph). But where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of most serious nature, and, in a sense, both intrinsic and extrinsic." As a rule the courts, in the few cases that fall within the scope of the note on the facts, do not classify the cases in reference to extrinsic or intrinsic fraud, but merely hold that there is such fraud as will subject the judgment to attack in a separate proceeding brought for the purpose, and relief in some form is usually granted. They could base the conclusion upon either one of two theories; i. e., that the fraud is sufficiently extrinsic to bring the case within the rule stated in the Throckmorton Case (U. S.) *infra*, or that the fact that the guilty party is a fiduciary makes an exception to the rule. But, as noted already, most courts simply take a broad view and reach their conclusion without discussing the kind of fraud.

The case referred to in the quotation, *supra*, of United States v. Throckmorton (1878) 98 U. S. 61, 25

L. ed. 93 (see also Rose's Notes to this case), is not in point on the facts upon the question here considered. Nevertheless, the stamp of approval is there placed upon the doctrine that a court of equity will not give relief against a judgment on the ground that it was obtained by intrinsic as distinguished from extrinsic fraud. Whether the court intended to convey the impression that this is an absolute rule to be arbitrarily followed, or merely stated some general principles, as is so often done, within which the case fell, without stating all of the exceptions, etc., it is impossible to say. The courts in later decisions have seemed to consider it both ways, but the question is too broad for full discussion here. However that may be, courts of equity have always been willing to relieve in an independent suit against a judgment on the ground that a fraud upon the court was practised in its procurement to the detriment of the cestui que trust by the fiduciary's concealing or not disclosing material facts.

The fraudulent concealment or omission of facts, by a fiduciary, the revealing of which would have caused the entry of the judgment in favor of the cestui que trust, is fraud which will induce a court of equity, in an independent suit, to relieve against a judgment or order that is unjust to the cestui que trust. *Smith v. Smith* (1914) 210 Fed. 947, affirmed in (1915) 139 C. C. A. 465, 224 Fed. 1; *Sohler v. Sohler* (1902) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Campbell-Kawannanako v. Campbell* (1907)



152 Cal. 201, 92 Pac. 184; *Burnett v. Milnes* (1897) 148 Ind. 230, 46 N. E. 464; *Bowsman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092, rehearing denied in (1912) 62 Or. 444, 125 Pac. 270; *Schneider v. Sellers* (1900) 25 Tex. Civ. App. 226, 61 S. W. 541; the reported case (*LAUN v. KIPP*, ante, 655).

A suit in equity may be maintained against the executor of complainant's former guardian to recover full legal interest on the ward's funds for all the time it was in the guardian's possession, notwithstanding an order of court, made eighteen months after the guardian obtained possession of the fund, authorizing the guardian to use the fund at 3 per cent interest, and a settlement by the guardian with the ward after his majority, allowing interest according to the order of court, where the ward alleged and proved that the guardian, in applying for the order, did not disclose to the court the fact that, eighteen months before presenting the petition, he had used the ward's funds to pay his own personal debts, thus impliedly asserting that he had at that time the ward's funds in his possession intact, the ward being ignorant of the fraud at the time of the settlement. *Smith v. Smith* (Fed.) supra.

In *Sohler v. Sohler* (1902) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282, it was held that a decree of distribution by the probate court that made a distributee of one not entitled was obtained by extrinsic fraud, where those defrauded were pretermitted heirs and minor children of the executrix, who, being their natural guardian, did not disclose to the court their full rights, but falsely represented to the court in her petition that another son of hers was an heir and son of decedent, and, by conspiring with him, obtained the decree giving him the share to which he was not entitled. The court said: "The executrix of the estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and,

as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship, or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that, during all of this time, she was executrix of, and administered upon, the estate through which her children were to derive their property. Such being her position, it is charged that, in violation of this duty, and of the rights of her minor children, she connived with her adult son—not an heir to the estate of the deceased—to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here certainly is a charge of concealment upon the part of the guardian, when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at

issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her codefendant, it is asserted she did not do, and it is clear that her fraud in pushing, on behalf of Reuss, his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the hearing, or from being represented at all."

In *Campbell-Kawannanako v. Campbell* (1907) 152 Cal. 201, 92 Pac. 184, extrinsic fraud, such as would justify the court in granting relief in a separate proceeding in equity by declaring the property to be held in trust for those defrauded, was held to have been committed where the trustees, in a void trust attempted to be created by will, by concealing the facts from the probate court, had a sham sale of the property under a court order, and obtained a decree of distribution of the proceeds to themselves, thus withdrawing the property from administration and possession of nonresident heirs to whom it should have been distributed. The court said: "The fraud here alleged, however, was extrinsic or collateral, within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined, which is perhaps the most common instance of what is held to be extrinsic fraud. See *Bacon v. Bacon* (1907) 150 Cal. 477, 89 Pac. 317; *Sohler v. Sohler* (Cal.) *supra*; *Aldrich v. Barton* (1902) 188 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169. The extrinsic character of the fraud is even clearer here than in such a case. The complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed sole-

ly to give the appearance of legality and protection against attack to what was in fact nothing but the taking of plaintiffs' property without consideration and without any authority of law, and that they were carried through by means of false representations to and concealment from the court as to the real facts and purposes of the transaction. Such an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from whom the nature of the transaction was concealed and who were wholly in ignorance thereof and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the property for legal distribution (*Bergin v. Haight* (1893) 99 Cal. 52, 33 Pac. 760), and who was, moreover, as the natural guardian of two of the owners, under obligation to protect their rights (*Sohler v. Sohler* (1902) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282), clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief."

And in *Burnett v. Milnes* (1897) 148 Ind. 230, 46 N. E. 464, it was held that equity will, in a separate proceeding, set aside a judgment refusing to admit a will to probate where the judgment was obtained by the fraud of the father of complainants, who were minor children, such fraud consisting of the father's appearance as a contestant, with the attorney who wrote the will, after he had satisfied all of the claims of the devisees, except those of the complainants, and stating to their guardian ad litem that it was an agreed case, and that all of the parties were satisfied to have probate refused, thereby inducing the guardian ad litem to file only a formal answer and pay no more attention to the case in the interest of complainants.

And where a guardian ad litem permitted a fraudulent claim to be established against the estate in which the ward was interested, and, without con-

sulting the ward or his mother as to his interests, permitted the ward's private property to be sold and purchased by the fraudulent creditor under order of the probate court, later accepting a deed from the purchaser for a one-half interest therein, and allowed a judgment in ejectment to be entered against the ward, the judgment may be set aside as a cloud upon the ward's title. *Bowsman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092, rehearing denied in (1912) 62 Or. 444, 125 Pac. 270.

Where minor children of a decedent are in the care and custody of their mother and stepfather at the time a partition judgment of the decedent's estate is rendered, and the latter fraudulently conceal from the court the fact that certain property was the separate estate of the decedent, and not community property, and the purchasers of the property, which was sold as community property, have notice of the fraud, the children may maintain a suit in equity, directly attacking the judgments, having for its object the recovery of the land. *Schneider v. Sellers* (1900) 25 Tex. Civ. App. 226, 61 S. W. 541.

But a consent decree in the final settlement of a trustee's account, awarding \$750 to the trustee's attorney for professional services rendered both to the trustee as such and to the

cestui que trust before the trustee was appointed, the heir of the cestui que trust having appeared at the hearing and not only consented to the entry of the decree, but testified that the amount was just compensation, will not be set aside or disturbed by a court of equity in a separate proceeding brought for that purpose by the heir upon the ground that the attorney had falsely and fraudulently stated to complainant, in the presence of his attorney and of the trustee, that the cestui que trust owed him over \$1,000 for the services in question, and that he had never been paid for the same, and in this way induced the complainant to consent to the decree and give the testimony. *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534. It was here held that there was no fiduciary relation existing between the attorney and the complainant, especially in view of the fact that he was represented by his attorney, so that the case is not within the scope of the note, and the case is here stated merely to raise the query regarding the holding if the trustee had been the complainant. The attorney was relieved of the duty of rendering an itemized account of his claims by a compromise, and the compromise was induced by the alleged false and fraudulent statements. J. W. M.

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CHARLES C. MOORE et al., Interveners, Appts.,  
v.

F. L. DONAHOO et al.

*United States Court of Appeals, Ninth Circuit — September 14, 1914.*

(133 C. C. A. 171, 217 Fed. 177.)

**Receiver — priority of claim — operating expenses or mortgage — going concern.**

1. Expenses incurred prior to the appointment of a receiver for a railroad company cannot be given priority over the holders of mortgage bonds, although they were necessary to keep the road a going concern, if their payment by the receiver was not necessary to have that effect.

[See note on this question beginning on page 690.]

— necessity of application for.

2. The application of the trustee in a railroad mortgage for a receiver for the property is not necessary to enable the court to give priority to operating expenses over the mortgage lien.

— basis for priority.

3. The basis upon which the preference of operating expenses over mortgage bonds of an insolvent railroad rests is the implied understanding on the part of all parties that the debts are to be paid out of the current income before the mortgagee has any claim thereto.

[See 22 R. C. L. 1128.]

**Parties — action to enforce lien on railroad — who may maintain.**

4. One furnishing labor or supplies to keep a railroad subject to mortgage a going concern may institute a proceeding to enforce his right to be paid out of income in preference to the bondholders.

**Receiver — what claims entitled to preference.**

5. The maturity of the claim at the time of diversion of income is not necessary to entitle one furnishing labor and material to keep a railroad a going concern to priority mortgage bonds, where the claims are numerous and the accounts current, but the unit during which all claims are deemed to constitute a single group is the six months' preference period prior to appointment of the receiver.

[See 22 R. C. L. 1137.]

**On Petition for Rehearing.**

**Interest — on labor claims — transferee of railroad property.**

6. One to whom railroad property is transferred at receiver's sale upon condition that he pay labor claims existing against the property is liable for interest from the time of the transfer, rather than the time of proof and allowance of the claims.

**APPEAL** by interveners from a decree of the District Court of the United States for the Northern District of California (Van Fleet, District Judge) awarding preference to certain claimants in a suit for the appointment of a receiver of the defendant insolvent railroad company, and for an order directing him to pay the plaintiff and other creditors out of the current income. *Modified.*

The facts are stated in the opinion of the court.

Argued before Gilbert and Ross, Circuit Judges, and Dietrich, District Judge.

Messrs. Edward J. McCutchen, Gavin McNab, A. Crawford Greene, and McCutchen, Olney, & Willard for appellants.

Messrs. Goodfellow, Eells, & Orrick for certain claimants.

Messrs. Sullivan & Sullivan, T. J. Roche, and Goodfellow, Eells, & Orrick for certain labor claimants.

Messrs. Charles S. Cushing and William S. McKnight for Remington Typewriter Company.

Mr. Frank M. Hultman for August Johnson.

Mr. Maurice R. Carey for Standley et al.

Mr. Daniel H. Knox for Knox et al.

Messrs. A. F. Morrison, Peter F. Dunne, and W. I. Brobeck for defendant Trust Company.

Dietrich, District Judge, delivered the opinion of the court:

The appellants represent the interests of the mortgagee, and the

respondents are the unsecured creditors, of an insolvent railroad company. The general question involved is when and to what extent the claims of those who in the ordinary course of business furnish labor and supplies for the maintenance and operation of a railroad will, in the distribution of its assets by a court of equity, be preferred to bonds secured by a pre-existing mortgage.

The facts are presented in the form of an agreed statement, accompanied by the decree of the lower court, as provided by general equity rule 77 (115 C. C. A. xli., 198 Fed. xli.) It is thereby shown that the Ocean Shore Railway Company was the owner of two short lines of railroad near the city of San Francisco, California, and on November 1, 1905, it executed a trust deed to the Mercantile Trust Company of San Francisco to se-

cure the payment of an issue of bonds aggregating \$5,000,000, the deed covering all of its property, including future acquisitions and income. Substantially all of the bonds were sold and became the valid obligations of the mortgagor. No interest having been paid on account of the instalments falling due upon November 1, 1909, and May 1, 1910, the trustee, acting in pursuance of the authority conferred upon it by the provisions of the mortgage or trust deed, declared the entire principal due, and upon June 7, 1910, caused notice to be published of its intention to sell the property for the purpose of paying the indebtedness. The sale was originally set for September 1, 1910, but was postponed to October 1, 1910, and, under circumstances to be explained, was finally consummated on January 17, 1911.

In the meantime, on December 6, 1909, the Baldwin Locomotive Works, an unsecured creditor, filed a bill against the Railway Company as the sole defendant in the United States district court for the northern district of California, in behalf of itself and of other creditors. It was shown by the bill that the defendant was indebted upon unsecured claims aggregating approximately \$2,000,000, that it was insolvent, and that there was danger of its property becoming dissipated or impaired in value by the prosecution of numerous suits and the levy of attachments and executions. There was a prayer for the appointment of a receiver, and for an order directing him to pay the claims of plaintiff and others out of the net operation revenues of the property. Upon the same day the Railway Company appeared, and by answer admitted the allegations of the bill and joined in the prayer for a receiver. One F. S. Stratton was thereupon appointed receiver, who at once took possession of the property and continued to operate it until February 1, 1911. On May 21, 1910, by supplemental bill, the Mercantile Trust Company was

made a party defendant, together with numerous creditors who had intervened.

On July 22, 1910, upon the representation of the receiver that he could not operate the property without loss, the court entered an order directed against all parties to the suit, including the trustee, requiring them to show cause why a sale should not be made by the receiver. In response thereto, the Trust Company, appearing "specially," asked that the order to show cause be discharged, and also filed a cross bill setting forth its interest and praying that it be permitted to proceed with the sale without interference from the receiver. Hearings were had, and the court, having assumed jurisdiction to supervise and control the sale, entered an order authorizing the Trust Company to sell the property under certain prescribed conditions, one of which was that out of the proceeds a specified sum should be turned over to the receiver for the payment of the expenses of the receivership and for other purposes, and another that the sale and transfer should be made subject to the payment of certain operating and maintenance claims against the Railway Company, incurred before the appointment of the receiver, not exceeding in the aggregate \$100,000, provided the court should ultimately hold that they were entitled to priority of payment over the bonds. The claims so referred to were those which the respondents now hold, but the character and amount of which had not at that time been judicially ascertained.

The sale was made in compliance with the terms of this order and the appellants, who became the purchasers thereat, took the title subject to the conditions prescribed. It thus appears that the sale was made under the power of the trust deed, with the permission and subject to the conditions imposed by the court. In due time the trustee made return of its proceedings, and prayed for an order confirming the sale and

directing the receiver to join with it in the execution of proper instruments of conveyance. Such an order was made, and conveyances were executed accordingly. Thereupon the purchasers sought and procured permission to intervene.

The question whether or not the respondents' claims should be paid in preference to the bonds was referred to a master. The master found (and the correctness of the finding is not questioned) that the claims which accrued during the period of six months immediately preceding the appointment of the receiver—that is, from June 1, 1909, to December 6, 1909—on account of labor done and materials furnished in the ordinary course of business, for the normal maintenance and operation of the railroad, and which it was reasonable to expect would be paid out of the current operating income, aggregated \$48,571.42. It is agreed that the labor and supplies for which this indebtedness was incurred were in each instance necessary to the business of the Railway Company as a carrier of freight and passengers, and to the public service, and were necessary for the maintenance of the railroad, and to keep it a going concern. There was no current income on hand at the time the receiver was appointed, and the operation by the receiver was at a loss. Of the operating income accruing from June 1, 1909, to December 6, 1909, there was applied to the payment of expenses of construction and other obligations having no relation to the operation or maintenance of the road, the aggregate sum of \$30,000. There was no evidence as to the exact time when the diversion of any specific part of this sum was made.

The master held that all of the claims were preferential in character, but, adopting the "income" theory, limited the preference to the amount of the diverted income, and hence recommended a pro rata distribution of the \$30,000 to the several respondents. While confirming

the master's report in other respects, the court below took the view that, inasmuch as the indebtedness due the respondents was necessarily incurred in keeping the railroad a "going concern," the question of diversion was not controlling, and entered a decree adjudging the entire amount of \$48,571.42 to be a first lien upon the property, and required the purchasers to pay the same, together with interest. The appeal is from this decree.

Conceding that under certain circumstances and within certain limitations the claim of a general creditor of an insolvent railroad corporation may be preferred to a pre-existing mortgage lien, appellants contend that the decree should be reversed or modified for the following reasons:

(1) The preference of the respondents, if any they have, is limited to the amount of income diverted, namely, \$30,000.

(2) No one of the respondents is entitled to priority, because the trustee did not commence an action of foreclosure or secure the appointment of the receiver, or, as is claimed, submit itself to the operation of the rule that he who seeks equity must do equity.

(3) There is no proof that any current income was diverted during the six months' period after the indebtedness of any one of the respondents had become payable.

1. As already intimated, the general question involved in the first proposition is whether we shall give place to what is known as the "net income" theory, or to the "going concern" theory, as the basis for preferential allowances. Are claims, such as those of the respondents are conceded to be, for current supplies and services which are necessary to the maintenance of the property of a public service corporation, and to keep it in operation, to be paid out of the current income in preference to the bonds, upon the assumption that the lien of the mortgage attaches only to the residue of the in-

come remaining after the payment of the operating expenses, or may they displace the vested lien of the mortgage upon the corpus of the estate, because the claimants by their labor and supplies rendered necessary assistance in continuing the operation of the property, thus enabling the debtor to discharge its obligations to the public?

In the court below, as we have seen, the latter view prevailed. The point urged by the appellants is not that an incorrect application of the principle was made, but that the principle itself is inherently incorrect. The question has been the subject of frequent consideration in the Federal courts, but the decisions are in hopeless conflict. Different rules have prevailed in the several circuits, and in some instances there has been an apparent lack of uniformity in the same circuit. Entertaining, as we do, the opinion that the point is conclusively ruled by *Gregg v. Metropolitan Trust Co.* 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415, we do not deem it necessary to review or attempt to classify the numerous decisions cited in the briefs. This case was brought against the Columbus, Sandusky, & Hocking Railroad Company for foreclosure of two mortgages, and a receiver was appointed. Within the six months' period prior to the receivership, Gregg, in pursuance of the terms of a contract with the railroad company, furnished crossties for the replacing of ties decayed in the current operation of the road. A large proportion of the ties were on hand when the receiver was appointed, and used by him in maintaining the roadway. The circumstances indicated that payment would be made out of the current income. Furthermore, it was stipulated that the claim was for "necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition."

"The case stands," such is the language of Mr. Justice Holmes, speaking for the court, "as one in

which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can only be by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 219, 33 U. S. App. 491, 75 Fed. 54, 58, and perhaps in other cases. But we are of opinion, for reasons that need no further statement (*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 97, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950), that the general rule is the other way, and has been recognized as being the other way by this court."

If by this language any doubt were possible of the intention of the court to disapprove of the "going concern" theory, the dissenting opinion most clearly indicates that it was this precise question upon which there was a division.

It is pointed out by respondents that their labor and supplies "were necessary to the business" of the road, while in the *Gregg Case*, after referring to certain allowances sanctioned in *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140, the following language is used: "The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition."

Attention is also directed to that

part of the opinion where it is observed that "the payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts," and to the further statement that "we already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies, etc."

But plainly all of these expressions have reference to the principle underlying an exceptional class of preferences considered in the Miltenberger Case. In brief, this principle is that a receiver may sometimes be authorized to pay past debts and charge the same against the corpus of the funds, where failure to make such payment would result in injury to, or would make it difficult to carry on the business of, the estate. If, for illustration, upon the appointment of a receiver, he finds that the pay of the enginemen of the railroad is in arrears, and that they are unwilling to render further service unless their claims are paid, the receiver may very readily conclude, especially where other skilled men are unavailable, that payment is necessary to the business of the road, and disbursements so made may be held to constitute a prior lien, upon the theory that they are required for the preservation of the value of the estate. So in the case where there is only one available source of fuel supply, and the owner declines to furnish the receiver with fuel until past bills are paid, a similar course may be taken for like reasons.

"It is easy to see," said the court in the Miltenberger Case, "that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated in the interests both of the property and of the public, and the payment of limited amounts

due to other and connecting lines of road for materials, and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

In such cases the nature or character of the debts which the receiver is called upon to pay is comparatively unimportant; the controlling consideration is the present necessity of the receiver. If the exigency is such that he must pay past debts before he can procure indispensable future supplies, he must, in deference to his paramount duty to preserve the value of the estate, yield to the necessity, provided, of course, that the probable loss would exceed the required payments. It is to be noted that in the language above quoted from the Gregg Case a distinction is not drawn between supplies necessary for the *preservation* of the road, and supplies necessary to the *business* of the road; it is difficult to see how, upon principle, such a distinction could be made. The ground of the allowance, says the court, was not merely "that the supplies were necessary," but that "the payment (therefor) was necessary." The distinction is between the necessity of past supplies and the necessity of present payment therefor. Accordingly it was further said in the Gregg Case that "the payment of employees of the road is more certain to be necessary, in order to keep it running, than the payment of any other class of previously incurred debts."

Not that a different principle applies to labor claims, but that they



are more likely to fall within the principle. In any case it is a question of business necessity, and such necessity is more likely to arise in the case of skilled labor than in the case of general supplies, which, if they cannot be procured from one source, may be gotten from another.

In the case at bar the receiver recognized this rule of necessity in the payment of a limited number of claims for rentals, which are not here in controversy. But very clearly it was not made, and under the facts of the case it could not properly be made, the basis of the allowance of respondents' claims. So far as appears, the receiver never concluded that, as a matter of business policy, it was necessary to pay these claims, and no order was ever made directing or authorizing

Receiver—priority of claim—operating expenses or mortgage—going concern.

him to pay the same. There are no facts in the record from which it can be intelligently in-

ferred that any one of the claimants continued to perform labor for or to furnish supplies to the receiver upon the condition or assumption that his claim would be paid. Indeed, there is no evidence that any one of the respondents was furnishing supplies or performing labor at the time the receiver was appointed, or thereafter furnished any supplies or performed any labor.

2. In response to the second proposition the reply may be made that, while the receiver was not appointed upon the application of the trustee, it did seek the aid of the court. True, it was formally empowered to enforce its security by notice and sale; but, without a decree adjudicating the rights of the numerous claimants, apparently no one would have purchased the property at such sale. This it practically conceded in the course of the hearings, and accordingly it filed a cross bill, sought and procured judicial sanction for a sale, and upon its motion the sale was confirmed, and the receiver directed to join

with it in executing conveyances to the property.

But, aside from these considerations, we are unable to yield to the view that claims of the character of those here involved can be preferred only in cases where the trustee institutes a foreclosure suit and applies for the appointment of a receiver. The principle of preference rests upon a **necessity of more substantial application for.**

basis than the power of the courts to deny an application for the appointment of a receiver, in case the applicant is unwilling to submit to what the court may conceive to be equitable conditions. In the statement sometimes made that the court may, in the exercise of its discretion, deny relief to the mortgagee unless it is willing to recognize the equities of the unsecured creditor, there is clearly implied a pre-existing equity in the latter. As was pointed out in *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950, the discretion is not to be exercised arbitrarily, but with due regard to contractual rights. And surely no equity as against a mortgagee or in favor of a general creditor arises from the mere fact that the mortgagee may be under the necessity of invoking the aid of the courts to enforce his lien. The mortgagee's lien is such as by fair implication he has contracted for, and he cannot justly be required to barter a measure of his rights for a measure of the relief which it is the duty of the courts freely to accord to anyone standing in need thereof. So with the unsecured claimant: Such equity as he may have flows from the fact that, in the ordinary course of business, he has performed labor or furnished necessary supplies to the Railroad Company, with the reasonable expectation of being paid therefor from certain funds. His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the ap-

pointment of a receiver, or for other equitable relief, a circumstance wholly fortuitous, or, at least, one over which he exercises no control.

The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto. Reference to a few of the decisions of the Supreme Court will be sufficient to make this clear. In the leading case of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, the court, speaking through Mr. Justice Waite, said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do."

It is further said that "it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have

been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income; but because in a sense the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights."

It is also said that sometimes the court can require restoration of the diverted income from the corpus of the fund, the power so to do resting "upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors."

In *Burnham v. Bowen*, 111 U. S. 776, 780, 783, 28 L. ed. 596, 598, 599, 4 Sup. Ct. Rep. 675, 677, 679, it was said: "The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings." And again: "If current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

To the same effect is *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 673, 31 L. ed. 832, 837, 8 Sup. Ct. Rep. 1011.

In the more recent case of *Southern R. Co. v. Carnegie Steel Co.* 176 U. S. 257, 285, 44 L. ed. 458, 471, 20 Sup. Ct. Rep. 347, 358, Mr. Justice Harlan, speaking for the court, said that while each case must depend upon its own special facts it could be safely deduced as a conclusion from the former decisions of the court "that a railroad mort-

gagee, when accepting his security, impliedly agrees that the current debts of a railroad company, contracted in the ordinary course of its business, shall be paid out of the current receipts before he has any claim upon such income."

If, as is thus held, the current income constitutes a trust fund, and if the mortgagee, in taking his security, impliedly agrees that laborers and materialmen may first be paid out of this fund, before he has any claim thereto, and if one performs labor or supplies material in reliance upon this understanding, it follows as a matter of course that he has a right which a court of

Parties—action  
to enforce lien  
on railroad—  
who may main-  
tain.

equity may assist him to enforce, as well as to defend, and he may, if he

so desires, initiate a proceeding for that purpose.

3. Under the third head appellants contend that a railroad company is under no obligation to provide for future indebtedness by the accumulation of a surplus, and that therefore a general creditor cannot complain of diversions of income prior to the maturity of his claim. The materiality of the contention lies in the fact that the record fails to disclose the relation of the several claims in point of time to the diversions relied upon. It is to be admitted that a measure of support for the general proposition may be found in the following decisions: *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 26 C. C. A. 30, 47 U. S. App. 663, 80 Fed. 624; *Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 702; *For-dyce v. Omaha, K. C. & E. R. Co.* (C. C.) 145 Fed. 544, 555.

But here, as is the general rule, the courts must be understood as having spoken with reference to and in the light of the facts they had under consideration, and there is no very close analogy between some of the cases and the one at bar. In

the first one cited, it may be pointed out that there was but a single intervention, and that the intervenor sought to take advantage of diversions antedating the preferential period. While, as a matter of strict logic, these distinctions may not be controlling, still it is apparent that the court had no reason to consider, and probably did not consider, the practicability or propriety of applying the rule relied upon to a case like the present one, where the diversions are all within the preferential period, and where the task of marshaling the numerous claims with reference to diversions, and calculating the distributive share to which each is entitled, would be extremely difficult, if not impossible. In the *Central Trust Company Case* there were but three intervenors, and it is not clear that the diversion was within the preferential period. In each of the other cases there was but one intervention, and in at least one of them the diversion relied upon was prior to the six months' period. It is also to be noted that the cases are not in harmony touching the date when the diversion period commences to run; two of them adopting the maturity of the creditor's claim, and other two its creation.

The appellants insist upon the former standard; that is, that there can be no diversion as to any creditor until his claim becomes due. In that view, if we suppose that employees upon monthly salaries, payable upon the tenth day of each succeeding month, render services to a corporation during a given month in expectation that they will be paid out of the current income, which they help to create, and upon the first day of the following month such income is applied to the payment of claims for betterments, and thereupon the mortgagee commences a suit in foreclosure and procures the appointment of a receiver, it is clear that the employees are left remediless. Again, under such a rule, what relief is available for those who supply ma-

terials or perform labor during the month immediately preceding a receivership, in a case where the current revenues for that month are applied to the satisfaction of similar claims accruing during the preceding month, which have remained unpaid because of the diversion of the current revenues for that month of the discharge of interest on bonds? And, generally speaking, it would inevitably result that claims most recently accruing, and therefore most clearly entitled to protection, would least often be in a position to demand a restoration of diverted funds. It is doubtless true in actual practice that credit is extended for current supplies and for labor upon the assumption that there has been no improvident diversion of the current income in the immediate past, quite as often as upon the expectation that there will be no such diversion in the immediate future. Whatever standard

**Receiver—what claims entitled to preference.**

may be employed in the case of an isolated claim in relation to an isolated diversion, it is thought that, at least in cases where the claims are numerous and the accounts current, the rule contended for would not only be difficult of application, but inequitable as well, and that some period must be adopted as a unit, during which all claims are to be deemed to constitute a single group and have the same footing. We agree with the court below in adopting the preferential period as such unit, and in holding that presumptively the current revenues thereof are applicable to the current debts, and that in case of diversion restoration may be decreed for the common benefit of the entire group.

Accordingly, the cause will be remanded with directions to modify the decree by limiting its operation to the \$30,000 fund, to which is to be added interest at the rate of 7 per cent per annum from the date the property was transferred to the appellants. Costs to appellants.

A petition for rehearing having been filed, the following additional opinion was handed down on November 17, 1914:

The principal contention made in the petition for rehearing is that the appellants ought not to be compelled to pay interest from the date the property was transferred to them. The propriety of such a requirement appeared to us to be so obvious that discussion of the point was not thought to be necessary in our original opinion. We are not unmindful of the general rule that, where property of an insolvent debtor passes into the hands of a receiver or an assignee in insolvency, interest is not ordinarily allowed to claimants to cover the delay incident to the settlement of the estate; but this rule is not applicable here. The order of sale was made, and the appellants purchased the property, and the transfer thereof was made to them, upon the condition and upon their implied agreement that they were to pay the aggregate of respondents' claims, up to \$100,000, as a part of the purchase price. It is, therefore, not a question of penalizing them for the delay incident to the litigation, but rather a question whether or not they are to profit thereby. When they bought the property, in effect they agreed to pay, as the purchase price therefor, not only the amount which they had already paid, but also this \$30,000. They have had the use of the \$30,000, and the respondents, to whom it was presently due, have been deprived thereof. It is only fair and equitable that they should pay the value of such use.

**Interest—on labor claims—transferee of railroad property.**

Upon other points no new considerations are advanced. Accordingly the petition will be denied.

#### NOTE.

The question of preference of wage claims over lien creditors of a corpo-

ration, involved in the reported case (MOORE v. DONAHOO, ante, 675), is treated in annotation on page 690, post.

MOORE v. DONAHOO is of interest not only for the lucidity of its discussion of a question concerning which there is a diversity of judicial opinion, but also because of its negation of the

theory, which has had some vogue, that, even where there has been no diversion of current earnings prior to the receivership for the benefit of the mortgagees, the latter have received a benefit from the continuation of the business as a going concern for which they ought to pay.

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FLORIDA CONSTRUCTION & REALTY COMPANY et al., Appts.,

v.

P. E. POURNELL et al.

*Florida Supreme Court — October 31, 1913.*

(—Fla. —, 80 So. 54.)

**Receiver — priority of wages.**

Where judgment creditors procure the appointment of a receiver to operate an insolvent railroad for their protection and benefit, a court of equity may, on a proper showing, give to the wages of engineers and others engaged in operating the railroad during the receivership, or a short time theretofore, priority in payment over the judgment creditors from the corpus of the railroad property.

[See note on this question beginning on page 690.]

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Headnote by WHITFIELD, J.

APPEAL by plaintiffs from a decree of the Circuit Court for Duval County (Simmons, J.) in favor of interveners in a suit for the appointment of a receiver to operate the defendant insolvent railway. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. T. G. Crawford, for appellants:

There must be a showing of a diversion of earnings by the receiver for the benefit of the prior lien claimant, and that there has been no restoration of the diverted fund, before a claim will be given a preference out of the corpus of the property or a fund realized from its sale.

Gregg v. Metropolitan Trust Co. 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415; Chicago & A. R. Co. v. United States & M. Trust Co. 141 C. C. A. 64, 225 Fed. 940; Carbon Fuel Co. v. Chicago, C. & L. R. Co. 120 C. C. A. 460, 202 Fed. 172; Illinois Trust & Sav. Bank v. Doud, 52 L.R.A. 481, 44 C. C. A. 389, 105 Fed. 123; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co. 83 C. C. A. 403, 154 Fed. 629.

Mr. R. E. Stillman also for appellants.

Messrs. J. F. Harrell and C. D. Blackwell for appellees.

Whitfield, J., delivered the opinion of the court:

The "Florida Construction & Realty Company and Florida Railway, both corporations organized and existing under the laws of the state of Florida," brought a bill in equity "against Florida Railway Company, also a corporation organized and existing under the laws of the state of Florida," in which it is in effect alleged that the "defendant was and still is a public service corporation, duly organized and existing under the laws of the state of Florida, and carrying on, conducting, and operating a line of railroad;" that on June 13, 1913, the "Florida Construction & Realty

Company obtained a final judgment against said defendant in the circuit court of Duval county, Florida, which, together with interest up to that time, and costs, would and does amount to the sum of \$151,451.19; that said judgment was and is duly recorded in the public records of said Duval county, Florida;" that on the same day "one Frank Drew obtained a final judgment against said defendant Florida Railway Company in the circuit court of Duval county, Florida, which, together with interest up to that time, and costs, would and does amount to the sum of \$136,235.88; that said judgment was and is duly recorded in the public records of said Duval county, Florida;" that on July 12, 1915, "said Frank Drew did for value transfer and assign said judgment, and each and every his rights, claims, interests, and demands thereunder, to your orator Florida Railway, a corporation as aforesaid; that by reason of said assignment said complainant Florida Railway became and is the owner of said judgment, and all the rights, interests, claims, and demands thereunder;" that on November 11, 1913, "writs of execution were issued out of the circuit court of Duval county, Florida, upon both of said judgments; that said executions are now in the hands of the sheriff of said Duval county, Florida, and have not been satisfied, either in whole or in part; that said judgments, and each of them, have been duly recorded in the public records of said counties of Taylor, Lafayette, Suwannee, Hamilton, Columbia, Baker, Duval, and Nassau; that said judgments are liens on the aforesaid property of said defendant, and are prior in time and dignity to any other valid lien or encumbrance thereon, except as hereinafter set forth; that said defendant Florida Railway Company, although possessed of the aforesaid property, is insolvent, in that it is unable, in the due course of its business, to meet its debts and obligations as they mature; that

said defendant owes to the state of Florida a large amount of money for taxes claimed by the state of Florida to be past due and unpaid; that said taxes, as estimated by the state of Florida, amount to a sum upwards of \$12,000; that the duly constituted authorities of the state of Florida are threatening to sequester the property of said defendant for the payment of said amount, or so much thereof as may be legally and lawfully assessed against said defendant; that the only remedy at law afforded to your orators by the laws of the state of Florida is the sale of said property separately and severally in each of the aforesaid counties in which said property, or any part thereof, is situated; that said remedy is totally inadequate to protect the rights and interests of your orators, in that said property is not susceptible of division; that sales of said property by piecemeal would greatly, if not completely, destroy its value, to the great prejudice of your orators; that such sale is, in the case of railroad companies, prohibited by law; that said property of said defendant being indivisible, and no provision having been made by the laws of the state of Florida for the sale of said property as an entirety to satisfy your orators' lien, said judgments cannot therefore be satisfied for want of property of said defendant subject to levy and sale, and that a court of equity is the only forum authorized to afford to your orators the relief to which they are entitled; that the defendant does not own or possess any other property out of which the aforesaid judgments of your orators can be satisfied, other than such property as is necessarily used in the operation of said line of railroad already constructed and in course of construction." The prayer is "that a receiver be appointed to receive and take possession of all the property of said defendant, of whatever nature and kind, and that said receiver be authorized to operate said lines of railroad, and to do any and

all other things with reference thereto, as he may be directed from time to time by this court, and that your orators may have such other and further relief in the premises as equity may require and to the court shall seem meet."

A copy of the assignment of the Drew judgment was made an exhibit.

The defendant, by Frank Drew, its president, admitted the material allegations of the bill of complaint in an answer filed.

On July 13, 1915, the court ordered that

"The foregoing cause having come on to be heard upon the bill of complaint, and the answer of the defendant corporation admitting the material allegations of said bill, and said defendant, by its solicitor, having consented to the granting of the prayers of said bill, it is

"Ordered, adjudged, and decreed that Frank Drew be and he is hereby appointed to be receiver of said defendant corporation, to take charge of and operate the business and affairs of said corporation, under the direction of this court; and

"It is further ordered that said receiver shall have full power to collect the outstanding debts, claims, and property due and belonging to said defendant corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents to assist him, and to do such other things as may be necessary in carrying on, conducting, and operating the business of said defendant corporation; and

"It is further ordered that said defendant corporation shall forthwith deliver over to said receiver all and every part of the property, both real and personal, estate, effects, and business of said corporation, and all books, vouchers, accounts, and all papers touching the business of said corporation, or any part thereof; and

"It is further ordered that said receiver hereby appointed, before

entering upon his duties as such receiver, shall give a bond in the penal sum of \$25,000, conditioned for the faithful performance of his duties as such receiver, which said bond shall be approved by this court; and

"It is further ordered that this order appointing the said receiver shall not be effective until after the filing and approval of said bond."

Thereafter the said receiver gave bond as required by the foregoing order, and, having become duly qualified, entered upon the discharge of his duties.

On December 31, 1915, the court made the following order:

"This cause coming on to be heard upon application of T. F. West, attorney general of the state of Florida, and attorney for the intervenor herein, and it appearing that an order was made in said cause on the 16th day of November last, whereby the receiver of said railway company, its property and assets, was directed and required to pay over to the said William V. Knott, as comptroller of the state of Florida, within thirty days thereafter, the taxes due by the said Florida Railway Company to the state of Florida—that is to say, the sum of \$12,922.35—or that, upon the failure to make such payment at the time required, the said receiver should show cause to this court why the said taxes should not be paid, and it appearing further by affidavits filed herein that due notice was given to said receiver of said order, and that said taxes have not been paid, and the said receiver having filed his objections, and counsel for the intervenor and the receiver having argued said objections, it is, upon consideration thereof,

"Ordered and decreed that the said receiver, Frank Drew, shall from any funds in his hands as receiver of said railway company forthwith pay the amount of said taxes, that is to say, the sum of \$12,922.35, to the said William V. Knott, as comptroller of the state of Florida, and, if the said receiver has

no funds of the said railway company in his hands out of which to pay said taxes, he is hereby directed and required to forthwith sell to the highest and best bidder for cash therefor, before the courthouse door in the city of Jacksonville, Duval county, Florida, so much and such part of the property of said railway company held by him as receiver of said railway company as may be necessary and proper to realize an amount sufficient to pay said taxes; that said sale shall be made after the giving of notice of said sale by said receiver by publication for four consecutive weeks in a newspaper published in each county wherein the property to be sold is located, said notice giving the time and place and terms of said sale, and describing the property or so much thereof to be sold as shall be sufficient to satisfy the said sum due for taxes, and said sale to be made between the hours of 11 and 2 o'clock on the first Monday in February, 1916. It is further ordered that, immediately after the sale, the said receiver do report to this court in writing his acts and doings under this order for confirmation and further instructions, before transferring the title or the delivery of any property sold by him, and before paying over any money derived from said sale for taxes to the said comptroller."

This order was affirmed by the supreme court. *Drew v. Florida Constr. & Realty Co.* 72 Fla. 588, 72 So. 1025.

By permission of the court, actions were brought and judgments obtained in 1916 by Pournell and four others, appellees here against the receiver, for services rendered "to the receiver" of the defendant railroad company in the operation of its railroad as conductors, engineer, and foreman respectively.

On October 2, 1916, the receiver reported a sale of the railroad property for \$35,000. This sale was confirmed.

On December 2, 1916, Pournell

and four others, appellees here, filed a petition in the cause, asking that their judgments, obtained for services rendered to the receiver of the Florida Railway Company as conductors, engineer, and foreman, be paid from the balance of the funds received from "sale of the railroad after payment of taxes." On December 16, 1916, the Florida Railway Company moved for a discharge of the receiver. On the same day the receiver moved to strike the petition of the interveners, appellees here, and also answered the petition of the appellees, averring "that the claims of said petitioners, and each of them, are in part for services performed before the appointment of this respondent as receiver as aforesaid, and in part for services performed subsequent to the appointment of this respondent as receiver as aforesaid," and "admits that he has refused to pay the said petitioners the amounts claimed by them, for the reason that the judgments obtained by said petitioners do not constitute any preferred lien upon any of the property of said Florida Railway Company, but are simply money judgments, and as such inferior to other judgments and liens amounting in the aggregate to upwards of \$2,000,000."

The interveners moved to strike the portion of the answer averring "that the claims of said petitioners, and each of them, are in part for services performed before the appointment of this respondent as receiver, as aforesaid, and in part for services performed subsequent to the appointment of this respondent as receiver as aforesaid."

On December 30, 1916, the court decreed as follows:

"This cause coming on to be heard upon motion of respondent to strike the petition herein, and upon motion of the petitioners to strike a part of the answer of the respondent, and for an order that the receiver pay the several judgments of petitioners mentioned in said petition, and upon the motion of



Florida Railway Company for the discharge of the receiver,

"It is therefore ordered, adjudged, and decreed that the motion to strike the petition be and is denied. It is further ordered that the motion of petitioners to strike a part of the answer of the respondent be and is granted; and it is further ordered that the respondent, Frank Drew, as receiver, do pay to the petitioners, and each of them, the amounts of the said judgments, the court finding that said judgments are entitled to a preference in payment, viz.: To G. K. Lowery, \$954.67; to W. L. Lowery, \$503.79; to P. E. Pournell, \$685.74; to J. J. Kicklighter, \$119; to William Kirby, \$392.95—together with court costs, if any remain, which are not included in said judgments.

"It is further ordered that the motion of Florida Railway Company for the dismissal of the receiver be denied, but without prejudice to renew said motion whenever the said receiver shall have complied with this order."

This appeal was taken from the decree of December 30, 1916.

Sections 1640 and 1641, General Statutes of Florida 1906, Florida Compiled Laws 1914, provide that:

"1640. Upon any judgment against any corporation, a plaintiff may sue out a fieri facias, and the writ of fieri facias may be levied as well on the current money as on the goods and chattels, lands and tenements of said corporation.

"1641. If such writ cannot be satisfied in whole or in part, for want of property of the defendant subject to levy and sale out of which to satisfy the same, upon petition of the judgment creditor or of his agent or attorney, the circuit court sitting in chancery within whose circuit such corporation may have been doing business, or in which any of its effects are to be found, may by order sequester the property, things in action, goods and chattels, of such corporation for the purpose of enforcing such judgment, and may appoint a receiver

5 A.L.R.—44.

for the same, and the receiver so appointed shall be subject to the rules prescribed by law for receivers of the property of other judgment debtors. His power shall extend throughout the state."

The main contention here is that claims of the interveners for services rendered in operating the insolvent railroad should not have preference over the prior judgment creditors in the proceeds from the sale of the property after the payment of taxes.

It appears that the services rendered by the interveners were necessary to the business of the insolvent railway company, and that such services were rendered during the receivership, or perhaps a small part thereof within a short time prior thereto, when the insolvent condition of the defendant company existed, as shown in the proceedings taken by the judgment creditors, and that the receiver was asked for and appointed to operate the railroad for the protection and benefit of the prior

judgment creditors Receiver—  
priority of  
wages. and at their in-

stance. Under these circumstances an equitable preference existed in favor of the interveners. See *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Gregg v. Metropolitan Trust Co.* 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415; *United States & M. Trust Co. v. Beaty*, 156 C. C. A. 242, 243 Fed. 544; *United States & M. Trust Co. v. Beaty*, 153 C. C. A. 396, 240 Fed. 592; *Moore v. Donahoo*, 133 C. C. A. 171, ante, 675, 217 Fed. 177, 2 L.R.A. (N.S.) note, p. 1013; *Scott v. Queen Anne's R. Co.* 89 C. C. A. 536, 162 Fed. 828; *Knickerbocker Trust Co. v. Green Bay Phosphate Co.* 62 Fla. 519, 56 So. 699; *Citizens Trust Co. v. National Equipment & Supply Co.* 178 Ind. 167, 41 L.R.A. (N.S.) 695, 98 N. E. 865.

Affirmed.

Browne, Ch. J., and Taylor, Ellis, and West, JJ., concur.

## ANNOTATION.

### Preference of wages over lien creditors of corporation in hands of receiver, in absence of statutory provision therefor.

- I. Preliminary statement, 690.
- II. Wages earned prior to appointment of receiver:
  - a. As a charge on income, 690.
  - b. As a charge on corpus, 700.
  - c. Right to preference as affected by time of accrual of claim, 706.

#### *I. Preliminary statement.*

Nothing more is aimed at by this annotation than a collection of decisions involving the point stated in its title. Inasmuch as these decisions are the result of the application of general principles of broad operation, concerning the scope of which there is some diversity of opinion, no generalization based upon the cases herein reviewed may safely be made. The collection of cases is confined to those in which the preference was sought for wage claims as such, or for receiver's certificates issued for the purpose of discharging wage claims, and does not extend to cases involving the question of the priority of "operating expenses" as such, though such expenses may have been incurred, in part, in the employment of labor, nor to cases in which the claim was that of an independent contractor for labor and materials furnished.

#### *II. Wages earned prior to appointment of receiver.*

##### *a. As a charge on income.*

In determining the relative rights of creditors to a fund in the hands of a receiver, the primary principle is that the rights of lien creditors are paramount to all subsequent charges, and if displaced at all it must be by a clearly superior equity.

#### *The decisions analyzed.*

In the case of wage claims, there have been a number of different theories propounded upon which such an equity may be based. One is that, as upon default the mortgagee may proceed forthwith to have a receiver appointed, he is, where he fails to do

#### *II.—continued.*

- d. Right to preference as affected by time of diversion of income, 707.
- e. Rights of assignees, 708.
- III. Wages earned during receivership:
  - a. As a charge on income, 709.
  - b. As a charge on corpus, 710.

so, to be considered as having constituted the mortgagor his agent in respect to the continued operation of the mortgaged property. This, of course, is applicable only in the case of property devoted to some form of public service, the continued operation of which is within the contemplation of the parties.

It has been adopted in at least one instance falling within the scope of this note (*Duncan v. Chesapeake & O. R. Co.* (1876; Va. C. C.) 9 Am. R. Rep. 386, set forth *infra*; and see also *Dow v. Memphis & L. R. R. Co.* (1884) 20 Fed. 260), but is now generally regarded as untenable (see *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471; *Skiddy v. Atlantic, M. & O. R. Co.* (1878) 3 Hughes, 320, Fed. Cas. No. 12,922; *Coe v. New Jersey Midland R. Co.* (1879) 31 N. J. Eq. 105,—as set forth *infra*).

Another theory, which appears only in *Finance Co. v. Charleston, C. & C. R. Co.* (1892) 49 Fed. 693, is that the right to a preference "is not a right vested in the employees, or an equity administered in their favor. It is a personal protection given to them by the court *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food."

The generally accepted theory upon which wages earned prior to the appointment of a receiver are held to be a first charge upon the net earnings during the receivership is that, as where property employed in a business serving the public is mortgaged, the continued operation of the business is contemplated by the parties, the mortgagee has a right to look only to the net earnings, and therefore that

his right in equity to current earnings is inferior to that of wage claimants; and accordingly that the courts should not permit the mortgagee to impound the income except upon condition that he allow the same application to be made of the income as would have been made had not the receiver been appointed. See *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339; *Union Trust Co. v. Souther* (1883) 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295; *Turner v. Indianapolis, B. & W. R. Co.* (1878) 8 Biss. 315, Fed. Cas. No. 14,258; *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* (1892) 53 Fed. 182; *McIlhenny v. Binz* (1890) 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655,—all of which are set forth *infra*.

Notwithstanding some intimations in the cases to the contrary, which seem to be attributable to a confusion between the right of wage claimants to a preference out of current earnings and their right to a preference out of the corpus, it is not necessary to a preference out of earnings that there should have been a diversion of current income for the benefit of the mortgagee. See *Union Trust Co. v. Souther* (1883) 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295.

It is immaterial that a portion of the preferred claim was for labor performed before plaintiff's mortgage was executed. *Central Trust Co. v. Utah C. R. Co.* (1897) 16 Utah, 12, 50 Pac. 813.

It has been held that a company engaged in the mining and manufacturing of iron does not come within the equity principles that give the employees of a railroad corporation a prior lien on its current earnings for the payment of their wages, in that such a corporation, unlike a railroad company, is not necessarily to be treated as a "going concern." *Seventh Nat. Bank v. Shenandoah Iron Co.* (1887) 35 Fed. 436.

The right of persons furnishing labor necessary to the operation of a railroad, to preference over a prior mortgage debt, is not limited to cases in which the mortgagee was the moving party in having the receiver ap-

pointed, the real basis upon which the preference rests being the implied understanding on the part of all parties that such debts are to be paid out of current income before the mortgagee has any claim thereto. *MOORE v. DONAHOO* (reported herewith) ante, 675.

It is not essential that the order for the payment for preferential debts should be made at the time and as a condition of appointing a receiver. *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339; *Atkins v. Petersburg R. Co.* (1879) 3 Hughes, 307, Fed. Cas. No. 604; *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471; *Finance Co. v. Charleston, C. & C. R. Co.* (1894) 10 C. C. A. 323, 8 U. S. App. 547, 62 Fed. 205. The better practice is to do so but if such an order is not then made, it may be made afterward. *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* (1892) 53 Fed. 182.

Another and more restricted form of this theory is that, as in the nature of the business of railroads and other public service corporations some time must elapse between the rendition of service by the corporation and the receipt of compensation therefor, the labor of its employees during the period immediately preceding the receivership is a factor of the receipts during the receivership, and hence is, in equity, entitled to a preference therefrom. See *Texas Co. v. International & G. N. R. Co.* (1916) 150 C. C. A. 571, 237 Fed. 921, set forth *infra*. Something of the same idea may be found in *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471, *infra*.

Wages earned prior to the appointment of a receiver have likewise been held to be a first charge upon net earnings during the receivership, upon grounds which would also entitle them to preference out of the corpus, namely, that there has been, prior to the receivership, a diversion of the current earnings out of which such wages should have been paid (see *Williamson v. Washington City, V. M. & G. S. R. Co.* (1881) 33 Gratt. (Va.) 628, *infra*), or that payment was necessary in order to retain the services of employees needed by the receiver (see *Skiddy v. Atlantic, M. & O. R. Co.* (1878) 3

Hughes, 320, Fed. Cas. No. 12,922), or that the mortgagees have received a benefit from the continuation of the business as a "going concern" for which they are bound in equity to pay (see *Street v. Maryland C. R. Co.* (1893) 59 Fed. 25; *Atkins v. Petersburg R. Co.* (1879) 3 Hughes, 307, Fed. Cas. No. 604; *Douglass v. Cline* (1877) 12 Bush. (Ky.) 608,—set forth *infra*).

**The decisions stated in detail.**

In *Duncan v. Chesapeake & O. R. Co.* (1876; Va. C. C.) 9 Am. R. Rep. 386, it was held that the bondholders of a railroad who have allowed the railroad company to continue in operation after a default render such company their agent in contracting obligations necessary to preserve and operate the property; and therefore that the employees are entitled to a prior claim as against the mortgagees out of the earnings of the trust property.

In *Coe v. New Jersey Midland R. Co.* (1879) 31 N. J. Eq. 105, it was held that the fact that wages earned prior to the appointment of the receiver in an action to foreclose a mortgage on the property of a railroad company were earned after the interest upon such mortgage was in default and the trustee therein was entitled, under the provisions of the mortgage by reason of such default, to take and hold possession of the mortgaged franchises and property and apply the income in the first place to the payment of the expenses of operating the road, and at a time when the mortgagee and bondholders were aware of the insolvency of the company, while the employees were not, did not constitute a sufficient equitable ground for charging such wage claims upon the net income of the property in the hands of the receiver. The court said: "The claim made on the ground of knowledge on the part of the mortgagees and their cestui que trust of the default in payment of interest, and the power of the former to take possession under the mortgage, and the ignorance of the employees of the existence of the default, is not sustainable. The mortgagees owed to the employees of the mortgagor no duty under the circumstances. They were at liberty to

refrain from taking possession if and as they saw fit, and by so doing they incurred no liability to the employees of the mortgagor to indemnify them on the contracts, express or implied, of the latter with them for the payment of their wages. The mortgages were on record, and the record was notice to all. It surely would not be claimed that the holder of a mortgage past due upon a farm is liable, merely because he is mortgagee, for the wages of the hands employed by the mortgagor in working the farm after default; nor that the holder of a mortgage upon a factory is, merely because he is mortgagee, liable for the wages of the workmen who may be employed by the mortgagor in operating the works after default, although it may have been of the greatest importance to the mortgagee's security that the farm, in the one case, should not go untilled, or the factory, in the other, remain idle. The doctrine of salvage is an admiralty doctrine, and has not been adopted by this court."

In *Dow v. Memphis & L. R. R. Co.* (1884) 20 Fed. 260, it was held that, where a mortgagee delayed for a year after default in applying for a receiver, wage claims should be given a priority of payment out of the net income of the road in the hands of a receiver. The court said: "It is no answer to say the company used its earnings for other purposes. The bondholders knew such liabilities must be incurred in running the road. They had it in their power to take possession of the road and secure its earnings to pay such liabilities. The class of persons protected by this order could not do anything to protect themselves or compel a different application of the earnings, if there was any, is not, therefore, to prejudice the class of creditors named. The right to require the payment of such debts does not depend on whether current earnings have been used to pay the mortgage debt."

In *Finance Co. v. Charleston, C. & C. R. Co.* (1892) 49 Fed. 693, the court said: "As I understand the current of cases which began with *Fosdick v.*

Schall, the rule is this: When holders of railroad bonds, secured by mortgage, come into a court of equity, and ask not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a condition precedent to granting this last request, can impose terms in reference to the payment from the income during the receivership, of such outstanding claims as address themselves peculiarly to the protection of the court. Ordinarily, a mortgagor is entitled to the possession of his property until the execution of a decree for foreclosure. When the mortgagor is a railroad company, the employer of many persons on weekly wages, both the employer and employed can enter into engagements, relying upon this normal condition. If, therefore, the court, at the instance of mortgage creditors, interrupts the possession of the railroad company, and suddenly removes the employer from control of current earnings, it may well see to it that the employed are not put at a disadvantage, or made to suffer from this unexpected change. Without considering liens or equities, acting only in its discretion, it imposes upon the suitors, as the condition of granting their request, that such employees be paid not only accruing wages, but such as have accrued within a reasonable period. This is not a right vested in the employees, or an equity administered in their favor. It is a personal protection given to them by the court *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food."

And upon appeal in the foregoing case, in (1894) 10 C. C. A. 323, 8 U. S. App. 547, 62 Fed. 205, the court said: "It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid

debts for operating expenses, accrued within ninety days, and of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, in view of the interests both of the property and of the public, that the property may be preserved and disposed of as a going concern, and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims."

The right of claims for labor performed in operating a railroad prior to the appointment of a receiver, to preference out of the net income of the receivership, is established by the leading case of *Fosdick v. Schall* (1878) 99 U. S. 239, 25 L. ed. 339, in which the court said: "We have no doubt that, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and effect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise

be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current-debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may, in terms, give a lien upon the profits and income until possession of the mortgaged premises is actually taken or something equiva-

lent done, the whole earnings belong to the company, and are subject to its control. *Galveston, H. & H. R. Co. v. Cowdrey* (1871) 11 Wall. (U. S.) 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleg. Co.* (1876) 91 U. S. 603, 23 L. ed. 405; *American Bridge Co. v. Heidelberg* (1877) 94 U. S. 798, 24 L. ed. 144. The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mold his order that, while favoring one, injustice is not done to another."

In *Union Trust Co. v. Souther* (1883) 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295, it was held that, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable; and that the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses. The court said: "There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and, as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, that debts incurred

by the company in thus protecting the security should be paid from the income of the receivership, if, in consequence of an increase of revenue, it could be done."

In *Turner v. Indianapolis, B. & W. R. Co.* (1878) 8 Biss. 315, Fed. Cas. No. 14,258, it was held that the court may, as a condition of appointing or continuing a receiver, make it a condition that back wages due employees shall be first paid out of net earnings.

In *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* (1892) 53 Fed. 182, it is said: "Railroads and railroad mortgages are of modern origin. The courts at first failed to distinguish between a mortgage on a railroad and a mortgage on a house and lot, and receivers were appointed without making any provision to pay even the current wages of the employees of the company, or to pay for the most essential supplies, however recently furnished. Experience and observation demonstrated the inequity of this mode of proceeding. Courts of equity were compelled to inquire into the nature of railroad property and railroad mortgages. It was perceived that, as a security for a debt, there was much more analogy between a railroad and a ship than there was between a railroad and a house and lot. It was perceived that railroads performed on land the same offices that ships did on the sea. They are both great and indispensable instruments of commerce. Their chief difference as such instruments is the chemical composition of the elements upon which they are operated. One moves in the water, and the other on iron rails. It is said of ships that they are made to plow the seas, and not to rot at the wharves, and railroads are built to be actually operated in carrying the commerce of the country, and not to rust out. Unless it is kept in operation, a railroad does not fulfil the purpose of its creation, and is comparatively valueless as a mortgage security; but, like a ship, it cannot be operated and made valuable as an instrument of commerce, or for any other purpose, without incurring daily expenses for work, supplies, and ma-

terials. These debts are never paid at the time they are contracted. That is impossible, from the nature of the business. In the case of solvent companies, the time of payment varies, and it varies with the same company at different times. It is longer or shorter, depending on the financial condition of the company, the length of its line, and other causes. The labor, supplies, and materials are absolutely essential to the operation of the road, and, as a matter of fact, are in most cases furnished on its credit, in the same sense that the supplies of a ship are furnished on the credit of the ship. For these and other like reasons there has been a growing tendency among the courts and legislatures in this country to give such debts of a railroad company priority over the lien of a mortgage."

In *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471, the court (Brewer, J.), speaking with reference to the theory that the mortgagees, by failing to take action after default in the payment of interest on the mortgage debt, make the mortgagor company their agent to incur debts, and thereby impliedly consent that all such debts shall take precedence of their secured claims, said: "I do not think that this principle is sound. There is no implied agency to that extent, and I do not think that the rulings of the Supreme Court are based upon any such doctrine. The idea which underlies them I take to be this: that the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employees cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees, because both the mortgagees and the public are interested in keeping up the road, and having it preserved as a going concern, and whatever is necessary to accomplish this result must be taken

as assented to by the mortgagees. In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary. Certainly, so far as the present road is concerned, six months is ample. If any person permits a claim to continue longer than that, he certainly has no right to be considered other than as a general creditor, with no preference over a secured debt."

In *Texas Co. v. International & G. N. R. Co.* (1916) 150 C. C. A. 571, 237 Fed. 921, the court, speaking with reference to the rule that current-expense claims, arising out of the operation of a railroad during a period of six months prior to the appointment of a receiver, are a first charge on the net earnings of the receivership, even where the net income from operation is made a part of the security of the mortgage by its terms, said: "The equity of the rule lies in the manifest justice of paying those whose labor or material went to create the income which the mortgagee claims as part of his security, before the mortgagee receives it in payment of his debt. If the current expense could be specifically traced to the current income it creates, the application of the rule would be easy and definite. The impossibility of tracing each dollar of expense into the corresponding dollar of income created by it has made it necessary for the courts to fix an arbitrary period beyond which it will not be presumed that labor and material furnished the railroad will continue to produce income. This accounts for the arbitrary period of six

months fixed by rule of court. It depends upon the assumption that the period over which labor and supplies used by a railroad will continue to contribute to its earnings is a period of not exceeding six months. Under this rule, if a railroad ceased to be operated upon the appointment of a receiver, supplies and labor furnished at any time within six months prior thereto would share in earnings up to the time the receiver was appointed. If operations are continued by the receiver, it would seem proper to assume that labor and supplies furnished the railroad company, during at least some period prior to the receivership, would continue to contribute to create earnings under the receivership; for it is clear that, if the company's operations had not been interrupted by a receivership, such labor and supplies would have entered into future earnings as a creating factor. If the mortgagee is permitted to subject the entire surplus earnings of the receivership to his security, to the exclusion of labor and supply claimants, who furnished the railroad labor and material prior to the receivership, he would be receiving, in part at least, 'that which in equity belongs to the whole or a part of the general creditors.' He would be receiving as net income what would not be properly net income, the claims of the labor and supply creditors who contributed to its creation not having been deducted from it. He would, in that event, receive the benefit of the earnings of the receivership, without paying the incidental burden of the expense by which they were created. If there had been no receivership, the supply creditors would receive payment from the railroad company, out of the same earnings that went to the receiver after his appointment. It is inequitable that the mortgagee should profit in this respect at the expense of supply and labor claimants, through the placing of the mortgaged property in the hands of a receiver. The bondholders also profit by receiving the earnings of the railroad company on hand when the receiver was appointed, as well as earnings earned before the receiver-



ship and subsequently collected by the receiver, all of which would have gone to the supply and labor claimants, but for the interruption of the company's operation by the receivership. The impossibility of tracing the exact extent of the effect to expenditure into the future income of the receivership is no more an argument against the allowance of the priority, or against its equity, than is the same uncertainty with reference to the extent of the effect of expenditure on income before the receivership an argument against the conceded priority of supply and labor creditors, as against the income of the company earned before the receivership. It prevailed as to the latter only to limit the time before which the furnishing of supplies or the performance of labor would not entitle the creditor to a priority, to six months. If it is to have any effect on the priority of such creditors as against the income of the receivership, it should only be to fix the time after which no priority should be allowed upon the receiver's earnings, and not to deny the priority altogether. It seems equitable, therefore, that the priority should extend as well to the income of the receivership as to that of the company prior thereto. We also think that authority as well as reason supports this rule. Indeed, but for the earnest contention of the appellees to the contrary, we would have considered the question so finally settled by the former decisions of the Supreme Court as to pretermitt discussion. The appellees contend that the expression of the rule in the opinions of the Supreme Court in the former cases was obiter, and should be reconsidered by us, and that subsequent cases, cited on appellees' briefs, support the correctness of their position. A re-examination of the cases has failed to convince us, either that the question was not settled by the former decisions of the Supreme Court, or that the later cases relied upon by the appellees are in conflict with the rule as laid down in the former cases."

In *Williamson v. Washington City, V. M. & G. S. R. Co.* (1881) 33 Gratt. (Va.) 628, it was held that wages earned by the employees of a railroad

company, prior to the appointment of a receiver at the instance of mortgage creditors, are properly a first charge on the net revenues of the road in the hands of the receiver, or, if such income has been used under the instructions of the court for other purposes, upon the proceeds of the sale of the road itself, where during the time such claims accrued the current revenue of the road, in an amount exceeding such claim, has been applied to the payment of interest, the purchase of equipment, and in making repairs and useful improvements. In comparing the relative equities of the claimants, the court said: "The learned counsel for the appellees, in discussing the equities of the parties litigant, tells us that the employees of the company stood by and saw without objection the revenues of the road diverted to the payment of the general creditors, and now call upon the mortgage creditors for restitution. If it can be supposed that these employees knew anything of the condition of the company, it is difficult to see how they could prevent a diversion of the funds. They clearly could not demand the appointment of a receiver. It will not be seriously insisted that each one of them ought to have instituted his action or warrant whenever there was any delay or default in paying the wages of each accruing from time to time. What would be the condition of a railroad company thus involved in perpetual litigation with its army of employees, with its funds under process of garnishment, and its stores and necessary supplies subject to levy and sale under interminable executions? From what source could the company obtain its labor and material absolutely essential to the successful operation of the road, when it is once understood that no man could safely trust to its power of payment? It is a matter of common notoriety that these employees are but too often delayed in receiving their hardly-earned wages, because the revenues of the road are taken for the payment of more pressing demands, or for the purchase of equipment and for necessary improvements. But for the labor and supply creditor the road must stop

operation, resulting in the loss of its trade and its diversion to other channels, the general deterioration of the property of the company, and lasting injury to the mortgage creditor. If the latter, through the instrumentality of a receiver, obtains possession of a road properly appointed and equipped, yielding valuable revenues, it is due in a great measure to the class of men whose claims are the subject of controversy here. The mortgage creditor knows all these things. He certainly cannot be ignorant of the continued default in the payments of the interest due him—a fact of itself sufficient to attract his attention and excite his suspicions. And yet he leaves the company for years in the uninterrupted possession and control of the earnings of the road, and notoriously obtaining credit from third persons for supplies and labor upon the faith of these earnings. When, under such circumstances, the creditor calls upon a court of equity to intercept the revenues for his benefit, he cannot complain that debts thus contracted shall first be paid, within limits so just and reasonable as are now prescribed by the courts.”

In *Skiddy v. Atlantic, M. & O. R. Co.* (1878) 3 Hughes, 320, Fed. Cas. No. 12,922, wages of employees past due for eight months prior to the receivership were ordered to be paid to such employees as were retained in the employment of the road by the receiver, out of the net earnings of the road during the receivership; but the court refused to accord a similar preference to the wage claims of persons who had ceased to be employees, on the ground that the payment of such claims was not necessary to the operation of the road. The court in this case also refused to accede to the validity of the contention that, as the mortgagees had a right to take possession of the road so soon as default was made in their mortgage, and did not do so, the obligations thereafter contracted by the company must be considered as having been incurred for their benefit, saying: “It has never been decided yet that because a mortgagee does not immediately pounce upon his security, foreclose, take possession, and sell,

that he impairs the obligation of his lien. If a man have a mortgage on a large stock of goods of a retail merchant, and default is made, it will hardly be contended that, unless possession is at once taken, the lien for wages of the mortgagee's clerks and employees is superior to the mortgage. These petitions present cases of great hardship, but the contract for hire was with the company, not with these mortgagees, and these claimants are entitled to be paid, as are the materialmen, out of anything the company has, unmortgaged.”

The claim of wages of persons who were actually engaged in the practical operation of a railroad, and by whose labor it was kept going, have an equity to be paid out of any net income which the receiver may be able to realize from running the road. *Street v. Maryland C. R. Co.* (1893) 59 Fed. 25.

In *Atkins v. Petersburg R. Co.* (1879) 3 Hughes, 307, Fed. Cas. No. 604, it was held that money advanced by persons interested in a railroad company as owners of its stock and bonds, for the payment of back wages due its employees, in order to avert a threatened strike, upon an understanding that they should be reimbursed out of the first net earnings of the company, are, where the railroad was put into the hands of a receiver before their reimbursement, entitled to be repaid out of net income accruing while the road was in the custody of the court, in preference to the claims of mortgagees.

In *Douglass v. Cline* (1877) 12 Bush. (Ky.) 608, it was held that, as against the holders of bonds secured by a mortgage not specifically pledging the revenues of the mortgaged property, the court might, as a condition of appointing a receiver of the rents and profits in an action to foreclose the mortgage, order the payment out of net earnings, of back pay due the employees of a railroad company at the time the railroad was placed in the hands of a receiver, for labor and services performed after default had been made in the payment of the interest due under the mortgage, in constructing, repairing, and operating

the mortgaged property, whereby such property was preserved, and the debtor or company enabled to retain its good will and the public confidence. The court said: "In this connection it is proper to consider the fact that there is a perceptible distinction between the character and nature of the net earnings realized by the operation of a line of railways, and the ordinary rents and profits of lands and tenements. The receiver of a line of railways is not the mere passive agent or officer of the court, charged with the simple duty of preserving the property intrusted to his care, and of collecting the rents and profits arising directly out of the thing mortgaged, and holding them until the rights of the litigants shall be determined. His duties comprise the management and operation of the roads. He, ex necessitate, becomes a common carrier, and, in order to preserve the mortgaged property, is compelled to discharge the duties of a quasi public corporation. It is a fact of which judicial notice may be taken that a railway has but little rental value when, as in a case like this, the lease cannot be made for a greater length of time than will probably be sufficient to enable the mortgagees to prepare their cause for trial and judgment, and compel a sale of the mortgaged property. Hence the net earnings of a railway in the hands of a receiver depend very greatly upon his experience and skill as a railway operator, and upon the energy and fidelity he may display in the discharge of his duties. Now, whatever rights, legal or equitable, the mortgagee may have to the thing mortgaged, and to the rents and profits springing directly out of the thing itself, he certainly has no claim to or lien upon the experience, skill, energy, and fidelity of the court's receiver, who represents the interest as well of the mortgagor as of his lien creditor. *Ellicott v. United States Ins. Co.* (1848) 7 Gill (Md.) 319. Such being the case, it is difficult to assign a reason why the chancellor may not assume in this case to exercise the discretionary power of applying so much, at least, of the net earnings of the mortgaged

roads as is manifestly attributable to the superior skill and fidelity of his receiver, to the payment of the wages due to these appellees for labor and services, performed, it is true, at the instance and request of the mortgagor, but for the direct benefit and advantage of the mortgagees. Of course, it is not possible to ascertain the extent to which the superior skill and energy of the court's receiver contributed to increase the sum of the net earnings of the roads. The record discloses that under his management the roadbeds, tracks, bridges, cars, engines, and other property of the company were put and have been kept in repair, and the current expenses of operating the roads, including the wages of the officers and employees, paid, and in a period of about nine months a surplus of net earnings amounting to over \$180,000 accumulated. When this result is compared with the result of the management of the same property by the railroad company, accepting as true the representations of appellants with regard to that matter, it is very difficult to show that any portion of the fund directly and solely attributable to the money-earning capacity of that property under ordinary management has been diverted from the payment of their bonds. It is not strictly accurate to say that the appellees bear to the mortgagees the same relation as that borne them by other general creditors of the insolvent company. The mortgagees accepted their securities with knowledge that the railroad company, though, technically speaking, a private corporation, was under obligations to the state to render certain important public services. They knew that the railroads were in a certain sense public highways, and that whoever owned them or held them in pledge was bound to see that they were at all times so operated as to subserve the public convenience. The interest the public has in the construction and successful operation of lines of railway has influenced the courts to treat railroad mortgagees as possessing rights superior to those of beneficiaries under mortgages covering other kinds of property; and courts of

equity have not hesitated to interfere for their protection in cases in which other mortgagees would have been left to their remedy at law. *Phillips v. Winslow* (1857) 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729. In the case just cited the 'great inconvenience to the public' likely to result from the acts, the commission of which was sought to be enjoined, was distinctly recognized as one of the grounds upon which the interference of the court below was approved. The considerations leading to the adoption of this rule are not to be wholly overlooked when the public interests may require that the equitable rights of this class of mortgagees shall be subordinated to the claims of a class of persons who, by their labor, enabled the mortgagor to discharge its public duties. It was through the labor and services of these appellees, performed and rendered after the railroad company had become notoriously unable to meet its indebtedness, and during a period when these appellants either could not or would not interfere to protect and preserve their mortgage security, that the company's roads were operated and its duties to the public discharged; and, as we have already seen, it was by this labor and these services that said mortgaged property during this period was preserved and kept in repair. It is plain, therefore, that the debts due to the appellees were contracted for labor which resulted in substantial advantage to the parties who are here insisting that their payment out of a fund to which said parties have no legal or contract claim, and which they can reach only through the intervention of the chancellor, is an abuse by that officer of his equitable discretion. It was to the interest of the lienholders, and especially of those represented by Douglass, that the receiver should be enabled, pending the litigation, to operate the roads of the company successfully and profitably. To secure immediate success in this regard, it was desirable, if not indispensably necessary, that he should be enabled to retain in his service the force of employees he found in the service of the company when he took possession

of its roads. One of the principal grounds of complaint urged against the management of the company by both Green and Douglass was the discontent upon the part of the employees and laborers constituting this force, resulting from the nonpayment of their wages. It was the duty of the chancellor to allay this discontent, and to assist his receiver in securing the services of these people, and thus insure the profitable management and operation of the roads in his hands, if this could be accomplished by an act manifestly just, certainly within the scope of his judicial powers, and to which the appellants ought not, in good conscience and fair dealing, to object."

*b. As a charge on corpus.*

Although cases may arise in which wage claims will be made a lien upon the corpus of the property and payable out of the proceeds of receiver's certificates, this can be done only in exceptional cases, and, where there is no special equity therefor, the appointment of a receiver cannot give the claimants a priority which they had not before. *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471.

*The decisions analyzed.*

One of the grounds upon which the lien of a mortgage upon the corpus has been displaced in favor of claims for wages earned prior to the receivership is that the fund from which such wages should have been paid, namely, current earnings, has been, either before or after the appointment of the receiver, diverted from its proper course, and either paid to the mortgagee in the form of interest, or applied for his benefit in the improvement of the mortgaged property. This is the so-called doctrine of diversion and restoration. Under it, the right of priority of the mortgagee to the corpus is displaced only to the extent of the benefits received. See *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339; *Union Trust Co. v. Illinois Midland R. Co.* (1885) 117 U. S. 434, 29 L. ed. 968, 6 Sup. Ct. Rep. 809; *Calhoun v. St. Louis & S. E. R. Co.* (1880) 9 Biss. 330, 14 Fed. 9; *MOORE v. DONAHOO* (reported herewith) ante, 675;

*Drennan & Co. v. Mercantile Trust & D. Co.* (1897) 115 Ala. 592, 39 L.R.A. 623, 67 Am. St. Rep. 72, 23 So. 164; *Citizens Trust Co. v. National Equipment & Supply Co.* (1912) 178 Ind. 167, 41 L.R.A. (N.S.) 695, 98 N. E. 865, —set forth *infra*. And see also, in this connection, *Williamson v. Washington City, V. M. & G. S. R. Co.* (1881) 33 Gratt. (Va.) 628, set forth in II. a, *supra*.

And so, where there has been no diversion, there can be no preference (see *Street v. Maryland C. R. Co.* (1893) 59 Fed. 25, *infra*), except upon some one of the theories next discussed.

Out of the idea that a mortgagee is bound to make good the benefits received has sprung another theory, concerning the merits of which there is a difference of opinion, and to which the fact of diversion is immaterial. This is that, even where there has been no diversion of income, the mortgagees have received a benefit from the continuation of the business as a going concern, for which they ought to pay. See *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* (1892) 53 Fed. 182; *Putnam v. Jacksonville, L. & St. L. R. Co.* (1898) 61 Fed. 440; *Wood v. New York & N. E. R. Co.* 70 Fed. 741; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897) 79 Fed. 39; *Keelyn v. Carolina Mut. Teleph. & Teleg. Co.* (1898) 90 Fed. 29; *First Nat. Bank v. Ewing* (1900) 43 C. C. A. 150, 103 Fed. 168; *LeHote v. Boyet* (1904) 85 Miss. 636, 38 So. 1, 3 Ann. Cas. 705; *Litzenberg v. Jarvis-Conklin Trust Co.* (1892) 8 Utah, 15, 28 Pac. 871,—set forth *infra*.

This doctrine has, so far as supply creditors are concerned, received its quietus in *Gregg v. Metropolitan Trust Co.* (1905) 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415, and it has been strongly argued that the claims of employees for wages stand on no better basis. See *MOORE v. DONAHOO* (reported herewith) *ante*, 675, set forth *infra*; also *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* (1886) 103 N. Y. 245, 8 N. E. 488, *infra*.

Its operation is confined to claims for labor performed in keeping the business a going concern, and it does not extend to claims for labor performed in construction, repair, or improvement. See *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897) 79 Fed. 39.

It has been held that it does not apply in the case of a purely private corporation, but only in the case of railroad companies or other corporations of a quasi public nature, which the public interest requires to be kept as going concerns (see *Spencer v. Taylor Creek Ditch Co.* (1912) 114 C. C. A. 407, 194 Fed. 636), but there seems to be no valid reason for so limiting it, and it was, in fact, applied in the case of a private corporation, in *Le Hote v. Boyet* (1904) 85 Miss. 636, 38 So. 1, 3 Ann. Cas. 705, *infra*.

Another and an independent ground for giving preference out of the corpus to wage claims accruing prior to the receivership is that the payment of such claims was necessary in order to enable the receiver to continue operations, and they are, in such case, paid out of the corpus as an expense necessary to the preservation of the value of the property. See *Miltenberger v. Logansport, C. & S. W. R. Co.* (1882) 106 U. S. 311, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Gregg v. Metropolitan Trust Co.* (1904) 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415; *MOORE v. DONAHOO* (reported herewith) *ante*, 675; *International & G. N. R. Co. v. Coolidge* (1901) 26 Tex. Civ. App. 595, 62 S. W. 1097. In such case, of course, only the wage claims of employees retained by the receiver can be given a preference. Where the right of preference is based upon this ground, the question of whether or not there has been a diversion of current earnings to or for the benefit of the mortgagee is immaterial.

It is not enough to warrant a preference on this ground that the unpaid employees are riotous, and have threatened the destruction of the property. See *Raht v. Attrill* (1887) 106 N. Y. 435, 60 Am. Rep. 456, 13 N. E. 282, *infra*.

**The decisions stated in detail.**

Where income earned during the receivership has been used to make permanent improvement on the fixed property, or to buy additional equipment, whereby the value of the mortgaged property is increased, it is proper to restore to the current-debt fund what has been thus diverted from it in order to increase the value of the property sold; and the same may sometimes be true with respect to expenditures before the receivership. *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339.

In *Union Trust Co. v. Souther* (1883) 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295, it was held that as the income of the receivership, instead of being applied in accordance with the order appointing the receiver, imposing terms with reference to the payment out of the income during the receivership, of outstanding debts for labor, etc., had been used to buy additional ground, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property, such claims should be paid out of the proceeds of the sale of the road.

In *Union Trust Co. v. Illinois Midland R. Co.* (1885) 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809, it was held that wages due the employees of a railroad company within six months immediately preceding the appointment of a receiver were properly allowed priority out of the corpus of the property, where the current income had been diverted to the improvement of the property by the receiver.

In *Calhoun v. St. Louis & S. E. R. Co.* (1880) 9 Biss. 330, 14 Fed. 9, it was held that the net earnings of a railroad are to be applied primarily to the payment of the employees of the company and of the amount due for supplies and materials furnished, and that if, instead of making the payment, the earnings are diverted, either to the payment of what is due the mortgagee, or for improvements or betterments placed upon the road, that constitutes a valid claim against the corpus which it is the duty of the court to see enforced.

In *Drennen & Co. v. Mercantile*

*Trust & D. Co.* (1897) 115 Ala. 592, 39 L.R.A. 623, 67 Am. St. Rep. 72, 23 So. 164, it was held that employees of a corporation in the hands of a receiver on foreclosure of a mortgage have a perfect equity to priority of payment for wages earned within six months before the receiver's appointment, when the funds from which they ought to have been paid have been used for the benefit of bondholders, even if the terms of the mortgage embrace income, but that labor necessary to the continuation of the business of a corporation does not entitle the workman to priority of payment out of the assets of a receiver on foreclosure of a mortgage, if the labor is not shown to have been to the advantage of the bondholders, or necessary in conservation of their interests, or that the receiver has realized any income out of which the wages should be paid. And in discussing the question, the court said: "The doctrine proceeds on the broad principle which underlies the administration of all law concerning property rights that, when one party has property which belongs to another, restitution in some form or another must be adjudged or decreed by the courts, upon proper and seasonable application by the party aggrieved. The theory is, to get nearer the case in hand, that the bondholders, or the receiver for them, have property or something of value, to which the party invoking the court's aid has a better abstract right,—a superior equity. To state the proposition yet more concretely, the equity arises and is rested upon one or another of the three following categories or states of fact: First, that the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are, upon all the authorities, entitled in preference and priority to the bondholders, have been diverted from the payment of their wages and accounts, and paid to the bondholders, or are in the hands of the receiver, to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended,

either before or after receiver appointed, in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased, to the obvious advantage and benefit of the bondholders. Or, second, that whether, strictly speaking, there has been any diversion of gross earnings from the employees, directly or indirectly, to the bondholders or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders, in the enhancement of the value of their security, and hence of their bonds; they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment, at their instance, of the receiver. Or, third, that labor and services have been performed and rendered in carrying on the business of the corporation, and keeping it a 'going concern' (the mortgages and bonds evidencing a contemplation of the parties to them that the operations of the corporation should be kept on foot and going, and a necessity therefor, as a means of production, of the net income out of which the bonds, principal and interest, are to be paid); that the business has been kept going by the receiver, and earnings from it have been realized; that such earnings have been paid to the bondholders, or are held by the receivers; and that the laborers have not been paid for services thus rendered prior to the receivership."

Where the current income of a water and light company, which had mortgaged its property, franchises, after-acquired property, and income, has been applied to betterments, claims for labor necessary to keep the plant a going concern, which should have been satisfied out of such income, are entitled to priority out of the proceeds of a foreclosure sale under the

mortgage. *Citizens' Trust Co. v. National Equipment & Supply Co.* (1912) 178 Ind. 167, 41 L.R.A. (N.S.) 695, 98 N. E. 865.

In *Street v. Maryland C. R. Co.* (1893) 59 Fed. 25, it was held that claims for arrears of wages due employees of a railroad at the time the receiver was put in possession were not entitled to a preference out of the corpus, where there was no equity as against mortgage creditors to require them to admit these claims as prior to their mortgages, the receiver not having been appointed at their instance, but at the instance of a stockholder, there having been no interest paid on the bonds during the period covered by the arrears of wages, and no diversion for the benefit of the bondholders, and, there having been no default in the mortgages, they had no right to disturb the possession and management of the corporation.

In *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* (1892) 53 Fed. 182, it is said that it is an error to suppose that debts incurred for materials, labor, and supplies in operating a railroad can only be given priority where there has been a diversion of the income of the road, and that it is not true that they can only be paid out of the earnings of the road, and cannot be made a charge on the corpus of the property. "A diversion of the income is not essential to give them priority, and they may be made a charge on the corpus of the estate if the earnings are not sufficient to pay them."

In *Putnam v. Jacksonville, L. & St. L. R. Co.* (1893) 61 Fed. 440, the court, on an application by bondholders for a receiver, in speaking of labor claims, said that under what is known as the "six months' rule" claims for labor and supplies, if not provided for, become entitled to preference over the mortgage debt, and may be enforced against the mortgaged property if there be no other means of payment.

In *Wood v. New York & N. E. R. Co.* (1895) 70 Fed. 741, it is said that, independently of the question of diversion, debts may be preferred which are incurred for labor and supplies

necessary to keep a railroad a going concern from day to day.

Irrigation companies are within the reasons of the equitable rule giving priority out of the corpus of the property to claims for labor performed in keeping the concern going, arising in a limited time before the appointment of a receiver in foreclosure proceedings. *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897) 79 Fed. 39.

And the same rule was applied in favor of the operators of a telephone and telegraph line, in *Keelyn v. Carolina Mut. Teleph. & Teleg. Co.* (1898) 90 Fed. 29.

Priority over the mortgage bonds in the distribution of the proceeds of the mortgaged property exists in the case of expenses incurred by a railway company prior to the receivership, for labor, materials, etc., necessary to operate the railway and maintain it as a going concern. *First Nat. Bank v. Ewing* (1900) 43 C. C. A. 150, 103 Fed. 168 (writ of certiorari denied in 179 U. S. 686, 45 L. ed. 306).

In *Le Hote v. Boyet* (1904) 85 Miss. 636, 38 So. 1, 3 Ann. Cas. 705, claims for labor performed for a private corporation which had been engaged in the manufacture of lumber, necessary to continue the business and preserve the property of the corporation, and rendered within three months prior to the appointment of the receiver, were held to be entitled to a preference out of the estate of such corporation over all other creditors, including mortgage creditors, on the ground that the labor and services so performed had inured directly to the benefit of the mortgagees in the enhancement of the value of their security.

In *Litzenberg v. Jarvis-Conklin Trust Co.* (1892) 8 Utah, 15, 28 Pac. 871, it was held that, although the petitioners performed the labor for which they were asking compensation in the operation of a street railroad before the receiver took possession of it, the proceeds of its use and the benefit from its continued use were the result in part of the petitioners' labor, and, accordingly, that the payment thereof should precede the pay-

ment of the debt secured by the deed of trust.

In *Metropolitan Trust Co. v. Tona-wanda Valley & C. R. Co.* (1886) 103 N. Y. 245, 8 N. E. 488, reversing (1886) 40 Hun, 80, it was held that the claim of employees of a railroad company for labor performed before the appointment of a receiver cannot be so extended as to diminish or impair or postpone the lien of a mortgage for the enforcement of which the action was brought, or of a prior mortgage upon the property. The court said: "The legislature has given the laborer a remedy in certain cases, against the stockholders of a corporation, upon default of the corporation to meet its obligations (Laws 1850, chap. 140, § 10; Laws 1854, chap. 282, § 16); but the decree in this case goes much further, and requires their payment out of the property of other creditors. The argument in its support is that the value of the mortgage lien has been enhanced by the labor of the workman. It is easy to see that under such a plea the lienor might be entirely defeated, and the foreclosure of his mortgage rendered inoperative and useless. Such a result, except upon his consent, the courts have no power to sanction. It is going a great way in that direction to permit, as it is true courts sometimes have permitted, a receiver of an insolvent railroad corporation to pay for materials and labor procured by him after his appointment, necessary to the running of the road, it may be, but not to the winding up of the affairs of the corporation. The propriety of that practice we are not called upon to review, but notwithstanding the research of the respondents' counsel, no case has been cited where an unsecured creditor, however meritorious the consideration of his claim, has been given priority over a lien contracted for and in force when his debt was created. When, as in this case, the plaintiff procures the appointment of a receiver, with power to control and operate the mortgaged railroad, he cannot well object to the depreciation of his security by expenses incurred for these purposes, but he may properly seek to have excluded any previous ones.



Here the claimants are mere general creditors, with no special equities in their favor against prior creditors, nor have they any equitable lien upon any fund in court."

In *Miltenberger v. Logansport, C. & S. W. R. Co.* (1882) 106 U. S. 311, 27 L. ed. 126, 1 Sup. Ct. Rep. 140, it was said: "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. . . . It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be depreciated in the interest both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relation would be a probable result in case of nonpayment. The general consequence, involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

In *Gregg v. Metropolitan Trust Co.* (1904) 197 U. S. 188, 49 L. ed. 717, 25 Sup. Ct. Rep. 415, it was said that the payment of the employees of a railroad is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.

In *MOORE v. DONAHOO* (reported herewith) ante, 675, it is held that claims for wages accruing prior to the appointment of a receiver can be permitted to displace prior mortgage liens only when failure to make pay-

ment would result in injury to or would make it difficult to carry on the business of the estate. The court said: "If, for illustration, upon the appointment of a receiver, he finds that the pay of the enginemen of the railroad is in arrears, and that they are unwilling to render further service unless their claims are paid, the receiver may very readily conclude, especially where other skilled men are unavailable, that payment is necessary to the business of the road, and disbursements so made may be held to constitute a prior lien, upon the theory that they are required for the preservation of the value of the estate.

. . . In such cases the nature or character of the debts which the receiver is called upon to pay is comparatively unimportant; the controlling consideration is the present necessity of the receiver. If the exigency is such that he must pay past debts before he can procure indispensable future supplies, he must, in deference to his paramount duty to preserve the value of the estate, yield to the necessity, provided, of course, that the probable loss would exceed the required payments. It is to be noted that in the language above quoted from the *Gregg Case*, a distinction is not drawn between supplies necessary for the preservation of the road and supplies necessary to the business of the road; it is difficult to see how, upon principle, such a distinction could be made. The ground of the allowance, says the court, was not merely 'that the supplies were necessary,' but that 'the payment [therefor] was necessary.' The distinction is between the necessity of past supplies and the necessity of present payment therefor. Accordingly it was further said in the *Gregg Case* that 'the payment of employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.' Not that a different principle applies to labor claims, but that they are more likely to fall within the principle. In any case it is a question of business necessity, and such necessity is more likely to arise in the case of skilled labor than in the case of gen-

eral supplies, which, if they cannot be procured from one source, may be gotten from another."

In the absence of any showing that the payment of a pay-roll indebtedness incurred by a railroad company prior to the appointment of a receiver was essential and necessary to the operation, preservation, and proper management of the property by the receiver, the court cannot authorize the issuance of first lien certificates therefor, as against a lien creditor. *International & G. N. R. Co. v. Coolidge* (1901) 26 Tex. Civ. App. 595, 62 S. W. 1097.

In *Raht v. Attrill* (1887) 106 N. Y. 485, 60 Am. Rep. 456, 13 N. E. 282, it was held that the receiver of a hotel company could not issue receiver's certificates to raise money to pay the wages of employees which had accrued prior to his appointment, and that such certificates could not be given preference as a "debt of the receiver, incurred for the benefit and protection of the property in his hands," by reason of the fact that the workmen, comprising 800 or 1,000 men, whose wages were in arrears, had become riotous in their language and demeanor, and threatened, unless paid, to burn the hotel and personal property therein. The court said: "No doubt a serious emergency existed, growing out of the discontent and riotous disposition of the workmen. But the state primarily assumes the duty of the preservation of public order and the repression and punishment of crime. It enacts laws, constitutes courts, and commissions officers to this end. It especially makes provision intended to prevent riots, and it seeks to insure prompt action on the part of local officers and communities by imposing upon the latter pecuniary responsibility for injuries to property caused by riotous assemblages. In this case no attempt, so far as appears, was made by the receiver, or by the company, to secure the intervention of the public authorities to suppress the apprehended disturbance, or to arrest those who threatened to burn the property of the company. It clearly ought not to have assumed that the ordinary agencies of the law were in-

adequate to the situation, or that the law, operating through its regularly appointed channels, was impotent to control it. . . . There must be something approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case."

*c. Right to preference as affected by time of accrual of claim.*

In *Turner v. Indianapolis, B. & W. R. Co.* (1878) 8 Biss. 315, Fed. Cas. No. 14,258, it was held that, in fixing the time within which such claims will be allowed and ordered paid, the court will adopt by analogy the rule of the state statutes in relation to liens on railroads for work done.

The usual practice, however, is to limit the right of priority to claims accruing within six months preceding the appointment of a receiver, upon the ground that one who has let his claims run longer is to be presumed to have waived his equitable right to a preference. This is, however, merely a presumption; and, as the following cases show, claims of longer standing have been awarded preference, under the special circumstances of the case.

In *Central Trust Co. v. Utah C. R. Co.* (1897) 16 Utah, 12, 50 Pac. 813, it was held that there is no six months' rule applicable to all cases; the rule being that debts for labor, etc., in operating the road or preserving its property, to be entitled to a preference, must have been incurred within a reasonable time and that what will be regarded by the court as a reasonable time will depend upon the special circumstances. It was accordingly held that a claim for labor performed in operating a railway nearly three years prior to the appointment of the receiver was properly given preference out of the net earnings, over the claim of a mortgagee, where suit had been commenced against the railway company within four months after the services were rendered, and the failure to collect was due to the litigation of the claim.

In *McIlhenny v. Binz* (1890) 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655, it was held that the claim of operatives

of a railway company for services rendered prior to the appointment of a receiver are entitled to priority of payment out of the current revenue, over that of mortgage creditors; and that the fact that the order directing the payment of claims of operatives for services rendered prior to the appointment of the receiver prescribed a term of six months preceding as the period of time within which the debts to be so paid should have accrued is only provisional, and cannot properly be held exclusive against anyone not a party to the suit at the time the order was made, and that the equitable right to priority of payment of such claims out of current revenue continues until it is lost by such delay in the prosecution thereof as should be sufficient to bar such equity, the period of time necessary for this purpose depending upon the circumstances of each particular case.

If material and labor furnished to keep the debtor a going concern were not to be paid for when furnished, but payment was to be postponed until it could be made from earnings; the lapse of more than six months before the appointment of a receiver will not defeat a right to priority of claims therefor, over an existing mortgage, if earnings were diverted to betterments. *Citizens' Trust Co. v. National Equipment & Supply Co.* (1912) 178 Ind. 167, 41 L.R.A. (N.S.) 695, 98 N. E. 805.

In *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 471, claims for labor accruing more than two years prior to the appointment of the receiver were held to be a proper charge against the earnings of the road, although there was no diversion of income to the payment of interest or to permanent improvements.

See also, in this connection, the excerpts from the decisions in *Blair v. St. Louis, H. & K. R. Co.* (Fed.) *supra*, and *Texas Co. v. International & G. N. R. Co.* (1916) 150 C. C. A. 571, 237 Fed. 921, set forth in II. a, *supra*.

Labor claims will not be awarded priority of payment out of the proceeds of a foreclosure sale, where the corporation must have been in default for more than a year with respect to many of them when the original action

was commenced, and not less than nine months with respect to any of them. *Spencer v. Taylor Creek Ditch Co.* (1912) 114 C. C. A. 407, 194 Fed. 636.

*d. Right to preference as affected by time of diversion of income.*

In *MOORE v. DONAHOO* (reported herewith) ante, 675, it was held that the diversion of income giving wage claimants a right to preference over prior mortgages need not have taken place prior to the time when such wage claims became due, but that it is sufficient that the diversion has been made within the preferential period before a receivership. In discussing this question, the court said: "Under the third head appellants contend that a railroad company is under no obligation to provide for future indebtedness by the accumulation of a surplus, and that therefore a general creditor cannot complain of diversions of income prior to the maturity of his claim. The materiality of the contention lies in the fact that the record fails to disclose the relation of the several claims, in point of time, to the diversions relied upon. It is to be admitted that a measure of support for the general proposition may be found in the following decisions: *St. St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* (1888) 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1897) 26 C. C. A. 30, 47 U. S. App. 668, 80 Fed. 624; *Kansas Loan & T. Co. v. Electric R. Light & R. Co.* (1901) 108 Fed. 702; *Fordyce v. Omaha, K. & C. E. R. Co.* (1906) 145 Fed. 544. But here, as is the general rule, the courts must be understood as having spoken with reference to and in the light of the facts they had under consideration, and there is no very close analogy between some of the cases and the one at bar. In the first one cited, it may be pointed out that there was but a single intervention, and that the intervener sought to take advantage of diversions antedating the preferential period. While, as a matter of strict logic, these distinctions may not be controlling, still it is apparent that the court had no reason

to consider, and probably did not consider, the practicability or propriety of applying the rule relied upon to a case like the present one, where the diversions are all within the preferential period, and where the task of marshaling the numerous claims with reference to diversions, and calculating the distributive share to which each is entitled, would be extremely difficult, if not impossible. In the Central Trust Co. Case there were but three interveners, and it is not clear that the diversion was within the preferential period. In each of the other cases there was but one intervention, and in at least one of them the diversion relied upon was prior to the six months' period. It is also to be noted that the cases are not in harmony touching the date when the diversion period commences to run; two of them adopting the maturity of the creditor's claim, and the other two its creation. The appellants insist upon the former standard; that is, that there can be no diversion as to any creditor until his claim becomes due. In that view, if we suppose that employees upon monthly salaries, payable upon the tenth day of each succeeding month, render services to a corporation during a given month in expectation that they will be paid out of the current income, which they help to create, and upon the first day of the following month such income is applied to the payment of claims for betterments, and thereupon the mortgagee commences a suit in foreclosure and procures the appointment of a receiver, it is clear that the employees are left remediless. Again, under such a rule, what relief is available for those who supply materials or perform labor during the month immediately preceding a receivership, in a case where the current revenues for that month are applied to the satisfaction of similar claims accruing during the preceding month, which have remained unpaid because of the diversion of the current revenues for that month to the discharge of interest on bonds? And, generally speaking, it would inevitably result that claims most recently accruing, and therefore most clearly entitled to protection,

would least often be in a position to demand a restoration of diverted funds. It is doubtless true in actual practice that credit is extended for current supplies and for labor upon the assumption that there has been no improvident diversion of the current income in the immediate past, quite as often as upon the expectation that there will be no such diversion in the immediate future. Whatever standard may be employed in the case of an isolated claim in relation to an isolated diversion, it is thought that, at least in cases where the claims are numerous and the accounts current, the rule contended for would not only be difficult of application, but inequitable as well, and that some period must be adopted as a unit, during which all claims are to be deemed to constitute a single group and have the same footing. We agree with the court below in adopting the preferential period as such unit, and in holding that presumptively the current revenues thereof are applicable to the current debts, and that, in case of a diversion, restoration may be decreed for the common benefit of the entire group."

*e. Rights of assignees.*

The rights of assignees of labor claims to a preference obviously depends upon the theory upon which the right of their assignor in preference is deemed to rest.

Thus, in *Finance Co. v. Charleston, C. & C. R. Co.* (1892) 49 Fed. 693, it was held that as the making of an order, upon the appointment of a railroad receiver, for the payment of back wages which have accrued within a reasonable period, is not a matter of right in the employees, or an equity administered in their favor, but a personal protection given to them by the court, *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food, one who has furnished rations to such laborers under contract with the company, the value of which the company charges to the laborers as a part of their wages, is not entitled to the benefit of the order.

In *Drennen & Co. v. Mercantile*

Trust & D. Co. (1897) 115 Ala. 592, 39 L.R.A. 623, 67 Am. St. Rep. 72, 23 So. 164, in which the equity of labor claims was dependent on benefits accruing to the bondholders, it was held that assignees of employees may have their priority of payment out of the assets of a receiver.

In *Calhoun v. St. Louis & S. E. R. Co.* (1880) 9 Biss. 330, 14 Fed. 9, where claims had been transferred by the original parties to whom they were due, the court allowed as valid claims only what had been paid for the claims thus transferred.

### III. Wages earned during receivership.

#### a. As a charge on income.

That wage claims arising out of the operation of the business by the receiver are, with other operating expenses, a first charge upon the income, is so thoroughly understood that the courts have seldom had occasion to pass upon the point.

In *Gehr v. Mont Alto Iron Co.* (1896) 174 Pa. 430, 34 Atl. 638, it was held that upon a distribution of the assets of an insolvent corporation, which had been placed in the hands of a receiver who converted its raw material on hand into a finished product, a claim for wages should be allowed as a preferred claim.

#### b. As a charge on corpus.

Where the receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property to their advantage, all proper charges, expenses, and liabilities incurred incident to the receivership are, as in *FLORIDA CONSTR. & REALTY CO. v. POURNELL* (reported herewith) ante, 685, held to be a first charge not only upon the current earnings, but also on the corpus of the estate; but the priority of a mortgage cannot be postponed to the payment of the expenses of a receivership which the lien creditors did not seek, and which was not necessary to protect their interests.

Wages of employees of receivers, while primarily payable out of the in-

come of the road, may be awarded priority of payment out of the proceeds of the property itself. *Union Trust Co. v. Illinois Midland R. Co.* (1885) 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809.

Receivers' certificates issued for work done and material supplied during the period of the receivership are entitled to priority over the mortgage bonds, on the theory that the expenditures have resulted in the improvement and betterment of the property. *First Nat. Bank v. Ewing* (1900) 43 C. C. A. 150, 103 Fed. 168.

In *Farmers' Loan & T. Co. v. Oregon P. R. Co.* (1897) 31 Or. 237, 38 L.R.A. 424, 65 Am. St. Rep. 822, 43 Pac. 706, it is held that although a railroad mortgagee, at whose instance a receiver is appointed in a foreclosure suit, thereby consents to the absolute control and management of the mortgaged property by the court and its agents, and to the priority of claims for the expenses incurred in its operation and management, it is not liable for unpaid wages or other obligations incurred by the receiver, where the expense of operation has exceeded the value of the mortgaged property, unless such responsibility was imposed by the court as a condition to the appointment or the continuance of the receiver in office. The court said: "Unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employees must look to the property in the custody of the court, and its income, for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

E. S. O.

## SIGRED THOMPSON

v.

J. TAYLOR THOMPSON, Appt.

*Iowa Supreme Court—July 7, 1919.*

(— Iowa, —, 173 N. W. 55.)

**Divorce — curses — suspicion and neglect.**

1. Subjecting a wife to curses, suspicion, and neglect, which produce mental disturbances, heart sickness, and unhappiness, may amount to inhuman treatment, calculated to endanger her life within the meaning of the divorce laws.

[See note on this question beginning on page 712.]

— inhuman treatment — what is.

2. Authority to grant divorce for cruel and inhuman treatment, calculated to endanger life, is not limited to acts of physical violence, which, in and of themselves, endanger life.

[See 9 R. C. L. 340.]

— treatment — what is.

3. Life may be endangered within the meaning of the divorce law by treatment, though it involves no physical violence.

[See 9 R. C. L. 389 et seq.]

Evidence — divorce — consideration of differences in training.

4. Although divorce cannot be granted for incompatibility of temperament, yet unsuitability of mind and purpose, differences in previous training, of character and temperament, may be considered in determining the effect of treatment inflicted by a man upon his wife upon her mind, and whether its natural effect would be to imperil her life.

[See 9 R. C. L. 337.]

**APPEAL** by defendant from a decree of the District Court for Story County (McCall, J.) in favor of plaintiff in an action for a divorce. *Affirmed.*

Statement by Gaynor, J.:

Appeal from a decree of the court granting a divorce based upon the grounds of cruel and inhuman treatment. Decree granted plaintiff as prayed. Defendant appeals.

Messrs. McHenry, De Ford, & McHenry for appellant.

Messrs. C. G. Lee and I. R. Meltzer, for appellee:

Personal violence amounts to cruel and inhuman treatment.

Caldwell v. Caldwell, 141 Iowa, 192, 119 N. W. 599; Barr v. Barr, 157 Iowa, 153, 138 N. W. 379.

A husband may be guilty of cruel and inhuman treatment within the meaning of the statute without personal violence, if his demeanor and conduct are such as to affect his wife's health.

Shors v. Shors, 133 Iowa, 24, 110 N. W. 16; Felkner v. Felkner, 153 Iowa, 60, 133 N. W. 341; Berry v. Berry, 115 Iowa, 545, 88 N. W. 1075; Rader v. Rader, 136 Iowa, 224, 113 N. W. 817; Luettjohann v. Luettjohann, 147 Iowa, 288, 126 N. W. 172.

It is cruel and inhuman treatment to publicly accuse a virtuous woman of unchastity.

Luick v. Luick, 132 Iowa, 303, 109 N. W. 783; Shook v. Shook, 114 Iowa, 592, 87 N. W. 680; Shors v. Shors, *supra*.

It is extreme cruelty for a husband to swear at and curse a refined woman.

Emery v. Emery, 181 Mich. 146, 147 N. W. 454.

Gaynor, J., delivered the opinion of the court:

In this action the plaintiff sought a divorce against her husband on the ground of cruel and inhuman treatment. Upon the record made the court found her contention sustained, and entered a decree in her favor as prayed. From this the defendant appeals. The only ground for the appeal is that the evidence does not justify the decree.

The action is based on subdivision 5 of § 3174 of the Code of 1897, which reads: "Divorces from

the bonds of matrimony may be decreed against the husband for the following causes: . . . When he is guilty of such inhuman treatment as to endanger the life of his wife."

This statute does not mean that divorce from the bonds of matrimony may be decreed only when it is shown that the husband has been guilty of some act of physical violence

Divorce—  
inhuman treatment—what is.

to the wife, which in and of itself endangers her life. It does not mean that the complaining wife, before she is entitled to invoke this provision of the statute and obtain the relief which it affords, must be able to show that the husband was guilty of some physical violence, which, operating upon her person, had, in and of itself, a tendency to endanger her life; or, to express it differently, the word "treatment," as used in this statute, does not refer to physical violence alone. Physical violence towards the wife, when carried to such a point as to endanger her life, is unquestionably ground for divorce. Physical violence may consist in many acts, each slight in its character, and none producing marks of violence upon the person, and yet, considered as a whole, may be ground for divorce; certainly so when from them the court is able to say the life of the wife is endangered. Life may be endangered by

—treatment—  
what is.

treatment, though it involves no physical violence. It takes more than the physical body to make up the entity known as a human being. The mind can grasp the possibility of inhuman treatment that does not endanger life. Whether it does or not depends, not only upon the physical, but upon the moral, mental, or spiritual quality of the one made subject to the treatment. Some people are stoical and indifferent in a degree to certain kinds of treatment. To others, more sensitive and delicate in their organization, the treatment is intolerable, weighs heavily upon the

heart, and preys upon the mind. This, reacting upon the body, endangers the life of the body. As some poet has said: "Killed by unutterable unkindness, worse than a life of blows."

In the case before us the record does not disclose any single act of physical violence on the part of the defendant, which, considered alone, had a tendency to endanger the life of his wife; but it does disclose a mental picture of conditions and treatment which, operating upon the mind of this plaintiff, might well tend to produce painful mental disturbance, a heavy heart, and a sorrowing mind, or, in other words, such treatment as tended to humiliate her and destroy her inalienable right to be happy. The relationship between husband and wife is very close. Each rightfully looks to and depends upon the other for companionship of heart and mind, and each is pledged to the other to bring into the home life that sunshine which gives warmth and comfort and happiness. We recognize the fact that, even in the balmiest weather, a cloud may pass between the sky and earth; but none of us look with pleasure on perpetual storms, clouds, and bitter cold, though through the operation of natural laws they sometimes come into our lives. "Some days must be dark and dreary." We know of people who live happily in the northland, mid snow and ice and bitter cold. These conditions do not imperil their lives because they are hardened to them, yet to one brought up in the warmth of the southland, the conditions of the northland are intolerable, and under their chilling influences they fade away and die. So it is with life in the home. A woman reared in the atmosphere of love and trust and confidence pines away when transplanted into an atmosphere pregnant with curses, suspicion and neglect.

During the years that intervened between the marriage of this plaintiff and the defendant, dark clouds

had slowly enveloped her life. She was subject to ~~—curse—~~ suspicion and neglect. curses, suspicion, and neglect. These produced mental disturbances, heart sickness, and unhappiness. These, reacting, had a natural tendency to imperil her life. There are plants that grow in dark and gruesome places. There are plants that thrive only in the sunshine and the light. The sunshine and the light are essential to their lives. Without it they fade and die. So, under the record that is made in this case, the court might well have found, and we think did find, that the plaintiff was not accustomed to the atmosphere in which she was forced to live after her marriage; that the chilling and life-sapping conditions found in her married life and in her home were due to the treatment of the defendant. Nothing is shown to have come between them and the happiness to which she was entitled as the wife of this man, except such as is traceable directly to his conduct. That her home life was unhappy, that the cold and chilling atmosphere of neglect, supplemented by a harsh mental attitude towards her and her antecedents, would ultimately tend to imperil her life, we think the record makes reasonably clear.

We are not disposed to set out the evidence, nor is it necessary to do so, because the questions upon which this case must be determined have many times been before this

court. No rule can be laid down that binds the mind of the court in determining whether or not the plaintiff has shown herself entitled, under this statute, to be relieved from the unhappy and life-blighting influences in which she finds herself. Each case must be adjudged on its own particular facts. In reaching the conclusion we do, we are not guided entirely by the verbal testimony of the witnesses, but from the suggestion which that evidence gives to the mind of conditions.

While it is true incompatibility of temperament is not a ground for divorce in this state, yet unsuitability of mind and purpose, differences in previous training, of character and temperament, may be considered in determining the effect that the treatment complained of has upon the mind of the complaining party, and whether the continuation of that treatment would have, in its natural effect, the imperiling of the life of the complainer. Though this record is not as strong in its facts as some that have been submitted to us, yet we think there is sufficient to justify the court in reaching the conclusion that it did, and with that conclusion we are satisfied, and the judgment is affirmed.

**Evidence—  
divorce—con-  
sideration of  
differences in  
training.**

Ladd, Ch. J., and Weaver and Stevens, JJ., concur.

### ANNOTATION.

#### Conduct amounting to treatment endangering life within statute defining grounds for divorce.

- I. Introductory, 712.
- II. General rule, 713.
- III. Conduct justifying divorce, 714.
- IV. Conduct not justifying divorce, 717.

##### *I. Introductory.*

This note is confined to a discussion of the question, what constitutes conduct "endangering life" under a statute thus defining the cruelty for which

- V. Misconduct of complainant defeating divorce, 719.
- VI. Rule in Alabama, 722.

a divorce may be granted. Whether danger to life is essential to cruelty generally is excluded, as is the matter of conduct endangering life as a ground for a separation.



*II. General rule.*

In the majority of cases the courts have held that a statutory provision specifying treatment endangering life as a ground for divorce does not require the use of physical violence, but that conduct, violent or otherwise, which, under all the circumstances of the case, endangers life, is intended thereby. *Beebe v. Beebe* (1859) 10 Iowa, 133; *Caruthers v. Caruthers* (1862) 13 Iowa, 266; *Cole v. Cole* (1867) 23 Iowa, 433; *Wheeler v. Wheeler* (1880) 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689; *Harnett v. Harnett* (1880) 55 Iowa, 45, 7 N. W. 394; *Sesterhen v. Sesterhen* (1882) 60 Iowa, 301, 14 N. W. 333; *Sackrider v. Sackrider* (1882) 60 Iowa, 397, 14 N. W. 736; *Doolittle v. Doolittle* (1889) 78 Iowa, 691, 6 L.R.A. 187, 43 N. W. 616; *Douglass v. Douglass* (1890) 81 Iowa, 258, 47 N. W. 92; *Haight v. Haight* (1900) — Iowa, —, 82 N. W. 443; *Shook v. Shook* (1901) 114 Iowa, 592, 87 N. W. 680; *Berry v. Berry* (1902) 115 Iowa, 543, 88 N. W. 1075; *Turner v. Turner* (1904) 122 Iowa, 113, 97 N. W. 997; *Ellithorpe v. Ellithorpe* (1904) — Iowa, —, 100 N. W. 323; *Rader v. Rader* (1907) 136 Iowa, 223, 113 N. W. 817; *Thornberry v. Thornberry* (1829) 2 J. J. Marsh. (Ky.) 322; *Hooe v. Hooe* (1906) 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214; *Butler v. Butler* (1849) 1 Pars. Sel. Eq. Cas. (Pa.) 329; *Dietrick v. Dietrick* (1879) 14 Phila. (Pa.) 649; *Jones v. Jones* (1870) 66 Pa. 494; *McMahan v. McMahan* (1898) 186 Pa. 435, 41 L.R.A. 802, 40 Atl. 795. And see the reported case (*THOMPSON v. THOMPSON*, ante, 710).

In *Caruthers v. Caruthers* (1862) 13 Iowa, 266, the court said that the question was whether the complaint showed "such a disposition of mind upon the part of defendant as would justify the chancellor in concluding that the life of the complainant was endangered by compelling the parties to live together."

And it has been said that "to impair health is to endanger life." *Cole v. Cole* (1867) 23 Iowa, 433.

In *Berry v. Berry* (1902) 115 Iowa, 543, 88 N. W. 1075, the court said: "With the husband a strong man of violent temper and profane and abusive tongue, and the wife a woman in frail health and of weak and sensitive nerves, it does not require murderous blows or the display of firearms to endanger life, within the meaning of the statute. Upon such a woman every curse and foul epithet falls with as killing effect as a stroke from the clenched fist. Cruelty of this kind is good ground for divorce."

Each case, however, must be decided on its own facts and circumstances, for the effect of a certain course of conduct upon the health and lives of different people varies according to their breeding, physical constitution, and temperament. *Douglass v. Douglass* (1890) 81 Iowa, 258, 47 N. W. 92; *Cole v. Cole* (1867) 23 Iowa, 433.

In *Blair v. Blair* (1898) 106 Iowa, 269, 76 N. W. 700, the court, by way of dictum, said: "Cruel and inhuman treatment towards one who was mentally or physically infirm might endanger life, when as to one who was in mental and physical health and vigor it would not have such an effect."

In *Knight v. Knight* (1871) 31 Iowa, 455, it was said: "In this class of cases precedents can do little more than inform the understanding and assist the judgment. Every case must very largely depend upon its own peculiar circumstances, and the character, habits, and disposition of the parties." And see, to the same effect, the reported case (*THOMPSON v. THOMPSON*, ante, 710).

In an early Kentucky case, *Thornberry v. Thornberry* (1829) 2 J. J. Marsh. (Ky.) 322, "some injury to the body, intended or inflicted, which will endanger life," was held to be necessary under the statute, but in a later case (*Hooe v. Hooe* (1906) 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214) it was held that there need be no bodily injury or apprehension thereof, but that the cruelty in question may consist of acts showing "a settled aversion to the wife, such as permanently destroys her peace or happiness."

### III. *Conduct justifying divorce.*

In *Beebe v. Beebe* (1859) 10 Iowa, 133, an action for divorce brought by a husband on the ground that his life was endangered, it was shown that the wife had frequently beaten the plaintiff, and attacked him and pulled out his hair, and had threatened to poison him. It was held that the injuries committed by the wife were sufficient to justify a divorce. The court said, concerning the endangering of life: "There may have been no act done in the way of attempting the apprehended injury, and yet the court as well see that there is danger as though there had been many attempts."

In *Caruthers v. Caruthers* (1862) 13 Iowa, 266, where a wife sought a divorce on the ground of such inhuman treatment as would endanger her life, it was shown that her husband had threatened to whip her, that he had been brutal toward her and her children, and had left her for some time to provide for the family. It was held that such treatment of a person of the advanced age of the plaintiff "might so affect her mind as to destroy her health, and ultimately endanger her life."

In *Cole v. Cole* (1867) 23 Iowa, 433, the action was brought by a wife for divorce on the ground of "inhuman treatment endangering her life." The plaintiff as a result of an attack of rheumatism had lost the use of her lower limbs. It was shown that the husband, who was addicted to drink, abused his wife, used foul and profane language toward her, refused to provide her with necessities or with the services of a physician, of which she was greatly in need, insulted her beyond measure in his outbursts of anger, and shut her off from society. The court pointed out that, as regards an enfeebled woman, certain treatment might be inhuman which could not be so considered were she in sound health. The refusal to employ a physician was said to be, in itself, inhuman treatment, and it was held that the husband's conduct was such as might endanger the life of the wife. The court said: "To do an act involving,

to its injury, the health of a party is, *ex necessitate*, to endanger life."

In *Harnett v. Harnett* (1880) 55 Iowa, 45, 7 N. W. 394, a wife sought a divorce, alleging inhuman treatment. Evidence was offered to show that the husband had on one occasion choked his wife and had struck her until her mouth bled, and it was also shown that on account of the husband's idleness the wife lacked food, clothing, and bed clothing. The court held that while divorce might not have been granted for the few acts of violence alone, the failure of the husband to provide the necessities of life might result in impairing the health and shortening the life of the plaintiff, and so justified granting the divorce.

*Wheeler v. Wheeler* (1880) 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689, was an action for divorce brought by a wife on the ground of inhuman treatment endangering her life. It was shown that the husband called his wife foul names, accused her of unchastity, and used violence against her on several different occasions, choking her and pushing her against a door. The husband was a confirmed drunkard. The court said that if a husband calls his wife foul names, which impute unchastity, "in the presence of their children, who are of an age to understand the meaning of such terms, and also in the presence of their neighbors and others, there can, it seems to us, be but one result, and that would be to grievously wound the feelings and utterly destroy his wife's peace of mind to such an extent as to impair her bodily health." It was held that the conduct of the defendant was such as to endanger the life of the plaintiff and accordingly justified a divorce.

In *Sackrider v. Sackrider* (1882) 60 Iowa, 397, 14 N. W. 736, an action for divorce brought by a wife on the ground of inhuman treatment, it appeared that the husband had thrown a satchel full of groceries against her, that he had threatened to hit her with a hammer which he held over her, and that he had searched the house for a pistol to shoot her. It was held that the evidence was sufficient to justify

a divorce, and that it was not necessary that physical injury should be sustained before life could be considered to be endangered within the meaning of the statute.

In *Sesterhen v. Sesterhen* (1882) 60 Iowa, 301, 14 N. W. 333, wherein a wife sought a divorce on the ground of cruel and inhuman treatment, it was shown that violence was used toward the plaintiff on several occasions, and that in one instance "he struck, beat, and choked her," upsetting a lighted lamp, etc. It was held that such an act constituted legal cruelty and justified a divorce.

In *Doolittle v. Doolittle* (1889) 78 Iowa, 691, 6 L.R.A. 187, 43 N. W. 616, wherein a wife sought a divorce from her husband, alleging inhuman treatment, it was shown that the wife, who had been stricken with paralysis, was continually abused by the husband, who addressed her in "profane and obscene language," accused her in the presence of her children of impropriety with another man, refused her the necessaries of life, and on several occasions used personal violence. The court said: "A long-continued course of ill treatment, even without physical violence, may be made as effectual, in many cases, to destroy life as any deadly weapon would be. If the treatment of plaintiff by defendant, considered as an entirety, is of a nature to affect her mind, undermine her health, and thereby endanger her life, it is sufficient to entitle her to the relief she demands."

In *Douglass v. Douglass* (1890) 81 Iowa, 258, 47 N. W. 92, wherein a wife sought a divorce from her husband, charging cruel and inhuman treatment, it was shown that the defendant was exceedingly quarrelsome and threatening, that he used vile and profane epithets in addressing her, and that he threatened her with violence, and did use violence upon her. It was held that the health of some women might be impaired or their life endangered by reason of the fact that their husbands called them foul names, but that to others of a different temperament such was not cruel and inhuman treatment within the

meaning of the statute. And no divorce would have been granted in this case had it not been for the personal violence and threats of violence, but the husband continually shook his fist at his wife, jostled her, pushed her about, and assaulted her, and on this evidence the court refused to say that the plaintiff's life was not in danger, and granted the divorce.

In *Haight v. Haight* (1900) — Iowa, —, 82 N. W. 448, an action for divorce brought by a wife on the ground, *inter alia*, of cruel and inhuman treatment, it appeared that the defendant had used vile and abusive language to his wife, and had made frequent and false charges of adultery against her to third persons. The court said: "That frequent and false public charges of this kind constitute legal cruelty, within the meaning of our statute, we have no doubt."

In *Shook v. Shook* (1901) 114 Iowa, 592, 87 N. W. 680, where a wife had brought an action for divorce, it was shown that the husband, although never having beaten his wife, insulted and dishonored her by calling her vile names, and finally "refused to eat of her cooking," and would not occupy the same room with her. It was held that such a course of treatment, if continued, might have induced nervous prostration and insomnia, resulting finally in impairing her health and endangering her life.

In *Berry v. Berry* (1902) 115 Iowa, 543, 88 N. W. 1075, an action by a wife for a divorce, it appeared that the husband had acted in a cruel and inhuman manner toward his wife, although her assertions that he struck her were denied. The court said: "Some women may be so constituted that loud-mouthed curses upon themselves, their parents, and friends, and coarse insinuations against their wife's virtue, will be received with perfect equanimity; and as to them, while it is cruel and inhuman treatment, it does not endanger life. But women who thrive upon such treatment are rare. With the husband a strong man of violent temper and profane and abusive tongue, and the wife a woman in frail health and of weak and sen-

sitive nerves, it does not require murderous blows or the display of firearms to endanger life, within the meaning of the statute. Upon such a woman every curse and foul epithet falls with as killing effect as a stroke from the clenched fist. Cruelty of this kind is good ground for divorce."

In *Ellithorpe v. Ellithorpe* (1904) — Iowa, —, 100 N. W. 328, an action for divorce brought by a wife, it appeared that the husband had used "vulgar and profane language toward" his wife, had threatened to persuade other women to live in concubinage with him, and had impliedly accused her of unchastity. She became a victim of nervous prostration. The court approved a finding that his conduct was such as to break down her health and endanger her life.

In *Turner v. Turner* (1904) 122 Iowa, 118, 97 N. W. 997, an action for divorce brought by a wife, it appeared that the defendant had frequently and publicly charged his wife with being an unchaste woman, and had stated that their youngest child was not his son. The evidence showed that these false charges had been the cause of ill health to the plaintiff, and had thereby imperiled her health and life so as to justify a divorce under the statute.

*Rader v. Rader* (1907) 136 Iowa, 223, 113 N. W. 817, was an action for divorce instituted by the wife on the ground of "cruel and inhuman treatment, calculated to endanger life, and consisting of the use of profane, vulgar, and obscene language toward plaintiff, threats of bodily injury, and deprivation of food and wearing apparel." It was not claimed that violence was ever used by the husband, but it was shown that the wife had become "broken, both in health and spirits," since her marriage. The court said: "The general treatment accorded the wife by the husband should be considered, and if, upon the whole record, it appears that the life and health of the wife have been endangered by ill treatment, be that nothing more than abusive, insulting, profane, and vulgar language, lack of affection, or failure to furnish the

necessaries of life, a divorce should be granted."

In *Thornberry v. Thornberry* (1829) 2 J. J. Marsh. (Ky.) 322, a wife sought a divorce on the ground of cruel and barbarous treatment. It appeared that she had been heard to shriek in her house, that she had been seen leaving the house, apparently in great agony, and her husband had acknowledged the use of violence upon her. The court held that the evidence did not show that the plaintiff's life had been endangered within the meaning of the statute, which was said to demand "some injury to the body, intended or inflicted, which will endanger life."

In *Hooe v. Hooe* (1906) 122 Ky. 590, 5 L.R.A. (N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214, a wife brought an action for divorce, alleging cruelty. A statute provided for a divorce on the ground of "such cruel beating or injury, or attempt at injury, of the wife by the husband, as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury from her remaining with him." The court, pointing out that each case must stand on its own facts and circumstances, held that the cruelty involved need not necessarily take the form of bodily injury or apprehension thereof, but might consist of acts showing "settled aversion to the wife," such as to destroy "her peace and happiness."

In *Butler v. Butler* (1849) 1 Para. Sel. Eq. Cas. (Pa.) 329, the court, in considering what constituted cruelty endangering life within the statute, included violence and apprehension of violence, refusal to furnish the necessaries of life when financially capable of doing so, and treatment calculated by insult and annoyance to impair the health and endanger life, saying "that the cruelty, within our statute, which entitles a wife to a divorce from her husband, is actual personal violence or the reasonable apprehension of it, or such a course of treatment as endangers her life or health and renders cohabitation unsafe." It was further said that "the cruelty is judged from its effects, not

solely from the means by which those effects are produced."

In *Jones v. Jones* (1870) 66 Pa. 494, a husband brought an action for divorce, alleging cruel and barbarous treatment. It appeared that the wife had been violent and abusive, had used vile epithets in addressing her husband, had forced the family out of the kitchen, and had threatened to poison and kill the libellant and his family. It was held that the libellant was entitled to a divorce, the court pointing out that threats might "impress the mind with fear and tend directly to endanger health, and may even peril life."

In *Dietrick v. Dietrick* (1879) 14 Phila. (Pa.) 649, a wife brought an action for divorce, and alleged cruelty as one of the grounds. It was shown that the husband had persecuted his wife by a long series of threats and acts of violence, had threatened her with poisoning and beatings, put paint on her face and fastened her in a corncrib, and was finally put in jail for his conduct toward her. It was held that the evidence showed treatment which might result in endangering her health and life, and justified a divorce.

In *McMahen v. McMahan* (1898) 186 Pa. 485, 41 L.R.A. 802, 40 Atl. 795, it appeared that a wife who sought a divorce on the ground of cruelty had contracted syphilis from her husband. It was held that continued cohabitation with her husband would endanger her life within the meaning of the statute, and that she was entitled to a divorce.

See also the note to C. — v. C. —, post, 1013, on venereal disease as a ground for divorce.

#### IV. *Conduct not justifying divorce.*

The courts have refused to grant a divorce on the ground of conduct endangering life, where it is evident from all the circumstances of the case that no great injury, physical or mental, has been inflicted on the complainant. *Rose v. Rose* (1849) 9 Ark. 507; *Rie v. Rie* (1879) 84 Ark. 37; *Kurtz v. Kurtz* (1881) 38 Ark. 119; *Haley v. Haley* (1884) 44 Ark. 429; *Freerking v. Freerking* (1865) 19 Iowa, 34; *Knight v. Knight* (1871) 31 Iowa, 451;

*Rivers v. Rivers* (1882) 60 Iowa, 378, 14 N. W. 774; *Whaley v. Whaley* (1886) 68 Iowa, 647, 27 N. W. 809; *Edgerton v. Edgerton* (1890) 79 Iowa, 68, 44 N. W. 218; *Ennis v. Ennis* (1894) 92 Iowa, 107, 60 N. W. 228; *Blair v. Blair* (1898) 106 Iowa, 269, 76 N. W. 700; *Wells v. Wells* (1902) 116 Iowa, 59, 89 N. W. 98; *Harkins v. Harkins* (1904) — Iowa, —, 99 N. W. 154; *Robertson v. Robertson* (1906) — Iowa, —, 106 N. W. 166; *Pfannebecker v. Pfannebecker* (1907) 133 Iowa, 425, 119 Am. St. Rep. 608, 110 N. W. 618, 12 Ann. Cas. 543; *Layton v. Layton* (1914) 166 Iowa, 74, 147 N. W. 134; *Chapman v. Chapman* (1917) 181 Iowa, 801, 165 N. W. 96; *Gordon v. Gordon* (1864) 48 Pa. 226; *Detrick's Appeal* (1888) 117 Pa. 452, 11 Atl. 882.

Thus, in *Knight v. Knight* (1871) 31 Iowa, 451, wherein it appeared that several little tussles had taken place between the husband and wife, it was held that no great harm had been done.

A similar decision was given in *Whaley v. Whaley* (1886) 68 Iowa, 647, 27 N. W. 809, wherein it appeared that a wife threw a piece of paper in her husband's face during a controversy.

Slight acts of violence, without more, are insufficient grounds for a divorce under the statute. *Haley v. Haley* (1884) 44 Ark. 429; *Wells v. Wells* (1902) 116 Iowa, 59, 89 N. W. 98; *Robertson v. Robertson* (1906) — Iowa, —, 106 N. W. 166.

Nor will testimony that the wife has been forced to excessive household or farm labor satisfy the statutory requirements. *Kurtz v. Kurtz* (1881) 38 Ark. 119; *Robertson v. Robertson* (Iowa) and *Detrick's Appeal* (Pa.) supra.

A harsh disposition, a contemptuous manner, or foolish conduct do not come within the meaning of the statute in question. *Rose v. Rose and Rie v. Rie* (Ark.) supra; *Ennis v. Ennis* (1894) 92 Iowa, 107, 60 N. W. 228.

A wife's accusation of infidelity is not sufficient to entitle a husband to a divorce on the ground of treatment endangering life. *Pfannebecker v. Pfannebecker* (1907) 133 Iowa, 425,

119 Am. St. Rep. 608, 110 N. W. 618, 12 Ann. Cas. 543. And the same is true as to a similar accusation made by a husband against his wife, when not made in the presence of third persons. *Harkins v. Harkins* (1904) — Iowa, —, 99 N. W. 154.

In *Rose v. Rose* (Ark.) *supra*, wherein it was found that a husband acted toward his wife in a manner that was contemptuous, neglectful, and indifferent, and that he was unkind and harsh, the court held that he could not be held guilty of such "cruel and barbarous treatment" of his wife as to "endanger her life" within the contemplation of the statute.

In *Rie v. Rie* (1879) 34 Ark. 37, wherein a husband had brought an action for divorce, alleging, *inter alia*, cruel and barbarous treatment endangering his life, it was held that the charge had not been upheld by evidence showing great harshness and uniform unkindness on the part of the wife, and a threat to poison him, the threat having been substantially denied.

In *Haley v. Haley* (1884) 44 Ark. 429, wherein a wife, in an action for divorce, alleged that her husband used toward her opprobrious epithets, etc., it was held that in spite of several occasions of slight personal violence by him there was no proof to sustain a charge of cruel and barbarous treatment endangering life.

In *Freerking v. Freerking* (1865) 19 Iowa, 34, a wife seeking a divorce alleged such inhuman treatment as to endanger her life. It was asserted that the husband abused his wife by the use of profane language and insulting names and by unjust accusations against her; and further that he insulted and threatened the children of his wife by a former husband, and neglected to provide all the necessities of life. The court pointed out that in deciding whether life was endangered, general allegations must be put aside and consideration given only to specific facts established by the evidence, and held that there was no evidence to justify a divorce.

In *Rivers v. Rivers* (1882) 60 Iowa, 378, 14 N. W. 774, wherein a wife

brought an action for divorce on the ground of "cruel and inhuman treatment, such as to impair the health and endanger the life of plaintiff," she charged that her husband had neglected to provide for his family, permitting them to be evicted from their home, and that he was of notoriously bad reputation, having been indicted for a felony. No violence or even violent language was shown to have been used by him toward his wife. The court held that there was no evidence of cruel or inhuman treatment.

In *Ennis v. Ennis* (1894) 92 Iowa, 107, 60 N. W. 228, wherein an action for a divorce had been brought by the husband on the ground of inhuman treatment, it appeared that at the time of the marriage and for a long time thereafter the wife had been infatuated with another man; no misconduct was alleged, but the matter formed a source of constant irritation, with the consequence that their home life became a failure, and the plaintiff's health became impaired. It was held that the plaintiff's ill health, arising from the effect of his wife's conduct on a sensitive and jealous nature, did not constitute "inhuman treatment" within the statute. The court said: "Acts of physical violence are not necessary to constitute inhuman treatment. . . . But treatment, to be inhuman, must be wilful, and not merely the result of sickness, nervous derangement, or other weakness, for which the party guilty of it is not responsible, and which deprives him of the power of self-control."

In *Blair v. Blair* (1898) 106 Iowa, 269, 76 N. W. 700, wherein a wife brought an action for a divorce, it appeared that the husband was extremely jealous of his wife, and that on one occasion he had induced a hired boy to sign a statement that she had been unduly intimate with him; he also sought the boy's help in entrapping his wife. However, no violence or threats of violence were attributed to the defendant, although the wife was shown to have been very violent at times. The plaintiff was in good health at the time of the separation. It was held the treatment of the husband was

not shown to have been such as to endanger the life of the wife.

*Wells v. Wells* (1902) 116 Iowa, 59, 89 N. W. 98, was an action for divorce brought by a husband with a cross petition by the wife, asking for divorce on the ground of cruel and inhuman treatment. It was held that treatment endangering human life within the meaning of the statute may consist either of "physical violence, which, in itself, endangers life," or of conduct the effect of which is to impair the wife's health. The evidence, while showing slight violence, was held not to be sufficient to fulfil the statutory requirements.

In *Robertson v. Robertson* (1906) — Iowa, —, 106 N. W. 166, an action for divorce brought by the wife, it appeared that she was a cripple, and that her husband, a drunkard and an epileptic, with a crippled arm, had struck her on several different occasions when drunk. Because of the refusal of the husband to work the wife was sometimes compelled to provide for the family. It was held that the evidence did not show that the plaintiff's life was endangered by the treatment of her husband.

In *Gordon v. Gordon* (1864) 48 Pa. 226, wherein a husband charged that his wife used vicious and obscene language, was guilty of immoral conduct, and had committed acts of violence against him, it was held that such indignities did not endanger life within the meaning of the statute.

#### *V. Misconduct of complainant defeating divorce.*

A divorce will not be granted where the treatment alleged as endangering life was provoked by the misconduct of the complainant. *Knight v. Knight* (1871) 31 Iowa, 451; *Maben v. Maben* (1887) 72 Iowa, 658, 84 N. W. 462; *Edgerton v. Edgerton* (1890) 79 Iowa, 68, 44 N. W. 218; *Evans v. Evans* (1891) 82 Iowa, 462, 48 N. W. 809; *Owen v. Owen* (1894) 90 Iowa, 365, 57 N. W. 887; *Coulthard v. Coulthard* (1894) 91 Iowa, 742, 60 N. W. 213; *Felton v. Felton* (1895) 94 Iowa, 739, 62 N. W. 677; *Schaffer v. Schaffer* (1898) 106 Iowa, 492, 76 N. W. 738; *Sylvester v. Sylvester* (1899) 109 Iowa, 401, 80

N. W. 547; *Olson v. Olson* (1906) 130 Iowa, 353, 106 N. W. 758; *Layton v. Layton* (1914) 166 Iowa, 74, 147 N. W. 134; *Wiley v. Wiley* (1915) 171 Iowa, 390, 151 N. W. 205; *Groves v. Groves* (1915) 170 Iowa, 489, 153 N. W. 69; *Chapman v. Chapman* (1917) 181 Iowa, 801, 165 N. W. 96.

Thus, in the case last cited, the court said: "We hold one reason why plaintiff is not entitled to divorce is that her own conduct brought upon her all the ill treatment of which she complains, and that there is no doubt that if she had justly appreciated the responsibilities and duties of her position, had properly regarded the failings of her husband, and restrained her pride and guarded her temper, she might have remained an honored and cherished wife."

In *Olson v. Olson* (1906) 130 Iowa, 353, 106 N. W. 758, it was said: "Most of plaintiff's troubles have been of her own creation, and the remedy, therefore, is not through the divorce court, but in change of conduct and demeanor toward her husband."

However, where the complainant has been at fault, but not to such a degree as to provoke the treatment complained of, the right to a divorce on the ground alleged is not impaired thereby. *Doolittle v. Doolittle* (1889) 78 Iowa, 691, 6 L.R.A. 187, 43 N. W. 616.

In *Maben v. Maben* (1887) 72 Iowa, 658, 84 N. W. 462, a wife sought a divorce on the ground of inhuman treatment endangering her life. It appeared that there were numerous quarrels and "spats" between the husband and wife, wherein both lost their tempers, with the result that there were occasional scuffles and tussles in which the wife may have been slightly bruised. On one occasion the husband in anger used a vile epithet in addressing her. The court held that the evidence did not show that the plaintiff's health had been impaired by anything that had been done, and pointed out that their troubles were due to the failure of both to curb their tempers and tongues.

In *Edgerton v. Edgerton* (1890) 79 Iowa, 68, 44 N. W. 218, wherein a wife

sought a divorce, alleging "inhuman treatment endangering life," it appeared that the parties were very contentious, and on the trial there were accusations and counter accusations of improper acts and threatenings. The court held that there was no evidence showing life to be endangered.

In *Evans v. Evans* (1891) 82 Iowa, 462, 48 N. W. 809, an action for divorce was brought by a wife on the ground of inhuman treatment endangering her life. It appeared that the husband used "indecent and profane language in the presence of his wife and child," that he cursed her, threatened her life, and accused her of unchastity. It was shown, however, that the plaintiff was guilty of improper conduct with other men, and that she had little regard for her husband's feelings. It was held that the plaintiff was not such a sensitive person that her life was endangered by the conduct of the defendant, whose "treatment of the plaintiff was for the most part kind when he was not provoked by her improper language and conduct."

In *Coulthard v. Coulthard* (1894) 91 Iowa, 742, 60 N. W. 218, wherein a wife brought an action for divorce on the ground of cruel and inhuman treatment in that her husband had charged her with adultery, the court held that, the charge having been well founded, no divorce was justified.

In *Owen v. Owen* (1894) 90 Iowa, 365, 57 N. W. 887, wherein a wife, aged twenty-seven, brought an action for divorce on the ground of such inhuman treatment as to endanger her life, it appeared that her husband was an old man of seventy-seven years, that she often provoked him to anger, and on one occasion when he had used violence and thrown her to the floor, she had been guilty of striking him on the head with a chisel. It was held that the inhuman treatment complained of was the result of the plaintiff's own misconduct.

In *Felton v. Felton* (1895) 94 Iowa, 739, 62 N. W. 677, an action for divorce brought by a wife on the ground of cruel and inhuman treatment endangering her life, it appeared that

both husband and wife had been abusive and violent toward each other; the husband had cursed her, charged her with unwifely conduct, put her mother and sister out of his house, and had struck her; the wife admitted quarreling with him, threatening him with a knife, and throwing a stove door at him. It was held that there was nothing to show that the plaintiff's life had been endangered. Concerning the husband, the court said: "He has not always exercised the forbearance and self-control he should have done, but the plaintiff gave him much cause for complaint, and was fully as much to blame for their domestic trouble as he was."

In *Schaffer v. Schaffer* (1898) 106 Iowa, 492, 76 N. W. 738, a husband, seeking a divorce, charged his wife with abuse, violence, threats, and neglect, so that his health was impaired and his life endangered. It was shown, however, that until the employment of a certain domestic, with whom the husband became too intimate, there was little ground for complaint of the wife's behavior. For his conduct with the domestic, the husband was expelled from church. It was held that he was responsible for his troubles, such as they were, and that his condition afforded no ground for relief.

In *Sylvester v. Sylvester* (1899) 109 Iowa, 401, 80 N. W. 547, an action for divorce brought by a wife on the ground of inhuman treatment endangering her life, it appeared that there had been difficulties from the day of their marriage; the husband had been guilty of threats and violence on a number of occasions; he had put her out of the house in her night clothes, had thrown things at her, and had been generally abusive. It was shown, however, that the plaintiff also had been abusive and violent, and in consequence had provoked her husband. It was held that the life of the plaintiff had not been endangered by her treatment at the hands of the defendant. The court said: "Both were in fault, neither exercised the forbearance nor manifested the consideration for the rights and desires of the other



which their relation demanded, and, although the husband's conduct is without justification, we are not prepared to say that it was more reprehensible than was that of the wife."

In *Olson v. Olson* (1906) 180 Iowa, 353, 106 N. W. 758, an action for divorce brought by a wife on the ground of cruel and inhuman treatment endangering the life and health of the plaintiff, it appeared that there were a few unimportant threats on his part, and that the incident relied upon by the wife to prove her case was merely a fight for supremacy in the family. The plaintiff attempted to interfere with the defendant in regard to the disposal of some junk and he used only the force necessary to make her desist. It was held that a decree of divorce was unwarranted, and that both parties were at fault in the matter. The court said: "Most of plaintiff's troubles have been of her own creation, and the remedy, therefore, is not through the divorce court, but in change of conduct and demeanor toward her husband."

In *Layton v. Layton* (1914) 166 Iowa, 74, 147 N. W. 134, an action for divorce brought by a wife on the ground of cruel and inhuman treatment, it appeared that the plaintiff had interfered with the defendant when he was punishing one of their children, whereupon he pushed her out of the door, the defendant claiming that the plaintiff was armed with a knife at the time and that he acted in self-defense. The wife also complained of neglect and abusive language used toward her, but it was shown that she had assumed an attitude of mental hostility. It was held that the plaintiff was in large measure responsible for the situation of which she complained, and that she had not sustained by her evidence the claim that her life was endangered by cruel and inhuman treatment.

In *Groves v. Groves* (1915) 170 Iowa, 489, 153 N. W. 69, an action for a divorce brought by a husband, the plaintiff charged that the defendant's treatment, consisting of the use of vile and abusive language toward him, "circulating false and malicious re-

ports" about him, and violent assaults upon him, had endangered his life. It appeared, however, that practically all the trouble arose from the wife's well-founded jealousy, and that the plaintiff had misconducted himself with other women, a visit of one of these women to his home having called forth one of the acts of violence charged against the defendant. It was held that there was absolutely no evidence showing the plaintiff's life to have been endangered so as to justify a divorce.

In *Wiley v. Wiley* (1915) 171 Iowa, 390, 151 N. W. 205, wherein a wife brought an action for a divorce on the ground of cruel and inhuman treatment, it appeared that the plaintiff, who, previous to her marriage, had been living with questionable people, aroused her husband's jealousy by writing to a man, an old friend, telling him that she loved him and was tired of her husband. There were also many vulgar post cards received by her from this man. It was shown that the defendant became abusive toward his wife and used violence upon her. It was held that it was not the fault of the husband, since the correspondence mentioned had made it impossible for him to treat his wife as he had prior to that time. The court said: "The record fails to establish cruelty on defendant's part, endangering the life of plaintiff, and this was essential to justify the entry of a decree."

In *Chapman v. Chapman* (1917) 181 Iowa, 801, 165 N. W. 96, an action for divorce brought by a wife, it appeared that the cruel and inhuman treatment charged consisted of accusations of unwifely conduct, of the use of vile and abusive language toward her, of alienating her son's affections, and of two instances of considerable physical violence, one of which the defendant denied, the other having been done in self-defense, after he had been struck by a large dish thrown at him by the plaintiff. It was shown that the plaintiff had failed in a former effort to obtain a divorce, that she returned to her husband in an unfriendly mood, with the intention of repeating her effort to obtain a divorce, that she was

easily angered and exceedingly profane and abusive when so angered, and that on one occasion she had been exceedingly violent, and had thrown the dish above mentioned. The court said: "We hold one reason why plaintiff is not entitled to divorce is that her own conduct brought upon her all the ill treatment of which she complains, and that there is no doubt that if she had justly appreciated the responsibilities and duties of her position, had properly regarded the failings of her husband and restrained her pride, and guarded her temper, she might have remained an honored and cherished wife. . . . We find that defendant's conduct towards his wife was by no means such as it should have been; that he did unquestionably at times mistreat her, but that there is substantially no evidence of permanent impairment of health; and that none of these cases of physical violence complained of was calculated to endanger life."

#### VI. *Rule in Alabama.*

In Alabama actual physical violence or a reasonable apprehension thereof is necessary under the statute, which provides, as a ground for divorce, actual violence attended with danger to life, etc. *Goodrich v. Goodrich* (1870) 44 Ala. 670; *Folmar v. Folmar* (1881) 69 Ala. 84; *Wood v. Wood* (1885) 80 Ala. 254.

In *Folmar v. Folmar* (1881) 69 Ala. 84, the court said: "There must be actual violence inflicted on the person of the wife, attended with danger to her life or health, or such conduct on the part of the husband as generates a reasonable apprehension of such violence."

In *Wood v. Wood*, *supra*, it was said: "Under the statute, it is requisite that there shall be physical or bodily violence or a reasonable apprehension of such violence, as distinguished from harsh and criminary words, rude and offensive manners, want of civil attention, or other conduct which wounds the feelings, shocks the sensibilities, and occasions grief and sorrow and domestic infelicity, but does not cause a reasonable apprehension of bodily harm."

But acts falling short of physical violence and consisting of harsh, rude, and insulting conduct may tend to show the animus by which the husband was moved in his violent conduct. *Goodrich v. Goodrich*, *supra*.

In the report of this case it was shown that violence had been done to a wife by her husband; she had appeared with her cheek wounded, her lips bruised and bleeding, and her mother testified that there had been a contusion on her side. It was held that a divorce allowed by statute "when the husband has committed actual violence on her person, attended with danger to life or health; or when, from his conduct, there is reasonable apprehension of such violence,"—had been properly granted. Concerning numerous insults which the wife had suffered, the court said: "It is true, that these acts of extreme vulgarity and rudeness, alone, would not justify a divorce in favor of the wife, though they might wholly undermine her peace of mind and health; but they show the animus of the husband, and afford the court a measure by which to estimate the import of other acts of a more violent character. For this purpose they are legitimate."

In *Folmar v. Folmar* (1881) 69 Ala. 84, an action for divorce brought by a wife, it was shown that the husband, moved by an unjustified jealousy, brought against his wife degrading charges of infidelity, his humiliating conduct continuing for a number of years. It was held that "such charges, by themselves, are not enough to authorize a divorce. There must be actual violence inflicted on the person of the wife, attended with danger to her life or health, or such conduct on the part of the husband as generates a reasonable apprehension of such violence. There being proof, however, of personal violence, actual or threatened, insulting or offensive language is received as evidence in aid of it." Since there was in this case some proof of actual violence and a threat thereof by the husband, the decree of divorce was upheld.

In *Wood v. Wood*, *supra*, a wife sought a divorce, alleging disgraceful

conduct on the part of the husband in that he neglected her while ill, treated her like a servant, and disregarded the obligations of his marriage vows. It was held that since there was "no allegation of actual violence on her person, or of threat or conduct from which there is reasonable apprehension of such violence," she had not satisfied the requirements of the statute under which the action was brought.

In *May v. May* (1905) — Ala. —, 39 So. 679, wherein a wife brought a bill for a divorce on the ground, *inter alia*, of cruelty, it was held that the requirements of the statute for proof of "actual violence on her person, attended with danger to life or health," had not been satisfied by the uncor-

roborated evidence of the wife thereon, said evidence being considered too general and too indefinite as to time and circumstances, and also as indicative that the violence, if any, had been condoned. And where the wife had been guilty of misconduct, she was considered to have been to blame in provoking her husband to abuses.

In *Morrison v. Morrison* (1910) 165 Ala. 191, 51 So. 743, it was held that the proof of violence on the part of the husband was very weak, and that if believed, it was doubtful whether it was sufficient to endanger the life or health of the wife or to create any reasonable apprehension thereof.

R. S.

VORIS FOX, Appt.,

v.

FORTY-FOUR CIGAR COMPANY, Respt.

*New Jersey Court of Errors and Appeals—June 18, 1917.*

(90 N. J. L. 483, 101 Atl. 184.)

**Evidence — statement to attorney after termination of relation — privileged.**

1. A communication made by a party to an attorney after the latter's employment has terminated is not privileged, and the attorney may be compelled to disclose the information so acquired.

[See note on this question beginning on page 728.]

**Witness — contradicting own.**

2. While a party cannot impeach a witness called by him, which is done by showing by general evidence that he is unworthy of belief, he may nevertheless show that such witness has made other and different statements from those to which he has testified. That is contradicting, not impeaching, the witness.

**Evidence — letter to attorney.**

3. When a party writes a letter to a

member of the bar, whose relation as counsel to the former had ceased, if, in fact, there ever had been such relationship between them, which letter contained statements tending to prove a fact concerning the question of master and servant, which was pertinent to the issue, the letter is not a privileged communication, and is competent evidence against the party writing it.

Headnotes by WALKER, Ch.

**APPEAL** by plaintiff from a judgment of the Supreme Court on direction of a verdict for defendant in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Bourgeois & Coulomb**, for appellant:

A communication between attorney and client, to be privileged, must have been made while the relation of attorney and client existed.

*Yordan v. Hess*, 18 Johns. 492; *Chillicothe Ferry, Road & Bridge Co. v. Jameson*, 48 Ill. 281; *Jennings v. Sturdevant*, 140 Ind. 641, 40 N. E. 61; *Turner's Estate*, 167 Pa. 609, 31 Atl. 867; *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058; 4 Wigmore, Ev. § 2304; *Cuts v. Pickering*, 1 Vent. 197, 86 Eng. Reprint, 133; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Marsh v. How*, 36 Barb. 649; *State v. Loponio*, 36 N. J. L. J. 373; *Bartlett v. Bunn*, 56 Hun, 507, 10 N. Y. Supp. 138; *Henderson v. Terry*, 62 Tex. 281; *Trask v. People*, 151 Ill. 523, 38 N. E. 248.

The jury should have been permitted to find whether the automobile at the time of the accident was being used for the purposes of the defendant company.

*Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322; *Denison v. McNorton*, 142 C. C. A. 631, 228 Fed. 401; *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; *Guinney v. Hand*, 153 Pa. 404, 26 Atl. 20; *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635; *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188.

Statements of the general manager of a corporation, made at its office, of which he was apparently in charge, as a consequence of which proceedings in an action by the corporation were actually stayed, accompanied by evidence of his subsequent acting with authority in the matter, are admissible in evidence against the corporation.

*Carey v. Wolff*, 72 N. J. L. 510, 63 Atl. 270; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27, 537; *Hill v. Adams Exp. Co.* 77 N. J. L. 19, 71 Atl. 683.

Mr. C. L. Cole, for respondent:

As the defendant is a corporation, the burden was cast upon the plaintiff to show that, at the time of the accident, the driver of the automobile was a servant of the corporation, and engaged in business for his master.

*Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

Defendant is a corporation and cannot be bound by any act or statement unless made by one duly authorized to act and speak.

*King v. Atlantic City Gas & Water Co.* 70 N. J. L. 679, 58 Atl. 345; *Thomson v. Central Pass. R. Co.* 80 N. J. L. 328, 78 Atl. 152.

**Walker, Ch.**, delivered the opinion of the court:

This was an action at law for damages growing out of an accident to the plaintiff by collision with an automobile while he and another were riding on a motorcycle along a public road in Atlantic county. On August 16, 1915, the plaintiff and his companion were traveling along the road in the motorcycle, when an automobile driven by a director and officer of the defendant company approached, and a collision occurred, which demolished the motorcycle and injured the plaintiff. One defense was that, at the time of the accident, the car was not being used for the purposes of the defendant company, and therefore the company was not liable to the plaintiff.

During the progress of the trial, for the purpose of showing that the car was being used for the purposes of the company, and for the purpose of showing an inconsistent statement made by Max Lipschutz, the assistant treasurer, certain letters to W. Frank Sooy, Esq., a member of the bar, were offered and admitted in evidence. After the testimony had been concluded, the letters were excluded by order of the court, to which an exception was noted. The judge then directed a verdict in favor of the defendant, to which exception was taken, and the plaintiff appealed.

The defendant company in its answer admitted that on the day of the accident it was the registered

owner of a certain touring car which was being driven by Max Lipschutz, who was a stockholder, director, and officer of the company, but denied that the car was being driven by him as such stockholder, officer, director, agent, or employee.

Max Lipschutz was called by the plaintiff and testified that he was assistant treasurer of the defendant company, whose president was his father, Benjamin Lipschutz, and whose assistant secretary was George M. Lex; that the defendant did quite extensive advertising through New Jersey by signs. He testified to the genuineness of a letter dated December 15, 1915, as to his own and Lex's signatures thereon. Asked what was the object of his tour through South Jersey on the day in question, he answered that he had promised his sister, who was sick, a little ride and outing for her friends, and it was for that purpose alone that he took them out that afternoon. Asked whether at that time he was engaged on the business of the company, he answered that he always looked around (meaning for and at the signs), but that the idea of taking them out that day was for pleasure alone. He could not remember whether he stated to the the officers of the company that he was going out on the business of the company that day. Shown the letter again, and asked to tell whether he informed the secretary that he was out on business of the company that day, he first answered "No," and then "Yes." He afterwards said that he had not gone out to inspect the signs on that day.

W. Frank Sooy, Esq., counselor at law, was called by the plaintiff, and testified he was one of the firm of Bolte, Sooy, & Gill; that he met Mr. Lipschutz, Sr., and Mr. Lipschutz, Jr., and talked the situation over with them; that he was notified by the defendant company that he was representing Max Lipschutz; that he was never formally employed by the company; that he handed the letter in question to Mr. Stern, who was

associated with Messrs. Bourgeois & Coulomb, attorneys for the plaintiff, to carry out an agreement he had with Mr. Stern as to the form of answer that would be filed by the company, leaving out, as defendants, Max Lipschutz and his father.

Benjamin Lipschutz testified that he instructed his son, Max, on the day in question, not to take his sister out, but to attend to certain business; that the car had been owned by the company for a couple of years, and was bought to entertain customers and for other business; that it was used by his son, by Mr. Funk (secretary of the company), and Mr. Lex; that it was primarily bought for the purposes of the company and the benefit and convenience of its officers, and also for the purpose of taking out his sick daughter.

In view of the testimony of the Lipschutzes, father and son, to the effect that the young man was not out on the business of the company that day, it became highly important to the plaintiff to have in evidence the letter from the assistant secretary to Mr. Sooy, in which it is stated, *inter alia*, that Max Lipschutz would testify at the trial that he was driving the car, combining both business and pleasure. The following is a copy of the letter:

"Benjamin Lipschutz, President and Treasurer. Mahlon A. Funk, Secretary and Sales Manager. Max Lipschutz, Assistant Treasurer. George M. Lex, Assistant Secretary. Forty-Four Cigar Company, Incorporated. Lipschutz's 44 Cigars. Adlon Cigars. Business Established by Benjamin Lipschutz 1893. Main Office and Factory, N. E. Cor. 11th and Wharton Streets, Philadelphia. P. O. Address, Southward Station. Address all communications to company. December 15, 1915. Bolte, Sooy, & Gill, 21 Law Building, Atlantic City, N. J. Attention of W. Frank Sooy, Esq. Gentlemen:—The writer has your letter of the 13th inst. addressed to Mr. Max Lipschutz. The answer as filed by the insurance

company is about what we expected, nevertheless, the policy that they issued to us calls for business and pleasure, and as Mr. Max Lipschutz was an officer of the company, we feel, under the terms of the contract, that he had a perfect right to drive the car. You can rest assured that Mr. Max Lipschutz at the trial will testify. First. That the company owned the car. Second. That he was driving the car, combining both pleasure and business. Third. That he is an officer of the company. In order to fulfil your wishes in the matter, I am having a postscript in this letter which is signed by Mr. Max Lipschutz. Very truly yours, '44' Cigar Company, Inc., Geo. M. Lex, Asst. Sec. L-AH.

"P. S.—W. Frank Sooy, Esq. The facts as covered by Mr. Lex above will be testified to by me at the trial.

"Very truly yours, Max Lipschutz."

The letter was offered to contradict Max Lipschutz, and as an admission by the company. Counsel for the defendant states in his brief that there is not the slightest evidence that the writer, who signed himself "Assistant Secretary," was such, or that he had authority to bind the company. This is evidently a misconception on the part of the learned counsel who argued the case for the defendant. Max Lipschutz testified that he was the assistant treasurer, and that Mr. Lex was the company's assistant secretary. As to whether they had authority to bind the company was, in all the circumstances of the case, at least inferable. The question remains: Was the letter properly excluded? We think not. It should have been admitted, and the case submitted to the jury.

Counsel for the defendant argues that the attempt to put the letter in evidence was for the purpose of impeaching the plaintiff's witness. This is not so. The attempt was to contradict the witness. The inhibi-

tion is only that a party calling a witness will not be permitted afterwards to impeach his general reputation for truth or veracity by general evidence tending to show him to be unworthy of belief. *Ingersoll v. English*, 66 N. J. L. 463, 49 Atl. 737. A party to a suit is not precluded from proving the truth of any particular fact by competent testimony in direct contradiction to that to which any of the witnesses called by him may have testified. *Schreiber v. Public Service R. Co.* 89 N. J. L. 183, 98 Atl. 316. It is always allowable to show that a witness has made other and different statements than those to which he testifies. Vice Chancellor Pitney, in *Thorp v. Leibrecht*, 56 N. J. Eq. 499, at page 502, 39 Atl. 361, states that the rule forbidding a party calling a witness to offer evidence for the purpose of impeaching his general character for truth and veracity falls far short of forbidding the party to show by any legitimate evidence that the witness has testified to what is not true in a matter material to the issue. This rule was approved by this court in *Buchanan v. Buchanan*, 73 N. J. Eq. 544, at page 546, 68 Atl. 780. Although in *Thorp v. Leibrecht* and *Buchanan v. Buchanan* the witnesses called by complainants were defendants, the rule is not restricted to such witnesses, that is, witnesses who are adversary parties, but is as broad as the statement in *Buchanan v. Buchanan*, at page 546 of 73 N. J. Eq., that "the rule against impeachment denies the right to impeach the general reputation of the witness for truth, but does not deny the right to show that the whole or any part of the testimony of the witness is untrue."

In fact, counsel for defendant concedes this in his brief, where he says: "While the law permits one who calls a witness to contradict him, it does not permit impeachment."

Impeachment, as shown, is an at-

tack upon a witness's general reputation for truth and veracity; and as that which was attempted in this case was not such an attack, but only a contradiction of the witness's statement, the letter was admissible upon that score.

It is next objected on behalf of the defendant that the letter was a privileged communication by defendant, addressed to the attorneys, Messrs. Bolte, Sooy, & Gill. While addressed to them, it was marked for the "Attention of W. Frank Sooy, Esq.," who appears to have had charge of the matter so far as his firm was concerned with it, if at all. Mr. Sooy was called as a witness by the plaintiff, and asked whether he or his firm represented the defendant company, and answered that he would rather tell what they did; that he did not know how to answer the question rightly. He also stated that he was advised that he was representing Max Lipschutz, and that Judge Starr, he thought it was, would take care of the defendant company. As a fact, Judge Starr did represent the company, filed their answer, and tried the case. It is a fact also that Mr. Sooy's bill was made to Max Lipschutz and paid by him. Besides, if Messrs. Bolte, Sooy, & Gill were retained by the defendant, their representative capacity ceased on December 11, 1915, when they received a letter from the defendant, signed by the assistant secretary, Lex, in which the company said: "Please leave the insurance company attend to looking after the '44' Cigar Company's interests and you look after the interest of Mr. Benjamin Lipschutz and Mr. Max Lipschutz personally, as they no doubt have arranged for."

There is no privilege as to communications made to an attorney after his employment has terminated. 4 Wigmore, Ev. § 2304; 40 Cyc. 2366.

These two letters were declarations by the company which were

admissible in evidence, the one of December 11th to show that the firm of Bolte, Sooy, & Gill did not represent the defendant company, at least after that date, and the one of December 15th that the company owned the car, and that Max Lipschutz was one of its officers who had a right to drive it, and was driving it on business as well as pleasure.

The remaining contention on behalf of the defendant is that the testimony failed to disclose that Max Lipschutz, the driver of the automobile at the time of the accident, was a servant of the corporation defendant, engaged on its business. Without deciding this question on the evidence which was before the court at the time of the direction of the verdict for the defendant, it is apparent, as stated, that if the letter of December 15, 1915, had been in evidence, it might have been inferred, if the jury found the other questions raised by the pleading and evidence in favor of the plaintiff, that the defendant company was liable for the consequences of the accident which was the subject of the controversy in the suit. No citation of authority is necessary to support so plain a proposition.

The letter of December 8, 1915, from the defendant company to Messrs. Bolte, Sooy, & Gill, which is referred to in the letter of December 11th, and which indicates that that firm represented the Lipschutzes, father and son, and not the defendant company, was pertinent evidence, and should have been admitted; not so the letter of January 25, 1916, written to Messrs. Bolte, Sooy, & Gill by Max Lipschutz personally, in which he inclosed his own check, with thanks to Mr. Sooy, or the firm (it not being stated which), for services rendered. This was properly excluded.

The judgment of the court below must be reversed, to the end that a venire de novo may be awarded.

—statement to attorney after termination of relation—privilege.

Evidence—letter to attorney.

## ANNOTATION.

**Privilege of communication to attorney as affected by termination of employment.****Communications made after termination of employment.**

The great weight of authority is to the effect that where the relation of attorney and client has wholly ceased, as by final judgment or definite abandonment of the employment, subsequent communications respecting the subject of the foregone employment, voluntarily made to the attorney by the former client, are not privileged from disclosure by the attorney, the theory being that the reasons for the rule of exclusion in case of confidential communications to an attorney in the course of his professional employment wholly fail where the communications are made after the termination of the employment, and that the rule must fall with the reasons therefor.

**California.** — *Hager v. Shindler* (1865) 29 Cal. 47.

**District of Columbia.** — *Oliver v. Cameron* (1880) MacArth. & M. 237 (dictum).

**Georgia.** — *Philman v. Marshall* (1897) 103 Ga. 82, 29 S. E. 598.

**Illinois.** — *Chillicothe Ferry Road & Bridge Co. v. Jameson* (1868) 48 Ill. 281.

**Indiana.** — *Doan v. Dow* (1898) 8 Ind. App. 324, 35 N. E. 709.

**Iowa.** — *Hanson v. Kline* (1907) 186 Iowa, 101, 113 N. W. 504.

**Kentucky.** — *McCoy v. McCoy* (1910) — Ky. —, 125 S. W. 177.

**Louisiana.** — *Williams v. Benton* (1857) 12 La. Ann. 91.

**Nebraska.** — *Brady v. State* (1894) 39 Neb. 529, 58 N. W. 161.

**New Jersey.** — *Fox v. FORTY-FOUR CIGAR CO.* (reported herewith) ante, 723.

**New York.** — *Yordan v. Hess* (1816) 13 Johns. 492; *Wadd v. Hazleton* (1892) 62 Hun, 602, 17 N. Y. Supp. 410, reversed on other grounds in (1893) 137 N. Y. 215, 21 L.R.A. 693, 33 Am. St. Rep. 707, 33 N. E. 143; *Marsh v. Howe* (1862) 36 Barb. 649.

**North Carolina.** — *Eekhout v. Cole* (1904) 135 N. C. 583, 47 S. E. 655.

**Oregon.** — *Young's Estate* (1911) 59 Or. 348, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310.

In *Hanson v. Kline* (1907) 186 Iowa, 101, 113 N. W. 504, it was said that the privilege was designed to protect parties in making full and free confidential disclosure to the end that the attorney might be enabled to properly perform his professional duties; and that the rule cannot be invoked where the reason thereof is wholly wanting, as is the case where the communication as to which privilege is claimed was made after the relation of attorney and client had ceased, even though it related to the subject-matter of the former employment.

And it has been held that an attorney can testify as to voluntary and unsought-for communications made after the relation of attorney and client ceased, although such communications were in substance the same as others made while the relation subsisted. *Brady v. State* (1894) 39 Neb. 529, 58 N. W. 161; *Yordan v. Hess* (1816) 13 Johns. (N. Y.) 492. This is upon the ground that since the privilege is that of the client, he, by voluntarily repeating the communication after the professional relation ceases, in effect waives the privilege. For instance in *Yordan v. Hess* (N. Y.) supra, the court said: "The confessions by plaintiff to Brackett were made after he ceased to be his attorney; and although they were, substantially, a reiteration of what had been communicated whilst the relation of attorney and client existed, yet they appear to have been voluntary disclosures, in no way sought for or drawn out by the witness. An attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity. But this is the privilege of the client, and if he chooses, after this relation has ceased, to volunteer any communications, he



is not protected, although they may be, in substance, the same as were given while that relation subsisted. The reason for the rule then ceases. If a repetition of the information should appear to have been drawn out by any artifice, for the purpose of being used as evidence, it ought not to be received. But when it is perfectly voluntary and unsought for, there can be no solid ground for excluding the evidence."

And for a better reason, where the communication concerns something foreign to the subject of a previous employment, there is no privilege because of such past employment. *Carroll v. Sprague* (1881) 59 Cal. 655 (holding that the fact that, previously to the making of the communication in controversy, the attorney had "incidentally or otherwise done a great deal of business" for the person making the communication, was not sufficient to render it privileged, it not being connected with the subject of the former and terminated employment); *Harless v. Harless* (1895) 144 Ind. 196, 41 N. E. 592; *State v. Herbert* (1901) 63 Kan. 516, 66 Pac. 235; *Mandeville v. Guernsey* (1862) 38 Barb. (N. Y.) 225; *Eekhout v. Cole* (1904) 135 N. C. 583, 47 S. E. 655; *Turner's Estate* (1895) 167 Pa. 609, 31 Atl. 867. And see *Plano Mfg. Co. v. Frawley* (1887) 68 Wis. 577, 32 N. W. 768.

Likewise it has been held that privilege does not extend to communications voluntarily made to a lawyer after he has informed the person making them that he will not accept employment in the matter to which the communications relate. *Farley v. Peebles* (1897) 50 Neb. 723, 70 N. W. 231; *Haulenbeek v. McGibbon* (1891) 60 Hun. 26, 14 N. Y. Supp. 393; *People v. Hess* (1896) 8 App. Div. 143, 40 N. Y. Supp. 486; *Setzar v. Wilson* (1844) 26 N. C. (4 Ired. L.) 501; *Plano Mfg. Co. v. Frawley* (Wis.) *supra* (holding that in such a case the would-be client was properly put on his guard, so that subsequent statements were no more privileged than if made to a mere stranger).

However, it has been held that a

privilege arises even as to a communication to an attorney, made after the relation of attorney and client had ceased, where the communication related to the subject of the former employment. Thus, in *Bush v. McComb* (1863) 2 *Houst. (Del.)* 546, where an attorney was asked "what statement or declarations had been made to him by the defendant on a certain occasion referred to after the settlement of the estate and he had ceased to be the counsel of either of the parties in regard to the matter now in litigation between him and the plaintiff," it was held, as against the objection that since "the statement alluded to was made by the defendant to the witness after the relation of counsel and client had ceased between them," there consequently "was no ground whatever for the objection that it was a confidential communication . . . and was, therefore, not privileged from disclosure for any such reason," that the object of exclusion seems plainly to require that the entire professional intercourse between attorney and client, whatever it may have been, shall be protected by profound secrecy, and the evidence was excluded. But, in reaching this conclusion, the court based its decision upon reasoning applicable to cases where the communication was made while the attorney was acting as such for the client, and in which a question arose as to the right to testify as to the same after that relation had ceased.

The rule that no privilege exists as to communications made after termination of the relation of attorney and client applies to written as well as oral communications. See the reported case (*FOX v. FORTY-FOUR CIGAR CO.* ante, 723); and *Young's Estate* (1911) 59 Or. 348, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310.

#### **Continuation of privilege after termination of relation.**

This discussion presupposes that the communications in controversy were privileged when made, and treats merely the question whether such privilege ceases with the termination of the confidential relation, or contin-

ues during the lifetime of the maker of the communications. The question of the effect of death upon the privilege, being a distinctive one, has been left for future treatment.

It is well settled that termination of the relation of attorney and client does not affect the protection given by the law to communications made in confidence during the existence of the relation, the rule being that the privilege, when once attached, continues at least during the lifetime of the client, unless waived by him. The following cases support this rule:

**United States.**—*Chirac v. Reinicker* (1826) 11 Wheat. 280, 6 L. ed. 474.

**Arkansas.**—*Bradway v. Thompson* (1919).—Ark. —, 214 S. W. 27.

**California.**—*Hardy v. Martin* (1907) 150 Cal. 341, 89 Pac. 111.

**Colorado.**—*Denver Tramway Co. v. Owens* (1894) 20 Colo. 107, 86 Pac. 848, 2 Am. Neg. Cas. 231.

**Delaware.**—*Andrews v. Thompson* (1858) 1 Houst. 522. And see *Bush v. McComb* (1863) 2 Houst. 546.

**District of Columbia.**—*Oliver v. Cameron* (1880) MacArth. & M. 237.

**Illinois.**—*Granger v. Warrington* (1846) 8 Ill. 299.

**Indiana.**—*Kern v. Kern* (1899) 154 Ind. 29, 55 N. E. 1004 (assumed that privilege continued during lifetime of client).

**Kentucky.**—*Carter v. West* (1892) 93 Ky. 211, 19 S. W. 592; *Standard F. Ins. Co. v. Smithhart* (1919) 183 Ky. 679, post, 972, 211 S. W. 441.

**Louisiana.**—*Hart v. Thompson* (1840) 15 La. 88; *Morris v. Cain* (1887) 39 La. Ann. 712, 1 So. 797, 2 So. 418.

**Maryland.**—*Chase's Case* (1827) 1 Bland. Ch. 206, 17 Am. Dec. 277.

**Massachusetts.**—*Foster v. Hall* (1831) 12 Pick. 89, 22 Am. Dec. 400; *Hatton v. Robinson* (1833) 14 Pick. 416, 25 Am. Dec. 415.

**Michigan.**—*Lorimer v. Lorimer* (1900) 124 Mich. 631, 83 N. W. 809.

**Minnesota.**—*Struckmeyer v. Lamb* (1899) 75 Minn. 366, 77 N. W. 987.

**Mississippi.**—*Perkins v. Guy* (1877) 55 Miss. 153, 30 Am. Rep. 510.

**Missouri.**—*Sweet v. Owens* (1891) 109 Mo. 1, 18 S. W. 928.

**New Hampshire.**—*Sleeper v. Abbott* (1880) 60 N. H. 162.

**New York.**—*Jordan v. Hess* (1816) 13 Johns. 492; *Bank of Utica v. Mersereau* (1848) 3 Barb. Ch. 528, 49 Am. Dec. 189; *Walton v. Fairchild* (1889) 24 N. Y. S. R. 314, 4 N. Y. Supp. 552.

**North Carolina.**—*Hughes v. Boone* (1889) 102 N. C. 137, 9 S. E. 286.

**Pennsylvania.**—*Bennett's Estate* (1880) 18 Phila. 331.

**Texas.**—*McIntosh v. Moore* (1899) 22 Tex. Civ. App. 22, 53 S. W. 611.

**Virginia.**—*Parker v. Carter* (1814) 4 Munf. 273, 6 Am. Dec. 513.

**England.**—*Bullock v. Corry* (1878) L. R. 3 Q. B. Div. 356, 47 L. J. Q. B. N. S. 352, 38 L. T. N. S. 102, 26 Week. Rep. 330; *Pearce v. Foster* (1885) L. R. 15 Q. B. Div. 114, 54 L. J. Q. B. N. S. 432, 52 L. T. N. S. 886, 33 Week. Rep. 919, 50 J. P. 4. See also *Cuts v. Pickering* (1672) 1 Vent. 197, 86 Eng. Reprint, 138.

And this seal of silence which the law imposes upon the attorney is not removed during the lifetime of the client unless waived by him, whatever may have been the cause of the breach of professional relations between the attorney and his client. *Denver Tramway Co. v. Owens* (1894) 20 Colo. 107, 36 Pac. 848, 2 Am. Neg. Cas. 231. And in *Oliver v. Cameron* (D. C.) supra, the court said: "The protection given by the law to such communications is perpetual and does not cease with the termination of the suit, nor is it affected by the party ceasing to employ the attorney and retaining another, nor by any other change of relation between them. . . . The seal of silence once fixed upon them remains forever, unless removed by the party himself in whose favor it was there placed."

And the privilege does not cease because of the fact that the subsequent action is entirely distinct from the action with respect to which the communications were originally made. *Pearce v. Foster* (1885) L. R. 15 Q. B. Div. (Eng.) 114, 54 L. J. Q. B. N. S. 432, 52 L. T. N. S. 886, 33 Week. Rep. 919, 50 J. P. 4. . . . G. J. C.

STATE OF NORTH DAKOTA EX REL. CITY OF FARGO  
v.

JOHN WETZ, Assessor of the City of Fargo, et al.

*North Dakota Supreme Court — June 14, 1918.*

(— N. D. —, 168 N. W. 835.)

**Tax — ad valorem — license fee on automobiles.**

1. Sections 176 and 179 of the Constitution, as amended in 1914 (see Laws 1913, chap. 103), which provide that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax," and for the assessment of certain public utility property by the state board of equalization, and other "taxable property, . . . in the county, city, township, village or district, . . ." do not require the taxation of all property on an ad valorem basis, and are not violated by a law which provides for the payment of a license fee in lieu of general and local taxes.

[See note on this question beginning on page 759.]

**License — motor vehicles — exclusiveness.**

2. Chapter 156 of the Session Laws of 1917 construed, and held, to provide for the collection of a license tax or fee in lieu of other taxes upon motor vehicles.

**Statute — conflict — application.**

3. Where, at the same session of the legislature, two bills are passed, one providing for the classification of property generally for purposes of taxation, and the other dealing particularly with a single species of property, which is embraced in the general schedules of the Classification Act, the conflict in the two bills must be resolved in favor of that which deals particularly with the specific property.

[See 25 R. C. L. 927.]

**— order of approval.**

4. Where two bills are approved by the governor in the inverse order of their passage, conflicting provisions therein contained cannot be resolved in favor of that which was passed last, on the theory of a repeal by implication.

[See 25 R. C. L. 914, 930.]

**Tax — special contribution.**

5. Section 176 of the Constitution, as amended in 1914 (see Laws 1913, chap. 103), which provides that the "legislative assembly shall, by general law, exempt from taxation . . . personal property to any amount not exceeding in value \$200 for each individual liable to taxation," is not violated

by an enactment according to which the owners of a given class of personal property will be compelled to contribute to the cost of maintaining certain governmental functions an amount which will approximately equal a fair property tax if levied upon an ad valorem basis.

**— local districts — rights.**

6. Under § 103 of the Constitution, the legislature is given plenary control over the taxing power of municipalities, and § 179 of the Constitution, as amended in 1914 (see Laws 1913, chap. 103), does not give to local taxing districts the constitutional right to retain upon their tax lists all of the property within such districts.

**— limitation — scope.**

7. Section 174 of the Constitution, under which the legislative assembly is directed to provide for the "raising of revenue to defray the expenses of the state, not to exceed in any one year 4 mills on the dollar on the assessed valuation of the taxable property in the state," is a limitation upon the power of the legislature to provide state revenues by the taxation of property upon an ad valorem basis. It has no application to revenues derived from other sources and according to some other method.

**License — motor vehicles — validity.**

8. Section 4 of the Motor Vehicle License Act, in conferring upon the secretary of state unlimited power to

employ agents and incur expense, is unconstitutional, as involving an attempted delegation of legislative power.

[See 6 R. C. L. 177.]

**Statute — partial invalidity — effect.**

9. Where a portion of a law is unconstitutional, the remainder will stand, where the court can reasonably say that the legislature would have passed the act with the invalid portion stricken therefrom.

**— construction — to save constitutionality.**

10. A construction cannot be given a statute which does manifest violence to a clearly expressed intention of the legislature, even for the purpose of saving the constitutionality of the law.

[See 25 R. C. L. 1002.]

**— repeal by implication.**

11. Repeals by implication are not favored.

[See 25 R. C. L. 918.]

**— power of legislature — constitutionality of statute.**

12. In the exercise of the legislative power the will of the legislature is supreme, and cannot be set at naught except when it contravenes restrictions upon the legislative authority that can be pointed out in the Constitution.

[See 6 R. C. L. 153; 25 R. C. L. 806.]

**Definition — tax.**

13. Any payment exacted by the state or its municipal subdivisions as a contribution towards the cost of maintaining governmental functions, where the special benefits derived from their per-

formance is merged in the general result, is a tax.

**On Rehearing.**

**Constitutional law — amendment — method.**

14. Section 202 of the Constitution of North Dakota, which requires that "if two or more amendments shall be submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately," is not violated by submitting as one amendment a proposed change which is expressed in two sections, both, however, relating to one general subject and designed to accomplish one main purpose.

[See 6 R. C. L. 30.]

**— legal adoption.**

15. It is held, that the amendments to §§ 176 and 179 of the Constitution (see Laws 1913, chap. 103), which were submitted to the electors in 1914 as one proposition, relate to the general subject of uniformity of taxation, and that the amendment was legally adopted.

[See 6 R. C. L. 30.]

**Evidence — judicial notice — omission of tax assessments.**

16. The North Dakota supreme court takes judicial notice that property assessments in that state have never approached full value, and probably more taxable personal property has been omitted from the tax rolls than has been assessed.

[See 15 R. C. L. 1057, 1129.]

(Robinson, J., dissents.)

**APPLICATION** for a writ of mandamus to compel the defendant assessor to assess and place on the tax rolls or lists of taxable property all autos and other motor vehicles, owned in the city of Fargo. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. Spalding & Shure, for relator:

The law is clearly invalid as delegating to the secretary of state legislative powers, in that it leaves it wholly within his judgment and discretion, and without any limit, as to how much to expend for clerk hire, tags, and other elements entering into the administration of the law.

State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; State ex rel. Miller v. Taylor, 27 N. D. 77, 145 N. W. 425; State ex rel. Mc-

Donald v. Holmes, 19 N. D. 286, 123 N. W. 884; State ex rel. Lenhart v. Hanna, 23 N. D. 533, 149 N. W. 573; Betts v. Land Office Comrs. 27 Okla. 64, 110 Pac. 766.

The law is invalid because it deprives persons of property without due process.

State ex rel. Miller v. Leech, 33 N. D. 513, 157 N. W. 492; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089.

It violates the Constitution because, under it, the assessment of property for the purpose of taxation is a local

function, and must be performed in the "county, city, township, village, or district in which it is situated."

State ex rel. Miller v. Leech, *supra*; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962; Valley v. Park Comrs. 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615; People v. Placerville & S. Valley R. Co. 34 Cal. 656; Savings & L. Soc. v. Austin, 46 Cal. 416; People v. Sacramento County, 59 Cal. 321; San Francisco v. Central P. R. Co. 63 Cal. 467, 49 Am. Rep. 98; People v. Pittsburg R. Co. 67 Cal. 625, 8 Pac. 381; San Francisco & S. M. Electric Co. v. Scott, 142 Cal. 222, 75 Pac. 575; 37 Cyc. 738, 888; McLendon v. State, 179 Ala. 54, 60 So. 392, Ann. Cas. 1915C, 691.

Wherever it is manifest that the amount of the license tax imposed in the exercise of the police power is substantially in excess of the reasonable expense of issuing a license and regulating the occupation to which it pertains, the act imposing the tax is invalid.

Bartels Northern Oil Co. v. Jackman, 29 N. D. 236, 150 N. W. 576; Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582, Ann. Cas. 1916C, 207; Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; State ex rel. Davidson v. Gorman, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948; Fatjo v. Pfister, 117 Cal. 1012, 48 Pac. 1012; State ex rel. Nettleton v. Case, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; State ex rel. Sanderson v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; 37 Cyc. 713; 25 Cyc. 90; McGehee, Due Process of Law, 341; State v. Lawrence, 105 Miss. 58, 61 So. 976; Re Smith, 143 Cal. 368, 77 Pac. 180; Plumas County v. Wheeler, 149 Cal. 766, 87 Pac. 909; San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.

This tax is very largely in excess of the rate of taxation permitted by the Constitution, which is limited to 4 mills on the dollar of the valuation for state purposes, and for this reason, if no other, it is illegal and void.

37 Cyc. 763; State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 573.

The law violates the uniformity clause of the Constitution.

State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916; Edmonds v.

Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Beale v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; People ex rel. Throop v. Auditor General, 9 Mich. 134.

Every tax must be for public purposes, and expended in the district in which it is raised.

Weeks v. Milwaukee, 10 Wis. 243; Ryerson v. Utley, 16 Mich. 269; Merri- ick v. Amherst, 12 Allen, 504; Wells v. Weston, 22 Mo. 384, 66 Am. Dec. 627; Morford v. Unger, 8 Iowa, 82; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; People v. Albany, 11 Wend. 539, 27 Am. Dec. 95; Parsons v. Goshen, 11 Pick. 396; Anthony v. Adams, 1 Met. 284; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Farris v. Vannier, 6 Dak. 186, 3 L.R.A. 713, 42 N. W. 81; Christy v. Elliott, 108 Am. St. Rep. 196, and note, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 74 N. E. 1035, 3 Ann. Cas. 487; Brown v. Nichols, 93 Kan. 737, L.R.A.1915D, 327, 145 Pac. 561; Schuster v. Louisville, 124 Ky. 189, 89 S. W. 689.

Mr. F. E. Packard, for defendants:

Motor vehicles should be subjected to the same tax burden for the support of the state and its political subdivisions as other property, the license fee and the license tax being an additional burden upon the property because of its nature.

Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; Phillips v. Mobile, 208 U. S. 472, 478, 52 L. ed. 578, 580, 28 Sup. Ct. Rep. 370; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 697, 699, 27 L. ed. 586, 587, 2 Sup. Ct. Rep. 732; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 449, 30 L. ed. 976, 978, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Huse v. Glover, 119 U. S. 543, 549, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Smith v. Com. 175 Ky. 286, 194 S. W. 367; State v. Collins, 94 Wash. 310, 162 Pac. 556; West v. Asbury Park, 89 N. J. L. 402, 99 Atl. 190; Huston v. Des Moines, 176 Iowa, 455, 156 N. W. 883; State, Cleary, Prosecutor, v. Johnston, 79 N. J. L. 49, 74 Atl. 538; Jackson v. Neff, 64 Fla. 326,

60 So. 350; *Bozeman v. State*, 7 Ala. App. 151, 60 So. 604; *Re Hoffert*, 34 S. D. 271, 52 L.R.A.(N.S.) 949, 148 N. W. 20; *Re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; *State v. Ingalls*, 18 N. M. 211, 135 Pac. 1177; *Lord v. Reed*, 254 Ill. 350, 98 N. E. 553, Ann. Cas. 1913C, 139; *Knight v. Savannah Electric Co.* 20 Ga. App. 314, 93 S. E. 17; *Smith v. State*, 130 Md. 482, 100 Atl. 778; *Mark v. District of Columbia*, 37 L.R.A. 440, and note, 37 App. D. C. 563; *Babbitt, Motor Vehicles*, chap. 6; *Berry, Automobiles*, 2d ed. §§ 80, 81.

Since the license relates to all persons in a class, and operates uniformly upon all therein, it is not unlawful discrimination.

*Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421; *Kane v. State*, 81 N. J. L. 594, L.R.A.1917B, 553, 80 Atl. 453, Ann. Cas. 1912D, 237; *Berry, Automobiles*, 2d ed. § 97; *State, Cleary, Prosecutor, v. Johnston*, 79 N. J. L. 49, 74 Atl. 538; *Babbitt, Motor Vehicles*, 2d ed. § 110; *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469, 161 Ind. 471, 68 N. E. 1027; *McCarter v. Ludlum Steel & Spring Co.* 71 N. J. Eq. 330, 63 N. E. 761; *Mark v. District of Columbia*, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440; *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080; *Kellaher v. Portland*, 57 Or. 575, 110 Pac. 492, 112 Pac. 1076; *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582.

The license fee was not unreasonable, although in addition to the property tax.

*State v. Ingalls*, 18 N. M. 211, 135 Pac. 1177; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Smith v. Conn.* 175 Ky. 286, 194 S. W. 367; *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Bozeman v. State*, 7 Ala. App. 152, 60 So. 604; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421; *Smith v. State*, 130 Md. 482, 100 Atl. 778; *State v. Collins*, 94 Wash. 310, 162 Pac. 556; *Re Kessler*, 26 Idaho, 764, L.R.A.1915D, 322, 146 Pac. 113, Ann. Cas. 1917A, 228; *People v. Sargent*, 254 Ill. 514, 98 N. E. 959; *Re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C,

706; *Re Hoffert*, 34 S. D. 271, 52 L.R.A.(N.S.) 949, 148 N. W. 20; *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583; *State ex rel. Haig v. Hauge*, 87 N. D. 583, L.R.A. 1918A, 522, 164 N. W. 289; *State ex rel. Poole v. Peake*, 18 N. D. 101, 120 N. W. 47; *School Dist. v. King*, 20 N. D. 614, 127 N. W. 615.

A license tax is not a property tax, within the meaning of § 179.

*Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Johnson v. Cook*, 179 Mich. 117, 146 N. W. 343; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421; *Achenbach v. Kincaid*, 25 Idaho, 768, 140 Pac. 529; *State v. Collins*, 94 Wash. 310, 162 Pac. 556; *State, Cleary, Prosecutor, v. Johnston*, 79 N. J. L. 49, 74 Atl. 538.

Messrs. William Langer, Attorney General, and E. B. Cox, Assistant Attorney General, also for defendants.

Mr. E. T. Burke for the city of Bismarck.

Birdzell, J., delivered the opinion of the court:

This is an application for a writ of mandamus which will command the defendant Wetz, as assessor of the city of Fargo, to list, assess, and place upon the tax rolls a certain Packard automobile, No. 33,646, owned by one A. L. Moody, a resident and citizen of Fargo, which automobile is kept and used by him in said city; also commanding the assessor to list, assess, and place upon the tax rolls other motor vehicles of other descriptions, owned, kept, and used by residents of the city of Fargo, so as to subject the same to taxation for the year 1918 as a part of the taxable personal property subject to the taxing jurisdiction of the city. The order to show cause issued herein is directed to George E. Wallace, H. H. Steele, and F. E. Packard, as members of the State Tax Commission, having supervision of the administration of the tax laws of the state.

In the affidavit and petition it is made to appear that the city commission of the city of Fargo directed the defendant Wetz to assess the property above referred to, and that Wetz refused to do so, basing his

refusal upon chapter 156 of the Session Laws of 1917, the same being an act providing for motor vehicle license fees, registration tax, etc. It is shown that the act contains a provision purporting to make the registration fee (excepting for dealers' licenses) a charge which shall be in lieu of all taxes, general and local. It is further alleged as a part of the petition, "on information and belief, that the revenue which has been and will be derived from the registration with the secretary of state, and the fee charged therefor, in accordance with the terms and provisions of said legislative act, will exceed by several hundred thousand dollars the expense incident and necessary to the carrying out of the provisions of said legislative act in such registration, and in the issuance of licenses thereby provided for, and that by provisions of said act revenue which, under the Constitution of the state of North Dakota, belongs to the villages, cities, counties, etc., is diverted therefrom and from use for the purposes for which such taxation is provided; that said act was passed with knowledge that the revenue derived from its operation would exceed by hundreds of thousands of dollars the cost of operating the department having charge of such registration and licensing and all the expenses incident thereto, and with and for the purposes of diverting any revenue to which such corporations were entitled under the provisions of the Constitution to unconstitutional and illegal purposes, to wit, to the repair and construction of roads in various places in the state of North Dakota, and under the jurisdiction and control and management of a board not provided for by said Constitution, and having no constitutional authority to expend funds so derived."

It is further alleged that the act in question does not provide for assessing motor vehicles in accordance with their value, but that the fees are based upon arbitrary, in-

equitable, and unjust distinctions, and that the provisions of the legislative act are not uniform in their operation, but are wholly arbitrary and unjustified. It is alleged that, under the provisions of the act, the city of Fargo would receive no part of the revenue derived from the registration tax, and that the motor vehicles of dealers are subject to assessment and taxation like other personal property, while similar vehicles belonging to others are not so subject.

The answer does not put in issue any facts material to the determination of the questions raised upon the application for the writ.

Section 1 of chapter 156, Session Laws of 1917, provides for the form of application for a dealer's license to be issued upon the payment to the secretary of state of \$15. Among other things, the application is required to contain a statement of "the amount of such motive power, stated in figures of horse power, in accordance with the rating established by the Association of Licensed Automobile Manufacturers."

Section 3, which amends § 2976g of the Compiled Laws of 1913, provides a minimum fee for the re-registration of motor vehicles of not less than \$6, and for those having a higher rating than 20-horse power an additional fee of 50 cents for each additional horse power, subject to reduction, however, in the case of vehicles which have been previously licensed for three years. In this section it is provided that "the registration fees imposed by this act upon motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, except that dealers' license fees shall not be in lieu of other taxes." Section 4, which amends § 2976h, Compiled Laws of 1913, provides: ". . . .

The secretary of state is hereby authorized to employ such agent or agents as may be necessary to enforce the provisions of this act." Section 5, which amends § 2976n, Compiled Laws of 1913, provides

that the moneys derived shall be paid into the state treasury by the secretary of state, and that the state treasurer shall in turn pay to the various county treasurers, to the account of the special road maintenance fund, "one third of the moneys received by him from the secretary of state under the provisions of this act, and shall credit the remaining two-thirds to the account of the state highway fund: Provided, however, that the state treasurer shall first deduct from all the moneys received by him from the secretary of state the cost of tags, clerk hire, printing, postage, express and other expenses, as estimated by the said secretary of state." Section 6 provides that "the state highway fund provided for by this act shall be expended under the direction of the State Highway Commission." Section 8 provides for the expenditure of the license money for repairing and maintaining all highways, and concludes with the following proviso: "Provided, further, that none of this money shall be expended within the limits of any incorporated city or village." An emergency clause is attached, stating as one of the grounds of emergency that, without the act, there would not be sufficient money available in the state treasury to comply with the requirements of the Federal law providing for Federal aid for the construction and maintenance of roads.

In view of the questions raised upon the argument, it will become necessary also to consider certain provisions of chapter 59, and, possibly, of chapter 131, of the Session Laws of 1917. Chapter 59 is an act which provides for the classification of property, for assessment at a percentage of its value, and, by § 1 of said act, class 2 of the schedule adopted is made to embrace "all live stock, agricultural and other tools and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks, and other power-driven cars, vehicles of all

kinds, boats and all water craft," etc. This class of property is required to be assessed at 20 per cent of its true and full value.

Chapter 131 of the Session Laws of 1917 provides for the establishment of a State Highway Commission, which is given general control and supervision of the construction, improvement, repair, and maintenance of roads and bridges, under prescribed limitations. Among other powers granted the Commission is the power to expend the state highway fund as follows (§ 2): ". . . It shall reserve out of the state highway fund hereby created a sufficient sum annually to meet its expenses and to pay the state's portion of the cost of properly maintaining all highways and bridges improved in pursuance of the provisions of this act; and the balance of said state highway fund shall be expended by the State Highway Commission in the improvement of highways and bridges in the several counties in the following manner: Ten per cent of said fund shall be spent within the discretion of the State Highway Commission and without regard to the amount of said fund collected in each county, and ninety per cent shall be spent by the said Commission in the several counties in proportion to the amounts collected therein."

In this act several sections dealing with the disposition of the auto license moneys are identical with the sections contained in chapter 156, dealing with the same subject.

Counsel for the defendant, in apparent recognition of the constitutional difficulties in the way of sustaining the act in question, have suggested the possibility of harmonizing chapters 156, 59, and 131, by giving to chapter 156 a construction rendering it consistent with that portion of chapter 59 which places automobiles and power-driven vehicles in class 2 of the assessment schedule, and purports to subject them to ad valorem taxation at 20 per cent of their value. Counsel for the plaintiff manifests agreement to



this construction, and professes to be interested solely in being able to subject the class of property referred to to taxation for municipal purposes. There is no appearance in this action on behalf of any owner of a vehicle affected by the legislation under consideration, and consequently no question is raised relative to the prejudicial effect of a construction such as that contended for. While the court should be and is reluctant to adopt a construction of chapter 156 that might render the same unconstitutional, we feel it nevertheless incumbent upon us to adopt a reasonable construction of the act, even though in doing so we should be forced to the conclusion that it is unconstitutional. In short, even in the absence of a representation by a numerous class of persons who would be adversely affected by the construction of the law with which counsel for both parties manifest satisfaction, we cannot adopt a construction that does manifest violence to a clearly expressed intention of the legisla-

Statute—construction—to save constitutionality.

ture, even for the high purpose of saving the constitutionality of the

law. We must, therefore, first construe chapter 156 to determine its meaning in connection with the subject of the general and local taxation of the class of vehicles to which it is applicable.

The language of § 3 of the Motor Vehicle License Act (chapter 156) is free from ambiguity and unmistakable in its literal meaning. The legislature has said: "The registration fees imposed by this act upon all motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, except that dealers' license fees shall not be in lieu of other taxes." In addition to this unambiguous language, the radical increase in the license fee over that which was previously charged, and the comprehensive plan according to which the large amount of anticipated revenue is required to be expended for

5 A.L.R.—47.

governmental purposes, is persuasive evidence of an intention on the part of the legislature to make the so-called license fee

License—motor vehicles—exclusiveness.

take the place of both the pre-existing license fee and the personal property tax upon the vehicles. Such evidences of legislative intent are so clear as not to be capable of being overcome by the consideration of a slight difference in the time of passage of the two apparently conflicting provisions, as disclosed by the legislative journals. It is more reasonable to regard the two chapters (156 and 59) as relating to independent subjects and as involving conflict only to a limited extent. One relates to the classification of the general property of the state for tax purposes, while the other deals particularly with a class of property which, for tax purposes, is intended to be segregated from the general mass and treated according to an entirely different plan. Under well-settled rules of statutory construction, the general statute must yield to that which deals specifically with a part of the subject-matter embraced in both.

Statute—conflict—application.

Had chapter 156 not been enacted, the intention of the legislature to subject motor vehicles to ad valorem taxation at the scheduled rate of valuation would have been clear and unmistakable; but it would be going beyond the bounds of legitimate inference to say that, by the adoption of both chapter 59 and chapter 156, it was the deliberate design of the legislature to negative an intention which clearly lies at the very basis of the License Act. It is only the fact that the License Act was first in order of passage by the legislature that furnishes occasion for the suggestion that the provision making the license tax a charge in lieu of all other taxes was repealed by chapter

59. Repeals by implication are not favored, and we are satisfied that

—repeal by implication.

the doctrine is not properly invoked in this case. Especially is this true here, because the two chapters referred to were approved by the gov-

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not repeal another by implication until it becomes a law.

The conclusion above expressed seems to be fortified by the very language of § 1 of chapter 59. This section purports to make the classification schedule adopted applicable only to "real and personal property *subject to a general property tax*, and not subject to any gross earnings or *other lieu tax*." Clearly, it was not intended that personal property which was not subject to a general property tax should be embraced within the classification scheme, nor was it intended that any property should any longer be embraced therein after it had become subject to taxation in some other form, in lieu of a property tax. That is precisely what is provided for in the Motor Vehicle License Act, and hence a motor vehicle comes directly within one of the exceptions to the classification schedule. The fact that motor vehicles are named, however, in class 2 of the schedule, is only evidence to our minds that, owing to the imperfections of legislative procedure and to the impossibility of determining in advance the fate of related legislation, it was thought well to make a class broad enough to provide a proper place in the general schedules in case the legislation dealing specifically with one particular kind of property should not be passed.

We are strongly of the conviction that chapter 156 was intended to authorize a license fee in lieu of all other taxes, and that the act will have to stand or fall as so interpreted. This construction accords with the express language of the act, and to attempt to attach a contrary meaning would be nothing short of trifling with a well-understood legislative intention. We are

thus compelled to consider the constitutional objections urged against the validity of the Motor Vehicle Tax Law, treating the same as substituting a graduated license fee in lieu of the combined pre-existing license fee and ad valorem tax.

We are, then, confronted with the question of the power of the legislature to effect such a change in the tax laws under the limitations of the Constitution. In approaching the consideration of the constitutional questions presented by the petitioner, we must do so in the light of the rule that, in the exercise of the legislative power, the will of the legislature is supreme, and cannot be set  
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upon the legislative authority that can be pointed out in the Constitution. Cooley, Const. Lim. 7th ed. p. 236. The judicial department of the government exercises no function that is more far-reaching in its importance than that of passing upon the constitutionality of legislation, nor one that it approaches with a greater sense of delicacy. Realizing this fact, and being duly conscious of the proper relationship of the co-ordinate branches of the government, the most eminent judges have approached such questions with a degree of solemnity that is not usually present in cases which call merely for the application of ordinary principles of law to controversies between suitors. Some of our most highly respected courts and most eminent jurists have been so reluctant to set at naught the will of a co-ordinate branch of the government that the principles according to which they have tested the constitutionality of statutes are indeed extreme in favor of the giving of effect to the legislative will. Said Chief Justice Shaw in the case of *Re Wellington*, 16 Pick. 87-95, 26 Am. Dec. 631, "that, when called upon to pronounce the invalidity of an act of legislation passed with all the forms

and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." See *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583. While the questions involved in the matter under consideration can scarcely be said to be free from doubt, we enter upon their discussion with a due appreciation of their importance, and entertaining the desire to give effect, first, to the true meaning of the Constitution, and, second, to the will of the legislature in so far as it may be found not to be in contravention of the limitations prescribed by the Constitution.

The provisions of the Constitution with which we are particularly concerned in this connection are found in article 11, §§ 174, 176, and 179, as amended by chapter 103 of the Session Laws of 1913, the latter being a concurrent resolution which was adopted as a constitutional amendment in November, 1914. Sections 174, 176, and 179, as they stood prior to the 1914 amendment, provided for what is commonly known as the general uniform property tax. By § 174 the legislative assembly was directed to provide for the raising of revenue to defray the expenses of the state, not to exceed in any one year 4 mills on the dollar on the assessed valuation of the taxable property in the state. Section 176 required the passage of laws "taxing by uniform rule all property according to its true value in money." It also provided for certain exemptions to be created by general law, among which was included "personal property to any amount not exceeding in value \$200 for each individual liable to taxation." Sec-

tion 179, as amended by article 4 of the amendments (1905), provided that all property should "be assessed in the county, city, township, village, or district in which" such roads "are located or through which they are operated, as a basis for the taxation of such property. . . ."

By the amendment which was made in 1914, the basic mandate of universal uniform ad valorem assessment was changed. The amendment provided merely that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax." Sess. Laws 1913, chap. 103. The power of the legislature to exempt property from taxation, however, was expressed in practically the same language as that contained in the original § 176, and, so far as applicable to personal property, reads as follows: "And the legislative assembly shall, by a general law, exempt from taxation . . . personal property to an amount not exceeding in value \$200 for each individual liable to taxation." Sess. Laws 1913, chap. 103. Section 179 was amended (chapter 103, Session Laws of 1913, § 2) by striking therefrom the provisions requiring an apportionment of the assessed valuation of public utility properties to local municipalities.

Being reminded at this point of the effect of the Motor Vehicle License Law to remove from motor vehicles the burden of general and local taxation, we are required to answer the inquiry whether it is competent for the legislature to strike from the tax rolls of local municipalities property not legally exempt, and thus deprive them of sources of revenue which, it is contended, are secured to them by the Constitution.

Without holding or meaning to intimate that the only source of revenue that would have been open to the state and its governmental subdivisions, under the provisions of article 11 of the Constitution as

it originally stood, was a tax derived from property uniformly assessed (*State v. Klectzen*, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324), we have no doubt that it was intended that such should be at least the principal source of revenue. The constitutional provisions were mandatory. They required the passage of laws designed to subject all property to taxation according to value. This was an expression of the belief prevalent at the time of the adoption of the Constitution, that the ends of justice were best served where contributions to the support of the government were in proportion to ownership of property, at least, in so far as it may be attempted to derive revenues from property taxes. This idea was as applicable to revenues for the support of local government as for the state government. It was thus made an integral part of the plan that all the property once assessed should be subjected to the property taxes required for the support of the minor municipalities. Any attempt to give property a situs other than its true local situs would, of course, have interfered with the plan and would have been unconstitutional. *Martin v. Burleigh County*, 38 N. D. 373, 165 N. W. 520; *Rosasco v. Tuolumne County*, 143 Cal. 430, 77 Pac. 148. The genius of this scheme of taxation could only be realized if the properties subject to tax, either state or local, were upon the tax list of the district in which the property was located and the taxes levied. It was the sine qua non or basic practical requirement that must exist coextensively with the power to tax property by whatever municipality that was made the recipient of the power. Thus it will be seen that the requirement of localization contained in § 179 was a necessary part of the idea that all contributions to the revenues derived from property taxes should be exacted according to the valuation of the property. It would have been the law of the state by reason of §

176, though § 179 had not been adopted.

Viewed in this light, which we believe reflects its true meaning, the requirement of localization expressed in § 179 was only the expression of a rule that it was necessary to follow, if the goal of general uniformity was to be realized, and it may properly be regarded as merely appended to the more important section preceding (§ 176).

Apart from the incidental effect of the original § 179, construed in conjunction with § 176, we are of the opinion that there was a most important reason for the adoption of the section. It gave to the state board of equalization the sole power to assess the enumerated public utility properties. This power was doubtless conferred upon a central board in order to obviate conflicts between local taxing authorities, each taxing portions of the same property. It will be noted that the properties affected are those which generally extend into and through a large number of taxing districts. In the light of this fact, it was thought that the best means of securing uniform valuation and of avoiding complications incident to the attempted exercise of authority by numerous local units was through the medium of a central assessment. We do not doubt that this affords the strongest, if not the sole, reason for the adoption of § 179. So important is this consideration that the supreme court of California, in construing a similar constitutional provision, was divided upon the question as to whether or not it should be extended by implication to cover assessments of street railways and interurban lines operating in more than one county. *San Francisco & S. M. Electric R. Co. v. Scott*, 142 Cal. 222, 75 Pac. 575.

In view of the fact that the constitutional provisions designed to perpetuate the plan of property taxation above discussed have been superseded by amendment, it may not be out of place to refer briefly to the views entertained by econo-

mists relative to the efficiency of the scheme as a just method of taxation. While we are not primarily concerned with the economics of the question, and express no opinion thereon, reference to the current views of such authorities may conduce to a better understanding of the amendment. It is only reasonable to assume that the amendment was made with a view to correcting inherent defects. A foremost authority on the subject of taxation in the American states condemns the general property tax, both from the theoretical and practical standpoints, and, in pointing out where-in it has signally failed as administered, says:

"The standard of ability has been shifted from property to product; the test now is not the extent, but the productivity, of wealth. . . .

"Practically, the general property tax, as actually administered, is beyond all doubt one of the worst taxes known in the civilized world. Because of its attempt to tax intangible as well as tangible things, it sins against the cardinal rules of uniformity, of equality, and of universality of taxation. It puts a premium on dishonesty and debauches the public conscience; it reduces deception to a system and makes a science of knavery; it presses hardest on those least able to pay; it imposes double taxation on one man and grants entire immunity to the next. In short, the general property tax is so flagrantly inequitable that its retention can be explained only through ignorance or inertia. It is the cause of such crying injustice that its alteration or its abolition must become the battle cry of every statesman and reformer." Seligman, *Essay in Taxn.* p. 61. See also Wells, *Theory & Pr. of Taxn.* p. 434.

Counsel upon argument referred to the general property tax as being of comparatively recent origin, and to the amendment as harking back to a period when legislatures were more free than now in the matter of tax legislation. In this, counsel

was only partially correct. The general property tax is medieval, not modern. When the organization of society was simple, the general property tax so strongly reflected the semblance of equality that it was quite generally adopted. But it has been so long discarded in Continental Europe and in the Eastern states of America that it usually receives but passing mention by those who devote attention to public finance. When it is mentioned it is only to be condemned for its utter failure to achieve the desired ends of justice and equality.

To what extent has the original scheme, which in practice has proved so disappointing, been departed from by the adoption of the amendment above referred to? It will be noted, first, that § 176 no longer commands the legislature to provide for the taxing of all property by uniform rule, according to its true value. On the contrary, the section purports to be only a limitation designed to preclude arbitrary classification, and to require uniformity only within a class and within the territorial limits of a taxing authority. Section 179, as now amended, while retaining the pre-existing requirement of local assessment, except as to enumerated public utilities, entirely does away with the necessity for a distribution of the assessed value of utility properties to the local taxing units. These two sections of the amendment of 1914 are significant of a decided change in the pre-existing constitutional policy. It is now neither required that all of the taxable property within a district shall be apportioned thereto, nor that the revenues to be raised from property taxes within the territorial jurisdiction of the municipality levying the tax shall be derived from all of the taxable property within the district. For instance, it may now be provided that the state may derive its tax revenue from railroads and express companies to the exclusion of other property; whereas minor municipalities may be authorized to

derive their revenues from the general property, including such utilities as telephone and telegraph companies, and be denied the right to tax the railroads and express companies. The effect of such a law would, of course, be to exempt the class of property referred to, wholly or in part, from other taxes for the support of other municipalities in which the property may be located; but in reality the property would not be exempt, because it would be bearing that portion of the general burden of taxation which the legislature deemed just. The only limitation upon the power of the legislature to thus classify property is the 14th Amendment to the Federal Constitution, which, by requiring equal protection of the laws, precludes purely arbitrary classification. See *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Santa Clara County v. Southern P. R. Co. (C. C.)* 9 Sawy. 165, 18 Fed. 385; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Citizens' Telegraph Co. v. Fuller*, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; *State ex rel. St. Paul City R. Co. v. Minnesota Tax Commission*, 128 Minn. 384, 150 N. W. 1087. Under such a scheme, property cannot be said to be exempt, provided it is made to bear what the legislature deems to be its just proportion of tax burden. The foregoing propositions based on the amendment are wholly beyond dispute because clearly within its very language.

But does the requirement that all taxable property except that of the enumerated utilities shall be assessed in the county, city, township, etc., in which it is situated, any longer require that all taxable property not excepted be placed upon the tax rolls of the designated local units? If so, the legislature

has no authority to effect its withdrawal. This, in our judgment, is a most serious question, and one that must be solved by a proper construction of the constitutional amendment in the light of the change sought to be effected.

As an aid in determining the meaning of the amended § 179, it should be borne in mind that § 202 of the Constitution requires the separate submission of amendments so that they may be separately voted upon, and that chapter 103 of the Session Laws of 1913, which amends both §§ 176 and 179, was adopted as one amendment. We should assume, therefore, that it was desired to effect but one basic change in the Constitution, and that whatever alterations in other sections were deemed essential to make that change effective were made for that purpose only. The basic change sought is doubtless found in § 176, wherein the rule of general uniformity is changed to that of a permissive classification, accompanied by a requirement of territorial uniformity. The change made in § 179, by removing the direction to apportion the assessed valuation of the utilities to the local units, but brings it into harmony with § 176. Where a single purpose seems to be dominant in an amendment, we should be reluctant to give to other sections a construction that would tend to defeat it; particularly, where the section which is not wholly consistent in its language was but a little more than an appendage to that which was most radically changed.

Under its authority to classify, the legislature may determine that there are subjects of tax within a given locality that may reasonably be made to contribute to the maintenance of one municipality rather than to another, both having jurisdiction over the same territory. Thus it may be thought more appropriate for a county or for the state, either of which may be charged with the duty of keeping up the public highways, to exact of

an automobile stage driver the taxes derived from the instrumentalities that he uses in connection with his business, than it would be to permit the city, where he might sleep half the time and over whose streets he might run but a short distance, to derive a larger benefit from his taxes upon the automobiles he uses than the county or state.

Or the legislature might deem it proper to authorize the creation of a park commission or board, and vest it with authority to levy a tax for the acquisition and improvement of park sites. If it should be of the opinion that such a tax should be levied only upon the assessed valuation of the real property of a city whose boundaries correspond with the jurisdiction of the board, manifestly it could so provide, under § 176. (Assuming, of course, the constitutionality of the classification involved under the equal protection clause of the Federal Constitution.) If § 179, as now amended, however, were construed to require the placing of all taxable property within the city or park district upon the tax rolls, its presence there could serve no useful purpose, because not accompanied by a power to tax. Or would it be contended that there must be a local power to tax it, because it is incompetent for the legislature to so far exempt it? If so, the legislature would be driven to the adoption of indirect means to accomplish its permissible ends. It could provide for an assessment for local purposes on so low a basis as to amount practically to an exemption from local taxation. If such an expedient were resorted to to effect a legitimate object, and it did not amount to arbitrary classification, it would not be for the courts to question the wisdom of the policy or the good faith of the legislature. We should shrink from a construction of the Constitution that can but result in imposing artificial rules so readily capable of being circumvented. Rather we should seek to discover the true aim

of each provision, and apply it according to its intent and spirit.

The true aim of the original §§ 176 and 179 was to compel an equitable distribution of the tax burden. This they sought to accomplish by requiring a uniform ad valorem assessment of all property and the application of the local and general tax rates thereto. The aim of the amendment is doubtless the same, but we must construe it as made in the light of the universal experience above referred to. It contemplated that the legislature might take cognizance of the economic setting of the various classes of property subject to its taxing authority, and consider this as a factor in legislating regarding the peculiar functions of the different municipalities and the duty of supplying the needed revenues to support them. If this be not the scope of the amendment, why was the requirement of uniformity limited to "the territorial limits of the authority levying the tax," and why was the constitutional form of expression changed from language strongly mandatory to permissive freedom within limited bounds? If, under § 179 of the Constitution, the legislature is precluded from differentiating between the various classes of property in a way that will reflect a just appreciation of economic and governmental relationships, manifestly the constitutional foundation for reasonable classification is undermined, and there is carried over into the altered scheme so large a part of the pre-existing iron-clad rule of uniformity as to afford a serious impediment to its reasonable and orderly operation.

In its essence, the objection interposed in this case on behalf of the city of Fargo amounts to a complaint that its taxing power is impaired; but by § 130 of the Constitution the legislature is given plenary control over municipalities in the matter of the limitations upon their taxing power. In fact, their power to tax

Tax—local districts—rights.

is derived from legislative grant. *State ex rel. Oliver Iron Min. Co. v. Ely*, 129 Minn. 40, 151 N. W. 545, Ann. Cas. 1916B, 189. If, under § 176, a new municipality can be given a limited taxing power, or one that will enable it to tax certain classes of property for certain purposes, wherein can there be any sound basis for objection on the score that the taxing power was not made more extensive? It may be that, under § 176 as it originally stood, all power to tax property must have been so conferred as to operate uniformly as to all property within the district; but, without the requirement of such uniformity, can it be reasonably said that every taxing power vested in a municipal government must be accompanied by authority to tax all taxable property according to some rate for the same purpose? A rate which would be nominal merely and wholly artificial might be thought to satisfy the constitutional requirement.

Enough has been said to indicate that constitutional localization of property for purposes of taxation is inherently inconsistent with the legislative power to classify. But does the language of § 179 require that we should give effect to a meaning so far inconsistent with § 176? We think not. When the entire amendment is read together, we think it reasonably clear that the effect of § 179 is simply to provide that property which is required to be taxed for local purposes be given a situs within the district in which it is to be taxed, and that certain properties shall be assessed by the state board of equalization. The word "taxable" qualifies "property" in the amended section, whereas there was no qualifying word in the original section. This would seem to imply that it was contemplated that some property might be made taxable in one jurisdiction that was not taxable in another. While the addition of this qualifying word may in itself be of slight consequence, yet when we also consider

the dropping of the only words expressly requiring the valuation of property to be apportioned to the taxing districts, and read the whole amendment in the light of the meaning of the newer limitation, which displaces a stiff mandatory provision, we are impressed that the localization only applies to property which is required by the legislature to bear a local tax.

Being of the opinion that the complaint of the city of Fargo is unwarranted in so far as it is predicated upon a right to retain the property in question upon its tax rolls, it remains to be determined whether the act so operates as to exempt personal property in violation of § 176 of the Constitution, or to circumvent § 174, limiting the amount of state taxes.

It is incompetent for the legislature to exempt personal property from taxation except to the extent of \$200 worth for each individual liable to taxation. This act imposes a charge denominated a license or registration fee. Does it necessarily violate the provision above referred to? It is clear, as hereinbefore pointed out, that the legislature intended that the property in question should bear no other tax burden than that provided in this law. The amount required to be paid entitles the owner to enjoy the right to use the highways and to hold his property free from other tax obligations. Doubtless, it would be competent for the legislature, in imposing a license tax, to take into consideration the uses commonly made of the property affected, together with the additional burdens which such uses place primarily upon the state. The duty of keeping the public roads in condition is a governmental one, which, under our Constitution, the state is now authorized to discharge directly. Const. § 185, Sess. Laws 1915, p. 403. Where a fee or tax may fairly be said to be no larger than is reasonably necessary to compensate for the extra burden incident to the common use of the highway by a



given class of vehicles, it cannot be said to be so arbitrary as to be unwarranted. There being no provision in the Constitution directly restricting the power of the legislature to impose a license fee or tax, the charge imposed, having been measured according to a reasonable standard, seems to meet every requirement of a valid license tax.

But unless it is included in the fee, there cannot be said to be any tax upon the property, and the act cannot stand because of the express provision of § 176, limiting the power of the legislature to exempt property from taxation. Can it be said that the legislature, by determining upon a policy of substituting a license fee for a tax, has in effect determined that the property is not exempt? In the absence of constitutional requirements to the contrary, the power of the legislature to provide for an equitable adjustment of tax burdens, in such a way as to take into consideration other burdens placed upon a given class of property, cannot be disputed. If the legislature deems it appropriate to single out a given class of property, and to require that the owners of that property, who, as a class, derive most benefit from the proper performance of a given governmental duty, must contribute

—special  
contribution.

most to the legitimate cost of its maintenance, and that they may be favored by a corresponding reduction of other burdens, it cannot be said that the property subject to the particular burden is exempt from taxation. The most that can be said is that it is singled out for special treatment, and taxed according to a method that is thought to be more appropriate for measuring the relative burden than would be the case if it were taxed according to valuation. There is no particular magic in a name, or even in a legislative designation of a particular form of taxation. Though the legislature may call that which is distinctly a tax by some other name, it nevertheless re-

mains a tax. Where the taxing power of the state is limited by the provisions of the Federal Constitution designed to secure the freedom of commerce between the states, the United States Supreme Court has not hesitated to distinguish between license fees and taxes, and the mere fact that a given charge is imposed by the state as a license charge is not conclusive of the legality of the charge. In the case of *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306, the United States Supreme Court held, in effect, that a charge imposed as a license fee for the use of the Chicago river was in fact not a fee or toll exacted as compensation for specific improvements, but was in fact a tax upon interstate commerce. As a mere license fee or toll the charge would have been valid. *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313. This proposition is equally applicable to this case. That which is imposed as a license fee may be in reality both a tax upon the property and a fee. Here it was clearly intended as such.

The prohibition of the exemption of personal property could have been designed for no other purpose than to prevent favoritism and to compel a fairly equitable distribution of the tax burden. A law which secures this end meets every requirement of such a provision, though the contribution exacted be not designated as a tax. The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions (see *Seligman*, *Essay in Taxn.* p. 281); but any payment exacted by the state or its municipal subdivisions as a contribution towards the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. This is such a charge, and it may properly be regarded as a tax.

Definition—  
tax.

We have had the gravest doubt

as to the propriety of so construing the law in question; but, viewed in the light of the ample powers of classification given to the legislature, of the known limitation upon the right to exempt personal property, of the declared intention to make the tax in question one in lieu of all other taxes, and of the evident attempt to make the new tax one that should approximately equal both the original tax and the license fee, we are impressed that the law in question imposes both a property tax levied according to a permissible standard and a reasonable license fee. The act consequently does not violate § 176 of the Constitution, concerning exemptions.

Here, too, greater assurance is added to our conclusion by the consideration that the legislature, in the exercise of its power to classify, could largely accomplish indirectly that which is accomplished directly by the act in question. If the legislature should see fit to adopt an act licensing automobiles and make the charge one in addition to a property tax upon vehicles, such as is done in a number of states, it would have the right to base the property tax upon a percentage of valuation that would be so low comparatively as to amount practically to an exemption, and its action in so doing would be justified principally by the fact that a larger burden had been placed upon the property by way of a license charge for its use. Again, we are prone to reiterate the thought that a construction of the Constitution which would compel the accomplishing of legitimate aims by indirection should be avoided, especially where the true ends of a particular constitutional provision are clear and are met by the legislation in question.

Does the act violate § 174 of the Constitution? In considering this question it must be borne in mind that § 174 was originally adopted as a part of the plan that contemplated the raising of the bulk of the revenues required, both for state and local purposes, from the gen-

eral property tax levied upon a uniform ad valorem assessment. The limitation was one that could readily be applied to any assessment of the general property of the state that might be made for tax purposes, but it cannot so readily be applied if the legislature should seek to exercise its powers of classification conferred by the amendment to § 176. Under this plan much of the property might be assessed at a small percentage of its value, and the contemplated basis would be entirely changed. Nor could the section ever have been fully applied under the Constitution as it was originally framed, had the state elected to exercise the power to levy a gross earnings tax upon the railroads in accordance with the express authorization contained in § 176. It was there provided that "the legislative assembly may, by law, provide for the payment of a per centum of gross earnings of railroad companies, to be paid in lieu of all state, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, . . . and whenever and so long as such law providing for the payment of a per centum on earnings shall be in force, that part of § 179 of this article relating to assessment of railroad property shall cease to be in force."

It is clear that it was originally contemplated that, in the event the legislature should see fit to adopt a gross earnings tax applicable to railroads, this class of property, which from the beginning has made up a substantial part of the total assessed valuation of the property of the state, should not be assessed at all, and it is equally clear that had this power been exercised it would not have been incumbent upon the state to have distributed the gross earnings taxes to the local governmental units. There would then have been no proper assessed valuation basis upon which to apply the 4-mill limitation of state taxes.

So, from the beginning, § 174 could not have been regarded as establishing an absolute maximum limitation upon the power of the state to levy taxes. It, of course, applied to that portion of the revenues which might have been derived from property made to contribute according to assessed valuation. State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 573.

When § 176 was so amended as to authorize the classification of property within reasonable limits, and to require uniformity only within the territorial limits of the authority levying the tax, it is manifest, from what has previously been said in this opinion, that the legislature became free to adopt any reasonable measure for determining an equitable basis for contributions to the revenues, and it is equally clear that it was no longer contemplated that there should be an annual assessment of property at its true value. Consequently, the very basis upon which the limitation contained in § 174 was originally intended to apply was no

**Tax-limitation  
—scope.**

longer fixed by a  
mandatory require-  
ment of uniform

ad valorem assessment. Therefore, whenever the legislature sees fit to adopt some other reasonable basis, upon which to determine the amount of tax that may be exacted from an individual than the value of the property owned by him, it does so in pursuance of an authority which is expressly recognized by the Constitution as now amended, and it cannot be said to be exceeding the revenue limitations prescribed in § 174. Section 174 means now very much the same as it has meant from the beginning, viz., that the legislature shall be precluded from raising revenues based upon an ad valorem assessment of property which will exceed in any one year 4 mills on the dollar of the assessed valuation of the taxable property in the state. To construe it otherwise would be not only to ascribe a meaning that would have

precluded the proper exercise of the legislative power to tax railroad companies according to gross earnings, under § 176 as it originally stood, but would also prevent the proper use of the authority which it clearly has under § 176, as amended, to provide for a separation of sources of state and local revenues, and to exact the same according to any fair method of classification that in its judgment is designed to meet the ends of justice. We are of the opinion that the act in question does not violate § 174 of the Constitution.

Much of the argument of counsel for the petitioner seems based upon the hypothesis that the Constitution precludes taxation of any other character than a property tax levied upon ad valorem assessment. It is doubtless true that, under the Constitution as it stood prior to the amendment, no other tax upon property than one levied upon an ad valorem assessment at a uniform valuation was contemplated. But, under § 176 as amended, the only requirement is one of uniformity within a class. In some of the states, Georgia for instance, the Constitution provides not only that taxation shall be uniform upon the various classes of subjects within the territorial limits of the authority levying the tax, but in addition contains the express requirement that property taxation shall be ad valorem. Ga. Const. art. 7, § 2. Had it been desired to limit the power of the legislature to prescribe property taxes in such a way as to permit no other kind of tax except one levied upon an ad valorem basis, it would seem that

—ad valorem—  
such a limitation license fee on  
would have been automobiles.

expressed in § 176. In the absence of such a provision, it cannot be held that the legislature is precluded from laying a property tax upon any basis that will exact contributions according to an equitable standard, and one which is free from the vice of arbitrary classification.

Under the law in question, the amount of the fee or tax is dependent upon the horse power of the motor, which is determined according to a rating established by the national association of licensed automobile manufacturers. It may be true, as contended, that the rating is defective, in that it does not take into consideration the length of the stroke of the piston and the valve equipment; but this is a matter for the legislature to determine, and it is not for the courts to review the reasonableness of the method adopted, in the absence of a showing that it is wholly arbitrary.

The owner of the car is required to make an application for the registration of his motor vehicle which must contain a description of the car, to enable the secretary of state to determine the registration and license fee, according to the prescribed rating. There is not involved in this procedure any act of a quasi judicial nature, such as the placing of a valuation upon property. The tax is determined wholly by the fixed rating, which is dependent upon the size and number of cylinders. The only other factor that enters into the determination of the fee is the length of time the vehicle has been in use as a registered car. Inasmuch as these facts are supplied by the owner, there is no merit in the objection that the secretary of state is made the assessor of this class of property for the entire state.

The act is further assailed as involving an unconstitutional delegation of legislative power upon an administrative or executive officer.

**License—motor vehicles—validity.** This objection appears to be a valid one.

In § 4 of the act it is provided: "The secretary of state is hereby authorized to employ such agent or agents as may be necessary to enforce the provisions of this act;" and in § 5 the state treasurer, in apportioning the moneys received to the credit of the counties, and to the state highway fund, is required to first de-

duct from the moneys received "the cost of tags, clerk hire, printing, postage, express, and other expenses as estimated by the secretary of state." These provisions clearly involve a delegation of legislative power to the secretary of state. There is no limitation upon the manner of persons he may employ nor upon the salaries he may pay. Neither is there any limitation placed upon the expenditure that he may authorize for tags, printing, etc.; nor even any limitation upon the purposes for which "expenses" may be incurred—the act says "other expenses." Nothing need be said upon this question, in addition to what has been said by this court in previous decisions which are clearly applicable to the case at bar. *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724, and *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 425. It does not follow, however, that the unconstitutionality of this portion of the law necessarily renders the remainder of the act void.

This identical question was before the supreme court of Illinois in the case of *People v. Sargent*, 254 Ill. 514, 520, 98 N. E. 961, and it was there held both that the provision of the Motor Vehicle Act which directed the secretary of state to pay into the state treasury the fees received, "less the cost of preparing and delivering the registration certificates, registration seals, and number plates," was void because it authorized expenditures without legislative appropriation, and that, though the act was invalid in that respect, the remainder of the Motor Vehicle License Law was not affected. This holding is clearly in accord with the doctrine of partial invalidity, as adhered to in this jurisdiction (*Malin v. Lamoure County*, 27 N. D. 140–153, 50 L.R.A. (N.S.) 997, 145 N. W. 582, Ann. Cas. 1916C, 207), and as expressed by an eminent authority upon the subject. *Cooley, Const. Lim.* 7th ed. 246. For the reasons

**Statute—partial invalidity—effect.**

assigned in the foregoing opinion, the writ is denied.

**Robinson, J., dissenting:**

This case presents no question arising under the Constitution or laws of the United States, or of any other state. Hence there is no good reason for considering and quoting from all or any of the decisions on the dissimilar laws of other states. This case was brought to compel the assessors of the city of Fargo to list and assess for taxation all automobiles and motor vehicles owned in the city. It challenges the validity of chapter 156, Laws of 1917. This statute imposes on all motor vehicles a license fee or tax of not less than \$6, and for each horse power in excess of 20 there is an additional tax of 50 cents. Only half the tax is laid on automobiles registered three years prior to the passage of the act. The same is in lieu of all other taxes, general or local, except that the fee paid by dealers is not in lieu of other taxes.

All taxes are paid to the secretary of state, and he is charged with the supervision and collection of all the taxes. He pays the same to the state treasurer, and from the moneys received in each month the state treasurer deducts the expenses of the business and the balance he divides into three parts. One part, or one third of the balance, he distributes to the several county treasurers, and he credits the remainder to the state highway fund. That fund is all expended and paid out under the direction of the State Highway Commission on vouchers approved by the secretary of the Commission, and the money paid to each county is expended for the repair of highways not within the limits of any city or village. Such is the theory of the law. There is no limit to the expense that may be incurred and paid by the Highway Commission and by the secretary of state. To collect the tax and to enforce the provisions of the act, the secretary of state is authorized to employ such agents and to pay such compensation as he may

think proper. On general expense accounts, there is no limit to his discretion. Were it not that the secretary is a strictly honest man, he might easily expend among his friends all the receipts of the business, and leave not a dollar for the Highway Commission to expend in the same manner; and so the Highway Commission are given full power to expend as they may please their share of the money.

In 1917, the tax receipts were \$210,000, the expense was \$33,700. In 1918, during the first three months, the receipts were \$250,000. To May 15, 1918, the Highway Commission expends for engineering and drawings, \$50,480.87; road work, \$335.21.

1. Every law imposing a tax must state the object of the tax to which only it shall be applied. If the object of a tax was the improvement of a highway, the statute should have directed and limited the manner of making the improvement and of collecting and expending the tax. It should not have been all left to the absolute discretion of the secretary and the Highway Commission. There must be some reasonable limitation on the expense of collecting and on the manner of expending a tax, or there can be no assurance of its application to any particular object. State ex rel. Rusk v. Budge (Capitol Commission Case) 14 N. D. 532, 105 N. W. 724; State ex rel. Miller v. Taylor (State Bonding Case) 27 N. D. 84, 145 N. W. 425.

2. The legislature must provide for a tax to defray the expense of the state for each year, not to exceed 4 mills on the dollar of the assessed valuation of taxable property, and a sum sufficient to pay interest on the state debt. And, with a few exceptions which do not include motor vehicles, all property must be assessed in the county, city, township, village, or district in which it is situated, and the assessment must be made in the manner prescribed by law. § 179.

Certain it is that under the plain

words of the Constitution no tax may be levied on motor vehicles without an assessment of the same in the manner provided by law for the assessment of other personal property; without an assessment of real and personal property according to its value in money, there can be no basis for the levying of a tax on the assessed valuation and for limiting the total to 4 mills on the dollar.

With a few exceptions, including a poll tax not to exceed \$1.50 a year, all taxes must be levied on property according to an assessed valuation to be made and equalized in manner provided by law. And by the guaranties of due process of law the owner of property must have an opportunity to be heard in regard to the assessment of the same and the levying of a tax against it. The tax which the statute imposes in lieu of all other taxes, it names a registration fee or license. Of course, that is a palpable misnomer, and it does not in any way evade the limitations of the Constitution. The motor vehicle, like other personal property, must be assessed for taxation in the county, city, township, village, or district in which it is situated, in the manner prescribed by law, and it may not be specifically exempt from taxation. "The legislature may by general law exempt from taxation personal property of each person to an amount not exceeding \$200." § 176.

The exemption must be limited to a certain sum of valuation, and not to any particular kind or class of property. It must have a uniform application. Obviously, the statute in question is in direct conflict with the above provisions of the state Constitution, and hence it is void.

A petition for rehearing having been granted, Birdzell, J., handed down the following additional opinion:

A rehearing was ordered in this case upon two propositions: First, as to whether or not §§ 176 and 179 of the Constitution had been amended in 1914 by the favorable

vote of the electors upon the proposition submitted; second, considering the Constitution to have been legally amended, what is the proper meaning of § 174 (the provision limiting the state taxes to 4 mills on the assessed valuation of the taxable property) as applicable to the law in question?

In the concurrent resolution submitting the amendment, the legislature referred to the proposed change or changes in the Constitution as "amendments to §§ 176 and 179," and required that "such amendments shall be submitted to the qualified voters of the state at the next general election, for approval or rejection, in accordance with the provision of the Constitution of the state of North Dakota." The amendatory matter has been referred to or set forth at length in the main opinion herein, and need not be reincorporated here. Section 202 of the Constitution outlines the procedure that must be followed in amending the Constitution. The last sentence of the section is: "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

It is argued that the amendments to §§ 176 and 179 are separate amendments; and that, not having been so submitted as to enable the electors to vote for or against each separately, the Constitution has not been legally amended. If this contention is sound it will follow, as a matter of course, that the law in question is unconstitutional; for it is patent that it does not provide for the taxing of automobiles according to their value, thus violating the first requirement of § 176, which, if still a part of the Constitution, requires the taxing by uniform rule of all property according to its true value in money.

Constitutional provisions similar to our own (§ 202), prescribing the requisite formalities to effect an amendment, are quite common. In

more than half the states there is a requirement of some character which is designed to secure such a submission of constitutional amendments as will enable the electors to vote for or against a single definite proposition. The concurrence of so many constitutional conventions upon the single question of the method of submitting amendments is, in itself, a strong indication of the importance of the question. See *Dodd on Revision & Amendment of State Constitutions*, p. 179; also 12 C. J. 690. If the amendment were not properly submitted, it would unquestionably be the duty of the court to declare it not a part of the Constitution. The provisions of our Constitution are mandatory and prohibitory (§ 21), and, as such, the Constitution construes itself in relation to such a matter as that under discussion. *State ex rel. Woods v. Tooker*, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840. Thus, when the Constitution says that "amendments shall be submitted . . . in such manner that the electors shall vote for or against each . . . separately" [§ 202], the failure of the proper officials to comply with the direction is necessarily fatal to the attempted amendment. It is the duty of the court to uphold and give effect to every part of the Constitution, and this provision can only be enforced by refusing to recognize as an amendment that which was never legally adopted as such. That this duty has been fully and faithfully discharged by the courts in the past is indicated by the statement of *Dodd*. After an exhaustive consideration of the experiences of the various states in the submission and adoption of constitutional amendments, he says: "If a required step is omitted, or is not even in substance complied with, no court has ever upheld the amendment, even though it may have been approved by the people; that is, the constitutional requirements are mandatory, not merely directory, and no court will overlook the entire disregard of even the less im-

portant of such requirements." *Dodd, Revision & Amendment of State Constitutions*, pp. 217, 218.

As to what constitutes a plurality of amendments within a provision such as our § 202, however, the attitude of the courts generally has been to adopt what is, in our judgment, properly termed a liberal and common-sense view.

The views of the supreme court of Wisconsin, as expressed in the case of *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785, are generally regarded as a sound expression of the true meaning of such constitutional provisions. In answer to the contention that an amendment was plural which provided for biennial instead of annual legislative sessions and adjusted the legislative terms and salaries to the new biennial system, the court said:

"Such a construction would, we think, be so narrow as to render it practically impossible to amend the Constitution; or, if not practically impossible, it would compel the submission of an amendment (which, although having but one object in view, might consist of considerable detail, . . . though all promotive of the same object and necessary to the perfection and practical usefulness thereof, if adopted as a whole), in such form that a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions, when adopted. . . .

"We think amendments to the Constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon, or connected with, each other." (The parentheses above are not quoted, but are inserted to facilitate the reading.)

The following expression from

the supreme court of Iowa is to the same effect: "If the amendment has but one object and purpose, and all else included therein is incidental thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment." *Lobaugh v. Cook*, 127 Iowa, 181, 102 N. W. 1121.

The supreme court of Montana has expressed the rule in a concise manner as follows: "If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment," *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39.

This and similar questions have been before the courts of last resort in a number of the states, and, while the decisions are not entirely harmonious, the conflict principally turns upon the application to the particular case of a principle which is quite generally adhered to. See *People ex rel. Elder v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; *People ex rel. Tate v. Prevost*, 55 Colo. 199, 134 Pac. 129; *Hammond v. Clark*, 136 Ga. 313, 38 L.R.A. (N.S.) 77, 71 S. E. 479; *Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237; *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93; *Gabbert v. Chicago*, R. I. & P. R. Co. 171 Mo. 84, 70 S. W. 891; *Hubbard v. St. Louis & M. River R. Co.* 173 Mo. 249, 72 S. W. 1073; *State ex rel. Teague v. Silver Bow County*, 34 Mont. 426, 87 Pac. 450; *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927, overruled in *State ex rel. Collins v. Jones*, 106 Miss. 522, 64 So. 241; *McBee v. Brady*, 15 Idaho, 761, 100

Pac. 97; *Lobaugh v. Cook*, supra; *Jones v. McClaughry*, 169 Iowa, 281, 151 N. W. 210; *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N. W. 419; *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 10 L.R.A. (N.S.) 149, 110 N. W. 1113, 15 Ann. Cas. 781; *Bethea v. Dillon*, 91 S. C. 413, 74 S. E. 983.

To refer in detail to the variety of circumstances in which the question under discussion has arisen in the foregoing cases would unduly lengthen this opinion. We shall consequently content ourselves with a mere statement of the principle which finds practically unanimous support in the many authorities cited.

Such a constitutional provision is designed to prevent the submission to the voters, as one amendment, of distinct propositions that are so far disconnected and independent of each other as to have no direct relation to a general subject. The vice it is designed to prevent is analogous to the logrolling and joker practices which are so familiar to students of legislation, and which are generally sought to be prevented by constitutional provisions requiring an expression of the subject of legislation in the title of the bill, and that the legislation shall concern but a single subject. It prevents the linking into one proposition of distinct amendments where there might be an attempt to join them together for the purpose of giving unmerited support to an amendment which might be thought to be unpopular, or for the purpose of defeating a popular measure by burdening it with an unpopular one. It compels each distinct amendment to stand upon its own merits, and relieves the voter of the embarrassment that would be occasioned by his being compelled to vote against a measure he deems desirable in order to defeat one that he does not favor; or, if he should deem it the



lesser evil, to vote for the proposition he favors and at the same time cast his vote in favor of an amendment that is distasteful to him. Reference to the cases cited above will disclose that the courts have differed little, even in the expression of the principles according to which the constitutional provision is enforced. But it will also disclose that, to the extent that there is a lack of harmony in the results arrived at, it is due to differences of opinion as to their application.

A somewhat extreme application of the foregoing principle is found in the case of *People ex rel. Elder v. Sours*, supra, in which the supreme court of Colorado held that an amendment was single where it provided for the consolidation of the city of Denver and the county of Arapahoe, and for the framing of a charter by the new municipal corporation; also for the framing of home rule charters by all cities of the first and second classes within the state. See *Dodd, Revision & Amendment of State Constitutions*, p. 180.

The amendatory matter in the instant case relates to the uniformity of taxation, permits the classification of property, and alters the section regulating the assessment and taxation of certain public utility properties. Within the principle stated above and under the authorities cited, there can be no question that a change may be effected by one amendment which would materially alter more than one section of the Constitution. Nor can there be any doubt that this can be accomplished either by implication or by express language. It is also clear that § 202 of the Constitution is not violated where an amendment which is in reality single is expressed in several sections which are all submitted as one proposition. In fact, the limitation applies only to the substance of the amendment and not to its form. So in this case our inquiry is narrowed to this: Is the whole of the matter so germane to the general subject of

the amendment as to have a direct bearing upon the object sought to be accomplished, and is it so closely related to the general subject that it may be considered as within its legitimate scope? If so, it is sufficiently connected with a single subject-matter to be properly embraced within one amendment.

In the original opinion a brief survey was made of various sections of the Constitution embracing limitations upon the taxing power, and it was seen that at the basis of all of them lay the mandatory requirement of § 176, that property should be taxed uniformly and according to value. It was also pointed out that for these limitations there was an apparent desire to substitute a provision that would enable the legislature to classify property with reference to its use, its value, its utility, and, in general, its setting in the economic organization of society with reference to the functions of government as exercised by the state, and its minor subdivisions. These purposes differ so radically from the purposes evidenced by the original section that the amendment would naturally carry with it, if accomplished, and if legislation were adopted in pursuance of the powers intended to be given, changes in the scheme of public finance that were not in the contemplation of the framers of the original Constitution. These changes were intended to be effective to the extent that legislation within the limitations of § 176 as altered departs from the requirement of full value ad valorem assessment as originally contemplated. For instance, the sections of article 12, which prescribe limitations upon the debts of various municipalities, take, as a basis, a percentage of the assessed valuation of the taxable property. Those limitations are doubtless still applicable, but the legislature may now give express sanction to assessments at a percentage of value, and executive and administrative officers may no longer be required to perpetuate a

legal fiction of sworn full valuation in the face of contrary facts and a quarter century's universally known administrative practices. In fact, many of the provisions of the Constitution relating to revenue and taxation were framed to fit a system that had no actual existence. It was a mere phantom that had never taken up its abode in the world of things prior to the adoption of the Constitution; nor did the hard and fast requirements of the Constitution prove efficacious to convert it into a reality. Under the amendments it may possibly be that there will be a closer proximity between express requirement and limitation and actual practice. To the extent, however, that the original plan stands in the way of attempts to carry out the powers conferred by the amendment, it is, of course, superseded.

The limitations of the original Constitution only acquired vitality as applied to the actual administration of the tax laws, and it is a fact so well known generally as to be

**Evidence—  
judicial notice—  
omission of tax  
assessments.**

properly within our judicial notice that property assessments have never approached full value in this state, and that probably more taxable personal property has been omitted from the tax rolls than has been assessed. It may be that, under the amendment in question, laws might be passed under which the aggregate assessed valuation would be radically increased. If so, the tax-levying and debt-limiting provisions of the Constitution might operate quite differently from the way they have in the past, or even from the way it was originally contemplated they would operate. This is but incidental to the change.

It is argued that a law which measures a tax by some characteristic of property other than its value destroys the basis of such limitations as those referred to. If this be so, the argument proves nothing, provided the original limitations ~~are~~ still applicable. If still appli-

cable, as we believe they are, they will necessarily preclude the legislature from taxing a great amount of property according to such a method as is employed in the instant case; as, under our construction of the law, it operates to reduce, rather than increase, the power to incur debts. While thus preventing extravagance, the legitimate needs of the local municipalities, which can only be supplied by a proper exercise of their borrowing power, will necessitate the continuance of the practice of taxing the bulk of the property on an *ad valorem* basis.

As stated in the original opinion, there is an inherent inconsistency between a constitutional provision that requires the taxing according to a uniform valuation and rate of all property lying within a given taxing district and a constitutional provision that requires uniformity only within a class and within the territorial limits of the authority levying the tax. The inconsistency lies in the entire absence of any semblance of permissive local option in the one case which is present in the other. Thus, under legislative authority, cities may levy, at their option, taxes for their own support in accordance with a classification of property that may be deemed appropriate for such purposes. Such a classification might not be adopted by other cities or even applicable to other municipalities at all. So long as the city taxes are uniform within a given city upon the same class of property, and the classification of the property upon which the tax is levied be one that does not violate the state or Federal Constitution in other respects, the law which would authorize it would provide for a tax that would be uniform upon the same class of property "within the territorial limits of the authority levying the tax," and would be valid within § 176 as amended. The limitation just quoted is the requirement of uniformity. It requires uniformity within a class and within the territorial limits of the particular taxing

authority. If it were still intended to require that all property within a tax district be subject to every levy of every municipal and quasi municipal corporation having jurisdiction to tax it, the rate would be uniform by virtue of the enforced localization of the property, and the words last quoted above would be surplusage. In interpreting the Constitution it is well settled that it should not be assumed that words have been used to no purpose. It seems clear to us that it was the aim of § 176 to make such provision for the classification of property for taxing purposes that the state taxes should be uniform throughout the state, county taxes throughout the county, city taxes throughout the city, school taxes throughout the district, etc.; and moreover, that each of such taxes should be levied alike upon the same classes of property, but that all need not be levied upon the same basic classification. Nothing could be plainer, we believe, than that by § 176 it was intended to provide that the legislature in its discretion might authorize a separation of the sources of state and local revenues, which can be accomplished only by subjecting some property to taxes for purposes to which all property does not contribute. This follows necessarily from a limitation that requires uniformity within a class only throughout the boundaries of the taxing authority.

If we have correctly sensed the meaning of § 176, it remains to be seen whether its scope is so broad as to embrace subjects so far unrelated as to require separate submission; for, as will be noted later, the changes made in § 179 are only such as affect the subject-matter clearly embraced in § 176. The general subject of the amendment is uniformity, but situs is also dealt with. May situs be so essentially a part of a particular plan of uniformity as to be embraced in the general subject? The subject of uniformity is broad in its scope and suggests a variety of means for ef-

fecting the desired end. Our ideas as to what constitutes uniformity in the abstract will likely be as variant as our opinions concerning the economic phases and incidents of taxation. But it is not our province to seek to ingraft any particular economic dogma into the Constitution. We are properly confined to the narrow question as to whether uniformity may embrace the element of situs. It seems clear to us that it may and does do so. It is one thing to require uniformity throughout the state, another throughout the district. It is one thing to require uniformity as to all property, another as to classes. It is one thing to require uniformity within a class in every taxing district, and quite another thing to permit classification for the purposes of a particular taxing authority. It would indeed be a difficult matter to dissociate uniformity and situs, for the reason that there must be a common location of property before it could be determined that one species has been unfairly dealt with. The relationship between situs and uniformity, then, is one which, in our opinion, is not remote or artificial, but direct and natural. It was, therefore, appropriate to link the two to effect the single purpose of substituting a different rule of uniformity in lieu of the one that had hitherto prevailed.

As pointed out in the former opinion, the change that was made in § 179, according to which it was no longer required that the assessed valuation of the public utilities properties be distributed to the local taxing units, was only such change as was necessitated by the evident desire to give effect to the full scope of § 176, and make possible the separation of sources of revenue for the support of the state and its subdivisions.

It should be noted, too, that § 179, as amended, no longer requires the state board of equalization to assess the public utilities properties "at their actual value," as formerly. This change was also doubtless dic-

tated by the desire to render § 179 harmonious with § 176, so that in any classification that would be attempted it would not be necessary for the legislature to make it conform to an assessment of public utilities properties at 100 per cent of their value. These changes were so essentially a part of the general purpose of § 176, as amended, that they might appropriately have been included in one section, and the fact of their being expressed in two sections renders them none the less connected with the general subject of uniformity of taxation, which is clearly the aim of the amendment. We are entirely convinced that all of the changes sought to be effected by the amendatory matter are so logically and directly connected with one general subject that none of them can be said to relate to a separate and independent subject.

Constitutional  
law—amend-  
ment—method.

It is argued that there might be many persons who would favor giving the legislature power to classify property for tax purposes and require that the taxes should be uniform within the territorial limits of the authority levying the tax, who would be unwilling to relinquish, at the will of the legislature, the assessed valuation of the public utility properties as they are apportioned to the various taxing districts by force of § 179. Perhaps this might be true, but amendments to the Constitution are not to be analyzed until each idea that enters into a composite thought or purpose is made to stand out, dis severed from every other idea with which it is related. There may be a distasteful clause or a possibly disagreeable minor result attributable directly to an amendment, but yet the amendment must not fail because it might have been possible to couch it in a little different language, or to have defined its scope in such terms as to have eliminated the disagreeable consequence. This is not the test of the singleness of an amendment. The controlling consideration is the sin-

gleness of the purpose and the relationship to the general subject.

We are entirely satisfied that the amendment in question was legally <sup>—legal adoption.</sup> adopted and is a part of the Constitution.

We think it proper to note in this connection, though the incident has no force as a legal precedent, that the second article of the amendments to the Constitution, which was adopted in 1898, amended two sections (§§ 121 and 127) relating to the elective franchise. Section 121 was amended by striking from it the provision including in the electorate of the state persons of foreign birth who had declared their intention of becoming citizens; and § 127 was amended by adding thereto the requirement that the legislature shall, by law, establish an educational test as a qualification, and that it might further prescribe penalties for neglecting or refusing to vote at a general election. The amendments to these sections were framed in two sections, and were adopted as one amendment to the Constitution in the election of 1898, being voted upon as a single proposition. Yet there are many reasons why intelligent alien declarants should be allowed to vote if they can meet the educational test prescribed for citizens. In the present war the government of the United States has held them subject to involuntary military duty. Doubtless there could be found many persons who would vote against depriving such persons of the franchise, who would also vote in favor of a general educational qualification. Yet it is clear that the amendment related to but a single subject and embraced appropriate safeguards of the elective franchise. Similarly, in our sister state of Minnesota, in 1906, an amendment which is almost identical with § 176 of our Constitution as amended was adopted as a single amendment and took the place of five distinct sections in the Constitution of Minnesota as it originally stood; and

though the statutes of Minnesota disclose that much legislation has been adopted in pursuance of the amendment which would have been constitutionally impossible under the sections superseded, and though Minnesota has a constitutional provision similar to our § 202, our researches have failed to disclose that the validity of the amendment has ever been assailed on the ground of multiplicity of subjects.

As to the meaning of § 174, since the amendment of the Constitution, and as applicable to the law in question, nothing need be said in addition to what was said in the original opinion. The rehearing has served to give added assurance of the correctness of the result arrived at, and the order denying the writ is confirmed.

Grace, J., concurs in confirming the order denying the writ.

Robinson, J., dissenting:

The purpose of this suit is to secure the assessment and taxation of motor vehicles in the same manner as other property. In 1917, the legislature passed an act to create a Highway Commission (chap. 131), and an act imposing on motor vehicles a specific license tax in lieu of all other taxes (chap. 156). By the first act a Highway Commission is created with power to construct and improve highways. By the second act, in lieu of all other taxes, there is levied on motor vehicles a license tax of \$6 on the first 20-horse power, and 50 cents for each additional horse power. The secretary of state is authorized to employ agents and to pay all expenses of collecting the tax. But, after making such payments, the balance of the money, if any, is divided into three parts: One part is apportioned to the several counties, and the rest is put to the credit of the Highway Commission, "to be paid by the state treasurer upon vouchers approved by the secretary of the Commission." Under the statute, the money allotted to the Highway Commission is virtually thrown into its lap. It is

given the key to the treasury and the right to expend, as it did from March, 1917, to May 15, 1918: For drawings, \$50,480; for road work, \$335.21. For the years 1917 and 1918 the motor tax is \$722,753.

Those acts are subject to many grave and serious objections. Indeed, they are in direct conflict with several sections of the Constitution and the fundamental principles of law governing taxation. Under the Constitution no act may embrace more than one subject, which must be expressed in its title. § 61. And yet the title to chapter 131 does manifestly embrace several subjects: The title is an act (1) to create a Highway Commission; (2) to fix the salary of the state engineer; (3) to provide for disposing of fines and penalties; (4) to assent to an act of Congress; (5) to provide state aid in the construction and repairs of roads and bridges; (6) to amend and repeal half a dozen sections of the Compiled Laws. Such a title speaks for itself and shows beyond question that the act is void, and hence in law there is no Highway Commission.

Now, for each year the state tax levy must not exceed 4 mills on the dollar of the assessed valuation of all taxable property and a sum sufficient to pay interest on the state debt. § 174. But how can that limitation have any force or effect if taxes may be levied on motor vehicles or on other property, without any assessment; and if one kind or class of property may be subjected to a tax levy without an assessment, what is there to prevent a similar levy on all kinds or classes of property? If we may levy on motor vehicles a specific tax of from \$6 to \$60, what is there to prevent a similar levy on every other kind of property? And if we may levy a tax on city property to make country roads, or to fill the pockets of a commission, why may we not levy a tax on country property to pave city streets; why may we not levy a tax on one class of people to benefit or enrich another class?

Furthermore, no tax may be levied except in pursuance of law, and every law imposing a tax must state distinctly the object of the same, to which only it shall be applied. § 175. Yet the law imposing a motor vehicle tax to an amount sufficient to pay nearly all the necessary expenses of the state does not state how it shall be applied. Its application is left mainly to the discretion of the secretary of state and the Highway Commission. Under the statute the bulk of the money should go to a commission that is left entirely free to expend it when and where and as they may please. The only limitation is that 90 per cent shall be spent in the several counties, in proportion to the amount collected therein. "Ten per cent of the fund shall be spent according to the discretion of the Commission," and "none of the money shall be expended within the limits of any incorporated city or village." The money is to be paid on vouchers approved by the secretary of the Commission, though the Constitution provides no money shall be paid out of the state treasury except upon appropriations made by law, and on a warrant drawn by the proper officer—the state auditor. § 186.

Of course, the statute does contemplate that the bulk of the tax shall be used for the construction or improvement of country highways; but the people have not, by a two-thirds vote, authorized the use of the money in that way, and under the Constitution the state may not engage in any work of public improvement unless authorized by a two-thirds vote of the people. § 185.

Moreover, all individual property must be taxed by uniform rule, according to its value in money, and there may be no exemption of personal property in excess of \$200 for each individual. § 176. And all property must be assessed in the county, city, town, village, or district in which it is situated, in manner prescribed by law, except railroads and other public utilities,

which are assessed by the state board of equalization. § 179.

By vote of the people in 1914 the first sentence of § 176 was amended to read thus: "Taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax." Under this innocent amendment, of course, the legislature may classify property for the purposes of taxation, but it may not dispense with an assessment. The amendment does fairly contemplate a classification of property for assessment and taxation purposes, and under it an act was passed dividing all property into three classes: (1) The real estate class, to be assessed at 30 per cent of its value; the personal property class, at 20 per cent; the nonproductive class of household property, at 5 per cent. Chapter 59 of 1917. Motor vehicles are in the second class, and they must be assessed at 20 per cent of their true and full value, and they may not be exempt from taxation. Under said last and latest amendment, approved in 1914, every motor vehicle, like other personal property, must be assessed in the county, city, township, village, or district in which it is situated, and in the manner prescribed by law. § 179. When the assessments are made, then taxes may be levied in pursuance of law by the state and by the several municipalities. Aside from the small sum necessary to pay interest on the public debt, the state may levy no tax in any one year in excess of 4 mills on the dollar of the assessed valuation of all the taxable property. § 174. It may not levy taxes for counties, cities, or other municipalities or take the control of their affairs, because their existence and rights are embedded in, and guaranteed by, the Constitution. True, the state may, by general law, provide for the organization of municipal corporations and restrict their power to levy taxes and assessments and to borrow money and contract debts. § 180.

But that is not a power to destroy the municipalities, to manage their affairs, or to levy and disburse their taxes, and most assuredly it is not a power to levy taxes on one municipality or locality for the special benefit of another.

In the majority opinion, it is said of those limitations of the Constitution: "If still applicable, as we believe they are, they will necessarily preclude the legislature from taxing a great amount of property according to such a method as is employed in the instant case." This is an admission that the tax is illegal and void, with a hope that the legislature may not do it again to any great extent. For if this method of taxation may not be applied to all other property, it must be in conflict with the uniform method of the Constitution. Indeed, it is in no way possible to sustain the motor vehicle tax by a single point of law or logic; for under the plain words

of the Constitution there can be no tax without an assessment.

Finally, if the state may levy a specific tax on motor vehicles or on one class of property, "to be in lieu of all other taxes, general or special," then it may in like manner levy a similar tax on any other class of property, and in that way deny to every municipality the power to levy any tax. It may virtually destroy every municipality by depriving it of any resources, collecting all its taxes, and giving the same to a commission to be used according to its discretions, but not in any city or village. As the argument shows, the specific motor vehicle tax, which the statute imposes without any assessment, is in direct conflict with all the fundamental principles of taxation as guaranteed by the Constitution. Hence the tax and the statute are illegal and void. That is all as clear and as certain as it is that twice two is four.

### ANNOTATION.

#### Validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxation.

- I. Provisions in respect to *ad valorem* taxes, 759.
- II. Prohibitions against double taxation, 760.
- III. Provisions as to uniformity and discrimination:
  - a. In general, 761.
  - b. Where classification relates to character of owner, 761.
  - c. Where distinction is made between pleasure and business cars, 761.

#### III.—continued.

- d. Where classification is based on seating capacity, 762.
- e. Where classification is based on horse power, 762.
- IV. Provisions forbidding interference with local taxing districts, 763.
- V. Provisions regulating legislature's delegating power to municipality, 763.
- VI. Miscellaneous, 764.

This note, as indicated by the title, includes only cases involving the effect of constitutional provisions which relate specifically and expressly to taxation.

#### I. Provisions in respect to *ad valorem* taxes.

Provisions for the payment of a fee by those using motor vehicles on the highway are generally held not to be a property tax, but in the nature of a license fee, so that constitutional pro-

visions governing *ad valorem* taxes do not affect the imposition of such fees.

Thus, in *Kane v. State* (1911) 81 N. J. L. 594, L.R.A.1917B, 553, 80 Atl. 453, Ann. Cas. 1912D, 237, affirmed on other grounds in (1916) 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30, a statute fixing registration fees according to the horse power of the automobile used was held not to impose a property tax, which must be laid, in accordance with the requirements of

the Constitution applicable to property taxes, upon the true value of the vehicles, but a license or privilege tax, which was properly based upon the destruction to the highway done by the machine used.

And in *Windham v. State* (1918) — Ala., App. —, 77 So. 963, writ of certiorari denied in (1918) — Ala. —, 79 So. 877, in upholding a vehicle license tax law against the objection that it imposed a property tax and was not levied according to the valuation of the property, the court said that a license tax is not a property tax, that the burden is not laid on the rem, it is exacted for the privilege of using the vehicles upon the public highways, and requires the owner of the vehicle to contribute his just share of the expense of the upkeep and repair of the highway; and that such a tax is in no sense an ad valorem or a property tax.

And the fact that a tax upon the right to use the highway with motor vehicles is in excess of the cost of policing the highway, and is not graduated according to the value of the cars, does not bring it into conflict with the constitutional provision that the legislature shall provide revenue by levying a tax by valuation. *Re Kessler* (1915) 26 Idaho, 764, L.R.A. 1915D, 322, 146 Pac. 113, Ann. Cas. 1917A, 228.

In *Atkins v. State Highway Dept.* (1918) — Tex. Civ. App. —, 201 S. W. 226, §§ 1 and 2, art. 8, of the Constitution were held to relate to ordinary ad valorem taxes, and not to license taxes or fees, and a statute which fixed the fee according to the horse power of the automobile was held not invalid because it was not levied on the basis of valuation.

It will be noted that in the reported case (*STATE EX REL. FARGO v. WETZ*, ante, 731) sections of the Constitution providing that "taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax," and providing for the assessment of certain public utility property by the state board of equalization, and other "taxable property

. . . in the county, city, township, village, or district," were held not to require the taxation of all property on an ad valorem basis, and not violated by a law which provided for the payment of a license fee on motor vehicles in lieu of general and local taxes.

A provision of the Constitution under which the legislature was directed to provide for the "raising of revenues to defray the expenses of the state not to exceed in any one year 4 mills on the dollar on the assessed valuation of the taxable property in the state" was construed in the reported case (*STATE EX REL. FARGO v. WETZ*) as a limitation upon the power of the legislature to provide state revenues by the taxation of property upon an ad valorem basis, and not applicable to revenues derived from a Motor Vehicle Act providing for a license tax.

## II. Prohibitions against double taxation.

To constitute double taxation within the prohibition of the Constitution, the same property must be taxed twice, and it is held that prohibition is not violated by a statute imposing a license tax on motor vehicles upon which an ad valorem tax is also levied. *Re Schuler* (1914) 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; *Harder's Fire Proof Storage & Van Co. v. Chicago* (1908) 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; *Smith v. Com.* (1917) 175 Ky. 286, 194 S. W. 367; *Re Hoffert* (1914) 34 S. D. 271, 52 L.R.A. (N.S.) 949, 148 N. W. 20.

And the imposition of a vehicle tax was held in *Hudgens v. State* (1916) 15 Ala. App. 156, 72 So. 605, not invalid on the ground that it constituted double taxation, since it was not a property tax but a privilege or license, running to the owners and possessors of vehicles.

And, following this case, the same conclusion was reached in *State v. Strawbridge* (1917) — Ala. App. —, 76 So. 479, certiorari denied in (1917) — Ala. —, 77 So. 356.

And in *Unwen v. State* (1906) 73 N. J. L. 529, 64 Atl. 163, affirmed in (1907) 75 N. J. L. 500, 68 Atl. 110, an act providing for a registration fee of \$1 was held a license fee to be paid



by owners of automobiles for the privilege of running their machines on the highway, and not a tax, and not, therefore, an infringement of the state or Federal Constitution on the ground that it constituted double or special taxation.

The decision in *Unwen v. State* (N. J.) *supra*, was followed in *State, Cleary, Prosecutor, v. Johnston* (1909) 79 N. J. L. 49, 74 Atl. 538, where the constitutionality of a statute was upheld which fixed a fee for registration at \$3 for motor vehicles having a rating of 30 horse power or more, and provided for a fee of \$1 for a license to drive a car less than 30 horse power, and \$2 for a license to drive cars over that, and provided that the money received for license fees should be paid to the state treasurer to be appropriated for use in repairing or improving the roads of the state.

In *Jackson v. Neff* (1912) 64 Fla. 326, 60 So. 350, it was held that even double taxation may not violate constitutional limitations where uniformity of rates, just valuations, and due process of law are observed and no unjust discriminations imposed, so that the organic right to equal protection of the laws is preserved. And it was held in this case that a license tax might be imposed for the use of motor vehicles on the highway, even though an ad valorem tax was paid on such vehicles, and they were not used for hire or charge; and that the levy of an ad valorem tax upon property, and also a license or occupation tax upon the use of the same property, was not double taxation.

### III. Provisions as to uniformity and discrimination.

#### a. In general.

It is held that a license fee on automobiles is not a tax within the meaning of constitutional provisions requiring uniformity and forbidding discriminations in levying taxes. *Jackson v. Neff* (1912) 64 Fla. 326, 60 So. 350; *Re Kessler* (1915) 26 Idaho, 764, L.R.A.1915D, 322, 146 Pac. 113, Ann. Cas. 1917A, 228; *Lillard v. Melton* (1915) 103 S. C. 10, 87 S. E. 421.

In *Westfalls Storage Van & Exp. Co. v. Chicago* (1917) 280 Ill. 318, 117 N. E. 439, an ordinance imposing on owners and operators of motor cars, or trucks, a much greater license fee than upon the owners and operators of horse-drawn vehicles was held to make a reasonable classification, and was held not to be unconstitutional.

In *Hudgens v. State* (1916) 15 Ala. App. 156, 72 So. 605, § 2 of Local Acts 1915, p. 85, imposing a vehicle license tax, was held not unconstitutional on the ground that it was class legislation; the exact provisions of the act involved, however, do not appear.

#### b. Where classification relates to character of owner.

In *Jasnowski v. Board of Assessors* (1916) 191 Mich. 287, 157 N. W. 891, a statute creating a class for the individual owners of motor vehicles, and levying a tax thereon of 25 cents per horse power, and 25 cents per hundredweight, and another class for manufacturers, and levying a flat rate of \$10 per car on the latter, was held not to violate a constitutional provision that the legislature may impose specific taxes which shall be uniform upon the classes upon which they operate, it being held that the difference in ownership constituted a reasonable distinction.

And in *Com. v. Densmore* (1908) 29 Pa. Co. Ct. 217, an act requiring the registration of automobiles was held not unconstitutional for lack of uniformity because of a section providing that it should not apply to any of the motor vehicles which any manufacturer or vendor of automobiles might have in stock for sale, and not for his private use, or for hire.

#### c. Where distinction is made between pleasure and business cars.

It has been held that an act providing for a privilege tax on automobiles used for pleasure, which fails to provide for such a tax on automobiles used for business, is not an arbitrary and unconstitutional discrimination. *Ogilvie v. Hailey* (1919) — Tenn. —, 211 S. W. 645. The court stated that the legislature has a very wide range of discretion in the matter of clas-

sification in police and revenue statutes, and that if any possible reason can be conceived to justify the classification it will be upheld, and that it was possible that automobiles used for pleasure run more rapidly, and are more destructive of the country roads, and that it was also possible that no automobiles were used for business purposes except in the interest of a business that itself paid a privilege tax, and that other possible reasons might exist for the classification made by the act.

And in *Park v. Duluth* (1916) 134 Minn. 296, 159 N. W. 627, an ordinance which, among other provisions, exacted a \$10 fee on account of a business truck and 50 cents per horse power on other cars, was held not to violate the constitutional provision that taxes should be uniform upon the same class of subjects. The court stated that exact equality in classification is not possible; that if the classification is made on some reasonable basis and is applicable without discrimination to all similarly situated, it is valid.

In *Kellaher v. Portland* (1911) 57 Or. 578, 110 Pac. 492, 112 Pac. 1076, an ordinance providing for the licensing of automobiles was held not invalid because not uniform in that it exempted vehicles used for pleasure, and out-of-town vehicles, but there was held to be an unreasonable discrimination by the ordinance where it omitted from its terms automobiles used in connection with the owner's business.

It has been held that a statute imposing a license tax on motor vehicles used for the conveyance of persons on the highway outside of the limits of municipalities, and exempting vehicles which are used for trade and commercial purposes within said limits, does not grant an unconstitutional immunity. *Re Hoffert* (1914) 34 S. D. 271, 52 L.R.A.(N.S.) 949, 148 N. W. 20.

*d. Where classification is based on seating capacity.*

In *Com. v. Hawkins* (1905) 14 Pa. Dist. R. 592, an ordinance making it unlawful for any person to operate, or cause to be operated, upon the

streets of the city, a motor vehicle or other vehicle the motive power of which should be other than human and animal power, except upon the condition, among others, of the payment by the owner of an annual license fee of \$6 for vehicles intended to carry one or two persons, and \$10 if intended to carry more, was held reasonable and uniform.

In *Ayres v. Chicago* (1909) 239 Ill. 287, 87 N. E. 1073, an ordinance providing for the licensing of motor vehicles of two or more seats, which was valid when passed, was held not to be rendered unconstitutional on the ground of unjust discrimination, by the subsequent introduction of motor vehicles of only one seat.

*e. Where classification is based on horse power.*

In *Lillard v. Melton* (1915) 103 S. C. 10, 87 S. E. 421, a statute providing for a license fee on all owners of vehicles, which was graduated according to horse power, was held not a violation of the equality and uniformity clauses of the Constitution, such provisions being applicable only to a property tax, and the license fee provided for not being such a tax, and since the apportionment of the fee according to horse power operated uniformly upon all of the persons in a class and was not, therefore, an unlawful discrimination.

And in *Smith v. Com.* (1917) 175 Ky. 286, 194 S. W. 367, it was held that the imposition of a license tax upon one privilege, and not upon another, does not create any inequality of taxation when all of the persons engaged in exercising the taxed privilege bear the burden alike, nor when those following the same calling are divided into classes for the purpose of classification, provided the classification is reasonable and founded upon a real distinction, and not an arbitrary one, and a statute imposing a license tax upon all persons who use motor vehicles upon the public highways, and basing the tax on the horse power of the vehicle, was held valid.

In *Heartt v. Downers Grove* (1917) 278 Ill. 92, 115 N. E. 869, a statute providing that no municipality should

require a registration or license fee from nonresidents for their motor vehicles, and providing different registration fees for resident owners of motor vehicles used for hire, and those not so used, and fixing different fees according to the size of the municipality, and the horse power of the vehicle, was held not unconstitutional on the ground that it was not uniform as to the classes upon which it operated.

In *Jackson v. Neff* (1912) 64 Fla. 326, 60 So. 350, the power of the legislature to impose ad valorem taxes was held to be unrestricted where the limitations imposed by the Constitution as to uniform and equal rates and just valuations were observed, and an act was held valid which provided that the owner or operator of every vehicle, when used for hire, should pay annually a county license tax, varying according to the horse power of the vehicle, from \$5 to \$100, and that when such machines were used by their owners without charge a license fee, varying according to the horse power, from \$3 to \$50, should be paid.

**IV. Provisions forbidding interference with local taxing districts.**

It has been held that the provision of the Alabama Constitution that the legislature shall not enact any law which will permit any person, firm, corporation, or association to pay a privilege, license, or other tax to the state, and relieve him or it from the payment of all other privilege and license taxes in the state, was intended to prohibit the legislature from enacting a law which would require the payment of one privilege tax or license fee for the benefit of the state alone, to the exclusion of the counties and municipalities, and the section was held not violated by a motor vehicle act providing for the payment of a license or registration fee, although the act provided that these fees should be in lieu of all other privilege licenses which the state or any county or municipality might impose, where the act provided that the revenue derived from the license fees should be divided between the state, the town, and the county in which the licensee

resided. *Bozeman v. State* (1913) 7 Ala. App. 151, 61 So. 604.

In *Re Schuler* (1914) 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706, a section of a motor vehicle act, providing that one half of the net receipts under the act should be returned to the counties from which the money was received, was held to violate a constitutional provision prohibiting the legislature from imposing a tax upon the inhabitants and property of counties for county purposes. The act involved in this case was held not to be local or special in violation of subdivision 10 of § 25, article 4, of the Constitution because it included the city of San Francisco as a county for the purposes of the act, and excluded all other cities, and it was held not local or special in its nature, because the greater portion of the funds derived from the licenses was to be expended outside of the cities of the state.

In *Atkins v. State Highway Dept.* (1918) — Tex. Civ. App. —, 201 S. W. 226, a statute fixing the license fee on automobiles according to horse power was held not to offend a provision of the Constitution prohibiting the assessment of property for taxation elsewhere than in the county where it is situated, since such provision was held to refer to ordinary ad valorem taxes, and not to include license taxes or fees.

It will be observed that in the reported case (*STATE EX REL. FARGO v. WETZ*, ante, 731), where a section of the Constitution gave the legislature plenary control over the taxing power of municipalities, another section of the Constitution providing that taxes should be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax, was held not to give to local taxing districts the constitutional right to retain upon their tax lists all of the property within such districts.

**V. Provisions regulating legislature's delegating power to municipality.**

In *Harder's Fire Proof Storage & Van Co. v. Chicago* (1908) 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536, it was

held that the legislature has plenary power as to the subjects and objects from which it will exact revenue, except as it is limited by the Constitution, and a constitutional provision giving the legislature power to provide such revenue as is necessary by levying a tax by valuation, and giving it power to tax peddlers, auctioneers, etc., by general law, uniform as to the class upon which it operates, and providing further that the specification of objects and subjects of taxation shall not deprive the legislature of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation of the Constitution, was held not to deprive the legislature of power to authorize a municipality to pass an ordinance regulating the use of its streets by vehicles, and imposing a license tax on such vehicles for revenue purposes.

In *Henderson v. Lockett* (1914) 157 Ky. 366, 163 S. W. 199, a statute governing cities of a certain class, providing that the common councils should, within the limitations of the Constitution, have power by ordinance to license, tax, and regulate hackney carriages, cars, omnibusses, wagons, drays, and all other vehicles, as limited by a section of the Constitution, providing that the general assembly might, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, various trades, occupations, and professions, was held not to confer power to impose a license fee upon motor vehicles not used or let for hire, as such a license fee would not be an occupation tax.

#### VI. Miscellaneous.

In *Bozeman v. State* (1913) 7 Ala. App. 151, 61 So. 604, the Alabama Act of 1911, pp. 634 and 650, providing for a license tax or registration fee on motor vehicles, although the amount exacted as a license was in excess of the necessary expense of regulation and control of the operation of motor vehicles, was held to provide for a license tax; and not a revenue tax, and

although it was passed on the last day of the legislative session, it was therefore held not to violate § 70 of the Constitution, prohibiting the passage of revenue measures on that day.

It has been held that an act providing that the money raised by taxes on automobiles should be devoted to the upbuilding of the highways of the state does not infringe a constitutional provision that all subjects of taxation now contributing to the primary school interest fund under the present laws shall continue to contribute to that fund, since such provision has reference to the subjects of taxation as a class, and motor vehicles as a class have never contributed to the primary school interest fund, and the mere fact that a few of such vehicles were included in the corporate property of corporations, when the value of their property was determined for the purpose of taxation, does not bring them, as a class, within the meaning of the constitutional provision. *Jasnowski v. Board of Assessors* (1916) 191 Mich. 287, 157 N. W. 891.

In *Com. v. Boyd* (1905) 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255, a statute requiring automobiles to be registered, and providing that each have displayed thereon in Arabic numerals not less than 4 inches long, its registered number and mark, and exacting a registration fee of \$2 for each automobile, was held not unconstitutional. The provisions of the Constitution involved, however, do not appear.

It will be observed that in the reported case (*STATE EX REL. FARGO v. WETZ*) a section of the Constitution providing that the legislature "shall by general law, exempt from taxation . . . personal property to any amount not exceeding in value \$200 for each individual liable to taxation," was held not violated by an act under which owners of motor vehicles were compelled to contribute to the cost of maintaining highways an amount which would approximately equal a fair property tax, if levied upon an ad valorem basis. J. T. W.

SUMNER COUNTY  
v.  
INTERURBAN TRANSPORTATION COMPANY.  
HARTFORD ACCIDENT & INDEMNITY COMPANY, Petitioner.

*Tennessee Supreme Court — May 24, 1919.*

(— Tenn. —, 213 S. W. 412.)

**Highway — liability for injury to.**

1. One is not liable in damages for injury to a highway merely because of the weight of the load which he transports over it.

[See note on this question beginning on page 768.]

— conveyance by turnpike company — effect.

2. The conveyance by a turnpike company to the county of a road over which it has maintained toll gates adds nothing to the rights of the county with respect to the protection and maintenance of the road.

— right to use.

3. A public road is a way open to all the people, without distinction, for passage and repassage at their pleasure.

[See 13 R. C. L. 14.]

— power to exclude use.

4. The county court, which has title to the public highways in trust for the public, has no power, without legislative authority, to exclude any member of the public from their reasonable use.

[See 13 R. C. L. 254.]

— restriction of size of vehicle.

5. The county court cannot, with-

out legislative authority, restrict the size and weight of vehicles which shall use the public highways.

[See 13 R. C. L. 254-257.]

— manner of use.

6. The use to which a public road is subject by a member of the public must be with due care and reasonable.

[See 13 R. C. L. 253.]

**Injunction — against use of road by motor trucks.**

7. One cannot be enjoined from operating motor trucks upon a highway because their weight is such as to destroy the roadway.

**Highway— injury by reckless use.**

8. One may be liable in damages for injury to a public highway by the unreasonable manner of using motor vehicles thereon, either in their careless operation or their reckless driving.

[See 13 R. C. L. 245.]

**PETITION** for a writ of certiorari to review a judgment of the Court of Civil Appeals reversing a judgment against petitioner and remanding the case to the Chancery Court for Sumner County (Stout, Ch.), in a suit to enjoin defendant from using trucks upon complainant's roads. *Modified.*

The facts are stated in the opinion of the court.

Messrs. William L. Granbery, W. L. Granbery, Jr., and H. E. Palmer, for petitioner:

Unlike cities and towns, counties have no power to adopt by-laws or pass resolutions regulatory in scope, and the resolution of Sumner county of January, 1916, attempting to regulate the weight of vehicles on its roads, is void.

Burnett v. Maloney, 97 Tenn. 697, 34 L.R.A. 541, 37 S. W. 689.

In the absence of a statute prohibiting a thing, when the legislature im-

poses a privilege tax upon it and such tax is paid, no power except the legislature can prohibit it, and the owner paying such tax acquires a right to do the thing for which the tax has been paid.

Palmer v. State, 88 Tenn. 553, 8 L.R.A. 280, 13 S. W. 233; McMillan v. Knoxville, 139 Tenn. 319, 202 S. W. 65.

Messrs. A. O. Denning, G. W. Boddie, J. T. Durham, and Baskerville & McGlothlin for complainant.

Lansden, Ch. J., delivered the opinion of the court:

Complainant filed this bill in the chancery court against the Interurban Transportation Company, a corporation, to enjoin it from using trucks upon the roads of the complainant. The bill shows in brief that the defendant is engaged in the transportation of freight over certain roads in Sumner county, which were formerly turnpike roads, built by corporations organized for such purposes. The county bought the turnpikes, and it and the state levied certain taxes upon defendant, which were all paid. Defendant owned a number of heavy trucks and operated them between the city of Nashville and points in Sumner and Trousdale counties, and over the roads which the county had purchased from the turnpike companies. The trucks and loads hauled over the roads and bridges in Sumner county weighed something more than 10 tons, and are heavier than the roads and bridges built by the turnpike companies were intended to accommodate. The use of the trucks upon the roads was very destructive to them. The roads were built of macadam, and the bridges were intended to accommodate a load of about 3,000 pounds. However, it is not shown that any bridge or highway was destroyed by the use to which it was subjected, but it is shown that the roads were damaged very materially by running the trucks over them. It is shown that the use of these heavy trucks upon macadam roads is destructive of them within a very short time.

An injunction was granted upon the following condition: "But said injunction to stand dissolved when the defendant files with you [the C. & M.] a bond in the penalty of \$1,000, conditioned to pay the complainant such damages as it may sustain and the court award for any excessive or unreasonable use of the highways and bridges of Sumner county, under the charges and allegations of the original bill."

The Hartford Accident & Indemnity Company became surety upon the bond.

The chancellor held the defendant liable for all damages to the roads and bridges occasioned by the use of the heavy, loaded trucks upon them. There is no showing that the use of the roads and bridges was in an unreasonable way other than might be attributed to the use of heavy trucks. Judgment was rendered for more than \$5,000 against the transportation company and for \$1,000 against the surety. The surety appealed to the court of civil appeals, and as there was no showing in the evidence for "any excessive or unreasonable use of the highways and bridges" by defendants, the court of civil appeals reversed and remanded the case to the chancery court of Sumner county for it to ascertain, if any, what damage was occasioned to the roads by excessive and unreasonable use of them and the bridges.

The surety has filed this petition for certiorari, and contends that the decree of the court of civil appeals, although undertaking to save the questions made upon the merits of the controversy, nevertheless in effect adjudges the transportation company liable for excessive and unreasonable use of the highways and bridges, and its decree is therefore *res judicata*. We think this view is correct, and that it is necessary for us to decide the merits of the controversy. It is erroneous to suppose that the surety is not interested in the merits. If his principal had the right to run the motor trucks over the roads of the complainant, and if the management of the trucks being used was reasonable and with due care, the surety would have no liability whatever.

The county claims as vendee of the turnpike company. This does not strengthen the claim of the county, for it is manifest that the turnpike company did not own the roads, nor have power to convey them. It had the right to erect gates over them, and collect tolls for

(— Tenn. —, 218 S. W. 412.)

travel on them, by complying with certain conditions prescribed by law. But it never owned the roads, and therefore its conveyance to the county added nothing to the rights

Highway—conveyance by turnpike company—effect.

of the county, and merely destroyed the rights of the turnpike company.

The roads belong to the public, and the county court holds them in trust for the public, and while it is proprietor for the purposes of its trust, it is not proprietor in the sense that it is the owner of the roads against the public, or any member thereof.

A public road is a way open to all the people, without distinction, for passage and repassage at their pleasure. Definitions in other terms have been given, but they mean substantially the same as the one just stated. The authorities make it clear that any road which is not for the use of the people is not a public road; the fact that it is for the benefit of the public destroys the thought that there can be a private ownership of the road. State v. Stroud, — Tenn. —, 52 S. W. 697.

This is a case of the court of chancery appeals and was affirmed by this court. *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379; *Morse v. Sweeney*, 15 Ill. App. 486; *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125; *Riley v. Buchanan*, 116 Ky. 625, 63 L.R.A. 642, 76 S. W. 527, 3 Ann. Cas. 788; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522. And the same definitions will be found in the reports of Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Wisconsin, and perhaps other states. We also cite *Bouvier's Law Dict.*, *Burrill's Law Dict.*, *Century Dict.*, *Holthouse's Law Dict.*, *Jacob's Law Dict.*, *Tomlin's Law Dict.*, *Rapalje's & L. Law Dict.*, and *Webster's Dict.*

This being the established nature of a public road, the county court would have no power to exclude any member of the public from its reasonable use without legislative authority. So far as we are advised, the legislature not only has not forbidden the use of motor vehicles, without regard to weight or load, upon public highways, but has authorized their use by levying a tax upon them. As stated heretofore, the defendant has paid this tax. The legislature, as the constitutional representative of the public, has the power to levy any reasonable condition upon members of the public for their use of the public roads; but the county court, without express authority, has not such power. It cannot take such action as proprietor, and as a county court it has no power to legislate. The manner of its discharge of its trust comes from the legislature. *Ledbetter v. Clarksville & R. Turnp. Co.* 110 Tenn. 92, 73 S. W. 117; *White's Creek Turnp. Co. v. Marshall*, 2 Baxt. 118; *Johnson v. Brice*, 112 Tenn. 65, 83 S. W. 791.

It follows, therefore, that the attempt of the county court to restrict the size of vehicles and the weight of their loads is void, because the legislature has not authorized such action.

Public roads, like everything else, are developing in their nature and character, and in the uses to which the public subjects them. As civilization develops, and the inventive genius of man progresses, new uses of public roads may be found. The remedy, in such event, is not to restrict the public in its enjoyment of the public highways, but to improve and enlarge the highways. Their sole use is to accommodate the public, and enable its members to communicate with each other, both socially and in a business way.

It is well-settled law that every member of the public has the right to use the public roads in a reasonable manner for the promotion of

his health and happiness. Such use, however, is restricted to a use with due care and in a ~~—manner of use.~~ reasonable manner.

In so far as the bill seeks to prevent defendant from using the public roads, because its trucks and their loads are too heavy, it must be dismissed. The motor vehicle is now a

**Injunction—  
against use of  
road by motor  
trucks.**

common means of transportation, and its use upon the public roads is authorized, wherever the size and character of the vehicle is not restricted by the legislature, and will be controlled, so far as we know, only by the convenience and profit of the public. The fact that the transportation company has used vehicles heavier than customary does not give the court, or anyone else, an action against it for such use. The county can neither restrain it from using the public roads and bridges, be-

**Highway—  
liability for  
injury to.**

cause of the size of its vehicles, nor collect damages for their reasonable use. If the defendant has operated its vehicles negligently, it would be liable in damages to anyone who has been injured thereby.

We do not think the defendant is liable for the excessive use of the roads. There is no legislative enactment prescribing an excessive use, and until there is one we cannot say that the uses to which the

roads were subjected by defendant are excessive.

The unreasonable use of the roads by the defendant might be ascertainable. It must have been more than the weight of the vehicles and their loads, and must relate to the manner of the use, either in the management of the vehicles, so as to carelessly operate them upon the roads, or the reckless driving of the vehicle by the motorman. The county in such cases might enjoin the employment of a negligent and reckless motorman, but we cannot conceive that it could enjoin the use of the vehicle, if reasonably made. Within the meaning of this opinion we will remand the case for the ascertainment of such damages to the roads and bridges as may ~~—injury by  
reckless use.~~ have accrued from the unreasonable use of the motor vehicles.

#### Response to Petition to Rehear.

The petition to rehear is allowed, and the decree heretofore entered will be modified, so as to dismiss the case as to the defendant Hartford & Indemnity Company.

The statements made in the petition make a case for the modification above referred to, and, as the petition is not answered, its allegations are taken as true both in law and in fact.

### ANNOTATION.

#### Liability for damaging highway or bridge by nature or weight of vehicles or loads transported over it.

It will be observed that it is held in the reported case (*SUMNER COUNTY v. INTERURBAN TRANSP. CO.* ante, 765) that in the absence of statute there can be no recovery of damages for an excessive use of a public road in driving vehicles heavier than usual over it. This seems to be a case of first impression in this country, in the absence of statute; but the decision appears to be in accord with the general

American theory as to right to use the highways.

Thus, in *Young v. Madison County* (1908) 137 Iowa, 515, 115 N. W. 23, in holding that one suing the county for damages for injury to a threshing machine by breaking of a bridge need not show his compliance with the statute requiring the use of planks in crossing bridges with engines, the court said: "The provision is one in



derogation of the common right of the public to use the highway as an avenue upon which vehicles for the transportation of passengers, goods, freight, and traffic of all kinds may be freely moved, having due regard for the rights of others, and while this, as other provisions of our statute, should be fairly and liberally construed to promote and effect the evident purpose for which it was intended, care should be exercised not to unduly extend its effect."

The view, however, has been taken that extraordinary traffic, damaging the road, is a nuisance.

Thus, in *Cavan v. Kane Bros.* [1910] 2 Ir. R. 644, it was held that the road authority might recover for damage to a public road done by the excessive weight of the defendant's traction engine, as it was a public nuisance.

It is stated in 3 Salk. 182, 91 Eng. Reprint, 764, where the case referred to is not named, that there was an "information against a common carrier, setting forth that no wagon ought to carry more than 2,000 weight; and that the defendant used a wagon with four wheels, and cum inusitato numero equorum, in which he carried 3,000 or 4,000 weight at one time, by which he spoiled the highway leading from Oxford to London (viz.) at Lobb lane, in the parish of Hosely; this was adjudged good . . . likewise, though it said that he went inusitato numero equorum, without setting forth what number, yet the information is good, because it was the excessive weight which he carried that made the nuisance."

And in *Com. v. Allen* (1892) 148 Pa. 358, 16 L.R.A. 148, 33 Am. St. Rep. 830, 23 Atl. 1115, it was held that the carrying of an unreasonable weight on a highway over its bridges, thus endangering their safety, and wearing them out in very much less time than would be the case with the ordinary and reasonable use thereof, is an indictable nuisance if such use renders the roads or bridges dangerous or unsafe for public travel.

It may be here noted that in *Thompson v. Matthews* (1834) 2 Edw. Ch. (N. Y.) 212, the court refused to en-

join the defendants from carrying heavy loads of marble over a toll bridge, and said: "The bridge is a public one. If persons take improper loads and the bridge has been properly constructed, then the owners of it have a remedy by a special action on the case or in trespass for damage done; while, on the other hand, if passengers and their property should sustain an injury by a breaking from ordinary loads, the owners must respond in damages. The law affords a reciprocal remedy in all such cases; and I shall leave the parties to their legal rights."

#### Under statutes.

An action for damages for injuries to a road by wrongfully making an excessive and unusual use thereof will not lie until the defendant, after notification, shall fail to repair the damage, where the statute provides: "Any corporation, company or individual who may, by unusual use of a road, materially damage the same, shall repair all damages caused by the use of such road or roads. The supervisor or overseer of roads shall, at any time when necessary, notify said corporations, companies or individuals of their duty as provided in this section; and should the said parties so notified fail, in a reasonable length of time, to be filed in the notice, to make such repairs, such parties shall be deemed guilty of obstructing the public roads, and shall be subject to a fine of not exceeding one hundred dollars, to be applied to road purposes." *Letcher County v. Wisconsin Steel Co.* (1911) 145 Ky. 323, 140 S. W. 305.

In England, the subject of this note falls within § 23 of the Highways & Locomotives (Amendment) Act 1878, which provided: "(23) Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighborhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordi-

nary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid. Provided that any person against whom expenses are or may be recoverable under this section may enter into an agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the persons so paying the same shall not be subject to any proceedings under this section." This section was amended in 1898, 61 & 62 Vict. § 12, by substituting for the words, "by whose order," the words, "by or in consequence of whose order," and also by some minor amendments.

In *Hill v. Thomas* [1898] 2 Q. B. (Eng.) 333, the defendant was held liable where he had carted shingle and cement for a government battery, though excessive weights were not carried, but there was an exceptional increase of traffic. The court said: "‘Extraordinary traffic,’ as distinct from ‘excessive weight,’ will include all such continuous or repeated user of the road by a person’s vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. Why should the singularity of the product carried, or the singularity of the purpose for which it is carried, be the sole criterion of the applicability of a section the scope of which is what we have said? To confine it in this way would be to deprive the legislation of half its practical value, and arbitrarily to limit it to a few cases of user not a whit more deserving of relief than others. It is true that extraordinary traffic is a traffic to be specifically distinguished from other traffic by the section; but the distinction cannot solely depend on the unusual character of articles carried, but rather on the effect which the carriage of the

particular articles—call them by whatever name or classification one will—may presumably be expected to have upon the road. If so, extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common." The court disapproved *Pickering Lythe East Highway Bd. v. Barry* (1881) L. R. 8 Q. B. Div. (Eng.) 59, 51 L. J. Mag. Cas. N. S. 17, 45 L. T. N. S. 655, 30 Week. Rep. 246, 46 J. P. 215, where it was held that carrying the materials for a dwelling house was not "extraordinary traffic," and distinguished *Wallington v. Hoskins* (1880) L. R. 6 Q. B. Div. (Eng.) 206, 50 L. J. Mag. Cas. N. S. 19, 43 L. T. N. S. 597, 29 Week. Rep. 152, 45 J. P. 173, in which case it was held that the defendant was not liable where it appeared that he was owner or occupier of stone quarries in the district, and that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognized business in the neighborhood, and the wagon loads of the usual weight in such traffic, the court holding that the traffic was not "extraordinary."

The traffic is not the less extraordinary because it comes from timber grown on the adjoining lands, when the quantity hauled is unusual. *Norfolk County Council v. Green* [1894] 90 L. T. N. S. (Eng.) 451; *Geirionydd Rural Dist. Council v. Green* [1909] 2 K. B. (Eng.) 845, 78 L. J. K. B. N. S. 1039, 100 L. T. N. S. 418, 73 J. P. 137, 25 Times L. R. 282, 7 L. G. R. 308.

So the statute was applied in the carting of timber, though the principal industry in the vicinity was chair manufacture. *Wycombe Rural Dist. Council v. Smith* (1903) 67 J. P. (Eng.) 75.

Using traction engines to carry

manure over a road used principally for ordinary farm traffic is "extraordinary traffic." *Reg. v. Ellis* (1882) L. R. 8 Q. B. Div. (Eng.) 466, 30 Week. Rep. 613, 46 J. P. 295.

So it is "extraordinary traffic" to employ a new plan of carting coal, taking a string of four or five carts at a time in the same track (*Wolverhampton v. Salop County Council* (1895) 64 L. J. Mag. Cas. N. S. (Eng.) 179, 43 Week. Rep. 494); or to employ a new manner of carting stone on the road in question, viz., by traction engines not usual there (*Shepton Mallet Rural Dist. Council v. Wainwright* (1908) 72 J. P. (Eng.) 459, 24 Times L. R. 894, 6 L. G. R. 1121).

Stone traffic, caused by the opening of a stone quarry, which had not been before carried over the particular road, is "extraordinary traffic," though there had been stone traffic over other roads in the vicinity. *Tunbridge Highway Bd. v. Sevenoaks Highway Bd.* (1885) 33 Week. Rep. (Eng.) 306, 49 J. P. 340.

That the needs of the district demand motor busses will not prevent their traffic from being "extraordinary traffic." *Abingdon Rural Dist. Council v. Oxford City Electric Tramways* (1916) 33 Times L. R. (Eng.) 69, W. N. 398, affirmed in [1917] 2 K. B. 318, 33 Times L. R. 319, 86 L. J. K. B. N. S. 1247, 117 L. T. N. S. 133, 81 J. P. 189, 15 L. G. R. 446.

A person by bringing in heavier and new kinds of vehicles cannot make the use of them ordinary traffic after a time, so that he can compel the authorities to provide for them as ordinary. *Weston-super-Mare Urban Dist. Council v. Butt* [1919] 1 Ch. (Eng.) 11, 34 Times L. R. 624, 87 L. J. Ch. N. S. 612, 82 J. P. 262, 62 Sol. Jo. 739, 16 L. G. R. 754, 145 L. T. Jo. 294. Nor can he make the hauling of bricks in heavy loads over an agricultural road not extraordinary. *High Wycombe Rural Dist. Council v. Palmer* (1905) 69 J. P. (Eng.) 167. And a quarryman was held liable for expenses where for seven years he had carted stone over a highway not before ordinarily used for that purpose. *Whitebread v. Sevenoaks Highway Bd.*

[1892] 1 Q. B. (Eng.) 8. But it would seem that great uncertainty will be created in the construction of the statute by the decision in *Ledbury Rural Dist. Council v. Somerset* (1914) 30 Times L. R. (Eng.) 534, W. N. 222, 84 L. J. K. B. N. S. 1297, 113 L. T. N. S. 71, 78 J. P. 433, 12 L. G. R. 850, affirmed in (1915) 31 Times L. R. 295, W. N. 131, 84 L. J. K. B. N. S. 1302, 113 L. T. N. S. 74, 79 J. P. 327, 59 Sol. Jo. 476, 13 L. G. R. 701, where it was held that greatly increased traffic from a stone quarry was not "extraordinary traffic." The theory of this case seems to be that such traffic was to be expected on the road in question in the ordinary course, and that the road was adapted to the traffic, and that the business in question was a recognized local industry.

The standard is the ordinary traffic of the particular road, not the ordinary traffic of other roads in the district. *Etherley Grange Coal Co. v. Auckland Dist. Highway Bd.* [1894] 1 Q. B. (Eng.) 37, 9 Reports, 88, 69 L. T. N. S. 702, 42 Week. Rep. 198, 58 J. P. 102.

That the pressure per square inch from the traffic in question was less than that of the ordinary cart does not show that the traffic was not extraordinary. *Hemsworth Rural Dist. Council v. Mickelthwaite* (1904) 68 J. P. (Eng.) 345, 2 L. G. R. 1084.

Under the original terms of the statute, the "person by whose order such weight or traffic has been conducted" was not the mover of an enterprise or business, but the subcontractor conducting the hauling. *Lapthorne v. Harvey* (1885) 1 Times L. R. (Eng.) 533; *Colchester v. Gloucestershire County Council* (1897) 66 L. J. Q. B. N. S. (Eng.) 290; *Kent County Council v. Gerard* [1897] A. C. (Eng.) 633, 66 L. J. Q. B. N. S. 677, 77 L. T. N. S. 109, 46 Week. Rep. 111, 61 J. P. 804; *Pethick Bros. v. Dorset County Council* (1898) 77 L. T. N. S. (Eng.) 603, affirmed in (1898) 14 Times L. R. 548, 62 J. P. 579. But see *contra* *Kent County Council v. Vidler* [1895] 1 Q. B. (Eng.) 448, 14 Reports, 240, 64 L. J. Mag. Cas. N. S. 77, 72 L. T. N. S. 77, 43 Week. Rep. 273, 59 J. P. 548.

Under the amendment of 1898, sub-

stituting for the words "by whose order," the words "by or in consequence of whose order," the owner contracting to have a building erected was held liable for the "extraordinary traffic" of the builder. *Epson Urban Dist. Council v. London County Council* [1900] 2 Q. B. (Eng.) 751, 69 L. J. Q. B. N. S. 933, 64 J. P. 727, 83 L. T. N. S. 284, 16 Times L. R. 571, 49 Week. Rep. 302; *Colchester v. Gepp* (1912) 76 J. P. (Eng.) 337, 10 L. G. R. 930.

But in *Egham Rural Dist. Council v. Gordon* [1902] 2 K. B. (Eng.) 120, 71 L. J. K. B. N. S. 523, 66 J. P. 759, 50 Week. Rep. 703, 87 L. T. N. S. 31, 18 Times L. R. 515, a defendant ordering a large number of bricks was held not liable because the seller damaged the road by the use of a traction engine and trucks, when it would not have been damaged had he delivered them with carts in the ordinary way.

Where a corporation, in carrying out a scheme for the widening of one of its roads, entered into a contract with a contractor for the hauling of stone, and the contractor used traction engines to haul the stone, and in so doing caused damage to some other roads which were repairable by the county council as the highway authority, it was held that an action could be maintained against the corporation as the person "in consequence of whose order" the damage had been done. *Kent County Council v. Folkestone* [1905] 1 K. B. (Eng.) 620, 74 L. J. K. B. N. S. 353, 69 J. P. 125, 53 Week. Rep. 371, 92 L. T. N. S. 309, 3 L. G. R. 438, 21 Times L. R. 269.

And where a municipal corporation, requiring road material for the general purposes of the maintenance and construction of roads within their district, entered into contracts for the delivery of stone, the plaintiffs, as the authority liable for the repair of highways in their district, recovered from the corporation for extraordinary expenses in repairing a highway in consequence of damage done to it by extraordinary traffic conducted over it in the haulage of stones by the contractors for the fulfilment of their contracts with the corporation. *Bromley Rural Dist. Council v. Croydon* [1908]

1 K. B. (Eng.) 353, 77 L. J. K. B. N. S. 335, 72 J. P. 17, 98 L. T. N. S. 165, 24 Times L. R. 132, 6 L. G. R. 165.

And where subsidiary companies ordered the hauling on behalf of the controlling company, the latter was held responsible. *Kent County Council v. Kent Coal Concessions* (1908) 72 J. P. (Eng.) 507, affirmed in (1909) 73 J. P. 305, 25 Times L. R. 479, 7 L. G. R. 899.

Where the defendants had hired a man to construct a reservoir for them in a short time, it was held that it was error to hold that there was not evidence that the damage to the road came "in consequence of the order" of the defendants. *Reigate Rural Dist. Council v. Sutton Dist. Water Co.* [1907] 71 J. P. (Eng.) 405, 5 L. G. R. 917.

In *Windlesham Urban Dist. Council v. Seward* (1912) 77 J. P. (Eng.) 161, 11 L. G. R. 324, where an owner contracted with A, who was to deliver bricks, and A contracted with B to cart them, it was held that A was liable for damage to the road.

"The sum to be recovered is the damage caused by the extraordinary traffic or the excessive weight, provided that it has been such as to cause extraordinary expense; and in considering whether the expense is extraordinary or not, regard is to be had to the average expense of repairing highways in the neighborhood. The expression, 'in the neighborhood,' . . . practically means repairing similar roads in a neighborhood of a similar character." *Billericay Rural Dist. Council v. Poplar Poor Law Union* [1911] 1 K. B. (Eng.) 734, affirmed in [1911] 2 B. K. 801, 80 L. J. K. B. N. S. 1241, 105 L. T. N. S. 476, 75 J. P. 497, 55 Sol. Jo. 647, 9 L. J. R. 796.

The "highways in the neighborhood" must be "comparable highways." *Cambridgeshire County Council v. Pepper* [1912] 76 J. P. (Eng.) 393, 10 L. G. R. 759, citing *Billericay Rural Council v. Poplar Poor Law Union* (Eng.) *supra*.

It seems that "the average expense of repairing highways in the neighborhood" is not satisfied by showing the average expense of repairing the high-

way in question. See *Colchester v. Gepp* [1912] 1 K. B. (Eng.) 477, 81 L. J. K. B. N. S. 356, 106 L. T. N. S. 54, 76 J. P. 97, 56 Sol. Jo. 160, 10 L. G. R. 109; *Morpeth Rural Dist. Council v. Bullocks Hall Colliery Co.* [1913] 2 K. B. (Eng.) 7, 82 L. J. K. B. N. S. 547, 108 L. T. N. S. 479, 77 J. P. 188, 29 Times L. R. 297, 57 Sol. Jo. 373, 11 L. G. R. 475.

But in *Bromley Rural Dist. Council v. Chittenden* (1906) 70 J. P. (Eng.) 409, 4 L. G. R. 967, it was held that the defendant is not entitled to see the books as to the expense of other highways in the neighborhood, as the average expense of repairing highways in the neighborhood is not an issue in the case.

A few miscellaneous cases under the act may be noticed. It is no defense that the defendant used a vehicle not prohibited by other sections in the act. *Aveland v. Lucas* (1880) L. R. 5 C. P. Div. (Eng.) 851, 49 L. J. C. P. N. S. 643, 42 L. T. N. S. 788, 28 Week. Rep. 571, 44 J. P. 360. The proceedings are in the nature of a personal tort, so that they cannot be taken against the executor of a person by whose order the extraordinary traffic was conducted. *Story v. Sheard* [1892] 2 Q. B. (Eng.) 515, 61 L. J. Mag. Cas. N. S. 178, 67 L. T. N. S. 423, 41 Week. Rep. 31, 56 J. P. 760. The road authorities cannot be debarred from recovery on the principle of their contributory negligence in having the road in bad con-

dition. *Hemsworth Rural Dist. Council v. Micklethwaite* (1904) 68 J. P. (Eng.) 345, 2 L. G. R. 1084. The action will not lie until the extraordinary expenses for repairs have been expended. *Little Hulton Urban Dist. Council v. Jackson* (1904) 68 J. P. (Eng.) 451, 2 L. G. R. 986. That the certificate of the surveyor is given at the instance of the road authority is immaterial. *Barnsley British Coop. Soc. v. Worsborough Urban Council* [1916] 1 A. C. (Eng.) 291, 85 L. J. K. B. N. S. 103, 113 L. T. N. S. 1121, 80 J. P. 114, 32 Times L. R. 41, 59 Sol. Jo. 25, 14 L. G. R. 22. The traffic is none the less extraordinary because it is diverted by an obstruction of another road, or by a change to inadequate pavement in such other road. *Ibid.*

For effect of indemnity contracts, see *Croydon Rural Dist. Council v. Sutton Dist. Water Co.* (1908) 72 J. P. (Eng.) 217, 6 L. G. R. 574; *Colchester v. Gepp* (1912) 76 J. P. (Eng.) 377, 10 L. G. R. 930.

Cases under the foregoing act as to procedure, limitations, and the like are not included.

It may be noted that in *Reg. v. Kitchener* (1873) 22 Week. Rep. (Eng.) 134, 43 L. J. Mag. Cas. N. S. 9, L. R. 2 C. C. 88, 29 L. T. N. S. 697, 12 Cox, C. C. 522, it was held that an earlier act, placing the repair of bridges broken by a locomotive upon its owners, did not relate to public bridges. B. B. B.

C. C. QUILLIN, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals — May 17, 1916.*

(79 Tex. Crim. Rep. 497, 187 S. W. 199.)

**Embezzlement — one not capable of offense — liability.**

1. One may be indicted as a principal for assisting a tax collector in embezzling public funds, where the statute makes all persons principals who are guilty of acting together in the commission of an offense, although he could not, under the statute, have committed the offense himself, since the embezzlement statute applies to custodians of public funds only.

[See note on this question beginning on page 782.]

— failure to account for public money.

2. The statutory offense of wilful misapplication of public money by a receiver thereof is distinct from a failure to remit state money to the proper custodian at stated intervals, and failure to obey a direction by such custodian to account for money collected.

**Indictment — following terms of statute.**

3. An indictment for embezzling state funds by a tax collector, which follows the language of the statute defining the offense as wilful failure to pay into the state treasury at the time specified any funds on hand, is not invalid for neglect to charge failure to pay over

to the state treasurer, as prescribed for other statutory offenses.

[See 9 R. C. L. 1287.]

**Criminal law — principal — incapable person.**

4. One can be principal of another when physically, or actually, incapable of committing the offense himself.

[See 1 R. C. L. 135.]

**On Motion for Rehearing.**

**Indictment — facts to make one principal.**

5. An indictment against one as principal in an embezzlement need not allege what accused said or did which would make him a principal.

**APPEAL** by defendant from a judgment of the District Court for Travis County (Fisher, J.) convicting him, as principal, for the misapplication of state tax money. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Worth S. Ray and McLean, Scott, & McLean for appellant.

Messrs. C. C. McDonald and C. A. Sweeton, Assistant Attorneys General, for the State.

Messrs. Odell & Ramsey, amici curiæ.

Prendergast, J., delivered the opinion of the court:

Appellant was convicted as a principal for the misapplication of state tax money, one Druesdow as tax collector of Harris county alleged to have actually committed the offense. His punishment was assessed at seven years in the penitentiary.

The sole question in the case is one of pleading. We will, therefore, state the indictment and the grounds on which it is attacked.

The indictment: There were several counts. All of them except the third were eliminated. Outside of the necessary preliminary and concluding allegations, which are usual, the third count alleges:

That Karl L. Druesdow, in Harris county, Texas, on or about May 1, 1914, and before this indictment was presented, was an officer of the government of the said state; to wit, was the duly elected, qualified, and acting collector of taxes in and for Harris county, in said state, and was then and there by law and in virtue of his said office the receiver

and depository of public money belonging to the said state; and as such officer by virtue of said office there had come into his hands and was then and there in his possession a certain sum of public money belonging to said state; to wit, the sum of \$29,759.34, current money of the United States, of that value, said sum of money being balances then and there in his hands of tax money belonging to said state, collected by him for said state by virtue of his said office during the period of time from May 1, 1913, to April 30, 1914, and which said sum of money he, said Druesdow, did then and there unlawfully, wilfully, and fraudulently fail to pay into the treasury of said state at the time prescribed, the time prescribed by law being on or before the first day of May, 1914.

And that, on or about May 1, 1914, C. C. Quillin did then and there unlawfully, wilfully, and fraudulently act together with the said Druesdow in the commission of said offense.

The indictment was based on articles 96, 97, and 74 of our Penal Code, in connection with the duties of collectors prescribed by our Revised Civil Statutes. We will now state these articles of the Code and

the substance of the Revised Civil Statutes applicable herein.

Art. 96. If any officer of the government who is by law a receiver of public money, or any clerk or other person employed about the office of such officer, shall fraudulently misapply any part of such public money, he shall be punished by confinement in the penitentiary for a term of not less than two nor more than ten years.

Art. 97. Within the term "misapplication of public money" are included the following acts (subdiv. 6): The wilful failure of any officer to pay into the state treasury at the time prescribed by law whatever funds he may have on hand.

Art. 74. All persons are principals who are guilty of acting together in the commission of an offense.

The substance prescribed by the Revised Statutes and actual practice is to this effect: The tax collector is authorized and required to collect all taxes due the state and county of his county, and he is charged as a liability on his part with all of said taxes. This, perhaps, besides others, includes all ad valorem, poll, and occupation taxes. Art. 7618. At the end of each month he is required, on forms furnished by the comptroller, to make an itemized report to the comptroller, showing each and every item of said taxes collected by him during said month, accompanied by a summarized statement showing full disposition of all state taxes collected. He is also required to then present such report, together with the tax receipt stubs, to the county clerk, who shall within two days compare said report with said stubs. If they agree in every particular, the clerk shall certify to the correctness of said report. The tax collector then immediately forwards it to the comptroller, and is required to pay to the state treasurer all moneys collected by him for the state during said month, with certain exceptions and his commissions on total amount collected. Then, at the end

of the tax year, which is fixed at May 1st, of each year, he is required to finally adjust and settle his account for the whole year with the comptroller, and "shall pay over to the state treasurer all balances in his hands belonging to the state." In order to enable him to do so, the commissioners' court is required to convene on or before the third Monday in April for the purpose of examining and approving his final settlement papers. In this settlement the commissioners' court is required to allow the collector for all delinquent and insolvent taxpayers; in which event the court itself must certify that such insolvent or delinquent taxpayers have no property out of which to make the tax which is assessed, or that they have moved out of the county, or that no property can be found in the county belonging to them out of which to make the taxes. This annual settlement is entirely additional to, and embraces additional matters from, the monthly reports and remittances otherwise required, and failure to make which monthly remittances is made a misdemeanor by article 144, Penal Code.

This prosecution was not had under either articles 107 or 144 of our Code.

Our law expressly makes the comptroller supervisor of the tax collectors, authorizes and requires him to furnish them various blanks for the transaction of their business and reports. And also expressly authorizes and requires him to notify the collectors to make remittances to the state treasury of all taxes collected by them from time to time during each tax-collecting year, in addition or otherwise than said monthly remittances expressly required by statute of them, and they are required to comply with his instructions and requirements.

Formerly our laws required tax collectors to remit to the state treasury the state taxes collected by them only quarterly, or perhaps only annually. But as the state necessarily, in order to run the government, had

to pay out large sums monthly to its employees, officers, and at times to pay special appropriations, etc., it became necessary, in order to prevent the state from being on a deficiency basis from time to time, to require the collectors to remit monthly to the treasury taxes collected by them, which was done. The legislation of the state from time to time, and the records of our courts, clearly show that the state has had to deal with at least three different classes of collectors: one, careless and indifferent, who merely *failed* to make remittances monthly; another, who *fraudulently and wilfully* withheld from the treasury taxes collected by them and thereby misapplied them; and still another, who *wilfully and negligently failed* to account for tax money in their hands and pay it to the state treasury whenever *expressly required and notified to do so by the comptroller*.

This first class was distinctly embraced by said article 144, which made it a misdemeanor only for a collector to *merely fail* at the end of each month, or within three days thereof, to remit to the state treasurer the amount due by him to the state for taxes collected for the preceding month.

The second class is embraced in said articles 96 and 97, wherein it is made a penitentiary offense, with a term of not less than two nor more than ten years, if such collector *fraudulently and wilfully fails* to pay into the state treasury at the end of each tax year, and thus *misapplies* whatever of the tax funds he at that time may have on hand.

The other class is embraced by article 107, which makes it an offense for any tax collector who shall *wilfully and negligently fail* to account for all moneys in his hands belonging to the state, and pay the same over to the state treasurer *whenever and as often as he may be directed to do so by the comptroller*; and if he violates that article his punishment is fixed at not less than three nor more than ten years.

This makes it clear that neither article 144 nor 107 are in conflict with or repeal or modify the offense prescribed in articles 96 and 97, but each provides for a separate and distinct offense. If this indictment had been preferred under said article 144, it would have been necessary only for it to have alleged that the tax collector of Harris county had failed within three days after the end of any given month to promptly remit to the state treasury the amount due by him to the state, alleging that amount, and that indictment could not have embraced the offense prescribed by either articles 96, 97, or 107. If the indictment had been preferred under article 107, it would have been necessary for it to have alleged that the comptroller on a given date had directed said tax collector to account for and pay over to the state treasurer the tax money he had collected belonging to the state, alleging the amount, and that such tax collector had wilfully and negligently failed to do so, thus making additional and different allegations from that under article 144, and without such additional allegations no conviction could have been obtained under article 107. Without doubt the indictment in this case by its face shows that it was preferred under said articles 96 and 97, and that every allegation made therein complies and is in strict conformity to said articles, which is an entirely distinct offense, as stated, from those prescribed by either article 107 or 144.

**Embezzlement**  
—failure to account for public money.

We see no necessity of further discussing or illustrating the distinct and different offenses prescribed by said articles. A mere reading and application of them clearly demonstrates that neither is in conflict with the other, and that the legislature intended that they should not be, and that the legislature intended also that neither should repeal or affect the other.

Appellant's objection to the indictment, wherein he claims the



failure of the state to allege the failure of Druesdow "to pay the money over to the state *treasurer* as prescribed by law," etc., is untenable. And so is his other like objection, that the indictment fails to charge that Druesdow failed to pay over to the state *treasurer* all balances, etc., he basing his objections on the idea that this indictment was preferred under article 144, instead of articles 96 and 97, as stated. The allegation in the indictment that he failed to pay the money, into the state *treasury* clearly follows the statute under which the indictment herein was preferred.

Indictment—  
following terms  
of statute.

Besides, the payment of such taxes to the state *treasury* would, in law and in fact, be the same thing under these statutes as paying it to the state *treasurer*, and vice versa.

This brings us to the discussion of appellant's objections to the indictment most earnestly insisted upon in oral argument and by his printed brief herein, which, in substance and effect, is that, as the offense denounced applied to a tax collector only, and that the offense could be committed by no one except a tax collector, no other outside party could be a principal with him in the commission of the offense; in other words, that as appellant was not alleged to be a clerk or other person employed about the office of Druesdow, he could not, therefore, legally be a principal in the offense alleged.

We have thoroughly considered this question and extensively investigated the authorities applicable thereto, and we are clearly of the opinion, both upon authority and reason, that appellant's contention is not sound. The indictment speaks for itself, and is in plain and unequivocal language. Briefly summarized, it alleges that Druesdow was tax collector of Harris county, and as such collected \$29,759.34 of state taxes belonging to the state, and had that sum on

Embezzlement  
—one not  
capable of  
offense—  
liability.

hand as balances on May 1, 1914, and that he unlawfully, wilfully, and fraudulently failed to pay it into the treasury at the time the law required him to do so, which was May 1, 1914. And that appellant unlawfully, wilfully, and fraudulently acted together with said Druesdow in the commission of said offense. Now, let us apply the law to the allegations, or the allegations to the law. The law, summarized, is that if Druesdow, tax collector of Harris county, fraudulently and wilfully failed to pay said money into the state treasury at the said time prescribed, he would be guilty of misapplying it, and that if appellant acted together with him in doing this, he, appellant, would be a principal with him in the commission of that specific offense. Our statute, as to who are principals, is applicable to each and every offense denounced by law, exactly the same as if it was incorporated in each article prescribing a specific offense (with possibly some exceptions not necessary to mention). Of course, it would be wholly inapplicable where one person only should be concerned in the commission of a specific offense. On the other hand, it is specifically applicable to every offense where another than the actual doer acts together with the doer in committing the offense. Our statute on principals was intended to, and actually does, embrace everyone who acts together with another who actually commits an offense. Otherwise, the more guilty of the two might escape all punishment for the most heinous crime. To illustrate this case: under the allegations in this indictment it might be shown that Druesdow was an honest and faithful officer, scrupulously discharging all the duties thereof; that Quillin came in contact with him and showed him how easy and safe it would be for him to rob the state of the tax money which he had collected, and actually induced him to do so. As compensation for this cunningly devised and iniquitous plan of robbing the state, he, Drues-

dow, might turn over, or pay, to him, Quillin, a part of this very money. The intent, even if first entertained by Druesdow, to withhold and misapply the money, would not alone constitute the offense. It must be combined with the act of fraudulently and wilfully doing so. And Druesdow could appear in Austin, elsewhere, with the money in his pocket to turn into the treasury, as an honest man should do, and at the last moment just before he actually pays it into the treasury, Quillin should approach him and induce him to then and there commit the act, and then and there pay to him, Quillin, a part of the fund which he induced Druesdow to then and there withhold from the treasury, and thus complete the crime. Under such circumstances it would be an outrage on justice and law that Quillin, the more guilty party, should escape, and that Druesdow alone should be punished for the crime which Quillin induces and acts together with him in committing, and is, in fact, responsible for Druesdow's committing. Other illustrations might be given, but we think it unnecessary. We have not distinguished between accessories and accomplices and principals under our law. This is wholly unnecessary, as the sole question we are passing upon is as to the sufficiency of the indictment.

The authorities clearly establish the principle that one can be a principal of another when physically, or actually, incapable of committing the offense himself; for instance, in rape, in order to commit that offense, whether by force, or on a girl under fifteen, it is absolutely essential that a male shall with his sexual organ penetrate the sexual organ of the female. It would, of course, be impossible for a woman to do this, but she can be and is a principal when she acts together with the male who actually does this. This is well settled by the authorities. We cite only some of them: Campbell v. State, 63 Tex.

**Criminal law—  
principal—  
incapable  
person.**

Crim. Rep. 595, 141 S. W. 232, Ann. Cas. 1913D, 858, and authorities therein cited; State v. Burns, 82 Conn. 218, 72 Atl. 1083, 16 Ann. Cas. 465, wherein it is said: "That a person may be guilty as a principal . . . of a crime which he is personally incapable of committing alone is too well settled to require extended citation of authorities;" State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; State v. Comstock, 46 Iowa, 265; Strang v. People, 24 Mich. 1. And while it is held that a man cannot be guilty of rape by himself forcibly having sexual intercourse with his own wife, yet he can be and is a principal if he assists another to thus have intercourse with her. People v. Chapman, 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896, 7 Am. Crim. Rep. 568; State v. Dowell, 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681; and see Law v. Com. 75 Va. 885, 40 Am. Rep. 750. So, an unmarried man, who himself could not be guilty of bigamy by marrying a single woman, yet is a principal when he aids, etc., a married man to thus marry. Boggus v. State, 34 Ga. 275. In State v. Rowe, 104 Iowa, 323, 78 N. W. 833, it was held that while a county treasurer could only himself embezzle county funds in his hands, yet another, who could not himself have committed embezzlement of those funds, could and would be guilty as a principal if he acted with the officer and aided him in committing the offense. So, in People v. McKane, 143 N. Y. 455, 38 N. E. 950, it was held that a person who is not a member of a board of registry, who alone as such was required to do a certain thing, could not himself commit an offense which only a member of the board could do, yet he could be, and was, a principal of such officer if he induced the other to commit the crime, the court saying: "The fact that he may for some reason be incapable of committing the same offense himself is not material so long as it can be traced to him as the moving cause by instigating others to do what he

could not do himself." To the same effect are *United States v. Snyder*, 4 McCrary, 618, 14 Fed. 554, and *United States v. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547, and other cases and textbooks which could be cited, but we think it unnecessary.

In oral argument appellant presented and relied upon a case from Michigan. At the time we took no memorandum of the case, presuming it would be cited somewhere in appellant's brief, but we failed to find it there, or elsewhere in the record. We have been informed, however, that that case was *Shannon v. People*, 5 Mich. 72. We have carefully read that case, and in our opinion, instead of being an authority in appellant's favor, it is against him. Under the peculiar statute of that state and indictment therein, it was held that the proof offered did not sustain the offense as alleged, and that he was indicted under the wrong statute, having been indicted directly as committing the offense, without any allegation that another, who alone could commit the offense, had done so. The very defect in that case was expressly met by the allegations in this. The fact that the laws of Michigan made an accomplice a principal would not make that case authority under our law to hold the indictment invalid.

We are clearly of the opinion that the indictment in this case is unquestionably valid, and the judgment will, therefore, be affirmed.

A petition for rehearing having been filed, Prendergast, P. J., on June 14, 1916, handed down the following additional opinion:

In the original opinion we stated that in oral argument appellant relied upon a certain Michigan case, and that at the time we took no memorandum of it, presuming it would be cited in his brief, "but we failed to find it there."

That was the statement of this writer. Neither of my associates are in any way responsible therefor. I was absent and did not hear the oral argument when the case was submitted. In some unaccountable

way I overlooked the citation of the case in appellant's brief.

However, as a matter of fact, it was cited therein in a paragraph to itself with other matter.

When I thus overlooked it, I was anxious to be certain to get the right case and study it, for I understood it was insisted upon as an important case in point in this case. I inquired of others who heard the oral argument to know what case it was. None of them could inform me at the time. Later, I was informed it was the Michigan case discussed in the original opinion. However, as I was apprehensive that might not be the case, but it might be some other, I made said statement. Otherwise, if I had been sure I had the right case, I would have made no statement at all on the subject, for, under the circumstances, it would have made no difference whether it was cited in the brief or not.

When, as stated, I in some unaccountable way overlooked it in the brief, I thought appellant's attorneys had not cited it therein, as it is not infrequent that attorneys read to the court in oral argument cases not cited in their briefs. I make this explanation and correction of my mistake in justice to all concerned.

The mistake, however, in no possible way affected appellant or any question in his case. It turned out he got the full benefit and consideration of the case cited by his attorneys.

Appellant contends that the indictment is fatally defective because it did not allege what

Indictment—  
facts to make  
one principal.

he said or did which would make him a principal, claiming that it was necessary that this should be done.

This is never necessary. The authorities so holding are many and uniform. We know of no case, and none has been cited, holding, or intimating a holding, to the contrary. Judge White, in his form for an indictment under our statutes of principals, specifically shows that no such allegation is necessary. White's Anno. Penal Code, § 85. Under art.

74, Penal Code, in § 86, he says: "It is not necessary to allege the facts relied upon to show the defendant to be a principal, although the offense may not have been actually committed by him. If he is a principal by reason of the part performed by him in the commission of the offense, he may be convicted under an indictment charging him directly with its actual commission;" citing *Williams v. State*, 42 Tex. 392; *Glad-den v. State*, 2 Tex. App. 508; *Davis v. State*, 3 Tex. App. 91; *Tuller v. State*, 8 Tex. App. 501; *Mills v. State*, 13 Tex. App. 487.

Judge Willson, in his forms, 4th ed. No. 733, under the articles of our Code (74-78, inc.) on principals, likewise shows that it is wholly unnecessary to allege the facts which make one a principal. His form shows that a party is to be charged directly with the commission of the offense without any allegation of what he did or said to make him a principal. He says: "It is unnecessary to allege the particular facts which constitute each a principal. Under a general indictment charging the defendant, or defendants, directly with the commission of the offense, any acts which make him a principal may be proved;" citing some of the cases cited by Judge White and others.

In some recent cases we have had occasion to quote Mr. Branch also on this subject with approval. We again do so. He says: "The acts which make the defendant a principal need not be alleged in the indictment. A principal offender may be charged directly with the commission of the offense, although it may not have actually been committed by him. *Cruit v. State*, 41 Tex. 477; *Williams v. State*, 42 Tex. 392; *Bell v. State*, 1 Tex. App. 598; *Davis v. State*, 3 Tex. App. 91; *Tuller v. State*, 8 Tex. App. 501; *Mills v. State*, 13 Tex. App. 487; *Farris v. State*, 26 Tex. App. 105, 9 S. W. 487; *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404; *Finney v. State*, 29 Tex. App. 184, 15 S. W. 175; *Gallagher v. State*, 34 Tex. Crim. Rep. 306, 30

S. W. 557; *Campbell v. State*, 63 Tex. Crim. Rep. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Oliver v. State*, 65 Tex. Crim. Rep. 150, 144 S. W. 604; *Madrid v. State*, 71 Tex. Crim. Rep. 420, 161 S. W. 93; *Dillard v. State*, 77 Tex. Crim. Rep. 1, 177 S. W. 99." 1 Branch, Anno. Penal Code, § 676. *Arensman v. State*, 79 Tex. Crim. Rep. 546, 187 S. W. 471, and other cases recently decided, but not yet reported. Exactly to the same effect is 1 Vernon, Crim. Stat. § 23, p. 42.

Each of the cases cited by Judges White and Willson and Mr. Branch are directly in point. We will quote from but two of them.

Before this court was created, and when the supreme court had criminal jurisdiction, *Cruit* and *King* were jointly indicted for stealing two bales of cotton, with the intent to appropriate them to their use and benefit. *Cruit* alone was tried. The court instructed the jury, if *King* stole the cotton with the intent to appropriate it to his and *Cruit's* use, and *Cruit* was present when the cotton was stolen, and, knowing the unlawful intent of *King*, did aid by acts in taking, etc., the cotton, to convict him. The jury did convict him.

The court said: "It is admitted that all who are present at the commission of a crime and give aid are principals. But it is insisted, in an ingenious argument, that the indictment does not warrant a verdict against appellant on the proof of the facts indicated in the charge to which we have referred. If the indictment had charged *King* with stealing the cotton, and that appellant, knowing the unlawful intent, was present, aiding and assisting him therein, it is conceded the charge of the court would have been strictly correct. But it is said appellant is charged with stealing the cotton, and not with aiding *King* to steal it, and, to convict him under this charge, the proof must show that he took the cotton with intent of converting it to his own use. With however much force we may

concede the objection has been urged, we regard it as more specious than sound. The indictment does not, as it seems to be supposed, charge the taking to have been with the intent to appropriate the cotton to the use of King alone, but to the joint use of appellant and King. And if the objection should be sustained, it would result that, in all cases where there are two or more principal offenders, it would be necessary to set forth in the indictment the particular acts done by each of the parties connected with the transaction. This certainly has never been the practice in prosecutions of this character, and has always been held to be unnecessary." *Cruit v. State*, 41 Tex. 477.

In *Mills v. State*, 13 Tex. App. 487, *Mills* was indicted separately for shooting Berry. Dart was in no way mentioned in the indictment. This court said:

"Upon the trial the defendant excepted to all evidence tending to prove that Dart shot Berry, upon the ground that there was no allegation in the indictment to that effect. The court overruled the objection and the defendant excepted. We are of the opinion that the ruling of the court was correct. The state proved that Dart did the shooting, and that defendant was present, and, knowing the unlawful intent of Dart, abetted and encouraged him in the commission of the offense.

"The question here raised is this: Must the indictment charge all of the parties engaged in the commission of the offense, in order to the admission of evidence to prove that a party not on trial committed the act, and that the defendant (the party on trial) was present, and, knowing the unlawful intent of such person, aided him by acts or encouraged him by words or gestures? We are of the opinion that this ques-

tion must be answered in the negative. If the party is present and knows of the unlawful intent, aids by acts or encourages by words or gestures the party who actually commits the unlawful act, he is held a principal actor, and can be prosecuted and convicted as such. In this case defendant told Dart to shoot; that he would stand by him. Dart shot. Dart's act was the act of defendant to the same extent and to all purposes in law as if defendant had actually shot Berry himself; and it is proper for the indictment to charge him with the actual shooting of Berry, omitting any or all others engaged in the commission of the act."

If the offense in this instance had been murder, arson, rape, or any other felony, it would have been wholly unnecessary to have made any allegation at all about Druesdow. Quillin could have been charged directly with having committed the offense, although Druesdow himself committed it, and Quillin was merely a principal by reason of what he did or said. It was only because under this particular law Druesdow was in a class who alone could directly commit such a crime, that it was necessary to allege what he did at all. Then, after making the necessary allegations which the indictment did as to Druesdow, it was only necessary as to Quillin to allege, as it did, that he did unlawfully, wilfully, and fraudulently act together with Druesdow in the commission of the said offense. This is the very language of the statute. No other allegation whatever as to what Quillin said or did was necessary.

All other questions were discussed and correctly decided in the original opinion. No further discussion of any of them is necessary.

The motion is overruled.

## ANNOTATION.

**Criminal responsibility of one co-operating in offense which he is incapable of committing personally.****I. Introductory, 782.****II. Aiding and abetting commission of offense:****a. General rule, 782.****b. Application of rule, 783.****I. Introductory.**

This note, in discussing the criminal liability of a person who co-operates in the commission of an offense which he is legally incapable of committing as prime actor therein, does not include the status of such a person as an accomplice within the rule requiring the testimony of an accomplice to be corroborated.

The liability of a person advising or procuring the commission of suicide is excluded for the reason that most of the cases regard a person so doing as the prime mover in the crime of homicide. In like manner the liability of a domestic servant for co-operation in a burglary is excluded because of the existence of authority to the effect that unauthorized entry by a servant with felonious intent is burglarious irrespective of the co-operation of others.

**II. Aiding and abetting commission of offense.****a. General rule.**

There are some offenses which are so defined by statute or by the common law that they may be committed only by certain persons or classes of persons. Nevertheless, a person who is not within the class of those by whom the crime may be directly perpetrated may, by aiding and abetting a person who is within the scope of the definition, render himself criminally liable.

**United States.**—*United States v. Van Schaick* (1904) 134 Fed. 592; *United States v. Snyder* (1882) 14 Fed. 554.

**California.**—*Re Kantrowitz* (1914) 24 Cal. App. 203, 140 Pac. 1078.

**Connecticut.**—*State v. Burns* (1909) 82 Conn. 213, 72 Atl. 1083, 16 Ann. Cas. 465.

**II.—continued.****c. Exceptions to rule, 786.****III. Conspiring to commit offense:****a. General rule, 787.****b. Application of rule, 788.**

**Georgia.**—*Bishop v. State* (1903) 118 Ga. 799, 45 S. E. 614; *Groves v. State* (1886) 76 Ga. 808; *Goggus v. State* (1866) 34 Ga. 275.

**Illinois.**—*People v. Trumbley* (1911) 252 Ill. 29, 96 N. E. 573; *McCracken v. People* (1904) 209 Ill. 215, 70 N. E. 749.

**Iowa.**—*State v. Rowe* (1898) 104 Iowa, 323, 73 N. W. 833.

**Kansas.**—*State v. Elliott* (1900) 61 Kan. 518, 59 Pac. 1049; *State v. Boyland* (1880) 24 Kan. 186.

**Kentucky.**—*Whittaker v. Com.* (1894) 95 Ky. 632, 22 S. W. 83.

**Louisiana.**—*State v. Haines* (1899) 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372; *State v. Williams* (1880) 32 La. Ann. 335, 36 Am. Rep. 272.

**Massachusetts.**—*Com. v. Fogerty* (1857) 8 Gray, 489, 69 Am. Dec. 264.

**Michigan.**—*People v. Chapman* (1886) 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896, 7 Am. Crim. Rep. 568; *People v. Stratton* (1869) 1 Mich. N. P. 33.

**Minnesota.**—*State v. McCartney* (1871) 17 Minn. 76, Gil. 54.

**Nebraska.**—*Mills v. State* (1898) 53 Neb. 263, 73 N. W. 761.

**New Jersey.**—*State v. Warady* (1909) 78 N. J. L. 687, 75 Atl. 977.

**New York.**—*People v. McKane* (1894) 143 N. Y. 455, 38 N. E. 950.

**North Carolina.**—*State v. Dowell* (1890) 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 563, 11 S. E. 525, 8 Am. Crim. Rep. 681; *State v. Jones* (1880) 83 N. C. 605, 35 Am. Rep. 586.

**Ohio.**—*Brown v. State* (1869) 18 Ohio St. 497; *Searles v. State* (1892) 6 Ohio C. C. 331, 3 Ohio C. D. 478.

**Oregon.**—*State v. Case* (1912) 61 Or. 265, 122 Pac. 304.

**Pennsylvania.**—*Com. v. Moll* (1909) 39 Pa. Super. Ct. 107.

**Rhode Island.**—*State v. Sprague* (1856) 4 R. I. 257.

**Texas.**—*Campbell v. State* (1911) 63 Tex. Crim. Rep. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Thomas v. State* (1903) 45 Tex. Crim. Rep. 81, 78 S. W. 1045; *Heitman v. State* (1915) 78 Tex. Crim. Rep. 349, 180 S. W. 701. And see the reported case (*QUILLIN v. STATE*, ante, 773).

**Virginia.**—*Law v. Com.* (1881) 75 Va. 885, 40 Am. Rep. 750.

**Wisconsin.**—*Nichols v. State* (1874) 35 Wis. 308.

**England.**—*Reg. v. Ram* (1893) 17 Cox, C. C. 609; *Reg. v. James* (1890) 59 L. J. Mag. Cas. N. S. 96, L. R. 24 Q. B. Div. 439, 62 L. T. N. S. 578, 17 Cox, C. C. 24, 54 J. P. 615; *Reg. v. Bird* (1849) 2 Car. & K. 817; *Reg. v. Brown* (1843) 1 Car. & K. 144; *Rex v. Potts* (1818) Russ. & R. C. C. 353; *Rex v. Baltimore* (1768) 4 Burr. 2179, 98 Eng. Reprint, 126; *Stafford v. Pooler* (1682) Cro. Eliz. pt. 2, p. 536, 78 Eng. Reprint, 783; *Audley's Case* (1631) 3 How. St. Tr. 413, 1 Hale, P. C. 629.

"A person not falling within the class described in a penal statute may, nevertheless, under the rules of the common law, be charged, provided (a) he was present, actually or constructively, and aided or abetted another person in the commission of the crime; (b) or, being absent, counseled or procured or caused that person to commit the crime; (c) or aided him after he had committed the offense; for example, to escape. If the crime is a misdemeanor, the aider and abetter in any one of the three cases above named would be a principal, and should be charged as such. If the crime is a felony an aider and abetter would be a principal in the second degree, if he was actually or constructively present when another committed the offense, or he would be an accessory before the fact, or after the fact, according as the case fell within subdivisions 'b' or 'c,' above." *United States v. Van Schaick* (1904) 134 Fed. 592.

#### *b. Application of rule.*

##### **Adultery.**

A single person, who cohabits or has carnal intercourse with a married

person of the opposite sex, is guilty of aiding and abetting the offense of adultery. *State v. Case* (1912) 61 Or. 265, 122 Pac. 304. Compare *Re Cooper* (1912) 162 Cal. 81, 121 Pac. 318, wherein it appeared that accused, an unmarried woman, lived and cohabited with a married man. She was accused of adultery. The court, after holding that an unmarried person could not be guilty of adultery, held that, because of the exclusion of the idea of any criminal offense by an unmarried person, the accused was not liable for aiding and abetting in the offense.

See to the same effect *Ex parte Sullivan* (1911) 17 Cal. App. 278, 119 Pac. 526.

##### **Arson.**

A person who aids and assists the owner of property to burn it may be convicted under a statute making it an offense for the owner of property to burn it with intent to defraud the insurer. *Searles v. State* (1892) 6 Ohio C. C. R. 331, 3 Ohio C. D. 478.

But in the absence of such a statute, the owner of property is not liable as an accessory to the burning thereof by others. *State v. Sarvis* (1896) 45 S. C. 663, 32 L.R.A. 647, 55 Am. St. Rep. 806, 24 S. E. 53; *Roberts v. State* (1869) 7 Coldw. (Tenn.) 359.

##### **Bigamy.**

A single person can be guilty of bigamy by aiding, assisting, counseling, or procuring a bigamous marriage. *Boggus v. State* (1866) 34 Ga. 275; *State v. Warady* (1909) 78 N. J. L. 687, 75 Atl. 977. So, it has been held that if an unmarried man marries a married woman, knowing her to be married, he is equally guilty with the woman of the offense of bigamy. *Reg. v. Brown* (1843) 1 Car. & K. (Eng.) 144.

##### **Concealment of birth or death of bastard child.**

A person who counsels, assists, aids, or abets the mother in the concealment of the birth or death of a bastard child is equally guilty with the mother, though the statute denounces as a crime the act of the mother only. *Com. v. Moll* (1909) 39 Pa. Super. Ct. 107; *State v. Sprague* (1856) 4 R. I. 257; *Nichols v. State* (1874) 35 Wis. 308;

*Reg. v. Bird* (1849) 2 Car. & K. (Eng.) 817; *Rex v. Douglass* (1836) 7 Car. & P. (Eng.) 644.

Compare *Frey v. Com.* (1885) 83 Ky. 190, wherein the court said: "The punishment fixed by the statute in this class of cases is imposed on the woman concealing, or endeavoring to conceal, the birth of her bastard child, so as it could not well be ascertained whether the child was born dead or alive. In such cases, and for the purpose of preventing the mother from concealing the evidence of her shame by destroying her offspring, it is provided that, when guilty of the offense, 'she (the mother) shall be confined in the penitentiary not less than one nor more than five years.' The punishment was intended to apply alone to the mother, the statute providing: 'If any woman be delivered of any issue of her body, which being born alive would be a bastard, shall endeavor privately, by drowning or secretly burying the same, or in any other way, directly or indirectly, to conceal the birth thereof, so that it may not be known whether it were born alive or not, she shall be confined,' etc. An aider or abetter, if the child were born alive and concealed so that death ensued, would be guilty of murder as well as the mother; but the difficulty in determining the question as to whether the child was or not born alive induced the passage of the statute inflicting a punishment on the mother who endeavors to conceal its birth. Section 10, article 1, chapter 29, General Statutes, making accessories before the fact liable as principals, was designed to apply only in cases where the offense existed at the common law, or, where created by statute, applies to all who are guilty. The father of a bastard child, concealing it, is not amenable to the statute, but would be subjected to a greater punishment if the concealment, or the attempt to conceal its birth, caused its death."

#### **Disposal of mortgaged property.**

A person other than a mortgagor may be convicted of aiding and abetting in the violation of a statute which makes it a crime for a mortgagor to

dispose of mortgaged chattels with intent to defraud the mortgagee. *State v. Elliott* (1900) 61 Kan. 518, 59 Pac. 1049.

#### **Embezzlement.**

While the definition of the crime of embezzlement confines the offense to agents, employees, fiduciaries, and the like, a person not within that category may be convicted of aiding or abetting the commission of the crime. *Bishop v. State* (1903) 118 Ga. 799, 45 S. E. 614; *State v. Rowe* (1898) 104 Iowa, 323, 73 N. W. 833; *State v. McCartney* (1871) 17 Minn. 76, Gil. 54; *Brown v. State* (1869) 18 Ohio St. 496; *Mills v. State* (1898) 53 Neb. 263, 73 N. W. 761; *Thomas v. State* (1903) 45 Tex. Crim. Rep. 81, 73 S. W. 1045. And see the reported case (*QUILLIN v. STATE*, ante, 773). So, in *McCracken v. People* (1904) 209 Ill. 215, 70 N. E. 749, it was held that a person not in privity with the bailment could be convicted of aiding a larceny by a bailee.

#### **False personation.**

In *Rex v. Potts* (1818) Russ. & R. C. C. (Eng.) 353, a woman was convicted of aiding and abetting in the offense of falsely personating a seaman.

#### **False return by postmaster.**

A person who aids and abets a postmaster in the violation of the Federal act (35 Stat. at L. 1128, chap. 321, § 206, Comp. Stat. § 10,376, 7 Fed. Stat. Anno. 2d ed. p. 785), which makes it an offense for "any postmaster" to make a false return to the auditor for the purpose of increasing his compensation, may be convicted as an aider and abetter, though incapable, because not a postmaster, or being the principal actor in the crime. *United States v. Snyder* (1882) 4 McCrary, 618, 14 Fed. 554.

#### **Incest.**

A person who aids and abets incestuous intercourse may be convicted of incest, though he is not related to the parties to the intercourse. See dictum in *Whittaker v. Com.* (1894) 95 Ky. 632, 27 S. W. 83.

#### **Larceny.**

A person who has the lawful custody of goods may be convicted as an



accessory to the larceny thereof by another. *Groves v. State* (1886) 76 Ga. 808, wherein a public officer was convicted as accessory before the fact to the larceny of public property of which he was custodian.

But a wife who assists another to steal her husband's property or their community property is not guilty of larceny. *Lamphier v. State* (1880) 70 Ind. 317; *Reg. v. Glassie* (1854) 1 Cox, C. C. (Eng.) 1.

A person who procures a postman to hand him certain letters is guilty either as principal or accessory before the fact in the crime of larceny of the letters. *Reg. v. James* (1890) 59 L. J. Mag. Cas. N. S. (Eng.) 96. In that case it appeared that the accused induced a postman to give him letters addressed to certain people, from a certain firm. The court held that a person who, without permission, induced a postman to hand over to him letters, was guilty of larceny of the letters received, either as principal at common law or as accessory before the fact. Lord Coleridge, Ch. J., said: "In this case I entertain no doubt whatever. The prisoner was either a joint thief with the postman, or he was an accessory to the taking of the letters before the fact, and by 24 & 25 Vict. chap. 94, § 1, liable to be convicted in all respects as if he had been a principal felon. In either case I am of opinion that he was rightly convicted." And Hawkins, J.: "The man was a thief, no matter how you look at it. He was either a principal felon at common law, or by the statute 24 & 25 Vict. chap. 94, § 1, as an accessory before the fact, he was in the same position as if he had been the principal felon. In either case, therefore, he was guilty."

#### Rape.

A woman who aids, assists, procures, or counsels a man in the commission of rape is guilty of the offense, either as a principal in the first or second degree, or accessory before the fact.

Connecticut.—*State v. Burns* (1909) 82 Conn. 218, 72 Atl. 1083, 16 Ann. Cas. 465.

5 A.L.R.—50.

Illinois.—*People v. Trumbley* (1911) 252 Ill. 29, 96 N. E. 573.

Louisiana.—*State v. Williams* (1880) 32 La. Ann. 335, 36 Am. Rep. 272.

Michigan.—*People v. Stratton* (1869) 1 Mich. N. P. 33.

North Carolina.—*State v. Jones* (1880) 83 N. C. 605, 35 Am. Rep. 586.

Texas.—*Campbell v. State* (1911) 63 Tex. Crim. Rep. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Heitman v. State* (1915) 78 Tex. Crim. Rep. 349, 180 S. W. 701.

England.—*Reg. v. Ram* (1893) 17 Cox, C. C. 609; *Rex v. Baltimore* (1768) 4 Burr. 2179, 98 Eng. Reprint, 136.

But where a woman connives to bring about fornication between a man and another woman, she is not liable for an assault committed by the man out of her presence. *State v. Jackson* (1900) 65 N. J. L. 105, 46 Atl. 764.

While a husband cannot personally be guilty of a rape on his wife, if he counsels, aids, or abets, assists or forces another to have sexual intercourse with her, or forces her to submit to sexual intercourse with another, he is guilty of rape. *Re Kantrowitz* (1914) 24 Cal. App. 203, 140 Pac. 1078; *State v. Boyland* (1880) 24 Kan. 186; *Com. v. Fogerty* (1857) 8 Gray (Mass.) 489, 69 Am. Dec. 264; *People v. Chapman* (1886) 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896, 7 Am. Crim. Rep. 568; *State v. Dowell* (1890) 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681; *Audley's Case* (1631) 3 How. St. Tr. (Eng.) 413, 1 Hale, P. C. 629. See also *State v. Haines* (1899) 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372, wherein the acquittal of the actual ravisher was held to necessitate the discharge of the husband.

A boy under fourteen years of age may, if capax doli, be convicted of aiding and abetting the commission of rape by an adult. *Law v. Com.* (1881) 75 Va. 885, 40 Am. Rep. 750.

But a girl under the age of consent cannot be convicted of rape in enticing or procuring a man to have carnal intercourse with her. *Reg. v. Tyrell* [1894] 1 Q. B. 710, 63 L. J. Mag. Cas. N. S. (Eng.) 58, 17 Cox, C. C. 716, 10

Reports, 82, 70 L. T. N. S. 41, 42 Week. Rep. 255.

#### **Violation of Election Law.**

Under a statute making criminal certain acts of election inspectors, a person not an inspector, who aids, abets, or procures the doing by an inspector of an act within the statute, may be convicted. *People v. McKane* (1894) 143 N. Y. 455, 38 N. E. 950.

#### **Violation of Navigation Laws.**

In *United States v. Van Schaick* (1904) 134 Fed. 592, the prosecution was against the directors of a steamboat company for a violation of a statute (Rev. Stat. § 5344, Comp. Stat. § 10,455) providing as follows: "Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years." It was held that the defendants, though not within the classes of persons enumerated in the act, could be convicted of aiding and abetting a violation of the act by such persons.

#### *c. Exceptions to rule.*

##### **Abandonment of child.**

Under a statute making it an offense for the father or mother of a bastard child, or a person to whom the child has been confided, to abandon it, it has been held that a person not bearing any of the specified relations to the child cannot be convicted of aiding and abetting in its abandonment. *Shannon v. People* (1858) 5 Mich. 71.

##### **Sale of intoxicating liquors.**

A purchaser of intoxicating liquors is not guilty of inciting, aiding, or abetting, counseling, or procuring the sale thereof to himself. The reason for this rule is that a sale contemplates a purchaser, and therefore the

legislature would have made it an offense if they had intended it so to be.

*United States*. — *Lott v. United States* (1913) 46 L.R.A.(N.S.) 409, 123 C. C. A. 836, 205 Fed. 28.

*Arkansas*. — *Wilson v. State* (1917) 130 Ark. 204, 196 S. W. 921; *Fenix v. State* (1909) 90 Ark. 589, 120 S. W. 388.

*Connecticut*. — *State v. Teahan* (1882) 50 Conn. 92.

*Iowa*. — *Wakeman v. Chambers* (1886) 69 Iowa, 169, 58 Am. Rep. 218, 28 N. W. 498.

*Kansas*. — *State v. Cullins* (1894) 53 Kan. 100, 24 L.R.A. 212, 36 Pac. 56.

*Massachusetts*. — *Com. v. Willard* (1839) 22 Pick. 476; *Com. v. Kimball* (1837) 24 Pick. 366.

*Mississippi*. — *Harris v. State* (1917) 113 Miss. 457, L.R.A.1917D, 1018, 74 So. 823.

*New Hampshire*. — *State v. Rand* (1871) 51 N. H. 361, 12 Am. Rep. 127.

*Tennessee*. — *Harney v. State* (1881) 8 Lea, 113.

*Canada*. — *Ex parte Armstrong* (1891) 80 N. B. 423.

Thus, in *State v. Teahan* (Conn.) supra, it was said: "It is insisted, however, that the statute (Gen. Stat. p. 545, § 3) which provides that 'every person who shall assist, abet, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were the principal offender,' governs this case; it being contended that the person who purchases the liquor induces the seller to commit the crime of selling it, and so aids and abets him in the commission of the offense.

"But we are satisfied that the purchaser is not an abettor of the offense within the meaning of the statute. The 'abetting' intended by it is a positive act in aid of the commission of the offense,—a force, physical or moral, joined with that of the perpetrator in producing it. This is clear from the context, where abetting is classed with 'assisting,' 'causing,' 'hiring,' and 'commanding.' The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal,—approach it from the same direction, touch it at the same

point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's." So, in *Harney v. State* (1881) 8 Lea (Tenn.) 113, wherein it appeared that the accused, indicted for the sale and tipping of intoxicating liquors within certain statutory limits, purchased a drink within that limit. The court held that the purchaser of intoxicating liquors sold in violation of law was not guilty of the offense, even though he was concerned in its commission, saying: "The general rule undoubtedly is, that in misdemeanors all who are in any manner concerned, if guilty at all, are principals, and may be proceeded against accordingly. *Curlin v. State* (1833) 4 Yerg. (Tenn.) 143. And under a statute which forbade the sale of liquor by a slave, this court sustained an indictment against a white man for buying liquor from a slave, which charged him with aiding, abetting, and encouraging the sale. *State v. Bonner* (1858) 2 Head (Tenn.) 135. The learned judge who delivers the opinion says that, upon general principles, the purchaser of spirituous liquor, in violation of the statutes passed to suppress tipping, is as much guilty of a violation of the law, and as much amenable to criminal prosecution and punishment, as the seller. And there can be no doubt, upon the strict principles of the law, carried out to their logical result, that the statement is warranted. But it is easy to see that, in the particular case before the court, the condition of the vendor as a slave might well induce the court to consid-

er the penalty of the act as directed against the white man, who enticed him to sell. And the practice has never prevailed in this state, under the ordinary statutes against tipping, to extend the punishment to the purchaser."

"No such prosecution," to borrow the language of Chief Justice Shaw upon the same question in *Massachusetts*," has been attempted within the knowledge of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of the buyers." The chief justice admitted that it was difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. But he thought that the principle might be limited to offenses which are mala in se, in contradistinction to mala prohibita, or acts otherwise indifferent than as they are restrained by positive law. And the court held that the buyer was not indictable under a statute which prohibited the sale of liquors. *Com. v. Willard* (1839) 22 Pick. (Mass.) 476.

### III. *Conspiring to commit offense.*

#### a. *General rule.*

A person who is personally incapable of committing an offense may be guilty of conspiring to commit the offense. *United States v. Rabinowich* (1915) 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682; *United States v. Holte* (1915) 236 U. S. 140, 59 L. ed. 504, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271; *Tapack v. United States* (1915) 137 C. C. A. 39, 220 Fed. 445; *United States v. Rhodes* (1913) 212 Fed. 518; *Roukous v. United States* (1912) 115 C. C. A. 255, 195 Fed. 858; *United States v. Lyman* (1911) 190 Fed. 414; *Cohen v. United States* (1907) 85 C. C. A. 113, 157 Fed. 651; *Chadwick v. United States* (1905) 72 C. C. A. 348, 141 Fed. 225; *United States v. Stevens* (1890) 44 Fed. 132; *United States v. Bayer* (1876) 4 Dill. 407, Fed. Cas. No.

14,547; *United States v. Martin* (1870) 4 Cliff. 156, Fed. Cas. No. 15,728; *People v. Wood* (1905) 145 Cal. 659, 79 Pac. 367; *State v. Crofford* (1907) 133 Iowa, 478, 110 N. W. 921; *Reg. v. Whitchurch* (1891) L. R. 24 Q. B. Div. (Eng.) 420, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1.

*b. Application of rule.*

**Abortion.**

A woman may be convicted of a conspiracy with others to commit the crime of abortion on herself. In *Reg. v. Whitchurch* (1890) L. R. 24 Q. B. Div. (Eng.) 420, wherein a woman was indicted with two men for conspiring to commit an abortion on herself. The court held that where three persons combined to commit a felony, although the person on whom the offense was to have been committed could not alone be guilty of the intended offense, they are all guilty of the conspiracy. The court said: "The question arises on an indictment charging a woman who, we must take it, was not in fact with child, with conspiring with others to procure abortion on herself. There might have been something to be said if the indictment had been for an attempt to procure abortion, for in that case the words of the section would not apply. This, however, is an entirely different case. The prisoner is charged with the offense of conspiracy, that is, a combination to commit a felony, and I cannot entertain the slightest doubt that if three persons combine to commit a felony, they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the intended offense." In *State v. Crofford* (1907) 133 Iowa, 478, 110 N. W. 921, the accused, a doctor, was convicted of the murder of a woman on whom he had committed an abortion. At the trial certain letters that passed between the deceased and her paramour were admitted in evidence. In sustaining their admission the court held that while a woman on whom an abortion has been committed is considered the victim, still it does not follow that she

cannot engage in a conspiracy to perpetrate the offense on herself, saying: "It does not follow that she may not engage in an unlawful conspiracy with another to perpetrate the offense upon herself. Section 5059 of the Code declares that, if any two or more persons conspire and confederate together to commit a felony, they are guilty of the crime of conspiracy. This offense is distinct from the crime which it is the object of the conspiracy to commit, and the acquittal of one is not a bar to the prosecution of the other. *State v. Brown* (1895) 95 Iowa, 381, 64 N. W. 277. Though she may not be guilty of committing an abortion upon herself, it is a crime for another to do so, and, if she conspires with others to perform the act, there is no escape from the conclusion that she is a co-conspirator, and that her declarations in promotion of the common enterprise are admissible in evidence against another conspirator, on trial for the commission of the substantive crime." In *Solander v. People* (1873) 2 Colo. 48, the accused was indicted for manslaughter in that she committed an abortion on a woman pregnant with a child, whereby the woman died. On the question of the admissibility of some of the declarations of deceased, the court held that while the woman upon whom the abortion was committed was not technically an accomplice, nevertheless she could conspire with others to produce the abortion. It was said: "It is not necessary that she should appear to be an accomplice in order to make her declarations accompanying acts done in furtherance of the criminal purpose evidence against another, who has joined in the unlawful act. She may be, and usually is, a party to the illegal combination to effect the abortion, and as this is the ground upon which the declarations are admitted, it can make no difference that she is not criminally liable for the act done. In some cases, probably, the woman is an unwilling subject, submitting to, but not actively joining in, the unlawful attempt, and in such cases the community of purpose, which alone can make the acts and declarations of

one admissible as evidence against his associate in crime may be wanting. But where it appears that the woman not only submits to the unlawful attempt, but actively promotes it by seeking the aid of others, and eagerly adopting the means suggested to accomplish the crime, it cannot be claimed that she is not a party to the criminal design. If the woman is not technically an accomplice, she may, nevertheless, conspire with others to produce the abortion, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act."

#### **Escape or rescue.**

The prisoner whose escape was contemplated may be convicted of conspiring with others to commit the offense of aiding a prisoner to escape. *United States v. Lyman* (1911) 190 Fed. 414. So, it has been held that where it is made an offense for a prisoner sentenced to a term less than life to escape, a prisoner sentenced for life may be guilty of conspiring with prisoners sentenced for a less term to escape. *People v. Wood* (1905) 145 Cal. 659, 79 Pac. 367.

#### **Fraud by bankrupt.**

It being a criminal offense for a bankrupt to conceal or dispose of his property fraudulently, other persons may be convicted of conspiring with a bankrupt to commit that offense. *United States v. Rabinowich* (1915) 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682; *United States v. Tapack* (1915) 137 C. C. A. 39, 220 Fed. 445; *United States v. Rhodes* (1913) 212 Fed. 513; *Roukous v. United States* (1912) 115 C. C. A. 255, 195 Fed. 353; *Cohen v. United States* (1907) 85 C. C. A. 113, 157 Fed. 651; *United States v. Bayer* (1876) 4 Dill. 407, Fed. Cas. No. 14,547. In *Tapack v. United States* (1915) 137 C. C. A. 39, 220 Fed. 445 (writ of certiorari denied in (1915) 238 U. S. 627, 59 L. ed. 1495, 35 Sup. Ct. Rep. 664), it appeared that five persons, two of whom were members of a bankrupt copartnership, entered into a conspiracy to conceal certain specified prop-

erty from the trustee in bankruptcy of the partnership. One of the persons was acquitted, but the other four were convicted. It was held that a person other than a bankrupt could commit the offense by conspiring with him to commit the offense. In *United States v. Rabinowich* (1915) 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682, the indictment embraced six defendants, three of whom were members of a partnership which had on hand a large amount of goods. The indictment recited that the members of the partnership and the other three defendants planned that the partnership should go into involuntary bankruptcy, and conspired and agreed that the members of the partnership should conceal, while bankrupts, from the trustee in bankruptcy, certain specified property belonging to the estate in bankruptcy. It also alleged overt acts. A demurrer to the indictment was sustained. In reversing this judgment the court held that while it was doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee could be perpetrated by any other than the bankrupt, a person could be guilty of conspiring to commit the offense. See to the same effect *United States v. Rhodes* (1913) 212 Fed. 513.

In *United States v. Bayer* (1876) 4 Dill. 407, Fed. Cas. No. 14,547, it appeared that a person who contemplated going into bankruptcy conspired with two other persons to dispose of some of his property and present a fictitious claim to the trustee in bankruptcy. Both of these contemplated acts were carried out, and the bankrupt failed to disclose to the trustee such fraudulent disposition or the fictitiousness of the claim by reason of the agreement with the other conspirators. An indictment against all the conspirators was sustained.

In *Cohen v. United States* (1907) 85 C. C. A. 113, 157 Fed. 651, certiorari denied in (1907) 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. Rep. 261, it appeared that several persons conspired to conceal from the trustee certain property of a corporation which they, as part of their scheme, were to force

into voluntary bankruptcy. It was held that they were guilty of conspiring to violate the Bankrupt Law.

That case was followed in *Roukous v. United States* (1912) 115 C. C. A. 255, 195 Fed. 353, modifying (1909) 170 Fed. 110, certiorari denied in (1912) 225 U. S. 710, 56 L. ed. 1267, 32 Sup. Ct. Rep. 840, wherein it appeared that several persons conspired with the president of a corporation for the concealment of certain specified property of the corporation, and also for the involuntary bankruptcy of the corporation. But in *Johnson v. United States* (1907) 85 C. C. A. 399, 158 Fed. 69, 14 Ann. Cas. 153, it appeared that the defendant with two others conspired that one of them should file a petition in voluntary bankruptcy, and that the petitioner should conceal a certain amount of his goods from the trustee. On the judgment of bankruptcy, the defendant was appointed trustee. All three were indicted for conspiring to conceal property from the trustee in bankruptcy. Defendant moved in arrest of judgment on the ground that he, being the trustee in bankruptcy, could not be convicted of conspiring to conceal from himself goods of the bankrupt. The motion was overruled. In reversing that judgment the court held that while a person could be held guilty of conspiring to commit an offense which he was incapable of committing, still the indictment was defective in that it charged the trustee, one of the alleged conspirators, with having knowledge of certain property which was claimed to have been concealed from him.

#### **Fraud by census enumerator.**

In *United States v. Stevens* (1890) 44 Fed. 132, it was held that persons who were not census enumerators could be convicted of conspiring with an enumerator to commit the offense of fraudulent insertion by an enumerator of fictitious names in a census schedule.

#### **Fraud or embezzlement by officer of bank.**

In *Chadwick v. United States* (1905) 72 C. C. A. 343, 141 Fed. 225, it was held that a depositor could be convicted of conspiracy with the officers of a

national bank to commit the offense of unlawful certification of checks.

In *United States v. Martin* (1870) 4 Cliff. 156, Fed. Cas. No. 15,728, the court sustained an indictment of a person not connected with a national bank for a conspiracy with the cashier of such a bank for the abstraction of money by the latter in violation of the National Banking Act.

#### **Violation of White Slave Traffic Act.**

A prostitute may be convicted of conspiring with a man for her own interstate transportation, in violation of the White Slave Traffic Act (36 Stat. at L. 825, chap. 395, § 2, Comp. Stat. § 8813, 9 Fed. Stat. Anno. 2d ed. p. 1409). *United States v. Holte* (1915) 236 U. S. 140, 59 L. ed. 504, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271. In that case it was said: "The words of the Penal Code of March 4, 1909, chap. 321, § 37, 35 Stat. at L. 1088, Comp. Stat. § 10,201, 7 Fed. Stat. Anno. 2d ed. p. 534, are, 'conspire to commit an offense against the United States,' and the argument is that they mean an offense that all the conspirators should commit; and that the woman could not commit the offense alleged to be the object of the conspiracy. For, although the Statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose, the conspiracy alleged, as we have said, is a conspiracy that *Laudenschleger* should procure transportation and should cause the woman to be transported. Of course, the words of the Penal Code could be narrowed, as we have suggested, but in that case they would not be as broad as the mischief, and we think it plain that they mean to adopt the common law as to conspiracy, and that 'commit' means no more than bring about. For, as was observed in *Drew v. Thaw* (1914) 235 U. S. 432, 59 L. ed. 302, 35 Sup. Ct. Rep. 137, a conspiracy to accomplish what an individual is free to do may be a crime, . . . and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that

there may be a degree of co-operation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser, although it was in the seller. . . . But a conspiracy with an officer or employee of the government or any other for an offense that only

he could commit has been held for many years to fall within the conspiracy section, now § 37 of the Penal Code. . . . So, a woman may conspire to procure an abortion upon herself when, under the law, she could not commit the substantive crime, and, therefore, it has been held, could not be an accomplice." R. C. L.

H. L. WATKINS, Admr., etc., of W. R. Fischer, Deceased, Appt.,  
v.

HOME LIFE & ACCIDENT INSURANCE COMPANY et al.

*Arkansas Supreme Court — January 20, 1919.*

(— Ark. —, 208 S. W. 587.)

**Insurance — death in common disaster — right to proceeds of policy.**

1. Where insured and beneficiary, under a policy providing that if the beneficiary shall die first, the interest of the beneficiary shall vest in the insured, perish in a common disaster, without evidence as to which died first, the proceeds of the policy go to the representatives of the beneficiary, on the theory that he did not die in the lifetime of the insured.

[See note on this question beginning on page 797.]

**Evidence — presumption of survivorship.**

2. When two or more persons perish in the same disaster, and there is no fact or circumstance tending to prove which survived the other, there is no presumption whatever on the subject, and all will be considered to have perished at the same time.

[See 8 R. C. L. 716.]

**Insurance — death in common disaster — survivorship.**

3. The rule that there is no presumption of survivorship in a common disaster applies where insured and the beneficiary died in a common disaster.

**Evidence — failure to sustain burden of proof — effect.**

4. The one who, having the burden of proof in an action, fails to sustain it, suffers defeat.

[See 10 R. C. L. 896.]

**— burden of proof — prior death.**

5. To effect a change of beneficiary under a policy providing that if the beneficiary die before insured, the interest of the beneficiary shall vest in the insured, the burden, where insured and beneficiary perish in a common disaster, rests upon the representatives of the insured to show that the beneficiary died first.

**APPEAL** by claimant from a decree of Pulaski Chancery Court (Martineau, Ch.) in favor of a rival claimant in an interpleader proceeding to determine ownership of the proceeds of a life insurance policy. *Affirmed.*

**Statement by Hart, J.:**

This was a bill of interpleader filed in the chancery court by the Home Life & Accident Insurance Company, in which it stated that there were rival claimants to the proceeds of a policy of insurance,

and that it did not know to which of them it should make payment. It offered to pay the proceeds of the policy into the registry of the court, and asked that the claimants be made parties to the suit to the end that their contest might be settled.

Each claimant filed an answer claiming the proceeds of the policy. The material facts are as follows:

The Home Life & Accident Insurance Company is an old line insurance company doing business in the state of Arkansas, and on the 13th day of February, 1917, it issued a policy of life insurance to W. R. Fischer in the sum of \$5,000, and J. E. Fischer, his son, was named in the policy as the beneficiary. On the evening of the 8th day of January, 1918, during the life of the policy, W. R. Fischer and J. E. Fischer were both shot from ambush in Montgomery county, Arkansas, and instantly killed. Their bodies were found lying in the road the next morning, riddled with buckshot and rifle balls. The bodies were found about 9 o'clock in the morning of January 9, 1918, and were lying in a mudhole, with ice frozen around the bodies.

A witness testified that he heard a volley of gunshots at about 6:30 on the evening of January 8, 1918, and in a few seconds he heard another volley of eighteen or twenty shots. He was in his house, and the shooting occurred in the vicinity of where the bodies were found.

Another witness testified that late in the evening before they were shot, he saw W. R. and J. E. Fischer riding in a buggy toward the place where they were found dead the next morning; that he saw them between sundown and dark, and they were about 3 miles from where they were found dead. There was nothing to indicate which one died first. The policy contained the following: "Any designated beneficiary may be changed by the insured during the continuance of this policy, by filing with the company a written request therefor, accompanied by this policy, such change to take effect upon the indorsement of the same on the policy by the company, whereupon all interest of the former beneficiary shall cease; provided that no such change of beneficiary shall be had if the policy or any interest therein be assigned at the

time of such change. If any beneficiary shall die before the insured the interest of such beneficiary shall vest in the insured."

The administrator of the estates respectively of W. R. Fischer, deceased, and J. E. Fischer, deceased, each filed an answer claiming the proceeds of the policy. The chancellor made a general finding in favor of the administrator of the estate of J. E. Fischer, deceased, and it was decreed that the proceeds of the policy be paid to him as such administrator. The administrator of the estate of W. R. Fischer, deceased, has appealed to this court.

Messrs. C. E. Johnson and S. S. Langley for appellant.

Messrs. Otis Gilleylan and Carmichael & Brooks for appellees.

Hart, J., delivered the opinion of the court:

The evidence shows that W. R. Fischer and J. E. Fischer were riding together in a buggy late in the evening on the 8th of January, 1918, and were shot from ambush and instantly killed. Their bodies were found the next morning lying in the frozen ground, and numerous charges of buckshot appeared to have been fired into their bodies. There is nothing whatever in the proof to indicate which one died first. It is well settled at common law that when two or more persons perish in the same disaster, and there is no fact or circumstance tending to prove which survived the other, there is no presumption whatever on the subject. The law treats the case as one to be established by evidence, and, in the absence of proof tending to show which one died first, all will be considered to have perished at the same moment, not because that fact is presumed, but because from failure to prove it the actual survivorship is unascertainable, and property rights must be settled as if death occurred to all at the same time. 8 R. C. L. p. 716; *Young Women's*

**Evidence—  
presumption of  
survivorship.**



(— Ark. —, 208 S. W. 587.)

Christian Home v. French, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; 1 Greenl. Ev. 16th ed. § 30, p. 126; Lawson, Presumptive Ev. p. 298; United States Casualty Co. v. Kacer, 169 Mo. 301, 58 L.R.A. 436, 69 S. W. 370, 92 Am. St. Rep. 641; Re Wilbor, 51 L.R.A. 863, and note (20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634), and St. John v. Andrews Institute, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708.

The rule that there is no presumption of survivorship in a common disaster applies where the insured and beneficiary died in a common disaster. 14 R. C. L. p. 1380.

Insurance—  
death in com-  
mon disaster—  
survivorship.

In the absence of any presumption as to which died first, the law requires evidence as a foundation for action in the matter. The burden of proof is always upon him who has the affirmative, and if he fails to discharge it with evidence legally sufficient for the purpose, he must suffer defeat. The adversary party succeeds, not upon proof of his own case, but by reason of the absence of evidence on the part of him who has the burden of proof. The authorities are divided upon the question of where the burden of proof lies in cases like this. In some of the cases it is held that the contract in policies like the one in the present case is made conditional on the beneficiary surviving, and that, there being no presumption, in case of death from a common disaster, that the beneficiary has survived the insured, the burden of proof is upon the representatives of the beneficiary, because the conditional benefit becomes absolute only upon proof of actual survivorship. *Middeke v. Balder*, 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002, and *Males v. Sovereign Camp, W. W.* 30 Tex. Civ. App. 184, 70 S. W. 108. Other cases hold that the result is the same as though the insured died first, on the theory that the beneficiary did not die in the

Evidence—  
failure to sus-  
tain burden of  
proof—effect.

lifetime of the insured. *Cowman v. Rogers*, 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64, *United States Casualty Co. v. Kacer*, 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370, and *Faul v. Hulick*, 18 App. D. C. 9.

We think the latter rule is more in accord with the trend of our decisions. It is true that in *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102, and other cases, the court held that the contract of insurance measures the rights of one and the obligations of the other party, and that the insured may change the beneficiary when he is authorized to do so by the policy itself.

Insurance—  
death in com-  
mon disaster—  
right to pro-  
ceeds of policy.

It is insisted by counsel for the appellant that these cases are authority for their position that the burden of proof is upon appellee in the present case because they hold that the beneficiary has no vested interest in the policy. It by no means follows that because the beneficiary has no vested interest that the burden of proof should be cast upon him. In the case of *Sovereign Camp, W. W. v. Israel*, 117 Ark. 121, 173 S. W. 855, the court quoted with approval the following: "It cannot be said that a beneficiary named in a certificate has no rights therein because he has no vested rights. The beneficiary has a right to the proceeds of the certificate of insurance, subject to the right of the member to change the beneficiary according to the terms of the by-laws and regulations of the society, which are a part of the contract of insurance; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary and the society. The power reserved to the member to change the beneficiary qualifies the right of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power

to revoke the appointment continues; but this expectancy becomes an absolute right upon the death of the member, unless he has in the manner prescribed defeated it by the affirmative act of changing the beneficiary."

It is not claimed that the insured changed the beneficiary during his lifetime. Indeed, the statement of facts shows the contrary to be true. We have copied in it the clause of the policy with reference to a change of the beneficiaries, and it need not be repeated here. In it the insured reserved in the contract of insurance the power of substitution of beneficiaries, but did not exercise it. The policy provides that, upon change of beneficiaries upon application of the insured, the same shall take effect upon the indorsement thereof in the policy by the company. The policy was introduced in evidence, and does not show any change of beneficiaries in accordance with this provision. The clause relied on, therefore, is the following: "If any beneficiary shall die before the insured, that the interest of such beneficiary shall vest in the insured."

This provided for a substituted beneficiary in case of the death of the primary one. The beneficiary, therefore, had a qualified interest in the policy, and his death in the lifetime of the insured is therefore a condition which must exist, and must be shown to exist, before the right of any subsequent beneficiary can be asserted.

Evidence—  
burden of proof  
—prior death.

J. E. Fischer was the beneficiary named in the policy, and under its terms his representative had a prima facie title to the fund. In this case by the terms of the policy itself the substituted beneficiary could only take in case the insured survived the beneficiary. It is not a case of where the beneficiary takes in the event he survives the insured. The insured and the beneficiary both died in the same disaster. There is no proof as to which one died first. Until it is shown that the beneficiary died in the lifetime of the insured, we think, according to the terms of the policy of insurance, the fund is payable to the representative of the beneficiary, because it is only in the event of the death of the named beneficiary in the lifetime of the insured that the heirs of the insured can take.

It follows that the decree must be affirmed.

#### NOTE.

A comparison of the holding that the representatives of the first beneficiary in an insurance policy take the insurance in preference to the second beneficiary or his representatives, even though the second beneficiary is the insured, where there is no proof of survivorship of either the insured or the first beneficiary, as expounded by the court in the reported case (*WATKINS v. HOME LIFE & ACCI. INS. CO.* ante, 791), and the holding to the contrary by the court in *McGOWIN v. MENEKEN* is made in the note following the latter case, post, 797.

ANDREW C. MCGOWIN, Admr., etc., of Frank B. Tesson, Deceased,  
Respt.,

v.

S. STANWOOD MENKEN, Admr., etc., of Alice E. Tesson, Deceased, Appt.

*New York Court of Appeals—May 28, 1918.*

(223 N. Y. 509, 119 N. E. 877.)

**Insurance — life — common disaster — proving survivorship.**

To recover under a policy, the proceeds of which are payable to the wife if living at the death of insured, otherwise to his estate, her representative

must, in case both perish in a common disaster, prove that she survived him.

[See note on this question beginning on page 797.]

**APPEAL** by the administrator of the deceased wife from an order of the Appellate Division of the Supreme Court, First Department, in favor of the administrator of the deceased husband, entered upon the submission of a controversy as to the disposition of the proceeds of insurance policies upon his life. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. B. Knowles, C. Ames Brooks, and William C. Armstrong for appellant.

Messrs. Stewart & Shearer, for respondent:

The life insurance policies issued to Frank B. Tesson were New York contracts, and the rights of the beneficiary and the distribution of the proceeds thereunder should be decided according to the law of the state of New York.

Hyde v. Goodnow, 3 N. Y. 266; Central Nat. Bank v. Hume, 128 U. S. 195, 207, 32 L. ed. 370, 376, 9 Sup. Ct. Rep. 41; Wayman v. Southard, 10 Wheat. 48, 6 L. ed. 264; Napier v. Bankers' L. Ins. Co. 51 Misc. 283, 100 N. Y. Supp. 1072; Miller v. Campbell, 140 N. Y. 457, 35 N. E. 651.

In the state of New York there is no presumption of survivorship or simultaneous death in the case of persons who perish in a common disaster.

Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

Where there is no evidence as to which of two persons dying in a common disaster perished first, the courts will dispose of property rights as though death occurred at the same time.

Middeke v. Balder, 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002; Russell v. Hallett, 23 Kan. 276; Young Women's Christian Home v. French, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; Dunn v. New Amsterdam Casualty Co. 141 App. Div. 478, 126 N. Y. Supp. 229.

The interest of the wife was conditioned on her surviving the assured, and the insurance money becomes part of the estate of the assured as though no such beneficiary had been named, unless the representative of the wife proves that the assured died first.

Southwell v. Gray, 35 Misc. 740, 72 N. Y. Supp. 342; Lane v. De Mets, 59 Hun, 462, 13 N. Y. Supp. 847; Waldheim v. John Hancock Mut. L. Ins. Co.

8 Misc. 506, 28 N. Y. Supp. 766; Cole v. Knickerbocker L. Ins. Co. 63 How. Pr. 442; Re Fowles, 176 App. Div. 637, 163 N. Y. Supp. 873; Fuller v. Linzee, 135 Mass. 468.

The burden of proof of survivorship of Alice E. Tesson is upon her next of kin, and in the absence of such proof the amount payable on such policies must be paid to the next of kin of Frank B. Tesson, deceased.

Clymer's Estate, 16 W. N. C. 86; Wing v. Augrave, 8 H. L. Cas. 182, 11 Eng. Reprint, 397, 30 L. J. Ch. N. S. 65, 8 Eng. Rul. Cas. 519; Underwood v. Wing, 19 Beav. 459, 52 Eng. Reprint, 428, 4 De G. M. & G. 633, 43 Eng. Reprint, 655, 3 Eq. Rep. 794, 24 L. J. Ch. N. S. 293, 1 Jur. N. S. 169, 3 Week. Rep. 228; Lehman v. Lehman, 214 Pa. 344, 64 Atl. 598; Knight Templars & M. Mut. Aid Asso. v. Green, 79 Fed. 461; Young Women's Christian Home v. French, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184.

Mr. James G. Dale also for respondent.

McLaughlin, J., delivered the opinion of the court:

Frank B. Tesson and his wife, Alice E., were lost at sea on the 7th of May, 1915, when the Lusitania was sunk. At the time of his death he held three policies of insurance upon his life, issued by the Equitable Life Assurance Society of the United States, each payable, upon his death, to his widow, if living; if not, then to his executors, administrators, or assigns, with the right on his part to change the beneficiary if he so desired. The respective administrators of the estates of Mr. and Mrs. Tesson claimed the proceeds of these policies. The Assurance Society, desiring to be relieved from liability, paid the money into court, and the administrators there-

upon, upon an agreed statement of facts, submitted their respective claims to the appellant division, which held that Mr. Tesson's administrator was entitled to such fund. Judgment was rendered to this effect, from which Mrs. Tesson's administrator appeals to this court.

In case of the death of two or more persons in a common disaster, there is no presumption either of survivorship or simultaneous death. *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *St. John v. Andrews Institute*, 117 App. Div. 698, 102 N. Y. Supp. 808, affirmed in 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708. In the submission the parties agreed it cannot be proved which one survived the other. Under such circumstances, by the express terms of the policies, the proceeds belong to the husband's estate. Mrs. Tesson's right thereto depended upon her surviving her husband. The provision in each policy is that the society will pay, upon receiving proof of the death of Mr. Tesson, "\$5,000 . . . to his wife, Alice E. Tesson, if living; if not, then to the assured's executors, administrators, or assigns." Survivorship of the wife, therefore, was a condition precedent to her taking. Had her administrator brought an action against the society, he would have had to prove, in order to recover, not only the issuance of the policies, but the death of Mr. Tesson prior to that of his wife. Failing in this, a recovery could not have been had. The same result follows, so far as the claim of her estate is concerned, from the submission. The burden of proving survivorship rests upon her administrator, since his claim is through her. Not being able to make such proof, the proceeds go, as the parties obviously intended they should when the policies were issued, to the representatives of the insured, who take under the policies, and not under a survivorship. *Dunn v. New Amsterdam Casualty*

**Insurance—life—common disaster—proving survivorship.**

*Co. 141 App. Div. 478, 126 N. Y. Supp. 229; Fuller v. Linzee*, 135 Mass. 468; *Hildenbrandt v. Ames*, 27 Tex. Civ. App. 377, 66 S. W. 128.

In the Massachusetts case the insurance company promised to pay the sum insured to the wife or assigns within ninety days after due notice and proof of death of the husband, and, in case she should die first, then the amount of the insurance should be payable to their children. The husband, wife, and all of the children were lost at sea, and there was no direct evidence as to which survived the other. The court held that the interest of the wife, under the policy, was contingent upon her surviving her husband, and that neither her assigns nor personal representatives could show any right to the insurance money, except upon proof of such survivorship.

In reaching the conclusion that the estate of Mrs. Tesson is not entitled to the proceeds of the policies, *United States Casualty Co. v. Kacer*, 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370, has not escaped my attention. The decision in that case seems to have been put upon the ground that the beneficiary had a vested interest, subject to being divested by death prior to the insured, and for that reason the court held that the burden was upon the representatives of the insured to prove his survivorship. I have been unable to adopt the reasoning which led the court to that conclusion. There the policy was payable to the beneficiary, if living at the time of the death of the insured, who did not have the right to change the beneficiary. In this respect the case is distinguishable from the one now before us. Mrs. Tesson did not have a vested interest. All she had was an expectancy, subject to be defeated by the assured's designating another beneficiary or failure on her part to survive him. *Lane v. De Mets*, 59 Hun, 462, 13 N. Y. Supp. 347.

I am of the opinion that the judg-

ment of the Appellate Division is right, and should be affirmed, with costs.

Hiscock, Ch. J., and Cuddeback, Cardozo, Pound, Crane, and Andrews, JJ., concur.

# ANNOTATION.

**Disposition of life insurance which, by terms of policy, is dependent upon survivorship, where there is no presumption or proof of survivorship.**

- I. Introduction, 797.
- II. General rule, 798.
- III. Interpretation of contracts, 799.
- IV. Illustrations of various wordings, 803.

## I. Introduction.

The insurance cases, in which the facts meet the conditions of the subject of this note, are all cases in which the insured and the beneficiary perished in a common disaster. The note includes cases in which the contract was a certificate for death benefits in a mutual benefit association, as well as those involving any sort of life insurance policy.

At common law there is no presumption of survivorship arising from the age, sex, etc., of persons who perish in a common disaster, so that any claimant upon whom the law places the burden of proving that one of the persons survived the other will fail in his claim unless he can prove survivorship by circumstances, witnesses, or otherwise. The courts in all of the cases cited, *infra*, as well as in many cases not within the scope of the note, have held that such is the rule at common law. The rule is too broad for exhaustive annotation here, and it is assumed to be correct. The conditions of the question here annotated eliminate the possibility of any claimant's proving survivorship, and limit the scope to cases concerning claimants for the proceeds of life insurance policies. So that the question is narrowed down to one of placing the burden of proof, as that claimant upon whom the law casts the burden of proving survivorship must fail in his claim. To this extent all of the courts agree, but they are not in absolute harmony on the question of where the burden of proof of survivorship is legally placed, and so they reach different conclusions. The weight of

authority is, however, that, as between the representatives of the beneficiary and those named as second beneficiaries, the burden of proving survivorship of the beneficiary over the insured rests upon the former, so that the latter are entitled to the proceeds.

Cases like *Grand Lodge, A. O. U. W. v. Miller* (1908) 8 Cal. App. 25, 96 Pac. 22, where it appeared that a statute had been enacted which raised presumptions of survivorship where there was no proof on the question, are not in point in this note. And cases in which a claimant was able to and did show facts or circumstances sufficient to prove survivorship are also excluded by the conditions of the subject.

In the following cases it has been held that the common law, as above stated, is correct, that the rule of no presumption is applicable to claimants of the proceeds of life insurance policies, where the insured and the beneficiary are both deceased, there being no proof of survivorship between them, and that the claimant upon whom the law casts the burden of proving survivorship must fail in his claim:

**Arkansas.**—*WATKINS v. HOME LIFE & ACCL. INS. CO.* (reported herewith) ante, 791.

**Illinois.**—*Middeke v. Balder* (1902) 193 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002, affirming (1901) 98 Ill. App. 525, which was a second appeal in the case reported in (1900) 92 Ill. App. 227.

**Maryland.**—*Cowman v. Rogers* (1891) 73 Md. 408, 10 L.R.A. 550, 21 Atl. 64.

**Massachusetts.**—*Fuller v. Linzee* (1883) 135 Mass. 468.

**Missouri.**—*United States Casualty Co. v. Kacer* (1902) 169 Mo. 301, 58 L.R.A. 437, 92 Am. St. Rep. 641, 69 S. W. 370; *Supreme Council, R. A. v. Kacer* (1902) 96 Mo. App. 93, 69 S. W. 671.

**New York.**—*McGOWIN v. MENKEN* (reported herewith) ante, 794; *Moehring v. Mitchell* (1845) 1 Barb. Ch. 264 (doubtful holding on this point); *Dunn v. New Amsterdam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229; *Re Hammer* (1917) 101 Misc. 351, 168 N. Y. Supp. 588.

**Texas.**—*Paden v. Briscoe* (1891) 81 Tex. 563, 17 S. W. 42 (holding not clear on point, see quotation, *infra*); *Hildenbrandt v. Ames* (1901) 27 Tex. Civ. App. 377, 66 S. W. 128; *Males v. Sovereign Camp, W. W.* (1902) 30 Tex. Civ. App. 184, 70 S. W. 108.

It should be noted that the contest in most of the cases already cited was not between those who take in the right of the beneficiary, and those who take in the right of the insured as such, but rather between the former and the second beneficiary. In perhaps most of the cases the insured or his estate was the second beneficiary, but the claim is seldom based upon his rights as the insured. (In the Massachusetts case cited *supra*, the contest was between the estate of the insured as such and the representatives of the first beneficiary, and in the Texas case, *Hildenbrandt v. Ames*, cited, *supra*, the court seemed to regard the contest in this light. See discussion of these cases, *infra*.) This distinction is not important in considering the various positions taken by the courts in the interpretation of the contracts that are held to place the burden of proof, for the reason that if the burden of proving survivorship is placed upon the beneficiary's representatives, they cannot take the insurance money, no matter how the other claimant is regarded. The great weight of authority is to the effect that the second beneficiary or the estate of the insured takes the money in preference to the representatives of the first. Where both beneficiaries perish with the insured and no others are named, the question might arise as to whether the representatives of the second have a better right than those of the first. The question has not been decided. It was suggested in *Fuller v. Linzee* (1883) 135 Mass. 468, *infra*,

where the first beneficiary was the wife of the insured, and their children were second, all perishing in a common disaster; but as the representatives of the children were not claiming, and the court held that the wife's representatives must fail, the money went to the insured's administrators, and the point under consideration was not decided. It could have arisen in *WATKINS v. HOME LIFE & ACCL. INS. Co.* (reported herewith) ante, 791, but since the court took the position that the representatives of the first beneficiary need not assume the burden of proof, the point could not arise. The court, in *Cowman v. Rogers* (1891) 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64, *infra*, took the same position, though perhaps upon a different ground, and thus avoided the necessity of deciding the question here discussed.

## II. General rule.

The great weight of authority supports the view that if, in a life insurance policy or in the laws of a mutual benefit association, a second beneficiary is provided, to take on failure of the beneficiary named in the contract, who may be called the first beneficiary, the personal or legal representatives of the first beneficiary must, as against the second beneficiary or the representatives of the insured, assume the burden of proving that the first beneficiary survived the insured, at least where, by the terms of the policy, the first beneficiary does not have a vested interest prior to the death of the insured, and in the absence of such proof of survivorship, the insurance money is payable to the second beneficiary. *Middeke v. Balder* (1902) 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002, affirming (1901) 98 Ill. App. 525, which was a second appeal in the case reported in (1900) 92 Ill. App. 227; *Fuller v. Linzee* (1883) 135 Mass. 468; *Supreme Council, R. A. v. Kacer* (1902) 96 Mo. App. 93, 69 S. W. 671; *McGOWIN v. MENKEN* (reported herewith) ante, 794; *Moehring v. Mitchell* (1845) 1 Barb. Ch. (N. Y.) 264; *Dunn v. New Amsterdam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229; *Re Hammer* (1917)

101 Misc. 351, 168 N. Y. Supp. 588; *Paden v. Briscoe* (1891) 81 Tex. 563, 17 S. W. 42; *Hildenbrandt v. Ames* (1901) 27 Tex. Civ. App. 377, 66 S. W. 128; *Males v. Sovereign Camp, W. W.* (1902) 30 Tex. Civ. App. 184, 70 S. W. 108.

**Contra:** *WATKINS v. HOME LIFE & ACCL. INS. CO.* (reported herewith) ante, 791. And see *Cowman v. Rogers* (1891) 73 Md. 403, 10 L.R.A. 580, 21 Atl. 64, and *United States Casualty Co. v. Kacer* (1902) 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370, as discussed in the following paragraph.

The holding in the last case cited supra, namely, *United States Casualty Co. v. Kacer*, is based upon the doctrine of vested interest. It is held that the first beneficiary had a vested interest in the proceeds of the policy even prior to the death of the insured, as shown by the fact that the insured had no power to change beneficiaries without her consent. This being the case, the court held, the burden of proving that the beneficiary was not living when the insured died is upon those claiming adversely to her. This may also have been the theory of the court in the *Cowman Case*, cited supra, immediately preceding the *Kacer Case*. (See quotation from *Hildenbrandt v. Ames* (Tex.) under III. infra, where the Texas court comments on this case.) It will be seen that cases decided upon this theory do not support the holding in *WATKINS v. HOME LIFE & ACCL. INS. CO.* as cited, since the doctrine is not applicable to cases in which it is admitted that the first beneficiary does not have a vested interest prior to the death of the insured. (This decision by the highest court in Missouri was held by a lower court in the same state, in *Supreme Council, R. A. v. Kacer* (1902) 96 Mo. App. 98, 69 S. W. 671, cited supra, to be not applicable where the beneficiary does not have a vested interest.) It will also be observed that the holding, since it is limited to cases where the beneficiary has a vested interest, is not directly opposed to the weight of authority, as cited supra, but the court in *Dunn v. New Amster-*

*dam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229, supra, held that the doctrine is not applicable even where the beneficiary cannot be changed without her consent, and for some purposes the beneficiary may be said to have a vested interest. See comment on this case by the court in *McGOWIN v. MENKEN* (reported herewith) ante, 794. Technically, it sounds logical to say that the policy vests an interest in the beneficiary subject to defeat upon proof that the insured survived the beneficiary, but the doctrine is open to the criticism that it applies to an insurance policy the rules of interpretation that are applicable only to instruments under seal, such as deeds, etc. The other courts seem to think that the policy should be construed more as the court would construe a will, that is, deduce the intention of the insured from the whole policy viewed in the light of all circumstances. See discussion, under III. infra.

### III. Interpretation of contracts.

In *McGOWIN v. MENKEN* (reported herewith) ante, 794, the New York court held, in harmony with the great weight of authority, that the second beneficiary named in the policy is entitled to the insurance money as against the representatives of the first beneficiary, there being no proof of survivorship as between the insured and the first beneficiary, at least where the policy does not vest an interest in the beneficiary prior to the death of the insured, while the Arkansas court in *WATKINS v. HOME LIFE & ACCL. INS. CO.* (reported herewith) ante, 791, reached the opposite conclusion. There was a slight difference in the wording of the two contracts, and this might possibly account for the difference in the holdings. Both courts held that the beneficiary did not have a vested interest in the proceeds of the policy prior to the death of the insured, the Arkansas court holding that those who legally take in the right of the beneficiary could take the insurance money, notwithstanding the fact that the beneficiary did not have a vested interest by the terms of the policy. The holding goes beyond that

in any other reported case, since, with the possible exception of *Cowman v. Rogers* (1891) 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64, in all of the cases in which the representatives of the beneficiary were awarded the proceeds the decisions are based upon the fact that the beneficiary had a vested interest prior to the death of the insured. (The holding in the *Cowman* Case is discussed, *infra*.) Thus, the holding in *WATKINS v. HOME LIFE & ACCL. INS. CO.* that the proceeds go to the representatives of the beneficiary even though the beneficiary did not have a vested interest prior to insured's death, is not supported by any decision reported at this time, and it is opposed by several cases. The holding seems to be based entirely upon the wording of the particular policy. There is a slight difference in the wording of the two contracts, the New York court holding that the contract clearly makes the survival of the wife a condition of her taking, while the Arkansas court holds that the contract casts the burden upon those who would take through the second beneficiary, of proving that the first beneficiary died first. Notwithstanding this slight difference in the wording of the contracts, the wording in each case technically supporting the court's interpretation, the impression is gained that if either court had been deciding both cases, there would have been no difference in the conclusion, and the result would have been the same in both cases. It does not seem reasonable that either court would be willing to make a distinction based upon the particular language used by the insurance company in its policies to express an identical idea. This impression is materially strengthened by the fact that the courts in several cases in which the contract was like that before the Arkansas court have reached the same conclusion as that reached by the New York court: *Middeke v. Balder* (1902) 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002; *Fuller v. Linzee* (1883) 135 Mass. 468; *Dunn v. New Amsterdam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229; *Paden v.*

*Briscoe* (1891) 81 Tex. 563, 17 S. W. 42 (see same cases under IV. *infra*, for wording of contracts).

In any event, it seems more reasonable for the court to take a broad view of the purpose of the insured in taking and paying for the insurance. For example, a man takes life insurance, naming his wife as first beneficiary, and his estate second; he certainly intends his estate to receive the money in case his wife does not live to receive and enjoy it. By no stretch of the imagination can it be supposed that he meant, under any circumstances, that his brother-in-law should get the money while, perhaps, the creditors of his estate go unpaid. This would seem to be equally apparent whether the printed form of policy read "payable to the wife, if living," as it was in the New York case, or "if any beneficiary shall die before the insured, that the interest of such beneficiary shall vest in the insured," as was the wording in the Arkansas case. This broad view has been taken by most courts.

The court took this view of the contract in *Dunn v. New Amsterdam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229, where the contract, technically construed, would have defeated the claim of the insured's administrator, claiming as second beneficiary, but the decision is in his favor. (See wording of the contract where same case is cited, IV. *infra*.) The court said: "Although the language of the clause in question was in fact the language of the defendant, it was a part of its printed form of contract, we think it is to be construed as the language of the assured. That particular form of policy was accepted by the assured, who thereby adopted as her own the language of the clause providing for the disposition of the money to become due under it. The assured alone was interested in that question. It is not easy to perceive why a different rule of construction should be applied to the clause of a life insurance policy providing for the disposition of the money to become due under it from that applicable to a testamentary



disposition, where both have the same object; i. e., provision for those who are the natural objects of the assured's or the testator's bounty. The mere fact that one instrument is a will and the other a contract appears to us to be of little consequence. In the one case the intention of the testator, in the other the intention of the insured, is paramount. The insurer has no interest in the matter, except to have the provisions definite enough for its protection. It is obvious that the policy in question was not taken out for the benefit of the personal representatives of the beneficiary named. They were not in the mind either of the insured or of the insurer. Upon its face the policy was procured for the benefit, first, of the assured's sister; second, of the assured's estate or next of kin. The indemnity was made payable to the sister, or, in the event of her prior death, to the legal representatives of the assured. Phraseology is important only to determine the intention, which in this case was that the indemnity should be paid to the sister, if living, otherwise to the legal representatives of the assured. And that purpose could not have been made more manifest if that language had been employed. The survivorship of the sister, then, was a condition of her taking, and it begs the question to say that she took a vested interest subject to being divested by her prior death. No doubt the law is that, in the absence of a reservation of the right to change a beneficiary, that may not be done by the assured. But the cases on that head have no application whatever to the question now being considered. Here the beneficiary named was not to take at all events, but only in case she survived the assured. And the case is therefore in principle precisely like the cases of fraternal or mutual benefit insurance, in which the right to change the beneficiary is expressly reserved, and in which it has been uniformly held, as is conceded by the respondent, in this and other jurisdictions, that those claiming under the beneficiary named must prove survivorship." It should be noted, however.

5 A.L.R.—51.

that Laughlin, J., wrote a dissenting opinion in this case; and he also wrote the opinion for the appellate division in *McGowin v. Menken* (1917) 177 App. Div. 841, 164 N. Y. Supp. 953, which is now affirmed by the decision in *McGOWIN v. MENKEN* (reported herewith), ante, 794. In the latter opinion, he says: "The learned counsel for the administrator of the wife contends that on the facts stated it is fairly to be inferred that the husband intended that, in the event of the death of himself and his wife in a common disaster, her next of kin should take in preference to his, and he draws attention to statements argumentatively made in *Dunn v. New Amsterdam Casualty Co.* (N. Y.) supra, with respect to the probable intention of the assured, and argues that they were controlling factors in the decision therein made. An examination of the opinion will disclose that the phraseology of the contract was the controlling consideration in construing it." So, it seems quite clear that he believed that a decision based upon the principles set forth in the quotation here made from the earlier decision would have led to the defeat of the claim by the insured's administrator. He stated the circumstances of the parties in the latter case, as follows: "The parties were married at St. Louis on the 28th of August, 1895. Mrs. Tesson was a widow, and had three sons by her former husband, who, at the time of her marriage to Mr. Tesson, were twenty-one, eighteen, and eight years old, respectively. Her three sons are without means. The youngest is a cripple, and wholly unable to support himself. He is unmarried, and Mr. Tesson supported him and gave him a small weekly allowance for spending money. Her other two sons are self-supporting. One is married and has six children, ranging from two to eighteen years of age, and four of them are girls. The next of kin of the husband are his mother, brother, and two sisters, none of whom resided with or was dependent upon him for support." But it is not proposed that the court pick out the claimant who is most in need of

the money or even who was most dependent upon the assured. The real question is, Does not the fact that the insured designated a second beneficiary, in itself, show that he intended such beneficiary to get the money in case the first beneficiary is not living to use it?

In *Paden v. Briscoe* (1891) 81 Tex. 563, 17 S. W. 42, the court said: "In order to divert the fund from the direction named by the husband, it devolved upon the interveners to establish by evidence the existence of the contingency that would accomplish such purpose. The court below finds that the wife, the beneficiary named by the husband, did not die before her husband, but died at the same instant. The result of this finding is that the beneficiary named at the time the policy was earned by the death of the husband did not survive him, and was incapable of taking the proceeds of the policies. The purpose of this contract of insurance, entered into by the husband and the association, was to provide a fund for his wife, payable at his death, and in the event she was incapable of taking by reason of her death, then those heirs of the husband dependent upon him should take. These are plain provisions of the rules and by-laws of the association that enter into and form a part of the contract of insurance. The use of the words 'die before' in the contract of insurance was evidently intended to mean that the beneficiary named must be dead and incapable of taking at the time the policy was earned by reason of the death of the husband. The instantaneous death of both the husband and wife successfully accomplished the inability of the wife to take as if she had died before. The court below finds that the interveners are the heirs of John F. Briscoe, and were dependent upon him at his death. The contingency having occurred that would vest the property in his heirs dependent upon him, the court correctly rendered judgment in favor of appellees."

In *Hildenbrandt v. Ames* (1901) 27 Tex. Civ. App. 377, 66 S. W. 128, the court said: "We think the question

can be properly determined by a consideration of the nature of the contract of insurance, the character of the interest which the beneficiary has in such contract, and the intention of the parties as evidenced by the language of the contract and the object sought to be obtained by its creation. We think the contract in its nature is analogous to that of an express trust. The insured is the grantor or creator of the trust, the insurance company the trustee, and the beneficiary the cestui que trust. While the trust fund out of which the beneficiary is to receive the amount named in the policy cannot, strictly speaking, be said to have been created by the insured, by the terms of the contract he secures an interest in a fund provided by the insurance company equal to the amount named in the policy payable at his death, and under this contract, which he obtains and keeps alive by the payment at stated times during his life of certain specified amounts to the insurance company, the amount named in the policy is held by the insurance company in trust for the beneficiary. If we consider the policy of insurance as partaking of the nature of a trust, rather than a chose in action, it is at once seen that the interest of the beneficiary is not a 'vested' interest in the broadest sense of that term, and the trustee cannot be compelled to execute the trust until the contingency happens which entitles the cestui que trust to its execution. It follows that the burden is upon the beneficiary to show that such contingency has happened, and all the conditions which are necessary to vest the title to the fund in him have been complied with, and unless the beneficiary's right to the fund is so proven, there is a failure of the trust, and the fund reverts to the insured or his representatives.

. . . This view of the law, we think, harmonizes with the primary object and purpose of life insurance and with the manifest intention and understanding of the insured in entering into the contract. Life insurance has for its primary object the protection of those who would be pecuniarily damaged by the death of the insured,

and to permit those who would not be so damaged to receive the benefit of the policy would be to defeat the purpose and intent of the contract; and especially is this true when the insured, as in this case before us, provides in the contract that the policy shall only be payable to the beneficiary in event she is living at the time of his death. Under the terms of the policy in question we are of opinion that Mrs. Doll's interest in the proceeds was a contingent interest, not transmissible to her heirs, and that it devolved upon her representatives to show that the contingency had happened which would entitle her to receive the proceeds of the policy. The appellant having failed to make this proof, the policy reverted to the estate of Frank Doll, and the trial court properly rendered judgment in favor of the administrator of said estate. The case of *Cowman v. Rogers* (1891) 73 Md. 406, 10 L.R.A. 550, 21 Atl. 64, is directly in point, and fully sustains the contention of appellant, but the opinion in that case is based upon the theory that the interest of the beneficiary in the insurance policy was a vested interest in the absolute sense of that term, and as before shown we do not consider this theory sound."

In *Fuller v. Linzee* (1883) 135 Mass. 468, the court said: "Mr. Fuller procured the contract in order to make a provision for his wife and children after his death. This provision he made, not by settling property upon them with limitations and successions, but by providing for payments of money to be made to them after his death. So far as the contract is to be regarded as his language, it is to be construed in view of these considerations. He was providing for the disposition of a fund which was not to exist until after his death, and he made the provision by designating the persons to whom it was to be paid, and his obvious intention was that it should be paid to his wife if she should survive to take it, and to their children if she should not survive. That it was intended to be payable to the wife upon the contingency that she should survive him appears from the considerations that

it was a provision for her support, which was not to come into existence until his decease; that it was not made payable to her personal representatives, although no right of action could arise until his decease; and that it was to be paid to her children if she died before her husband."

#### IV. Illustrations of various wordings.

It has been held, in cases in which there was no proof or presumption of either survivorship or synchronous deaths, as where the insured and the first beneficiary perish in a common disaster, that the second beneficiary is entitled to the insurance money as against the first beneficiary—

—where the contract in question was a certificate of a mutual benefit association which designated the wife of the insured as the beneficiary, and the laws of the association provided that "in the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made, the benefit shall be paid to the heirs of the deceased." *Middeke v. Balder* (1902) 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002;

—where the contract provided that if the beneficiary "should die before the decease" of the insured, the amount should be payable to their children, the beneficiary being the wife, and both husband and wife as well as the children all perishing in a common disaster (here the representatives of the second class were not claiming, so it was held that those of the second could not take as against the estate of the insured). *Fuller v. Linzee* (1883) 135 Mass. 468;

—where the contract was with a mutual benefit society, the laws of which create no vested interest in the beneficiary named, and, taken as a whole, show that the intent is to provide for persons dependent upon the assured, and the representatives of the beneficiary were not dependent upon him by relationship or otherwise. *Supreme Council, R. A. v. Kacer* (1902) 96 Mo. App. 93, 69 S. W. 671;

—where it was conceded that the right to change the beneficiary was

not reserved, the lower court's decision following the vested-interest theory being reversed, and the contract provided that "the indemnity for loss of life shall be payable to the beneficiary named in the stub attached hereto; or in the event of the prior death of such beneficiary, or in the event that no beneficiary is named in the said stub as herein provided, then to the legal representatives of the assured." *Dunn v. Amsterdam Casualty Co.* (1910) 141 App. Div. 478, 126 N. Y. Supp. 229;

—where the company, in issuing the policies, contracted "to pay . . . to Albert R. Smith . . . herein called the insured, on the fifth day of April, 1923, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to his wife, Gladys E. Smith, the beneficiary, with the right to the insured to change the beneficiary . . . upon the surrender of this policy properly receipted. Death of Beneficiary before Insured: Change of Beneficiary.—If any beneficiary die before the insured, the interest of such beneficiary shall vest in the insured, unless otherwise provided herein. When the interest of a beneficiary shall have vested in the insured, or when the right to change the beneficiary has been reserved, the insured . . . may . . . designate a new beneficiary, by filing written notice thereof at the home office of the company, accompanied by this policy for suitable indorsement hereon." *Re Hammer* (1917) 101 Misc. 351, 168 N. Y. Supp. 588;

—where the contract was a certificate of a mutual benefit society, naming the beneficiary, and the laws of the society provided that "should all the beneficiaries named die before the decease of a member, and no other or further disposition be made thereof, the benefit shall be paid to the heirs of the deceased member dependent on him or her, and if no person or persons are entitled to receive such benefit, then it shall revert to the relief fund of said knights and ladies of honor." *Paden v. Briscoe* (1891) 81 Tex. 563, 17 S. W. 42;

—where the policy was made payable to the wife of insured, "if living, if not living, to the insured's executors, administrators, or assigns." *Hildenbrandt v. Ames* (1901) 27 Tex. Civ. App. 377, 66 S. W. 128;

—where the contract was a certificate in a mutual benefit society, and insured a beneficiary, the laws of the society providing a second, third, and fourth beneficiary in case of death of the one named before insured, and permitting a change of beneficiaries. *Males v. Sovereign Camp, W. W.* (1902) 30 Tex. Civ. App. 184, 70 S. W. 108.

But the opposite conclusion has been reached—

—where the policy provides that "if any beneficiary shall die before the insured, that the interest of such beneficiary shall vest in the insured," thus casting upon the estate of the insured the burden of proving that the beneficiary died first. *WATKINS v. HOME LIFE & ACCL. INS. CO.* (reported herewith) ante, 791;

—where the contract was a certificate issued by a mutual benefit society, payable to the wife of the insured, and the laws of the association provided that if the beneficiary named in the certificate should die in the lifetime of the member, and the latter should make no other disposition of the benefit, it shall be paid to the member's widow; if no widow, then to his children; if no widow or children survive him, then to his mother; and if she is dead, then to his father, and failing all these, then to his brothers and sisters. *Cowman v. Rogers* (1891) 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64;

—where the contract provided that the insurance is payable to the daughter, "if surviving, if not, to the legal representatives of the insured," the insured and the daughter perishing in a common disaster, the court holding that an interest vested in the beneficiary, since the policy could not be changed in that respect without her consent. *United States Casualty Co. v. Kacer* (1902) 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370.  
J. W. M.

A. CONIGLIO, Respt.,  
v.  
CONNECTICUT FIRE INSURANCE COMPANY, Appt.

*California Supreme Court (Dept. No. 2) — June 17, 1919.*

(— Cal. —, 182 Pac. 275.)

**Insurance — property bought on conditional sale — violation of warranty.**

1. An insurance policy on stock and fixtures is not vitiated because the title of insured is stated to be fee simple, while among the fixtures is an implement bought under conditional sale, title to which is not vested in insured, if it was not specifically covered by the policy and all claim to recovery for it was waived, although it was included in the schedule of losses.

[See note on this question beginning on page 808.]

**— cause of explosion — finding.**

2. Failure to find that an explosion which aided in destroying insured property was caused by fire within the building is immaterial, where it is found that fire preceded and caused the explosion.

[See 14 R. C. L. 1218.]

**Evidence — of fire — sufficiency.**

3. Evidence that fire or flames were seen in a store some time before the occurrence of an explosion justifies a finding that the flames were attacking the insured stock and fixtures before the explosion occurred.

**— fragments as evidence of explosion.**

4. That fragments of the building in which an insured stock was stored were found some distance away from its site after an explosion which occurred in the building does not show that the explosion occurred before the stock was attacked by fire, if little of the stock was found so scattered.

**Appeal — comparison of testimony.**

5. The appellate court cannot compare the testimony of different wit-

nesses in a case tried without a jury, to resolve a disputed fact in the case.

[See 2 R. C. L. 204 et seq.]

**Insurance — on subject of conditional sale.**

6. A purchaser at conditional sale, by the terms of which title is to remain in the vendor until the price is paid, has an insurable interest to the extent of payments made.

[See 14 R. C. L. 916.]

**— interpretation of contract.**

7. Insurance contracts are to be interpreted in the light of the fact that they are drawn by the insurer and are rarely, if ever, understood by the people who pay the premiums.

[See 14 R. C. L. 926.]

**Appeal — summary of evidence after argument — irregularity.**

8. The furnishing, after argument, to the judge sitting without a jury in an insurance case, of an analysis by an expert accountant of the testimony as to the losses and a summary of the testimony of one witness upon the subject, is not reversible error, although an irregularity, if no prejudice is shown.

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County (Hewitt, J.) in favor of plaintiff in an action brought to recover an amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John R. Layng for appellant.

Messrs. Force Parker and F. D. R. Moots for respondent.

Melvin, J., delivered the opinion of the court:

Plaintiff recovered judgment on

a policy of fire insurance issued by defendant, insuring plaintiff against all loss by fire in the sum of \$1,500 on a stock of merchandise while contained in a described building in the city of Los Angeles, and \$500

on furniture and fixtures while contained in said building. Judgment was rendered in favor of plaintiff for the aggregate of these sums, together with interest and costs. From this judgment defendant appeals.

The court found that on July 21, 1913, the stock and fixtures covered by said policy were totally destroyed by fire; that the merchandise, the furniture, and other equipment were worth much more than the respective amounts of insurance, and that defendant was fully liable. The court also found as follows: "That during said fire, but subsequent to the commencement thereof, an explosion occurred in said building. That there was no explosion prior to said fire. That to the contrary said fire preceded and was the cause of said explosion."

The court also by the findings negated defendant's attempted showing of fraud in the presentation by plaintiff of his proofs of loss.

One of the contentions of defendant was that the policy was vitiated because there was contained among

Insurance—  
property bought  
on conditional  
sale—violation  
of warranty.

the fixtures a certain computing scale of which the plaintiff was not the sole and unconditional owner, title being vested in the vendor, a certain scale company. Upon this branch of the case the court found that the scale was not specifically named in the policy; that plaintiff waived in open court all claim for loss of or damage to said scale; that plaintiff had not concealed or misrepresented any material fact relating to this personal property, although he had included in his schedule of losses the said scale, believing that his equitable interest therein entitled him to recover from the insurer the cash value of the property.

Appellant contends that the findings fail to indicate that the explosion occurred by reason of a fire within the building. This is hypercriticism. There was a finding, which is quoted above, that the fire

preceded and caused the explosion. There was also a finding against defendant's contention that the building and contents were destroyed by an explosion occurring "within said frame building," and another that "an explosion did occur in said building on said 21st day of July, 1913, but that said explosion was subsequent to the commencement of said fire, and was the result of and was occasioned by said fire." We cannot see how, in view of these findings, it may be fairly or at all inferred

—cause of  
explosion—  
finding.

that a fire without the building may have caused the explosion within.

Appellant denies that the testimony or any of it tends to establish the conclusion that the stock and store fixtures had been attacked by fire when the explosion took place.

Several witnesses testified that they saw "light," or "fire," or "flames" in the direction of plaintiff's store some time before the explosion. One witness, Rioloc, said he saw the fire "at" plaintiff's store, and that shortly after there was an explosion. Without reviewing the testimony in detail, we think it sufficient to say that the findings are supported. Many of the witnesses spoke through an interpreter, and their statements are not, perhaps, so clear and satisfying as would be those of witnesses familiar with the English language; but there was sufficient testimony to justify the court in concluding that

Evidence—  
of fire—  
sufficiency.

there was a fire within plaintiff's store which, by its size and extent, must have been attacking the stock and fixtures at the time of its discovery and before any question relating to the injury worked by the explosion could arise.

Defendant bases its contention that the explosion and not the fire caused the damage upon testimony regarding fragments of the building found at some distance from the site of the store. But other witnesses said that they could

—fragments as  
evidence of  
explosion.

find no part of the stock or fixtures thus dispersed. One of defendant's own witnesses testified that there were of the grocery stock outside of the lines of the building the next morning only a few cans. The testimony on behalf of plaintiff, if believed, justified the court in concluding that there had been a substantial destruction of the stock and fixtures before the explosion dispersed any of the parts of the house. *Fountain v. Connecticut F. Ins. Co.* 158 Cal. 760, 139 Am. St. Rep. 214, 112 Pac. 546, cited by appellant, is not in point here. In that case the evidence, without substantial conflict, was that the building had been destroyed by earthquake before the fire started. Appellant asks this court to compare the testimony of certain witnesses, who said that they observed the illumination from a distance of several blocks, and that they subsequently heard an explosion, with that of witness Vatcher that there was no light in or about the plaintiff's premises prior to the detonation. Such a comparison is beyond our duty or power.

**Appeal—  
comparison of  
testimony.**

That was the peculiar province of the learned judge of the superior court who presided at the trial, trying matters both of law and of fact, a jury having been waived by the parties.

It is contended that plaintiff had no insurable interest in the automatic scale described in the findings; that the policy is nonseverable, and that by reason thereof it never attached to the risk. There is no merit in the insurance company's position in that behalf. A purchaser of property under conditional sale, by the terms of which title is to remain in the vendor until full payment is made, has at least an insurable interest to the extent of his payments on account. 14 R. C. L. 916, § 93; *Tabbut v. American Ins. Co.* 185 Mass. 419, 102 Am. St. Rep. 353, 70 N. E. 430. See 20 Am. Dec. 513, note,

**Insurance—  
on subject of  
conditional sale.**

an insurable interest to the extent of his payments on account. 14 R. C. L. 916, § 93; *Tabbut v. American Ins. Co.* 185 Mass. 419, 102 Am. St. Rep. 353, 70 N. E. 430. See 20 Am. Dec. 513, note,

*Vendor & Vendee.* Appellant suffered no possible injury by reason of the fact that plaintiff owed \$50 on the scale at the time of the fire, because there was a waiver at the trial of any claim arising out of the destruction of that article. It is true that in the portion of the policy signed by the witnessed mark of Coniglio (who could not read or write) was a declaration that the interest of the insured in the property was "fee simple," but there was no showing that appellant was or could be injured in the slightest degree by such alleged misrepresentation. It is to be remembered that contracts of this sort are to be interpreted in the light of the fact —interpretation  
of contract. that they are drawn

by the insurance companies, and are rarely, if ever, understood by the people who pay the premiums. Every rational indulgence must be shown by the assured. *Raulet v. Northwestern Nat. Ins. Co.* 157 Cal. 213, 107 Pac. 292. The case of *Goorberg v. Western Assur. Co.* 150 Cal. 510, 10 L.R.A.(N.S.) 876, 119 Am. St. Rep. 246, 89 Pac. 130, 11 Ann. Cas. 801, cited by appellant, has no application to the facts of this case. In that case the applicant for insurance had misrepresented his title to the land on which his house was built, stating that he owned the fee, whereas he was a mere "squatter" on lands of the government. The court held that such a misrepresentation was material because it increased the hazard on all property covered by the policy.

It is further contended that there was a gross irregularity demanding reversal of the judgment, due to the fact that plaintiff's attorneys, after argument, tendered to the judge, and he read, a report of an accountant regarding certain books and matters of account which had been introduced in evidence with the purpose of showing the amount and value of stock in plaintiff's store at the time when the fire started. It is shown by affidavits

that at the close of the taking of testimony in the case one of the counsel for plaintiff made an opening argument. During the reply of defendant's counsel the judge of the court stated that he would be pleased if the attorneys would furnish him with statements of the figures deemed of importance and brought out in the course of the trial. Plaintiff's counsel made no closing argument, and there was, according to his affidavit, no formal or other order that the cause stand submitted. Subsequently, defendant's counsel furnished the court with a document purporting to contain "memoranda of figures used on argument," but which also contained certain argumentative matter and certain authorities. Thereafter plaintiff's counsel served on defendant's counsel and delivered to the judge, as their reply to defendant's written argument, a report of one Rea, an accountant. This was adopted by counsel for plaintiff as their argument. It was a review of all the evidence in the record on the amount and value of plaintiff's stock. Plaintiff's counsel also sent to the judge, without serving it upon opposing counsel, a summary of

the testimony of Mr. Coniglio as to the value of the property destroyed. While this may have been an irregularity, it does not appear that the "summary" was in any respect improper. It consisted of a tabulated statement of figures indicating the value of property destroyed, as Mr. Coniglio estimated its worth. It was accompanied by no comment. Nor can we see how defendant was injured by the analysis of the testimony made by the accountant. It was in the nature of an informal brief furnished by plaintiff's representatives. It does not appear that appellant's counsel regarded this document and its service as a serious invasion of the rights of the insurance company, for he made no motion to reopen the case for the cross-examination of Mr. Rea. In other words, there is no showing that the informality in the manner of argument injured the defendant, or that it did or could prejudice that litigant with the learned judge of the trial court.

Appeal—  
summary of  
evidence after  
argument—  
irregularity.

The judgment is affirmed.

We concur: Wilbur, J.; Lennon, J.

### ANNOTATION.

**Insurance: effect of violation of warranty or condition of sole and unconditional ownership as regards one or more of several items of property covered by policy.**

- I. Where items are not insured for separate amounts, 808.
- II. Where items are insured for separate amounts, 810.
- III. Provision avoiding entire policy, or similar clause, 814.
- I. *Where items are not insured for separate amounts.*

It will be observed that in the reported case (*CONIGLIO v. CONNECTICUT F. INS. CO.* ante, 805) the policy involved, which covered a stock of merchandise for a certain sum and furniture and fixtures for another sum, but did not insure the different articles comprising the furniture and fixtures

separately, was held not vitiated as to either the stock, furniture, or other fixtures because there was among the fixtures a computing scale of which the plaintiff was not sole and unconditional owner,—it appearing that the scale was not specifically named in the policy; that the plaintiff waived all claim for loss or damage to it; and that he had not concealed or misrepresented any material facts relating thereto, although he had included it in his schedule of losses, believing that his equitable interest therein entitled him to recover its cash value.

In *Dow v. National Assur. Co.*



(1904) 26 R. I. 379, 67 L.R.A. 479, 106 Am. St. Rep. 728, 58 Atl. 999, where the policy covered household furniture of every description, the risk was held avoided as to all of the furniture by reason of the fact that the insured did not own a considerable portion of it, and a recovery on account of the furniture actually owned by the insured was denied. The court stated that when insurance is contracted upon property as a whole it is no answer to say that the insured owned a part of it, and that the condition providing for a termination of the risk was plain.

And in *Dumas v. Northwestern Nat. Ins. Co.* (1898) 12 App. D. C. 245, 40 L.R.A. 358, a policy which insured furniture for a gross sum was held a single and entire contract, and avoided as to all of the property by a breach of the provision as to sole and unconditional ownership as regards parts of the property.

And in *Hinman v. Hartford F. Ins. Co.* (1874) 36 Wis. 159, a policy insuring a hop house and certain personal property therein, apparently not for separate amounts, was held an entire contract, and a breach of the condition as to the realty was held to avoid the entire risk, notwithstanding the fact that the insured was the sole owner of the personal property.

In *Cooper v. Insurance Co. of Pa.* (1897) 96 Wis. 362, 71 N. W. 606, where the policy insured for a lump sum household and kitchen furniture, beds, wearing apparel, sewing machines, etc., it was held that the risk as to other articles was not avoided by reason of the fact that the insured was not the sole and unconditional owner of a sewing machine, although the policy provided that the entire policy should be void if the interest of the insured was other than sole and unconditional ownership. The court said: "The policy did not, in terms, designate any specific articles of property, but described it generally by classes. The policy itself did not designate any particular sewing machine as the one to be protected by its insurance. Doubtless, it was intended to cover any sewing machine at that place of which the plaintiff was

the sole and unconditional owner at the time of the loss, and no other. The effect must be that, if the plaintiff's title to this machine was not the sole and unconditional ownership, this machine was not insured by the policy. It could have no effect as to other property of which the plaintiff did have proper title. The property to be covered by the insurance is indeterminate and not specific. It was intended to cover all the property of the classes named of which the plaintiff should be possessed with proper title, at the place designated, at any time during the life of the policy. If some articles of the classes named, which were in plaintiff's possession, should not be his property, it simply was not intended to insure such. That could not affect the contract as to other property in his possession, of which he had proper title. The contract, in this sense and to this extent, is certainly divisible, and was intended to be so. The action of the court, in requiring the remission from the verdict of the value of the machine, removed all ground for complaint in that regard by the defendant."

In *Parsons v. Lane (Re Millers' & Mfrs. Ins. Co.)* (1906) 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144, a policy for a certain sum covering a building, and the stock and machinery situated in it, which were described in detail, and providing that the entire policy should be void if the interest of insured was other than unconditional and sole ownership, was held avoided as to the entire property by a breach of the foregoing provision, the theory of the case being that the breach of the condition increased the risk on the whole property. The court said that the condition with reference to the title affected the building, and its breach increased the moral hazard of the risk; that it was stipulated that the loss was on stock, machinery, boiler, and engine house; that the building stood on leased grounds; that the stock and machinery were in the building and additions thereto, and that the boiler and engine house were apparently situated upon the same leased land and

adjacent to the same building, and that it was thus apparent that whatever increased the risk to the building inevitably increased the risk on all the other property that was destroyed. This argument is further developed in cases cited in II. *infra*.

*II. Where items are insured for separate amounts.*

In many cases the policies involved have been construed as divisible, rather than entire, where the different items were insured for separate amounts, even though the premium was for a gross sum, with the result that a breach of the condition as to ownership as to one item was held not to avoid the risk as to the other items insured. *North America Ins. Co. v. Hofing* (1888) 29 Ill. App. 180; *Phoenix Ins. Co. v. Lawrence* (1862) 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Turner v. Home Ins. Co.* (1916) 195 Mo. App. 138, 189 S. W. 626; *Stephens v. Germania Ins. Co.* (1895) 61 Mo. App. 194; *Donley v. Glens Falls Ins. Co.* (1906) 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81; *Schuster v. Dutchess County Ins. Co.* (1886) 102 N. Y. 260, 6 N. E. 406; *Coleman v. New Orleans Ins. Co.* (1892) 49 Ohio St. 310, 16 L.R.A. 174, 34 Am. St. Rep. 565, 31 N. E. 279; *Georgia Home Ins. Co. v. Brady* (1897) — Tex. Civ. App. —, 41 S. W. 513.

Thus, in *Donley v. Glens Falls Ins. Co.* (1906) 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81, where the policy insured realty and personality for separate amounts, it was held that a breach of the provision as to sole and unconditional ownership as regards the realty did not avoid the policy as regards the personality. The court stated that it was well settled that where by the same policy different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable, and that a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention.

And in *Turner v. Home Ins. Co.* (1916) 195 Mo. App. 138, 189 S. W. 626, a policy covering a dwelling house

for a certain sum, and the furniture contained therein for another sum, was held a severable contract as to the house and the furniture, so that a violation of the provision as to sole and unconditional ownership as regards the real estate would not defeat a recovery for the destruction of the personality.

And in *Coleman v. New Orleans Ins. Co.* (1892) 49 Ohio St. 310, 16 L.R.A. 174, 34 Am. St. Rep. 565, 31 N. E. 279, a policy, issued for a gross premium, insuring a stated amount on a storehouse, and another amount on a stock of goods therein, was construed as a severable contract, so that a breach of the condition as to the title and ownership of the land did not defeat the right to recover for the loss of the stock of goods. The court in this case stated that it was not likely that the small amount of insurance on the storehouse, which was only \$200, constituted any inducement for the insurance placed upon the stock of goods, which was insured for about \$4,000.

And in *Georgia Home Ins. Co. v. Brady* (1897) — Tex. Civ. App. —, 41 S. W. 513, where the policy insured realty and personality for separate amounts, the risk as to the personality was held avoided because the insured was not the sole and unconditional owner of a part of the personal property, but this was held not to avoid the risk as to the realty, since the contract was divisible. And the same conclusion, under a like condition of facts, was reached in *Springfield, F. & M. Ins. Co. v. Green* (1896) — Tex. Civ. App. —, 36 S. W. 143.

And in *Phoenix Ins. Co. v. Lawrence* (1862) 4 Met. (Ky.) 9, 81 Am. Dec. 521, it was held that although the insurance on a building was void on account of an incorrect statement as to ownership, the insurance on the personality contained in the building was not rendered void, it appearing that the building and the goods were each insured for a separate amount. The exact provision of the policy as to forfeiture for misrepresentations does not appear.

And in *Stephens v. German Ins. Co.*

(1895) 61 Mo. App. 194, a policy insuring a dwelling, household furniture, a barn, and hay and grain, for separate amounts, was held a divisible contract, so that the insurance as to the personality was not avoided by a breach of the warranty of sole ownership of the realty.

And where a policy insured a house for a certain amount, and its contents for another amount, and provided that it should be void in case of misrepresentation, a false statement that the insured was the owner of the real estate was held to avoid the risk as to the realty, but not, in the absence of fraud, as to the personality. *Schuster v. Dutchess County Ins. Co.* (1886) 102 N. Y. 260, 6 N. E. 406.

In *Continental Ins. Co. v. Gardner* (1901) 23 Ky. L. Rep. 335, 62 S. W. 886, where a policy was taken on realty, and subsequently insurance was obtained on personality contained in the building insured, but a new policy was not issued, an additional paper merely being attached to the policy covering the realty, it was held that the contract as to the personality was a separate one, and that the insurance as to such property was not avoided because of a violation of a provision of the policy on the realty, avoiding the risk if the insured was not the sole and absolute owner.

In *North America Ins. Co. v. Hofing* (1888) 29 Ill. App. 180, where a policy insured a barn for a stated sum, and certain personality and grain therein for specified amounts, and provided that if insurance was desired on property of any kind in which the interest of the applicant did not amount to the entire, sole, and absolute ownership it must be so represented to the company and clearly expressed in the body of the policy, otherwise there would be no liability as to such property or limited interest, it was held that the forfeiture was confined to the property affected by a misrepresentation as to sole ownership, and that a recovery might be had for the other property.

But in *Cuthbertson v. North Carolina Home Ins. Co.* (1887) 96 N. C. 480, 2 S. E. 258, a false answer in the ap-

plication as to whether the applicant was the sole and undisputed owner, which answer was warranted and made the basis of the policy, was held to avoid the risk, both as to the realty and personality, consisting of certain articles of machinery, although the realty and such articles were separately valued in the policy, the contract being treated as an entire one.

In the cases previously cited in this division, the courts do not allude to the arguments that the breach of the condition as to one item should avoid the policy as to all items since it increases the risk as to all, although it is apparent that the premise of that argument was involved in the facts of those cases. That argument has, however, prevailed in other cases. Thus, it has been held in a number of cases that, although the items were insured for separate amounts, where they were so situated that the risk was the same as to all a breach of the provision as to sole and unconditional ownership as to one item would defeat the insurance as to the other items. *Western Assur. Co. v. Stoddard* (1889) 88 Ala. 606, 7 So. 379; *Phoenix v. Public Parks Amusement Co.* (1896) 63 Ark. 187, 37 S. W. 959; *Goorberg v. Western Assur. Co.* (1907) 150 Cal. 510, 10 L.R.A.(N.S.) 876, 119 Am. St. Rep. 246, 89 Pac. 130, 11 Ann. Cas. 801; *Geiss v. Franklin Ins. Co.* (1889) 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99; *Ætna Ins. Co. v. Resh* (1880) 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114.

In *Goorberg v. Western Assur. Co.* (1907) 150 Cal. 510, 10 L.R.A.(N.S.) 876, 119 Am. St. Rep. 246, 89 Pac. 130, 11 Ann. Cas. 801, a policy, issued for a gross premium, insuring for specified amounts a frame dwelling, household furniture contained therein, a smaller dwelling situated upon the same parcel of land, and the household furniture contained therein was construed as an entire contract. The court stated that a conflict exists as to the divisibility of insurance contracts, that in a general way the effect of the cases might be summarized and illustrated by saying that the courts of a number of states have laid down the rule that, where the prop-

erty insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible and the breach of warranty or condition as to one item will not affect the insurance on the remainder; that, on the other hand, there are many cases holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance; that there is still another line of cases which take a middle ground and hold that the question of the severability of the contract in such cases depends upon the nature of the risk, that is, that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other item the policy must be regarded as entire, but that where the property is so situated that the risk on each item is separate and distinct from the risk on the other item, so that what affects the risk on one does not affect the risk on the others, the policy must be regarded as severable. The court, in adopting the last rule in this case, said: "In our opinion, the rule declared in the cases last cited is supported by reason, and tends to produce a just result. Whether a contract is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted. . . . In these cases the policy, insuring several classes of property, provides that it shall be void in certain events. In view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, it is proper to say that this language should not be given the effect of avoiding the policy as to every item insured in all cases. Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which had no substantial relation to the interest of the insurer. The purpose of the warranties and condi-

tions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium, or, perhaps, for any premium. And if, as to any item, the breach of condition or warranty does not at all affect the risk, the release of the insurer from liability for that item may fairly be said not to have been within the reason for the condition or warranty, and hence not within the contemplation of the parties. For example, where a single policy insured, in separate amounts, two buildings situated upon farms several miles apart, the breach of a warranty of title as to one would not in the slightest degree increase the risk on the other, and the policy should be held severable. . . . We do not think the mere fact that the premium is entire should affect this conclusion. On the other hand, where the breach of condition, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite in order to protect the insurer from having to assume a greater risk than the one he had contracted for. Take the case here presented of a building, and furniture in the same, both covered by the same policy. There is a breach of a warranty or representation relating to the title to the land on which the building was situated. That any misrepresentation as to title is material, and has the effect of avoiding the policy, at least as to the building, is undisputed. And one ground upon which the materiality of statements as to title has been put is that they 'might influence, and probably would influence, the mind of the underwriter in forming or declining the contract. . . . Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk and in estimating the premium.' . . . 'In other words, it is in their relation to

the moral hazard that the materiality of statements as to title or interest rests.' 2 Cooley, Briefs on Ins. 1340. The risk is greater, then, where a man insures a house which is on land not belonging to him, than it would be if he owned the land. But if the risk on the house is greater by reason of the want of ownership, it is clearly greater as to the contents of the house. It is, of course, possible that a house may burn, and a part or all of its contents be saved, but surely the contents of a house are in great danger of burning if the house takes fire, and any circumstance which increases the risk of fire to the house necessarily increases the risk to the contents. If the insuring company would have been unwilling to insure a house on land not belonging to the insured, because it might be more advantageous to the insured to have the house burn than to have it saved, it can hardly be supposed that it would have consented to take the risk on furniture contained in a house exposed to such hazard. It is, we think, no answer to this position to say, as was said in *Merrill v. Agricultural Ins. Co.* (1878) 73 N. Y. 452, 29 Am. Rep. 184, a case frequently cited, that insurance companies habitually insure the contents of buildings, without insuring the building or inquiring about its ownership. Such insurance on the contents alone would involve no unusual hazard. It would not tempt the insured to permit his furniture or other movables to burn. But if it be coupled with insurance on a building which he does not own, and by the destruction of which he would profit, both the house and its contents are subjected to a risk which the insurer was not willing to assume, and one against the assumption of which he expressly contracted."

And in *Western Assur. Co. v. Stoddard* (1889) 88 Ala. 606, 7 So. 379, where a policy insured a gin house, and certain articles of machinery contained therein, and valued each article and the building separately, a breach of warranty that the insured was the sole and absolute owner of the gin house was held to avoid the

policy as to all articles, the court stating that while they would be unwilling to annul the entire insurance on the mere fact that several subjects separately valued were found embraced in one application and in one policy on account of the breach of warranty as to one of the subjects, yet in a case like the present a different principle applied where the insurance was upon the contents of a building as well as the building, and the destruction of one would naturally result in the destruction of the other.

And in *Geiss v. Franklin Ins. Co.* (1889) 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99, where, for a gross premium, several items of personalty, all contained in the same building, were insured for distinct amounts, the contract was held entire, and avoided as to all of the property, because of a violation as to one item of a provision avoiding the policy in case the insured was not the sole, absolute, and unconditional owner. The court stated that the property was all exposed to one risk, and that the consideration was a specified sum; that it could not say that the insurer would have insured the item in question if the true state of title had been disclosed, nor that it would have insured the other items without insuring that particular item too, and that the contract was clearly entire and indivisible.

In *Ætna Ins. Co. v. Resh* (1889) 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114, false representations that the insured was the absolute owner of the real estate insured were held to avoid the risk, both as to the realty and personalty covered by the policy, it being held that the contract was not to be construed as divisible unless it was clear that the insurer would have assumed the two risks separately. The court said: "If it was for the interest of the insured to cause or suffer a loss of the building, because he had not the interest therein he had represented, it would, we think, be idle to say that such fact would not increase the risk upon the personal property in such building. It would be very unsafe, therefore, to assume that the company would have taken a risk upon

the personal property, separate from the building, and therefore, because the rate and the amount insured upon the personal can be separated from that on the building, to hold that the contract is divisible. That the company would have taken a risk upon the personal property alone, to a like amount and at the same rate, we may assume, even with full knowledge that the insured had no title to the building; but it would be hazardous to assume that with such knowledge the company would have written upon both the personal property and the building, so that upon the whole policy the insured would be more interested in a loss of both than in their protection. It was declared in this policy that the omission to make known a material fact should render it void, and we cannot say that the false representation was not material as to both the real and personal property. The case should be clear and free from all reasonable doubt to warrant a court in carving out separate and distinct contracts from one common whole."

And in *Phoenix Ins. Co. v. Public Parks Amusement Co.* (1896) 63 Ark. 187, 37 S. W. 959, the breach of the representation as to part of the property that the insured's interest was sole, unconditional, and entire was held to avoid the policy as to all articles, where the property insured consisted of horses, vehicles, harnesses, and stable furniture and fixtures, which were insured for separate amounts for an entire premium. The court stated that the contract was entire and indivisible, that the property was exposed to one risk and that the consideration was for a specified sum, and that the fact that the separate amounts of insurance were apportioned to separate items or classes of property did not make the policy divisible.

### *III. Provision avoiding entire policy, or similar clause.*

In some cases, where the policy provides that the entire policy shall be void if, among other things, the insured was not the sole and unconditional owner, it has been held that a

breach of this provision as to one item avoids the entire risk, although the amount of the policy was distributed on different articles for separate sums. *Germier v. Springfield F. & M. Ins. Co.* (1903) 109 La. 342, 33 So. 361; *Shoup v. Dwelling House F. Ins. Co.* (1822) 51 Mo. App. 286; *Germania F. Ins. Co. v. Schild* (1903) 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706; *Schiavoni v. Dubuque F. & M. Ins. Co.* (1911) 48 Pa. Super. Ct. 252; *Elliott v. Teutonia Ins. Co.* (1902) 20 Pa. Super. Ct. 359; *Home Ins. Co. v. Smith* (1895) — Tex. Civ. App. —, 29 S. W. 264; *McWilliams v. Cascade F. & M. Ins. Co.* (1893) 7 Wash. 48, 34 Pac. 140.

In *Germania F. Ins. Co. v. Schild* (1903) 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706, where the policy provided that "this entire policy shall be void if the insured has concealed or misrepresented" any material fact or circumstance, and further provided that if the insured was not the sole and unconditional owner of the property the policy should be void, the contract was held entire, and a breach of the condition as to sole and unconditional ownership was held to avoid it, both as to realty and personalty, although the amount of the insurance was distributed among different articles of property for certain amounts. The court distinguished cases where the policy merely provided that it should be void in case of breach of certain conditions, but did not contain the word "entire," and said: "There is no ambiguity in this policy; and it is not contended that it is ambiguous. Counsel for the defendant in error insists that the words, 'this entire policy shall be void,' etc., have no more force than if the word 'entire' were omitted, and that therefore this case is controlled by *Coleman v. New Orleans Ins. Co.* (1892) 49 Ohio St. 310, 16 L.R.A. 174, 34 Am. St. Rep. 565, 31 N. E. 279. There is much force in the argument that the clauses, 'this policy shall become void,' and 'this entire policy shall become void,' mean the same thing; but by no legitimate construction can the latter clause be restricted to less than the whole policy

and whatever is included in it, and therefore the strength of the argument, if it has any, goes to the soundness of the decision in *Coleman v. New Orleans Ins. Co.* The two cases, however, are plainly distinguishable. In the former case, the language used in the policy, whether ambiguous in itself or not, had frequently been the subject of construction and ingenious debate, resulting in diametrically opposite conclusions in the courts. In this case, the parties, no doubt with knowledge of previous controversies, seem to have endeavored to put the indivisible character of their contract beyond controversy by inserting the word 'entire;' and in our judgment they succeeded in their purpose. Unless we reject this controlling word and thus make a new contract for the parties, the policy means precisely what it says, and cannot be valid in part and void in part. The parties have agreed that it should not be a severable risk, and they have clearly expressed that intention."

And in *Schiavoni v. Dubuque F. & M. Ins. Co.* (1911) 48 Pa. Super. Ct. 252, where the policy covered a store and stock of goods, the breach, as regards the store, of the provision that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership," was held to avoid the entire policy, although separate amounts were stated, fixing the liability for the several pieces of property insured. The court said that the parties had chosen to agree that the entire policy should be void if the insured was not the sole and unconditional owner, and further said: "The company takes insurance at less than the value of the property, that the owner may have an interest in protecting and preserving it; may be, in effect, part insurer. But when the owner's interest is less than that covenanted for by the policy, the company loses the benefit of this joint insurance, upon which they have a right, under the policy, to rely. The insurer might be perfectly willing to insure a store building and a stock of

goods therein, so long as both building and goods were absolutely owned by the insured, but might be unwilling to insure the stock of goods while in a building in which the insured had no interest. These may have been the considerations which led the insurer to insist upon these covenants in the contract, but whatever may have been the reason for the introduction of such covenants, we have no right to ignore the fact that they exist. The consideration for the policy, the premium paid, is entire and indivisible; the amount of the risk is stated in gross, although the amount of the liability upon each of the subjects of the contract is limited. That such a contract is entire, and not separable, has been settled by authority which we are not at liberty to disregard. . . . If the policy of insurance in this case was invalid as to the building at the time it was issued, it was also void as to the personal property, which was burned with the building and the plaintiff was not entitled to recover."

In *McWilliams v. Cascade F. & M. Ins. Co.* (1893) 7 Wash. 48, 34 Pac. 140, where a policy insured certain articles of household furniture for separate amounts, and contained a provision that the entire policy should be void if the interest of the insured was other than unconditional and sole ownership, the court was of the opinion that the policy should be construed as an entire contract for the reason that what affected the risk on one item also affected the risk on the others, the property being situated in the same building, but rested its decision that the entire risk was avoided on the phraseology of the policy, stating that it was plainly provided therein that the entire policy should be void if the interest of the insured was other than sole and unconditional.

And in *Home Ins. Co. v. Smith* (1895) — Tex. Civ. App. —, 29 S. W. 264, where the policy covered certain houses and furniture, and provided that the entire policy should be void if the subject of insurance was buildings upon grounds not owned by the insured in fee simple, it was held

that a want of title to the buildings and the land upon which they were situated rendered the entire policy void.

And in *Shoup v. Dwelling House F. Ins. Co.* (1892) 51 Mo. App. 286, where the policy provided that the entire contract should be void if the interest of the insured was other than unconditional and sole ownership, free from all liens whatever, misrepresentations as to the realty were held, by virtue of this provision, to avoid the entire contract, both as to the realty and the personalty.

And in *Elliott v. Teutonia Ins. Co.* (1902) 20 Pa. Super. Ct. 359, where the policy insured a stated amount on stock, another amount on machinery, and a third amount on factory and office furniture, and provided that the entire policy should be void if the interest of the insured was other than the unconditional and sole ownership, and contained a clause contemplating covering an interest other than that of the insured, provided the insurer's consent was obtained, it was held that the fact that the insured did not own the machinery, which was not indicated to the insurer, avoided the risk as to all of the property, since the express stipulations of the policy so provided.

And in *Germier v. Springfield F. & M. Ins. Co.* (1903) 109 La. 342, 33 So. 361, where the policy, insuring a dwelling and the furniture contained therein for separate amounts, provided that the entire policy should be void if there was either concealment or misrepresentation, the insurance on the personalty as well as that on the realty was held avoided by a breach of the condition as to unconditional and sole ownership of the realty.

But in *Oatman v. Bankers' Fire Relief Asso.* (1913) 66 Or. 388, 133 Pac. 1183, rehearing denied in (1913) 66

Or. 396, 134 Pac. 1033, where a statute required the insertion of a provision that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership," it was held that under this provision a failure to indorse the fact that the insured was not the sole and unconditional owner of the real estate avoided the policy as to that, but not as to the personalty, where the realty was insured for a stated sum, and the personalty for another sum.

And in *Mott v. Citizens' Ins. Co.* (1893) 69 Hun, 501, 23 N. Y. Supp. 400, where the policy insured a building for a certain amount, and personalty contained in it for separate sums, and provided that the entire policy should be void if the interest of the insured was other than unconditional and sole ownership, it was held that the policy as to the personalty was not avoided by reason of the fact that the insured was not the sole owner of the realty, the court holding that the policy should not be so construed as to avoid it in all its parts because the entire property covered by it, and every part thereof, were not owned unconditionally; that it did not say that if any part of the property was not owned by the insured unconditionally the whole policy should be void.

And the same conclusion was reached in *Donley v. Glens Falls Ins. Co.* (1906) 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81, where the court stated that the provision for avoidance meant the entire policy, so far only as it related to the subject of insurance affected by the breach, because a severable policy is equivalent to as many policies as there are classes of property separately valued.

See also *Cooper v. Insurance Co. of Pa.* (Wis.) *supra*, I. J. T. W.



EMILY HUGHES, as Widow and Sole Heir at Law of John J. Hughes,  
Deceased, Plff. in Err.,

v.

THOMAS W. LEONARD et al.

*Colorado Supreme Court (In Banc) — May 5, 1919.*

(— Colo. —, 181 Pac. 200.)

**Husband and wife — separation agreement — coercion.**

1. A threat by a man to alienate his property, which he has a perfect right to do, cannot be claimed by his wife to be coercion to the signing of a separation agreement.

[See note on this question beginning on page 823.]

— separation — inevitability.

2. A separation following the determination by one of the parties that it must occur, and as to which there is no prospect of reconciliation, is inevitable so as to furnish a basis for a separation agreement.

[See 9 R. C. L. 524, 525.]

**Evidence — presumption of materiality.**

3. It is presumed that an offer of proof will disclose its materiality if it is material to any issue in the case.

**Husband and wife — incompetent — effect of representation by counsel.**

4. That a woman was represented by counsel in her negotiations with her husband for a separation agreement overcomes her allegations that she was incompetent at the time it was made.

— ratification.

5. A woman ratifies a separation agreement by retaining the fruits of it after knowledge of grounds for rescission.

— effect of laches.

6. A woman is precluded by laches from attacking a separation agreement if she delays until her husband has, in good faith, changed his condition so that he cannot be restored to his former state.

**Laches — effect on separation agreement.**

7. A woman who, under threats of her husband, who has separated from her, to convey away all his property, which he has a perfect right to do, unless she signs a separation agreement, signs the agreement, takes the property coming to her under it, and waits until after his death before attacking the agreement on the ground of coercion, is precluded by laches from doing so.

**Fraud — attacking contract for — time.**

8. A woman defrauded into signing a separation agreement must take steps to set it aside within a reasonable time after discovery of the fraud.

**ERROR to the District Court for the City and County of Denver (Perry, J.) to review a judgment in favor of defendants in an action brought to set aside two certain deeds. Affirmed.**

**Statement by Burke, J.:**

April 29, 1915, John J. Hughes (since deceased) and plaintiff, Emily Hughes, were husband and wife. On that date, said John J. Hughes conveyed lots 29 and 30, in block 111, East Denver subdivision of the congressional grant of the city of Denver, and lots 15 and 16 in block 122, Stiles's addition to the city of Denver, to the defendant Thomas W. Leonard; the consideration named in the deed being \$1 and other good and valuable considerations.

5 A.L.R.—52.

May 3, 1915, said deed was filed for record, and recorded in Book 2558, p. 323, of the records in the office of the clerk and recorder of the city and county of Denver.

May 4, 1915, said John J. Hughes died, leaving as his sole heir at law his widow, this plaintiff, Emily Hughes.

May 5, 1915, defendant Leonard quitclaimed said property to the defendant Jane F. Dunn, by deed filed for record May 12, 1915, and recorded in Book 2460, at page 45, of said

records; the consideration named in said deed being \$1.

Plaintiff brings this action to have both deeds set aside on the ground that the warranty deed is a testamentary disposition made by decedent to circumvent the law and in fraud of the rights of the widow; that the quitclaim deed was executed in furtherance of the same plan; and that both deeds were without consideration.

The complaint alleges that at the time of the execution of the warranty deed John J. Hughes was ill and believed himself near death; that he placed this deed in the hands of Leonard with instructions to hold until the issue of said illness should become certain; that, should said illness prove fatal, Leonard was instructed to immediately place the instrument of record and convey the property to Dunn, otherwise to destroy the warranty deed or return it to said John J. Hughes; that when Leonard placed said warranty deed of record he was certain John J. Hughes "was about to die;" that the quitclaim deed from Leonard to Dunn was, in fact, not delivered, but was filed of record by Leonard himself; that Jane F. Dunn is a niece of decedent, and resides in Boston, Massachusetts; that the warranty deed was received by Leonard with full knowledge of the fraudulent purpose of decedent.

The quitclaim deed contains the following recital: "This deed is made to vest title to said property in the said party of the second part in pursuance of instructions from John J. Hughes, from whom the said party of the first part received his title to the same."

Both defendants filed demurrers to the amended complaint. Both demurrers were overruled.

Defendant Dunn denied, by answer, that when decedent executed the warranty deed he believed he was in danger of death; denied the alleged instruction of decedent to Leonard; denied that Leonard believed John J. Hughes was about to die at the time of the filing of the

warranty deed for record; denied that the deeds were without consideration or were executed to circumvent the law, or in fraud of the rights of the plaintiff. For a second defense, she set up a contract of separation between Hughes and his wife of date July 29, 1907. This contract recites, among other things, that by reason of "unhappy differences" the husband had left his wife in October, 1906, since which time they had lived apart, and that the husband refuses to return to his wife and home; that, "for the purpose of making and having a complete settlement of all the property rights and financial obligations between them," the home and its furnishings should be deeded to the wife, \$400 in cash paid to her, and, in addition thereto, \$50 per month for ten months. "The party of the second part agrees and is hereby obligated to support and maintain herself, and not hereafter at any time nor in any manner to call upon party of the first part, his heirs or lawful representatives, for any contribution of money or property whatsoever for her future needs, nor ask for, seek or demand in any manner whatsoever any part of the property or fruits of the labor of the party of the first part, either alimony or otherwise; and it is agreed that in the event of the death of either of the parties hereto the other party shall not ask for, seek, demand, or receive, or have any claim upon or interest in any part of the estate of the other party, by virtue of the marriage relation existing between them, either as widower or widow or heir, under any provision of law, statutory or otherwise, now in force or which may hereafter be enacted, so long as said parties shall continue to live separate and apart."

Defendant further alleges that this contract was filed for record September 19, 1907; that decedent complied with its terms; and that, by reason thereof, plaintiff has waived any rights she might otherwise have in this property in ques-

tion and is estopped from making any claim thereto.

Defendant Leonard answered, disclaiming any interest.

Plaintiff, by replication, admitted the making of the contract. She further alleged that when she was in ill health her husband had deserted her and left her penniless; had attempted to coerce her into an action for divorce, and, while she was suffering physically and mentally, she acquiesced, through her attorney, in a plan of separation; that a contract was drawn by her counsel, but that the contract, as signed, was dictated by her husband, who represented to her that he was a poor man, that there was a judgment of \$12,000 against him, which stood as a lien against all his property, that he would give plaintiff no more money, and that she could take what the contract gave her or nothing; that she believed her husband would fight her to the end, would cause litigation to be prolonged, and eventually leave her destitute; that she did not sign the agreement of her own free will; that its conditions are unjust; that there is a lack of sufficient consideration; that there was, in fact, no judgment against her husband; that he was worth approximately \$100,000; that the residence conveyed to her under the contract was not then worth over \$6,000, and is not now worth over \$4,000, and the furniture, etc., \$300; that the \$400 paid her in cash was for the payment of bills for her support; and that all these things were known to the husband at the time of the signing of the contract.

Other pleadings were filed, and rulings thereon made by the trial court, not now necessary to notice.

Trial was to the court without a jury. Plaintiff moved for default against the defendant Leonard, which motion was denied. At the close of plaintiff's case, defendant moved for a nonsuit, which motion was granted. September 14, 1916, motion for new trial was overruled, and final judgment was rendered in favor of the defendants, dismissing

the amended complaint and for costs, and from said judgment this writ of error is prosecuted.

Plaintiff was called as a witness in her own behalf. Objection was made to her being sworn or testifying on the ground that she was an incompetent witness under the statute. This objection the trial court sustained, on the ground of the decision of this court in *Conner v. Root*, 11 Colo. 183, 17 Pac. 773. Thereupon, her counsel made an offer to prove by her substantially the matters set out in her pleadings. A portion of that offer is as follows: "That she consulted an attorney, Mr. Keeler, as to what she should do, and he advised her to go ahead and buy what she wanted for her support, and that her husband would pay for it. . . . That she again consulted Mr. Keeler, and he advised her to wait a year and sue for divorce. That, when she stated to him that she did not want a divorce, he advised her, or suggested to her, that her husband go to Nevada and get a divorce from her. That thereupon she lost confidence in said attorney and turned to Mr. Bottom. . . . That her attorney, Mr. Bottom, called upon her husband, and advised her that her husband had stated: 'What I want is separation papers, if she won't get a divorce, and I won't give her any money for her support until then.' . . . That during all of said time (from the summer of 1907 until the time of the beginning of this action, in October, 1915) she was afraid to bring any action in court against her husband, because she knew his character and disposition thoroughly, and she verily believed that, if she did, he would make away with his property or wear her out with litigation, so that she would obtain no relief. . . . That she has never considered said agreement to be binding upon her, and that she did not attack it during the lifetime of her said husband because she feared and verily believed that, if she should cause said agreement to be set aside, what of her husband's

property was not spent in litigation would be so disposed of by him that she would not be benefited by such proceeding. That she had no accurate knowledge of her husband's means, but understood that he was very well off; that she knew that he owned considerable real estate, but did not know whether the same was encumbered, and that he owned considerable mining stock. That he was then engaged in dealing in mining stocks, and that she frequently, before the separation, saw letters to him inclosing checks for dividends upon such stocks."

Mr. Bottom, a witness for plaintiff, and her counsel in the negotiations with her husband, testified: That he prepared an agreement, which did not suit Mr. Hughes, who later came to Mr. Bottom's office with the one set out in the pleadings. "Mr. Hughes told Mrs. Hughes that she would have to sign this agreement or he would not give her a cent." That, in one interview which witness had with Hughes in the Brown Palace hotel, Hughes stated that the only property he owned was two or three pieces of real estate, one of which was the home; that he was in debt for a larger amount than the value of all of it; that he had a judgment against him which would wipe out all of the real estate. That he refused to give the wife anything except the home. That witness reported this conversation to Mrs. Hughes, and the result thereof was that Hughes brought in the contract in question.

Sara Huddart, a witness for the plaintiff, testified that she had a conversation with Hughes in August, 1919 (almost five years before the death of Hughes, and more than five years before the filing of this suit), in which Hughes said: "I was too cute for her. I was getting ready to leave her five or six years ago, and I covered my property so she would not ever get anything, and she would not have gotten the house if she had not homesteaded it."

This testimony was stricken out on motion of the defendant.

Messrs. John T. Bottom, N. Walter Dixon, and Thomas J. Dixon, for plaintiff in error:

When an agreement settling property rights is made as an incident to a separation fully determined upon between husband and wife, it is valid; but if a settlement of property rights is the cause and consideration of an agreement to separate, then the agreement is void as against public policy.

Foot v. Nickerson, 70 N. H. 514, 54 L.R.A. 554, 48 Atl. 1088; Stebbins v. Morris, 19 Mont. 115, 47 Pac. 642; Walker v. Walker (Walker v. Beal) 9 Wall. 743, 19 L. ed. 814; Poillon v. Poillon, 49 App. Div. 341, 63 N. Y. Supp. 301; King v. Molloy, 61 Kan. 683, 60 Pac. 731, 61 Pac. 685; Boland v. O'Neil, 72 Conn. 221, 44 Atl. 15; Randall v. Randall, 37 Mich. 563; Carey v. Mackey, 82 Me. 516, 9 L.R.A. 113, 17 Am. St. Rep. 500, 20 Atl. 84; Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D, 261.

Public policy will not permit a wife to contract away the legal liability of her husband to support her unless reasonable provision is made for her support.

Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657.

Plaintiff was a competent witness.

Prewitt v. Lambert, 19 Colo. 6, 34 Pac. 683; Cree v. Becker, 49 Colo. 268, 112 Pac. 783; Goelz v. Goelz, 157 Ill. 83, 41 N. E. 756.

Messrs. Hughes & Dorsey, E. I. Thayer, and Berrien Hughes for defendants in error.

Burke, J., delivered the opinion of the court:

The first question for consideration is the validity of this contract of separation. There is nothing in it which, under the laws of Colorado, is against public policy. Attorneys for plaintiff in error urge that, inasmuch as this contract fails to set forth a good cause for the separation, the contract is invalid. They admit that, if a separation is "inevitable," whether a property settlement is made or not, then a separation agreement settling the property rights of the parties may be made without violating public policy; but they further contend that

such separation must, in the first instance, be by agreement of the parties. In this we think they are in error. If it appears, as here, that such separation had first been definitely determined upon by one of the parties, that it had in fact thereafter taken place, and that no prospect of a reconciliation appeared, then such separation would be just as "inevitable" and furnish as good a basis for a separation agreement as if it had originally taken place by mutual consent. Mrs. Hughes could not compel her husband to live with her or remain in his home. If she were not at fault, she could compel him to support her in such circumstances as his

Husband and wife—separation—inevitability.

means justified. If she were without

personal knowledge of such means, our statutes afforded her an ample remedy to compel her husband to disclose them. Under these conditions, the cause of the separation and the reasons for the execution of the contract were exclusively for the determination of the parties. By their contract they found them sufficient, and, if the wife were not coerced into its execution, if no unfair advantage were taken of her by her husband, that contract is her own determination of the fact that a separation was "inevitable," and is a complete bar to her action. We think every question necessary to this conclusion has been settled, and correctly settled, by the opinion of Judge Sanborn in *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 367.

If the plaintiff were coerced into making this contract, or if any unfair advantage was taken of her by her husband, those allegations must depend for their proof upon the testimony hereinbefore set out. If the ruling of the trial court excluding the testimony of the plaintiff was erroneous (a question which it is unnecessary to determine herein), was the plaintiff prejudiced thereby?

It is not presumed that counsel for plaintiff, in his offer of proof,

set forth in detail what her testimony would be, but it is presumed that, having made the offer, he set it forth in substance; that, if her testimony would be material to any issue in the case, his offer would disclose that materiality. On the contrary, the offer convinces us of the immateriality of the excluded testimony. Plaintiff contends that she was coerced into the making of this contract: First, by her husband's threats to alienate his property in case of her refusal; second, that she was misled by his statements that he was a poor man and that there was a judgment against him of \$12,000, which was a lien against his property. Under our law, the husband had a perfect right to alienate this property during his lifetime subject to the prohibition of the rule laid down in *Smith v. Smith*, 22

Evidence—presumption of materiality.

Colo. 480, 34 L.R.A. 49, 55 Am. St. Rep. 142, 46 *Pac.* 128, and his threat to do what it was his lawful right to do cannot be held to be coercion. That plaintiff was not misled by her husband's allegations of poverty is clearly shown by her counsel's offer of her testimony "that she had no accurate knowledge of her husband's means, but understood that he was very well off." She further contends that at the time of the making of this contract she was ill and incompetent, physically and mentally, to execute such an agreement. The evidence of such incompetence is of itself very unsatisfactory, and is more than overcome by the fact that she was at all stages of her negotiations represented by counsel. She further attempts to show that the same influence by which she was induced to enter into this contract kept her silent and inactive from the date of its execution to the day of her husband's death. This contention is set forth in her pleadings, but more particularly in the offer of her counsel,

Husband and wife—separation agreement—coercion.

—Incompetent—effect of representation by counsel.

"that during all of said time she was afraid to bring any action in court against her husband because she knew his character and disposition thoroughly, and she verily believed that if she did he would make away with his property or wear her out in litigation so that she would obtain no relief." It cannot be presumed that the courts would permit him to make any defense which, under the law, he was not entitled to make, or unreasonably prolong the litigation, or fail to make proper provision for the support, maintenance, and suit money of the wife if she were without means; and since, during his lifetime, it was his right and privilege to make such disposition of his property as he saw fit, the fears of the wife which deterred her from protecting her rights were merely fears that the husband would do what, under the law, he had a perfect right to do.

So far as the testimony of witnesses Bottom and Huddart is concerned, it is to the same effect as the offered testimony of the plaintiff. For the same reason, it is immaterial, and the ruling of the court excluding it could not have been prejudicial.

Furthermore, we think the conduct of the plaintiff, as here shown, is a ratification of her contract; and she is likewise prohibited by the proper application of the rule of laches from now impeaching it. No express ratification is necessary. Any act of recognition of the contract (retaining the fruits of it through many years) has the effect of an election to affirm. Acts of dominion exercised over the property received under the contract "after knowledge of the ground of rescission" amount to a ratification. Laches need not be specially pleaded, and, without such plea, it is entirely within the power of the court, either at the trial or upon review, to dismiss an action upon that ground. *French v. Woodruff*, 25 Colo. 339-352, 54 Pac. 1015; *Hagerman v. Bates*, 24

Colo. 71-80, 49 Pac. 139; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720.

When a court sees neglect on one side and injury therefrom on the other, it is a ground for denial of relief. *E. Bement & Sons v. La Dow* (C. C.) 66 Fed. 185.

One who, knowing his rights, takes no steps to enforce them until the condition of the other party has in —effect of laches. good faith become so changed that he cannot be restored to his former state if the rights be then enforced, is estopped by the doctrine of laches from assertion of the rights. *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804.

Certainly Mrs. Hughes, long prior to the death of her husband, knew her rights. Certainly she took no steps to enforce them. Certainly, the condition of Hughes has become so changed that he cannot be restored to his former state.

Plaintiff says she was coerced by her husband's threat to do a lawful thing into entering into a solemn contract with him settling all their property rights. She took the property and money given her under that contract and pretended to be satisfied. She says she made that pretense to prevent her husband from dealing with his property as he had a right to do, and for the purpose of convincing him that all financial questions growing out of their marriage relations were settled; that she bided her time in silence, with no intention of keeping her contract, until death had stopped her husband's mouth, and she now claims the right to what must of necessity be an ex parte hearing on her principal allegations, and the right to reap the fruits of her watchful waiting. The husband had deserted her (she says without cause) and welcomed a suit for divorce or separate maintenance. According to her testimony, he seemed to have no fear as to what such an action would reveal as to his own conduct. It was this plaintiff who then saw fit to

(— Colo. —, 181 Pac. 200.)

accept what she could get, rather than submit her claims and her conduct to the tribunal whose aid she now seeks when there is no one to dispute her contention. Certainly here, if ever, must the doctrine of laches be applied.

Again, plaintiff's whole claim to a recovery is based upon an alleged fraud perpetrated on her by her husband. A well-settled rule of law required her, in such case, to take proper steps to set aside her contract within a reasonable time after the fact of the fraud became known to her. The fraud, if any, consisted in her husband's misrepresentations to her as to his financial standing. An essential element of recovery is that she believed such representations and was misled thereby to her detriment. She makes no such allegation in her pleadings, introduces no evidence thereof, and makes no offer of such proof. In fact, her pleadings and

her offer of proof show the contrary. If she were so misled at the time of the execution of this contract, there must have been some time between that date and the date of the bringing of this action when the facts became known to her. We search this record in vain for any pleading, or for the offer of evidence, of any such discovery.

From the foregoing, it must be concluded that the evidence offered and rejected by the court was immaterial; that plaintiff was not injured by that ruling; that she ratified the contract; that she is now prohibited by the doctrine of laches from impeaching its validity; that, granting the truth of all her testimony, rejected or received, there is no evidence of her having been misled by any material false representations made to her by her husband; and that she pleaded no facts upon which such evidence could be admitted.

The judgment of the trial court is, accordingly, affirmed.

### ANNOTATION.

**Validity of separation agreement as affected by fraud, coercion, unfairness, or mistake.**

- I. In general, 823.
- II. Fraud and deceit, 825.
- III. Coercion and undue influence, 827.
- IV. Unfairness and inequality, 828.
- V. Mistake, 830.

#### *I. In general.*

It seems to be unquestioned that a separation agreement must be untainted by fraud, must be in all respects fair, reasonable, and just, in view of all the circumstances of the parties at the time, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. The following authorities are illustrative of those adhering to this general principle:

**Arkansas.**—*Bowers v. Hutchinson* (1899) 67 Ark. 15, 53 S. W. 399; *McConnell v. McConnell* (1911) 98 Ark.

193, 33 L.R.A.(N.S.) 1074, 136 S. W. 931.

**Colorado.**—*Daniels v. Daniels* (1886) 9 Colo. 133, 10 Pac. 657.

**Georgia.**—*Sumner v. Sumner* (1904) 121 Ga. 1, 48 S. E. 727.

**Illinois.**—*Bailey v. Bailey* (1910) 157 Ill. App. 74; *Hill v. Hill* (1914) 190 Ill. App. 541.

**Indiana.**—*Dutton v. Dutton* (1868) 30 Ind. 452.

**Iowa.**—*Robertson v. Robertson* (1868) 25 Iowa, 350.

**Kentucky.**—*Branch v. Branch* (1907) 30 Ky. L. Rep. 417, 98 S. W. 1004; *Luttmer v. Luttmer* (1911) 143 Ky. 844, 137 S. W. 777.

**Michigan.**—*Randall v. Randall* (1877) 37 Mich. 563; *Nichols v. Nichols* (1912) 169 Mich. 540, 135 N. W. 328.

**Missouri.**—*Banner v. Banner* (1914) 184 Mo. App. 396, 171 S. W. 2; *Gilsey*

v. Gilsey (1917) 195 Mo. App. 407, 193 S. W. 858.

Montana.—Lee v. Lee (1919) — Mont. —, 178 Pac. 173.

Nebraska.—Hiatt v. Hiatt (1905) 74 Neb. 96, 103 N. W. 1051; Amspoker v. Amspoker (1915) 99 Neb. 122, 155 N. W. 602.

New Jersey.—Ireland v. Ireland (1888) 43 N. J. Eq. 311, 12 Atl. 184.

New York.—Hungerford v. Hungerford (1900) 161 N. Y. 550, 56 N. E. 117; McCormack v. McCormack (1908) 127 App. Div. 406, 111 N. Y. Supp. 563; Johnson v. Johnson (1912) 150 App. Div. 306, 134 N. Y. Supp. 1081, on subsequent appeal in (1913) 157 App. Div. 289, 142 N. Y. Supp. 416; Ducas v. Guggenheimer (1915) 90 Misc. 191, 153 N. Y. Supp. 591, affirmed in (1916) 173 App. Div. 884, 157 N. Y. Supp. 801.

North Carolina.—Archbell v. Archbell (1912) 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D, 261.

Ohio.—Garver v. Miller (1866) 16 Ohio St. 527.

Oklahoma.—Montgomery v. Montgomery (1914) 41 Okla. 581, 139 Pac. 288; Howell v. Howell (1914) 42 Okla. 286, 141 Pac. 412.

Pennsylvania. — Frank's Estate (1900) 195 Pa. 26, 45 Atl. 489.

Texas.—Caffey v. Caffey (1896) 12 Tex. Civ. App. 616, 35 S. W. 738; Versyp v. Versyp (1912) — Tex. Civ. App. —, 146 S. W. 705; Cox v. Mailander (1915) — Tex. Civ. App. —, 178 S. W. 1012.

Virginia.—Switzer v. Switzer (1875) 26 Gratt. 574.

West Virginia. — Cheuvront v. Cheuvront (1903) 54 W. Va. 171, 46 S. E. 233.

England. — Lambert v. Lambert (1767) 2 Bro. P. C. 18, 1 Eng. Reprint, 764; Evans v. Edmonds (1853) 13 C. B. 777, 138 Eng. Reprint, 1407, 1 C. L. R. 653, 22 L. J. C. P. N. S. 211, 17 Jur. 883, 1 Week. Rep. 412.

Canada.—Ditch v. Ditch (1911) 21 Manitoba, L. R. 507; Tuxford v. Tuxford (1913) 6 Sask. L. R. 96.

Assuming, therefore, that a separation agreement between husband and wife may be set aside for fraud, coercion, unfairness, etc., the question then arises, When and under what circumstances is a particular contract

void? Upon this general question there is considerable divergence of opinion, but this is largely due to the fact that since, in arriving at a specific conclusion, the surrounding circumstances and the situation of the parties must be taken into consideration, each case must stand on its own facts.

For instance, in jurisdictions where husbands and wives have equal contract and property rights, it has been held that separation agreements between them which, on their face, do not disclose any injustice or inequity, are presumptively valid so that a party pleading such an agreement need not aver or prove that its execution was free from coercion, fraud, or mistake, or that it was not unfair, and consequently that the burden as to such matters is upon the party seeking to take advantage thereof. Daniels v. Benedict (1899) 38 C. C. A. 592, 97 Fed. 367.

On the other hand, where the common-law restriction on the rights and powers of the wife have not been removed so as to make them equal, there is considerable authority to the effect that separation agreements are not presumptively valid and that if such an agreement is relied upon either as a cause of action or as a matter in defense, both the pleading and the proof must affirmatively show that the contract is free from fraud, unfairness, coercion, or mistake.

Thus, in Ireland v. Ireland (N. J.) supra, where the wife was sub potestate viri at the time the separation agreement was executed, and the husband's devisees sought to set the same up as a defense to a claim for dower, it was held that there was no presumption of validity as to such a contract, and that the party seeking to take advantage of it must allege and prove that the contract was fair, open, reasonable, and well understood.

So, in Garver v. Miller (1866) 16 Ohio St. 527, in holding that a separation agreement could not be relied on in a pleading by merely setting up the naked contract, the court said: "If the contract be relied on in pleading, either as a cause of action or matter of defense, the pleading must contain averments which show the contract to



have been fair, reasonable, and just to her under the then existing circumstances. If it becomes a question of fact, the proof must lead the mind of the chancellor satisfactorily to the same conclusion. It is not sufficient, either as a matter of pleading or of proof, to set up the naked contract and its execution by the husband. In addition to this, facts must be averred, or proved, or both, as the exigencies of the case may require, showing that the terms of the contract in favor of the wife were fair, reasonable, and equitable under the circumstances of the parties at the time it was made."

And in *Bowers v. Hutchinson* (1899) 67 Ark. 15, 53 S. W. 399, it was held that a party setting up an agreement of separation must allege the facts necessary to show that it was fair and equal, reasonable in its terms, and untainted by fraud or coercion. And again, in *McCormack v. McCormack* (1908) 127 App. Div. 406, 111 N. Y. Supp. 563, it was held that bare allegations that the pleader's signature to a separation agreement was "procured by fraud," and was "executed under duress," were insufficient to raise the question of fraud.

And in *Montgomery v. Montgomery* (1914) 41 Okla. 581, 139 Pac. 288, it was held that a husband who sets up a separation agreement as a defense has the burden of showing not only that it was entered into fairly and without misrepresentations, overreaching, or fraud, but that its provisions are equitable and just under all the circumstances. This holding was quoted with approval in *Howell v. Howell* (1914) 42 Okla. 286, 141 Pac. 412. And to the same effect is *Cheuvront v. Cheuvront* (1903) 54 W. Va. 171, 46 S. E. 233.

## II. *Fraud and deceit.*

Of course it is a familiar rule that, in order to establish a fraud sufficient to avoid a contract, it is necessary that the evidence be clear and convincing. However, this rule is often somewhat relaxed where the contract is between persons standing in a confidential relation. For instance, an oft-quoted statement of the principle by Pomeroy in § 966 of his *Equity Jurisprudence*

is as follows: "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." But to render this rule applicable a fiduciary relation must exist as a fact, in which there is actually a confidence reposed on one side. This situation, of course, does not always exist where a husband and wife have separated, or there is such a situation as to render a separation agreement desirable.

Applying the general rule that a wilful intent to deceive, or such gross negligence as is tantamount thereto, and the actual deceit of the victim to his damage, are essential elements of actionable fraud, or, in other words, that the perpetrator must have been guilty of some moral turpitude or of some breach of duty, and the victim must have been deceived and must have acted upon the deceit, it has been held that fraud on the part of a husband in securing an agreement of separation cannot be predicated on the fact that, during the negotiations, he wrote letters to his wife expressing the hope and expectancy that in a short time after the agreement was signed they would be living together again as husband and wife, there being no misrepresentations of existing facts and nothing to indicate an intent not to carry out the promises made by him. *Daniels v. Benedict* (1899) 38 C. C. A. 592, 97 Fed. 367.

Nor, it has been held, can fraud be predicated upon a showing that the lawyer who acted for the wife in making the separation agreement was brought to the conference by the husband; that when the lawyer announced that the different contentions were so wide that he could not act for the wife while he was retained by the husband, the latter released him; that

the lawyer then acted for the wife, and that the husband afterwards paid his fee pursuant to an agreement with the wife; at least, where all of such facts were known by the wife, and it appears that the lawyer conducted the negotiations in good faith and obtained for the wife a substantially larger allowance than she had previously offered to accept. *Ibid.*

So, in *Robertson v. Robertson* (1868) 25 Iowa, 350, it was held that the fact that a husband and a friend acting for him in conjunction with a representative of the wife represented to her, in negotiating for a separation agreement, that her interest in her husband's lands at his death would be a life estate, when in fact it would be a fee-simple interest, did not constitute fraud sufficient to avoid an agreement subsequently entered into, it not appearing either that such representations were known to the parties making them to be false, or that she was induced thereby to execute the deed.

And in *Luttmer v. Luttmer* (1911) 148 Ky. 844, 137 S. W. 777, a separation agreement was upheld as against an attack for fraud, it appearing that the wife received absolutely one third of the husband's property, that the contract was fully understood and consented to by her, that she had the advice of her brother, an attorney, and that she understood as well as the husband the value and character of the property.

In *Hogg v. Maxwell* (1916) 233 Fed. 290, where a wife alleged that her husband agreed to secure her an annual allowance equal to one third of his income, and that, upon his representation that his income was only \$15,000, she consented to accept \$5,200, whereas his actual income was between \$70,000 and \$100,000, it was held that the agreement would not be adjudged fraudulent and void after the death of the husband, it appearing that, previous to the negotiations, the wife had left the husband for unknown reasons, that neither party desired to have the matter taken into court, that both were represented by able counsel, that the husband made a definite offer of the \$5,200 per year,

that he unequivocally took the position that his wife must either accept it or resort to the courts, that the husband did not consider that the wife had a legal cause for separation, that there was a sharp conflict as to the statements made at the interviews as to the husband's financial condition, that the wife had previously asserted that her husband was a millionaire, and that the offer was accepted upon the absolute refusal of the husband to raise it.

Nor does the mere fact that, under a separation agreement, a wife received property the value of which was small when compared with the husband's entire property, and in fact was less than she might have been legally entitled to, if sufficiently valuable to provide a support for her, in itself establish fraud such as will warrant the avoiding of the agreement. *Sumner v. Sumner* (1904) 121 Ga. 1, 48 S. E. 727.

And it has been held that fraud sufficient to avoid a separation agreement is not shown by proof that the husband misled the wife by his statements that he was a poor man and that a large judgment constituted a lien against his property, whereas as a matter of fact there was no such judgment against him and he was well-to-do; at least, where her counsel offers to prove "that she had no accurate knowledge of her husband's means, but understood that he was very well off," since such offer in itself refutes the contention that she was misled by the husband's statements. *HUGHES v. LEONARD* (reported herewith) ante, 817. And that misrepresentations as to the amount of property owned by the husband will not operate as a fraud sufficient to avoid a separation agreement where the wife knew that the representations were false before she accepted payment under the terms of the agreement was the holding in *Price's Appeal* (1889) 2 Monaghan (Pa.) 554.

In *Hite v. Hite* (1910) 136 Ky. 529, 124 S. W. 815, it was held that a separation agreement could not be avoided for fraud of the wife merely because of the fact that, without the husband's consent, she obtained the advice of an

attorney as to the form of the contract, the husband having read it and fully advised himself as to its provisions, and expressed himself as more than satisfied with the reasonableness of such provisions.

In *Kendall v. Webster* (1862) 1 Hurlst. & C. 440, 158 Eng. Reprint, 957, 31 L. J. Exch. N. S. 492, it was held that a husband did not establish a defense of fraud and concealment in a suit based on a separation deed, where it merely appeared that the trustee, who was the wife's father, had induced the wife to live separately from the husband; that he, the trustee, was unlawfully harboring her; and that, at the time of the separation, the wife was pregnant, of which fact both she and the trustee kept the husband ignorant. So in *Krug v. Krug* (1914) 81 Wash. 461, 142 Pac. 1136, affirmed on rehearing en banc in (1915) 84 Wash. 696, 152 Pac. 17, an annulment of a separation agreement for fraud was denied where it merely appeared that the wife, at the time of the execution of the agreement, had concealed from the husband her previous improper conduct with another man during the marriage relation, the evidence being insufficient to show "positive immoral conduct." The court here applied the rule that the evidence of fraud was not so clear and convincing as to show that it inhered in the contract. But in *Evans v. Edmonds* (1853) 13 C. B. 777, 138 Eng. Reprint, 1407, 1 C. L. R. 653, 22 L. J. C. P. N. S. 211, 17 Jur. 883, 1 Week. Rep. 412, where a husband pleaded and proved in avoidance of a separation deed that he was induced to execute the same because of false and fraudulent representations that his wife was a virtuous and moral person, it was held that the plea was good, the court being of the opinion that the representations were of a material fact, *Jervis, Ch. J.*, saying that it could not be supposed that if the husband had known of the wife's infidelity he would have entered into a liability for her maintenance.

In *Cox v. Mailander* (1915) — Tex. Civ. App. —, 178 S. W. 1012, it was held that the fact that the husband, in negotiating a separation agreement, concealed from the wife the ownership

of certain shares of stock which he in reality held in trust for the community, constituted such a fraud as would avoid the contract.

Of course, a spouse cannot affirm that a separation agreement is valid, and then sue in law to recover damages for fraud and misrepresentations alleged to have induced its execution. Thus, in *Schmoltz v. Schmoltz* (1898) 116 Mich. 692, 75 N. W. 135, it was held that since a wife has only a contingent interest in the personal property owned by her husband, misrepresentations by him as to the value thereof, whereby she is induced to execute a separation agreement upon terms which otherwise she would not have accepted, do not entitle her to affirm that the contract was valid and maintain a cause of action at law for damages for the fraud.

However, it has been held that the fact that a wife continues to receive payments under a separation agreement after discovering fraud upon the part of the husband in procuring same does not estop her from subsequently questioning its validity where she is justly entitled to receive larger payments than she has received during such period. *Cox v. Mailander* (Tex.) *supra*.

### III. Coercion and undue influence.

It has been held that coercion sufficient to warrant the setting aside of a separation agreement is not established by a showing that the wife was induced to sign it by threats of the husband to alienate his property in case she refused to do so, since no legal coercion can arise from a threat to do that which a person has a legal right to do. *HUGHES v. LEONARD* (reported herewith) ante, 817.

And, of course, a separation deed cannot be set aside for undue influence or duress where the evidence discloses not only no undue influence, but that the wife gave due deliberation to consideration of the terms of the contract, and only executed the same after consulting her friends and a solicitor. *Tuxford v. Tuxford* (1913) 6 Sask. L. R. 96.

But in *Lambert v. Lambert* (1767) 2 Bro. P. C. 18, 1 Eng. Reprint, 764, where a husband, who was a very

wealthy man, by force and ill treatment, including confinement, starvation, and cruelty putting his wife in fear of her life, compelled her to execute a deed of separation in consideration of an annuity of £20, it was held that equity would relieve her from the agreement and decree a proper maintenance.

And in *Willetts v. Willetts* (1882) 104 Ill. 122, it was held that where a husband worth from \$25,000 to \$30,000 induced his wife, while in poor health and mentally weak, to enter into a separation agreement under such circumstances as to show undue influence amounting to moral duress, and by the terms of which she was to receive a life lease of a house worth \$400, and \$300 and 5 cords of wood a year, equity would grant relief from the contract. In this case the evidence also showed considerable domestic trouble as well as that the husband often shut the wife up, not allowing her to see anyone, that he frequently told her he would not live with her as a husband, and that he brought another woman to their home, followed by such conduct as to justify a belief of improper intimacy between them.

In *Cox v. Mailander* (1915) — Tex. Civ. App. —, 178 S. W. 1012, it was held that the fact that the wife under a separation agreement received less than one fifth of the property, all of which belonged to the community, with knowledge of the character and amount thereof, was an indication of undue influence upon the part of the husband.

For other cases which involve some elements of coercion and undue influence, and in which the separation agreement was avoided, see the following cases as set out in the following subdivisions of this annotation: *Kline v. Kline* (1907) 32 Ky. L. Rep. 492, 105 S. W. 1189; *Montgomery v. Montgomery* (1914) 41 Okla. 581, 139 Pac. 288; *Palmer v. Palmer* (1903) 26 Utah, 31, 61 L.R.A. 642, 99 Am. St. Rep. 820, 72 Pac. 3; *Switzer v. Switzer* (1875) 26 Gratt. (Va.) 574.

#### IV. *Unfairness and inequality.*

In a few instances separation agreements have been upheld as against the

contention that they were neither fair, just, nor equitable. Thus, in *Daniels v. Benedict* (1899) 38 C. C. A. 592, 97 Fed. 367, a separation agreement between a husband and wife whereby he gave her \$75,000 was held valid as against an attack by her on the ground that it was unjust and unfair, where it appeared that the husband was worth \$700,000, none of which the wife had brought with her or helped to earn or save, that they had lived together less than seven months, and that there were no children of the marriage, and that he had a son by a former marriage, whereas she was childless, although, under the statutes of the state, she would have been entitled to one half of his property upon his death. So in *Robertson v. Robertson* (1868) 25 Iowa, 350, it was held that a wife who received under a separation agreement all that she had brought with her, together with \$50 and other property of no great value, could not attack such agreement as unfair and grossly disproportionate to her just rights where she more than once before the separation offered to accept property of no greater value than was received under the agreement. And in *Howell v. Howell* (1914) 42 Okla. 286, 141 Pac. 412, equity refused to set aside a separation agreement between a husband and wife by the terms of which the wife received about one third of the husband's estate and in addition it appeared that no considerable portion of the estate was acquired through joint effort, and that the wife was left in "very comfortable circumstances." Again in *Versyp v. Versyp* (1912) — Tex. Civ. App. —, 146 S. W. 705, it was held that a separation agreement which divided 320 acres of land, the separate property of the husband, by giving the wife a life estate in 200 acres thereof, could not be set aside at the suit of the husband as unfair, unjust, and inequitable where the wife also took the children and assumed their maintenance and care as well as an indebtedness to them of \$2,600. Nor, it has been held (*Frank's Estate* (1900) 195 Pa. 26, 45 Atl. 489, affirming (1899) 8 Pa. Dist. R. 86), can un-

fairness in a separation agreement be predicated upon the fact that it gave the wife but \$1,000, whereas at the time of the death of the husband, twenty-six years later, he was worth \$60,000, there being no evidence of his possession of such an estate at the time the agreement was entered into. In *Tuxford v. Tuxford* (1918) 6 Sask. L. R. 96, it was held that a separation deed could not be set aside for unfairness to the wife merely because it provided an inadequate support for her, it appearing that she deserted the husband, that she executed the contract only after due deliberation and after consulting a solicitor, and that, at the time of such execution, she was earning her own livelihood as a professional nurse.

On the other hand, a considerable number of cases have involved facts which have been held sufficient to warrant the courts in setting aside separation agreements which were unjust, unequal, and inequitable.

Thus, in *Speiser v. Speiser* (1915) 188 Mo. App. 328, 175 S. W. 122, a separation agreement was declared void because unfair and unreasonable in that it undertook to divest the wife of all interest in her husband's property of the value of \$5,000, and gave her nothing in return. And it has been held that a separation agreement which allows a wife less than one fifth of the property, all of which belongs to the community, is so unfair that a court of equity will not enforce it even though both parties knew the amount and character of the property, the wife not having had the advice of an attorney or of any friend capable of giving same. *Cox v. Mailander* (1915) — Tex. Civ. App. —, 178 S. W. 1012. So, in *Nichols v. Nichols* (1912) 169 Mich. 540, 135 N. W. 328, a separation agreement providing for but \$7 per week to the wife was set aside at her suit as unconscionable and unfair, it appearing that the husband was worth over \$28,000 and had a net annual income of over \$1,200. Again, in *McConnell v. McConnell* (1911) 98 Ark. 193, 33 L.R.A.(N.S.) 1074, 136 S. W. 931, a separation agreement by which a man worth from \$15,000 to \$60,000

paid his wife, who had nothing, was in distress, and had no one to look to for advice, \$500 in lieu of all interest in his estate,—was held invalid as unfair. And in *Becket v. Becket* (1912) 175 Ill. App. 185, it was held that articles of separation providing for the payment of \$100 and a note for \$400, payable over two years later, as a settlement and satisfaction for a wife and child, and which were obtained while the wife was sick, and, according to her testimony, were not understood by her as a separation agreement, were not "fairly obtained," and, therefore, that they do not constitute a bar to a suit by the wife for separate maintenance. And again, in *Hill v. Hill* (1914) 190 Ill. App. 541, it was held that a separation agreement whereby the husband agreed to pay his wife \$50 per month out of an admitted salary of \$250 per month was unfair and no bar to a suit for separate maintenance, it having been obtained under a misunderstanding on her part, while she was in a nervous condition of mind brought about by his cruel and unkind treatment, and he having breached the agreement by refusing to make the payments. So, in *Hungerford v. Hungerford* (1900) 161 N. Y. 550, 56 N. E. 117, a court of equity, at the suit of the wife, set aside a separation agreement for unfairness in that it had been executed by her unadvisedly and improvidently as the result of ill treatment by the husband, and in that the provisions for her were entirely inadequate and unfair, considering the husband's means, the court arguing that such a contract is void in law and is enforceable in equity only when the provision for the wife is suitable and equitable. Likewise in *Montgomery v. Montgomery* (1918) 170 N. Y. Supp. 867, a separation agreement executed by a wife as the result of ill treatment, and which made inadequate and inequitable provision for her, considering the husband's means, was set aside because of such facts. And in *Ducas v. Guggenheimer* (1915) 90 Misc. 191, 153 N. Y. Supp. 591, affirmed in (1916) 173 App. Div. 884, 157 N. Y. Supp. 801, a separation agreement between a hus-

band and wife whereby she was to be paid \$4,000 per year was set aside because inadequate and unfair, it appearing that for the year of the separation the family expenses were over \$18,000, that the husband's income was over \$64,000, and that he was worth over \$850,000; that the husband, although not guilty of actual fraud, had failed to disclose his actual income and circumstances, and that the wife was induced to sign the agreement by reliance upon the husband's attorney and a desire to avoid litigation. In *Bailey v. Bailey* (1910) 157 Ill. App. 74, a separation agreement was set aside at the suit of the wife where the evidence (not set out in the report of the case) showed that "she was ignorant of her rights," and that, "considering the amount of property owned by the husband, the provision for her was inadequate and unfair."

And in *Montgomery v. Montgomery* (1914) 41 Okla. 581, 139 Pac. 288, where the execution of a separation agreement which would have left the husband in plenty and his wife almost in want was induced by the threats of the husband that if the wife did not take what was offered he would place all his property beyond her reach, it was held that equity would annul the same. And in *Palmer v. Palmer* (1903) 26 Utah, 31, 61 L.R.A. 641, 99 Am. St. Rep. 820, 72 Pac. 3, it was held that the facts irresistibly showed unfairness and coercion, it appearing that after the husband had sent the wife away he secretly sold all the property and left the state with the cash and instructed his attorney to conceal his whereabouts; that he kept her in ignorance of the value of the property and threatened never to return to the state while she was there; that the division of the property, which, with the assistance of her father, had been accumulated during their married life, was grossly unequal; and that he brought on the separation by his own intemperate habits and neglect of duties owed the wife. So, in *Kline v. Kline* (1907) 32 Ky. L. Rep. 492, 105 S. W. 1189, a separation agree-

ment was set aside as unfair, it appearing that it was obtained from the wife while she was in bad condition, both mentally and physically, and was under the domination of the husband, and that it provided but \$10 per week for the support and maintenance of herself and infant child, whereas the husband was receiving \$160 per month and had wealthy parents. In *Switzer v. Switzer* (1875) 26 Gratt. (Va.) 574, upon the theory that a separation agreement cannot be upheld unless clearly just and equitable and wholly free from deception and undue influence, it was held that a separation agreement entered into by a wife to avoid the scandal of a threatened divorce action, whereby the husband relieved himself and his property from the care or maintenance of the wife and children and obtained a life estate in her entire property of the value of about \$12,000, and the wife in return received a small amount of personal property of but little value and an annual supply of grain and pork not exceeding \$80 in value, would be set aside, it being said that the terms were so unjust as to warrant the belief that the contract must have been executed under influences of a potential character which, if they did not destroy, must, at least, have affected that freedom of will so absolutely indispensable in every contract between husband and wife.

In North Carolina by express statutory provision separation agreements between husbands and wives must be accompanied by the certificate of the probate officer that the contract is not unreasonable or injurious to the wife; and it has been held that where this statutory requirement has not been complied with the agreement is inoperative. *Archbell v. Archbell* (1912) 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D, 261.

#### V. Mistake.

In *Versyp v. Versyp* (1912) — Tex. Civ. App. —, 146 S. W. 705, in passing upon the admissibility of evidence to the effect that a husband would not have executed a certain separation agreement if he had not believed that his wife owned a half interest in the

property concerned, it was held that a court could not annul the agreement which divided the property on the ground that it was entered into by mutual mistake, the mistake having been pleaded merely as that of the husband. It was further held in this case that if the husband knew how the property was acquired, but believed it to be community property rather than his individual property, such belief was a mistake of law, and not of fact, where-

fore no relief against the contract could be given for such mistake.

And in *Hart v. Hart* (1881) L. R. 18 Ch. Div. (Eng.) 670, 50 L. J. Ch. N. S. 697, 30 Week. Rep. 8, 45 L. T. N. S. 13, it was held that specific performance of a separation deed could not be denied on the ground that, although the husband knew the words of the agreement when he signed it, he was laboring under a mistake as to their legal effect.  
G. J. C.

NELLE E. FINNIE, Admr., etc., of David T. Finnie, Deceased, Appt.,  
v.

ALFRED P. WALKER et al.

*United States Circuit Court of Appeals, Second Circuit — April 22, 1919.*

(257 Fed. 698.)

**Insurance — wagering assignment — effect on policy.**

1. A life insurance policy is not rendered void by a wagering assignment, but may be enforced by the personal representatives of the insured.

[See note on this question beginning on page 837.]

**— assignment of policy — validity.**

2. A life insurance policy taken out in good faith by the insured, with no idea of assigning it, can afterwards, in good faith and for a valuable consideration, be sold and assigned to one who has no insurable interest in the life.

[See 14 R. C. L. 907.]

**— contemporaneous assignments — wagering contracts.**

3. Assignments of life insurance policies contemporaneous with their issuance are wagering contracts.

[See 14 R. C. L. 908.]

**— wagering assignment.**

4. Assignment of an insurance policy some time after its issuance to one who knows that the insured is very sick, for a consideration so inadequate as to permit playing for a very high stake, and following a gradual acquisition of other policies on the life of insured, is void for wagering.

**Contract — against public interest — enforceability.**

5. A contract the tendency of which is to endanger the public interests and affect the public good, and which is subversive of sound morals, ought

never to receive the sanction of a court of equity or be the foundation for its judgment.

[See 10 R. C. L. 353.]

**Insurance — collection of policy — right of personal representative to proceeds.**

6. That a wagering assignee of an insurance policy has collected the face of the policy from the insurer does not prevent the personal representative of the insured from recovering from him the proceeds of the policy, less the expenses which he has incurred on account of it.

[See 14 R. C. L. 910.]

**— rights of assignee.**

7. The personal representative of an insured, seeking to recover the proceeds of the policy from a wagering assignee, must allow him to retain the consideration paid for the policy and the charges paid for keeping it alive.

[See 14 R. C. L. 910.]

**Evidence — assignment of insurance policy — condition of health of insured.**

8. In an action to recover the pro-

ceeds of a life insurance policy from an alleged wagering assignee, evidence of the condition of health of

the insured at the time of the assignment is competent upon the question of wagering intent.

(Ward, Circuit Judge, dissents.)

**APPEAL** by complainant from a decree of the District Court of the United States for the Southern District of New York dismissing a bill filed to recover the proceeds of a life insurance policy paid to defendant Morrow. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Messrs. Rollins & Rollins, and E. A. Merrill, for appellant:

The court erred in dismissing the bill of complaint, and in refusing to grant to the complainant the relief asked.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 36 L.R.A. (N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863; Lamont v. Grand Lodge, 31 Fed. 177; Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268; Stevens v. Warren, 101 Mass. 564; Cammack v. Lewis, 15 Wall. 643, 21 L. ed. 244; Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Mutual L. Ins. Co. v. Lane, 151 Fed. 276, affirmed in 85 C. C. A. 677, 157 Fed. 1002; Ritter v. Mutual L. Ins. Co. 169 U. S. 139-154, 42 L. ed. 693-698, 18 Sup. Ct. Rep. 300; Northwestern Mut. L. Ins. Co. v. McCue, 223 U. S. 234, 56 L. ed. 419, 38 L.R.A. (N.S.) 57, 32 Sup. Ct. Rep. 220; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Steinback v. Diepenbrock, 158 N. Y. 24, 44 L.R.A. 417, 70 Am. St. Rep. 424, 52 N. E. 662.

The court erred in excluding evidence of health.

Ritter v. Mutual L. Ins. Co. 169 U. S. 139-154, 42 L. ed. 693-698, 18 Sup. Ct. Rep. 300.

Messrs. Owen N. Brown and Conover English for appellees.

Manton, Circuit Judge, delivered the opinion of the court:

The Equitable Life Assurance Society in August, 1912, issued five policies of life insurance in the principal sum of \$5,000, upon the life of David T. Finnie. These policies were all delivered to A. S. Herenden, general agent of the society, and remained in his possession until their delivery by him.

Policy No. 1,778,976, payable to Finnie's wife, with right of revocation, was assigned September 26, 1913, to Morrow. Finnie paid the first premium to the agent of the company. Policy No. 1,778,977, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Morrow. Policy No. 1,778,978, payable to the estate of Finnie, was assigned August 20, 1912, to Morrow. Policy No. 1,779,245, payable to the estate of Finnie, was assigned September 12, 1912, to Morrow. Policy No. 1,779,241, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Walker, and on September 16, 1913, Walker assigned the policy to Morrow. The premiums on four of these policies were paid by Morrow, and on the fifth by Walker's note, but Morrow paid the note.

Finnie died September 18, 1917, and the moneys due on the five policies were paid to Morrow on September 20, 1917. The administratrix of the estate now sues in equity to recover the proceeds paid to Morrow, and praying that the appellees be allowed their respective sums paid for premiums, with interest, and that the difference be paid to the estate she represents. The theory of the action is that each assignee had no insurable interest in the life of Finnie, and that the assignments were in law wagering contracts. The trial judge dismissed the bill.

If Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924, has not been overruled or is not inconsistent with what was held in the later case of the Supreme Court, Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133,



36 L.R.A.(N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863, the appellant is entitled to the relief she seeks. In the Warnock Case, supra, the plaintiff's intestate, on procuring insurance upon his life, entered into an agreement with a firm whereby it was to pay all fees and assessments payable to the underwriters on the policy and to receive nine tenths due thereon at his death. Pursuant to this agreement, the intestate executed an assignment of the policy, and the firm paid the fees and assessments. Upon his death, the firm collected from the underwriters nine tenths of the amount due on the policy, plus the premiums paid. The administrator sued the underwriters for this nine tenths. There was no claim or charge of fraud upon the part of anyone. In approving a recovery, the court said, speaking of insurable interest:

"But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

*"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion, merely, of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to*

pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. . . .

"It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned."

In an earlier case, *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244, the policy of insurance for \$3,000 was procured by the debtor at the suggestion of a creditor to whom he owed \$70. It was assigned to the creditor to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds was to go to his widow. On his death, the assignee collected the money from the insurance company and paid the widow \$950 as her proportion, after deducting certain payments made. The widow, as administratrix of the deceased's estate, sued for the balance of the money collected and was successful. It was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering operation, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, for such advances as he might have after-

wards made on account of it, and that the assignment was valid only to that extent.

In the case relied upon by the appellees (*Grigsby v. Russell*, supra) it, at best, limited the doctrine of *Warnock v. Davis*, supra, so as to permit a policy previously taken out, under circumstances which made it perfectly valid, to be assigned to one who had no insurable interest in the life of the insured, providing a valid consideration was paid therefor by the assignee. A

**Insurance—** life insurance pol-  
**assignment of** icy taken out in  
**policy—validity.** good faith by the insured, with no idea of assigning it, can afterwards, in good faith, and for a valuable consideration, be sold and assigned to one who has no insurable interest in the life, under this latter case. In considering the authorities, Justice Holmes said: "And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager having no similarity to those where an honest contract is sold in good faith. . . . But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. *Warnock v. Davis*, supra."

In the *Grigsby* Case, supra, the insured, after paying two premiums and when the third was overdue, was in need of a surgical operation, obtained it from a doctor, and prevailed upon the doctor to buy the policy, for which the doctor paid \$100. This was held to be a valid assignment. It will be noted, however, that this was an out-and-out assignment, and there was no agreement, as in the *Warnock* or *Cammack* Cases, for a part interest only in the insurance; in other words, there were no conditions imposed which limited the extent of the assignment.

These policies were issued to the

estate of the intestate, and the salutary rule of public policy which condemns wagering assignments forbids the appellees retaining the moneys they received, other than the premiums paid by them. Contemporaneous assignments of life insurance policies are wagering contracts, and should be treated as such, just as the policies are where the beneficiary has no insurable interest. Here the policy was taken out with a view of its assignment. The assignment was contemporaneous with the issuance of the policy, and the facts disclosed in this record permit a fair inference that it was the intent of the appellees to obtain just such a result as the issuance of a wagering contract of insurance permits.

Justice Holmes, in *Grigsby v. Russell*, supra, indicates a desire on the part of the court to give as much commercial freedom and value as possible to the owner of a life insurance policy which has a market value; but that decision cannot be extended to cover facts such as are presented here, where there are four assignments of policies, with no consideration moving to the insured, and no consideration of commercial advantage is urged to sustain the assignments. As we read the opinion of the court, it is at least intimated that the court would follow the *Warnock* Case under similar circumstances, and it therefore follows that this court should visit its condemnation upon the assignments in the case now under consideration in this court.

It seems to us the facts require a conclusive presumption of wagering intent as to the fifth (that is, policy No. 1,778,976), assigned to Morrow in September, 1913. Even though this assignment be remote, in point of time, from the other contemporaneous assignments, and therefore not subject to the condemnation by reason thereof, it will be held illegal

—contemporaneous assignments—wagering contracts.

—wagering assignment.

and void beyond the sums advanced. This presumption was kept alive because of the inference in law arising from the wagering intent, established by the fact that Morrow knew at the time of this assignment that Finnie was a very sick man, and that the amount of the contract, compared with what was paid, permitted playing for a large stake. There was an intimate and close business connection between this transaction and the previous ones, wherein Morrow was gradually accumulating the five policies upon the life of the deceased. If, from these facts, the wagering intent may be presumed, as it must, that avoids the assignment. Any contract, the tendency of which is

Contract—  
against public  
interest—en-  
forceability.

to endanger the  
public interest and  
affect the public  
good, and which is

subversive of sound morality, ought never to receive the sanction of a court of equity, or be the foundation for its judgment. *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

In endeavoring to do equity between the two parties, the appellees will have full equity administered to them by obtaining the premiums and interest and other charges which they may have invested in keeping alive these policies. Relief should not be denied the appellant because the appellees have been paid by the insurance company. They may not keep the moneys which, through error of law or fact, or both, have been

Insurance—  
collection of  
policy—right of  
personal repre-  
sentative to  
proceeds.

paid to them by  
the insurance com-  
pany. Because of  
the mistake of the

insurance company, they should not have what the law says is not their property. The right to make them account as trustees for the moneys paid them by the insurance company cannot be denied the appellant. This would be contrary to *Warnock v. Davis*, as demonstrated by the language of the court above

quoted. The assignment of a policy to a party not having an insurable interest, with wagering intent, is as objectionable as the taking out of a policy in his name. The court can do no other than declare the assignment void; but it does not follow that the policy, which was issued and under which the money was paid, is void. Where the courts have held the assignments void and unenforceable, nevertheless the policy is valid, and the assignee may retain the antecedent debt or other consideration and advances made to keep the policy alive.

--wagering as-  
signment—effect  
on policy.

The theory of such a result seems to be that the assignment is said to be good as a designation of an appointee to receive payment from the insurance company and as a security for advancements. The illegality is in the attempt of the assignee to retain the entire proceeds. *Stevens v. Warren*, 101 Mass. 564; *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924. Certainly, if the assignment is held to be invalid, the administratrix may recover by virtue of her original title to the policy, for the reason that it never went out of the assignor or vested in the assignee. One who seeks equity must do equity, and therefore the administratrix here must permit the appellees to retain, out of the proceeds of the policy, the consideration and other charges paid.

--rights of as-  
signee.

Since there must be a new trial, we must consider the appellant's fourth assignment of error. The district judge, in his opinion, stated that the case presented a legal point of great importance, new in this jurisdiction, and he treated it as a law point, stating that if he was wrong there must be a new trial, because of the rejection of evidence offered by the appellant which would be of importance under the theory of law announced in this

opinion. The appellant offered evidence as to Finnie's bad health and knowledge thereof by assignee. Condition of health of the insured at the time of the assignment of his insurance policy was competent and important in determining the question of wagering intent. It was therefore error to exclude this testimony.

Judgment reversed.

**Ward, Circuit Judge, dissenting:**

The theory of the bill is that the assignees of the policies had no insurable interest to sustain absolute assignments, and that they should be construed only to secure any advances made to Finnie in his lifetime; the balance of the insurance collected by the defendant Morrow from the insurance company to be paid to Finnie's estate.

The defendants in their demurrers denied that they had advanced any moneys to Finnie in his lifetime, or that they held the policies as collateral security. On the contrary, they claimed to be absolute owners as purchasers. It is true that the defendant Morrow testified on the trial that Finnie owed him some \$400 to \$500; but this was rightly rejected by the district judge as having been a consideration for the assignments to him. The bill cannot be sustained on this theory. Neither of the defendants had any insurable interest in Finnie's life as relative, dependent, or creditor.

Policy 1,778,976, dated August 20, 1912, and executed by the company August 21st, was delivered to Finnie against his note for the first annual premium, which note he paid. Subsequently he revoked the designation of his wife as beneficiary, and assigned the policy to the defendant Morrow for an expressed consideration of \$1. This being a valid policy on Finnie's life, it was his property, which he could sell or give to anyone, without reference to insurable interest, as held in *Grigsby v. Russell*, 222 U. S. 149, 56 L. ed. 133, 36 L.R.A. (N.S.)

642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863.

The other four policies, though payable to his estate, were never delivered by the company to Finnie; he never paid any premiums upon them, and never owned them at all. They did not come into existence until delivery to his assignees against payment by them of the first annual premium. Finnie never had a valid policy to sell or give away, within the decision in the *Grigsby* Case. The situation was exactly as if the assignees had originally taken out wagering policies upon his life payable to them. Therefore I think, not merely the assignments, but the policies themselves, were void as wagering insurance. The fact that the insurance company has paid them to the defendant Morrow, assignee, as absolute owner, without raising any question of invalidity, does not change their character quâ Finnie's estate.

But the court, relying upon *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, holds that the assignments are void, but the policies valid. It must be admitted, as intimated by Mr. Justice Holmes in the *Grigsby* Case, that the language of Mr. Justice Field was too broad, although he finds the decisions themselves to be consistent with each other. I think they can be reconciled on the theory that in *Warnock v. Davis* the policy itself was held valid, perhaps because taken out by and delivered to the insured, he paying at least one tenth of the first annual premium, and being liable for at least one tenth of the subsequent premiums, and his widow, or, in case of her death, his estate, being entitled to at least one tenth of the insurance.

This may have justified treating the assignment of the remaining nine tenths as valid, but only as security for repayment of premiums advanced by the assignee. But the four policies in the instant case were, in my opinion, never valid at all, being pure wagers from their

inception, and therefore neither Finnie in his lifetime nor his estate after his death had any standing to make claims against the insurance company or the person to whom it has paid the insurance. I think the

decree should be affirmed as to the first policy, because it was valid, and as to the four policies, because Finnie's estate has no interest in them, and not because they are valid.

## ANNOTATION.

### Effect on insurance contract of wagering assignment thereof.

An irreconcilable conflict exists as to whether certain assignments constitute wagering contracts. This note, however, is not concerned with that question, but includes only cases which, assuming or determining that the assignment involved was a wagering one, have expressly considered the effect of that fact on the contract of insurance itself.

**Where policy was procured before assignment was agreed upon.**

It will be observed that the conclusion was reached in the reported case (FINNIE v. WALKER, ante, 831) that a wagering assignment of the policy did not render the contract of insurance invalid.

And in the following cases the fact that a wagering assignment of a policy was made in pursuance of an agreement entered into after the policy was issued was held not to render the policy itself invalid. *Quillian v. Johnson* (1904) 122 Ga. 49, 49 S. E. 801; *New York L. Ins. Co. v. Brown* (1902) 139 Ky. 711, 66 S. W. 613; *Gilbert v. Moose* (1883) 104 Pa. 74, 49 Am. Rep. 570; *Quinn v. Supreme Council, C. K. A.* (1897) 99 Tenn. 80, 41 S. W. 343; *Manhattan L. Ins. Co. v. Cohen* (1911) — Tex. Civ. App. —, 139 S. W. 51.

In *New York L. Ins. Co. v. Brown* (1902) 139 Ky. 711, 66 S. W. 613, supra, in an action by the insured's administrator, a policy issued to the insured and payable to his executor, administrator, or assigns was held not rendered invalid by an assignment to one having no insurable interest in the insured's life, the assignment having been made in pursuance of an agreement entered into after the receipt of the policy. The court stated that, although it was well settled in Kentucky that no one could enforce a

policy on the life of another without having an insurable interest in such life, it was equally as well settled that the contract of insurance was not violated by the designation of a person prohibited by law from being the beneficiary.

And in *Manhattan L. Ins. Co. v. Cohen* (1911) — Tex. Civ. App. —, 139 S. W. 51, an assignment made to one having no insurable interest in the insured's life, in consideration of a certain sum for the equities in the policy, was held void so that it vested no right in the assignee; and the insurer, which had paid the benefit to the assignee, was held liable to the beneficiary for the face of the policy.

And in *Quillian v. Johnson* (1904) 122 Ga. 49, 49 S. E. 801, where a wagering assignment of a policy payable to the insured's estate was made, it was held that the policy was not rendered invalid, and that the personal representative of the insured was entitled to the proceeds of the policy, which the insurer had deposited with a third party, less the advances made by the assignee. The court said: "It only remains to inquire whether or not the trial court did, as contended by counsel for Quillian (the assignee), undertake to enforce the terms of the illegal contract and distribute the fruits thereof. The fund in controversy did not arise from the illegal agreement, but was the proceeds of a valid policy of insurance on the life of Thomas. It was kept in life by the payment, in behalf of Thomas, of the past-due quarterly premium; Quillian paid over to Johnson, as the agent of Thomas, the money with which to pay this premium, and the money so advanced by Quillian was parted with by him under the terms of the illegal

agreement between him and Thomas. But the money was received by the insurance company as the money of Thomas, which it in fact was at the time the premium was paid; and though it came from an illegal source, this fact did not operate to vitiate the policy. The insurance company could not successfully so contend, nor can Quillian. He can only insist that he paid over the money on a wager, and has a statutory right to sue and recover the same from Thomas's executor. The court gave him credit for this amount, as though he had brought suit and established his statutory right to recover it."

And in *Quinn v. Supreme Council, C. K. A.* (1897) 99 Tenn. 80, 41 S. W. 343, where one who had a policy on his life payable to his wife entered into an agreement with another having no insurable interest in his life, to assign the policy to him in consideration of a small sum and the payment of future premiums, and, in pursuance of the agreement, allowed the policy to lapse and procured a new certificate in his own name upon reinstatement, and assigned this in accord with the agreement, the assignment was held not to invalidate the policy itself, and, the insurer having recognized it as valid and paid the benefit to the assignee, the original beneficiary was held entitled to recover from the assignee the amount of the benefit, less the amount expended by the latter in keeping the policy alive. And to the same effect is *Bendet v. Ellis* (1908) 120 Tenn. 277, 18 L.R.A.(N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795.

And in *Gilbert v. Moose* (1883) 104 Pa. 74, 49 Am. Rep. 570, where, upon the insured's application, a policy was issued in which one having no insurable interest was named as beneficiary, and was subsequently assigned to one having no insurable interest, to whom the insurer paid the benefit on the insured's death, a recovery was allowed from him by the insured's administrator. The court, with reference to the validity of the policy, said that they must take it as valid, nothing to the contrary appearing from the evidence, and that its validity did not seem to

have been questioned in the court below.

And in *Price v. Supreme Lodge, K. H.* (1887) 68 Tex. 361, 4 S. W. 633, where a policy was assigned by an insured, who was unable to pay the premiums, to one who agreed to pay them if the policy was transferred to him, it was held that the assignment was void and that the original beneficiaries were entitled to the fund. The insurer in this case set up no defense, and the court said: "This is not a question between the appellant and the lodge, but between him and parties who are entitled to the insurance money, if the assignment is void. The assignment did not vitiate the policy, but was itself of no effect, and left the insurance money payable to the parties originally designated in the certificate. From these views, our conclusion is that the transfer, having been made to one having no interest in the life of Thomas C. Harper, and upon no other consideration than the payment of premiums by the transferee, was void and against public policy, and the insurance money was payable to the original beneficiaries of the certificate."

But in *Missouri Valley L. Ins. Co. v. McCrum* (1887) 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517, where a paid-up policy was issued, payable to the insured's daughters, and he and the beneficiaries, several years after the policy was issued, assigned it for a valuable consideration to one having no insurable interest in the insured's life, the transaction between the parties was held contrary to public policy, and the policy was held worthless and void, not only as to the assignee, but also in the hands of the beneficiaries. The court reasoned in this case that the insurer did not intend that the policy should belong to anyone directly interested in the insured's death, and that the assignment of the policy by the beneficiaries to one who took for speculation only was a fraud on the company, and said: "If the party who attempts to speculate in human life cannot enforce the policy which he has purchased on the life of another, in whose life he has no in-

surable interest, the beneficiaries who knowingly and purposely sell and assign to such a person the policy on the life of another for a valuable consideration ought not thereafter to be permitted to enforce the same for their own benefit. If, under all the facts of this case, the beneficiaries, or their assignee, could recover, the law forbidding the assignment of policies of insurance to parties who have no insurable interest might be readily avoided. If Mrs. Parker had been a creditor of the insured for any sum, the assignment would have been a valid contract as security for the same, and upon the death of the insured the assignee could have collected any sum lent to or owed by the insured, and the balance would have belonged to the beneficiaries or their assignee. Such a case is not presented."

The McCrum Case (Kan.) *supra*, was followed in Metropolitan L. Ins. Co. v. Elison (1905) 72 Kan. 199, 3 L.R.A.(N.S.) 934, 115 Am. St. Rep. 189, 83 Pac. 410, 7 Ann. Cas. 909, where twelve days after a policy was issued the insured and beneficiary entered into an agreement with one having no insurable interest, by which the policy was to be assigned to him, and he was to pay the premiums, and receive a part of the benefit on the insured's death, or at the maturity of the policy, and it was held that the agreement was against public policy, and that neither the assignee nor beneficiary could recover on the policy.

**Where policy is taken in pursuance of agreement for wagering assignment.**

The fact that a wagering assignment was contemplated at the time a policy was secured has been held to avoid the policy on the ground that the entire contract was a wagering one. Brockway v. Mutual Ben. L. Ins. Co. (1881) 9 Fed. 249; Prudential Ins. Co. v. Williams (1914) 113 Ark. 373, 168 S. W. 1114; Bromley v. Washington L. Ins. Co. (1906) 122 Ky. 402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 Ann. Cas. 685; Equitable Life Assur. Soc. v. O'Connor (1915) 162 Ky. 262, 172 S. W. 496, second appeal (1916) 170 Ky. 715, 186 S. W. 502; Keystone Mut. Ben. Asso.

v. Norris (1886) 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638; Powell v. Dewey (1898) 128 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381; Hinton v. Mutual Reserve Fund Life Asso. (1904) 135 N. C. 814, 65 L.R.A. 161, 102 Am. St. Rep. 545, 47 S. E. 474; Clement v. New York L. Ins. Co. (1898) 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561.

In Bromley v. Washington L. Ins. Co. (1906) 122 Ky. 402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 Ann. Cas. 685, a life policy procured on the understanding that the insured was to secure it, and for a consideration assign it to one having no insurable interest in his life, who was to pay the premiums on it, and which was assigned and delivered to the latter without reaching the possession of the insured, was held void, although it was payable to the estate of the insured. The court said: "The proof shows clearly that Bates had no insurable interest in the life of Bromley, and while the assignment on the policies is dated March 25, 1901, the proof is clear that the policies were taken out by Bromley for the purpose of assigning them to Bates, under the arrangement that Bates was to pay him \$75 for them and pay the premiums. In other words, the arrangement was simply that Bromley was to get \$75 for having his life insured for Bates's benefit, Bates to pay the premiums on the policies. It is conceded that if the policies under this arrangement had been made payable to Bates they would have been void, as he had no insurable interest in the life of Bromley. But it is insisted that, as they were made payable to Bromley's estate, and were assigned by him to Bates, only the assignment is void, and that his administrator may recover of the insurance company. There would be force in this if the policies had been delivered to Bromley, and the assignment to Bates had been a subsequent and independent transaction. But the proof leaves no doubt that Bromley did not contemplate insuring his life for the benefit of his estate at any time. He contemplated simply getting \$75 out of the arrangement.

The policies were never intended to be delivered to Bromley. Bates was to pay the premiums and get the policies. The policies did not become effective until the first premium was paid. Bates paid the premium upon the idea that the policies were to be assigned to him, and for this reason they were left in the hands of the insurance agent until the assignment was made, the delay in closing up the matter being due to the fact that the parties had to wait for the second policy to come. To hold such an arrangement good would be to shut our eyes to the truth, and to enforce a mere form."

And where one procures a policy pursuant to an agreement with another that the latter is to pay the premiums, and take four fifths of the proceeds of the policy, and that the policy shall be assigned to such person, the policy is rendered invalid by an assignment made to a third person in pursuance of the agreement, as it is merely a cover for a wagering contract. *Prudential Ins. Co. v. Williams* (1914) 113 Ark. 373, 168 S. W. 1114.

And in *Brockway v. Mutual Ben. L. Ins. Co.* (1881) 9 Fed. 249, in charging the jury, in a case by the administrator of the insured against the insurer for the benefit of an assignee, the court stated that the defendant claimed that the evidence showed that the policy was taken out nominally for the insured, but actually for the assignee as a matter of speculation on the insured's life, and a mere cover for a wager policy, and told the jury that if they so found there could be no recovery upon the policy against the insurer.

And in *Hinton v. Mutual Reserve Fund Life Asso.* (1904) 135 N. C. 314, 65 L.R.A. 161, 102 Am. St. Rep. 545, 47 S. E. 474, it was held that an insurance company might resist payment to an assignee on the ground of fraud, of the amount due on a policy secured by the holder of a purchase money mortgage, on the life of the mortgagor's wife, who was not bound by the mortgage, to secure his debt, where, knowing that if the insurer knew the facts it would not issue a policy in his favor, he procured it to be issued to her,

paying the premiums himself, and within a month took an assignment of it, without notice to the insurer, and contrary to its rules.

And in *Powell v. Dewey* (1898) 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381, where a policy was issued on the life of a partner, and an assignment was made the same day to a partner having no insurable interest, it was held that the policy was void, and that no recovery could be had thereon.

In *New York L. Ins. Co. v. Davis* (1899) 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475, the insurer attempted to defend an action by the insured's representative on the ground that the policy was void in its inception because the application was not made at the insured's volition, but at the instance of one who had formed the purpose of procuring an assignment and murdering the insured. The evidence, however, was held insufficient to prove this defense, and a recovery was allowed of the excess over the premiums paid by the assignee. The court said: "The company resists all liability on the policies, upon the alleged ground that the application for the insurance was not the result of the volition of Davis, and did not emanate from him, but that he was induced by Lester to take out the policies, and that it was only at the instigation and by the persuasion of Lester that he did so; that Lester, at the time he induced Davis to effect the insurance, had formed the purpose to procure from Davis an assignment of the policies, and then take his life in order to collect the policies; and that when the policies were issued to Davis, Lester did procure from him an assignment of them to himself, and subsequently murdered him. It was conceded that, if the policies were taken out by Davis in good faith and were valid in their incipency, their subsequent assignment to Lester, although procured by him with a view to the murder of the insured and the collection of the policies, would not prevent a recovery on them for the estate of the deceased. Upon the company rests the burden of making good its defense, and establishing the al-



leged fraud. This it undertook to do, and it may be conceded that a number of facts and circumstances were shown in evidence which tend to excite suspicion that there was some foundation for the accusation of the company; but upon a full and careful consideration of all the evidence, it falls short of that clear and satisfactory proof required to establish fraud."

The court in *New York L. Ins. Co. v. Brown* (1902) 139 Ky. 711, 66 S. W. 613, stated that it was of the opinion that the mere fact that the insured intended, when he applied for his policy, to assign it to one without an insurable interest, would not of itself render the policy void, but it was not called upon to decide the question, as this defense was not pleaded.

J. T. W.

## SHELDON KNOWLTON

v.

HENRY BAUMHOVER et al., Appts.

*Iowa Supreme Court—January 18, 1918.*

(182 Iowa, 691, 166 N. W. 202.)

### School — what is a sectarian school.

1. To constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian instruction.

[See note on this question beginning on page 866.]

### Injunction — against paying public money to sectarian school.

2. Injunction lies to prevent officials of a public school district from appropriating and paying the funds of the district to the support of a school in a building under the control of the Roman Catholic Church, which is taught by sisters in the garb of their order, with religious emblems hanging upon the walls and religious exercises conducted either in the school building or in the adjoining church.

[See 24 R. C. L. 595.]

### School — sectarian — use of public money — consent of people.

3. That the maintenance of a sectarian school as a public school in a public school district is approved by the consent of the people of the district does not justify the appropriation of public money for its support.

[See 24 R. C. L. 595, 596.]

### Estoppel — acquiescence in sectarian school — effect on patron.

4. Acquiescence for a series of years by the inhabitants of a school district in the conducting of the school as a sectarian school does not estop a patron or taxpayer from seeking the aid of the courts to stop such practice.

### Evidence — character of school.

5. In a suit to enjoin the maintenance of a sectarian school with public money, evidence is admissible that the teachers were in the garb of their sect, taught the catechism of their sect, displayed its emblems on the walls of the schoolroom, gave religious instruction, used the sectarian prayer book, and that the school building was proximate to a church where the children were assembled to be taught by a priest of the order.

### School — what is sect.

6. Before the law, every church or other organization upholding or permitting any form of religion or religious faith or practice is a sect, which is denied the right to use the public funds for the advancement of religious or sectarian teaching.

[See 24 R. C. L. 596, 659.]

### Injunction — against discretionary act.

7. No action within the discretion of the directors of a school district can be controlled by injunction.

[See 24 R. C. L. 575.]

### School — discretion of trustees — control by court.

8. The discretion conferred on a school board, by statute, to rent a

room and employ a teacher when there are ten children for whose accommodation there is no schoolhouse, is abused so as to be subject to control of the courts where they abandon the schoolhouse and rent a portion of a parochial school for school purposes; and the remedy is not limited to appeal to higher school authorities.

[See 24 R. C. L. 575, 576.]

— controlled by courts.

9. Where a board of school directors acts without jurisdiction or in excess of its powers, and, by some act in an official capacity, has done, or attempted to do, that which it has not the right to do, the courts will interfere and correct the wrong.

[See 24 R. C. L. 574.]

Injunction — against religious instruction in private school.

10. Injunction does not lie to pre-

(Preston, Ch. J., and Salinger, J., dissent.)

vent a sectarian society from giving religious instruction in a school maintained by it at its own expense.

Schools — reading of Scriptures — validity.

11. The reading of the Scriptures without note or comment and recitation of the Lord's Prayer in a public school, will not be enjoined.

[See 24 R. C. L. 660 et seq.]

Mandamus — to compel performance of duties.

12. An injunction against paying public money for the support of a parochial school, which has been established in lieu of a public school, need not contain a mandate to maintain a proper public school, since it will be assumed that the directors will perform their duties in the matter.

[See 10 R. C. L. 880.]

**APPEAL** by defendants from a judgment of the District Court for Carroll County (Powers, J.) in favor of plaintiff in an action brought to enjoin defendants from using public money for the support of a parochial school. *Affirmed.*

Statement by Weaver, J.:

Suit in equity to enjoin the defendants, directors and officers of a school corporation, from appropriating, contributing, or paying out public school funds for the support, or in aid of the maintenance or support, of a parochial school, and for other equitable relief. The defendants denied the allegations of the petition, and on trial to the court a decree was entered substantially as prayed, and defendants appeal.

Messrs. Reynolds & Meyers and Lee & Robb for appellants.

Messrs. Sims & Kuehnle, for appellee:

Plaintiff had the right to maintain the action.

Kagy v. Independent Dist. 117 Iowa, 700, 89 N. W. 972; Weitz v. Independent Dist. 78 Iowa, 37, 42 N. W. 577; Cornell College v. Iowa County, 32 Iowa, 520; Kellogg v. School Dist. 13 Okla. 285, 74 Pac. 110.

Public money cannot be lawfully appropriated or used in aid of any private or sectarian school.

Cook County v. Chicago Industrial School, 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; State

ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373; Hackett v. Brooksville Graded School Dist. 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; Billard v. Board of Education, 105 Am. St. Rep. 151, note; State ex rel. Freeman v. Scheve, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169; State ex rel. Weiss v. District Bd. 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967.

Weaver, J., delivered the opinion of the court:

Maple River township district is a school corporation of Carroll county. One of its subdistricts includes a small village bearing the name Maple River, and is spoken of in the record as "Maple River district," or "Maple district," and sometimes as "No. 4." For many years prior to March, 1905, a schoolhouse had been provided for the use of this subdistrict, and a public school regularly maintained therein. At the March, 1905, meeting of the board of directors, a resolution was adopted to the effect that, because of the "inadequacy" of the school

building and for the "saving of expense," it was advisable to rent for school purposes "the north room of the second story of the building standing on lot 11, block 7, in the town of Maple River, for a period of ten years at a yearly rental of \$2.50, and that the president of the board be authorized to enter into such a lease with Joseph Kuemper." This was done, and the schoolhouse property was sold and disposed of. From that time forward the only public school, if any, in Maple district, has been maintained in the place described in the lease above mentioned. In the year 1914 this suit was brought by the plaintiff, a resident taxpayer of the district, alleging that the school so maintained is not a public school within the meaning of the law, but is in fact a parochial or religious school, which was established, and has been and still is being conducted, by and in behalf of the religious organization known as the Roman Catholic Church, and that the board of directors and the treasurer of the district have paid out and expended, and, if not restrained from so doing, will continue to pay out and expend, the public funds of the district for the benefit and support of the said parochial school. Upon this showing an injunction was prayed forbidding all such use of the public funds, and for other equitable relief. The answer of the defendants is a denial, generally, of the allegations of the petition.

The trial court, after hearing the evidence, found for the plaintiff, and entered a decree perpetually enjoining the defendants and their successors in office from using or appropriating the moneys of the district to such end, and commanding the board of directors to provide a school building for the use of the subdistrict, and meanwhile, until such building could be provided, that a suitable room be rented for that purpose elsewhere than in connection with the parochial school. From this decree the defendants have appealed.

I. While there is dispute at several points concerning certain matters of fact, very much of the testimony, and enough to fairly determine the merits of the case, is either undisputed or thoroughly well established by a clear preponderance of the evidence. It appears that the school township and subdistrict in question are peopled very largely by families of the Roman Catholic faith, and that parents of that communion prefer, whenever it is possible, that their children be trained or taught in parochial or religious schools of that faith until they have finished a course which is comparable to that which is covered by the first eight grades in public schools. A Roman Catholic house of worship known as the "St. Francis Church" had been erected in that vicinity, and there religious services were regularly conducted by priests to whom the pastoral charge of that parish was from time to time committed. By its side was also erected a building in which a parochial school was maintained. This building was of two stories, each having a schoolroom. The teachers in these rooms were Catholic sisters, wearing the characteristic garb and regalia of their order, who gave daily instruction to their pupils not only in branches of secular learning, but also in the Catholic catechism and in the elementary principles of Catholic faith. The building as a whole was to all intents and purposes a single schoolhouse, and the classes taught therein constituted a single school of two departments, established and maintained for the express purpose of giving religious training to its pupils, and at the same time affording such pupils, as nearly as practicable, the equivalent of a common-school education. Therefore, when we say that the property described in the resolution adopted by the board of directors as the "north room of the second story of the building standing on lot 11, block 7, in the town of Maple River," was in fact the upper room of the parochial school building which we

have described, and the nominal lessor, "Joseph Kuemper," was the priest in charge of St. Francis Church, which had the parochial school under its fostering care, the inevitable certainty of this controversy is plainly seen, and should have been visible to the parties to the transaction.

Let us now look briefly into the practical working of the arrangement thus made. Miss Martin, whose religious name is Sister Estella, and who was in charge of the upper room of the parochial school, was employed by the board of directors as teacher of the sub-district school, and she took charge, or rather she remained in charge of that room, while the lower room remained in charge of another sister of the same order, who continued to conduct it as an avowedly church school. The pupils in both rooms were organized and graded after the manner of a single school of two departments, the younger children being taught in the lower room, and the older ones in the upper. From the beginning, and for a period of more than nine years, the study of the Catholic catechism and the giving of religious instruction were part of the daily program of instruction in both rooms. The walls were hung with pictures of the Holy Virgin, of Christ crowned with thorns, of the Crucifixion, and others, all unmistakably appealing to Catholic sentiment, and the teachers were invariably arrayed in the striking robes of their order. Every influence of association and environment, and of precept and example, to say nothing of authority, were thus contrived to keep those of Catholic parentage loyal to their faith and to bias in the same direction those of non-Catholic parentage. In short, so far as its immediate management and control were concerned, the manner of imparting instruction, both secular and religious, and the influence and leadership exercised over the minds of the pupils, it was as thoroughly

and completely a religious parochial school as it could well have been had it continued in name as well as in practice the school of the parish, under the special charge and supervision of the Church, its clergy, and religious orders. The act of the board in thus surrendering its proper functions and duties is not to be explained as a mere change in the location of the public school, or a mere exercise of the discretion which the law gives to the board to rent a schoolroom when circumstances render it necessary. It was a practical elimination of the public school as such, and a transfer of its name and its revenues to the upper department of the parochial school. That the two departments, the so-called public school in the upper room and the church school in the lower room, were, in practical operation, considered and treated as a unit, a single school of two departments, is demonstrated by their organization and grading to which we have already referred. That Sister Estella was regarded as the head of this school as an entirety and the sister in the lower room as her assistant is quite apparent. Indeed, on at least one occasion, when, in her alleged capacity as teacher of the public school, Sister Estella undertook to make her regular report of the pupils attending her school together with other statistics relating to the school and its work, she included therein the total number of pupils in both rooms, their average attendance, and other facts and figures relating thereto. It is true the secretary of the board, who came into office after this report was made, and received it with other papers from his predecessor, to whom it had been delivered by the teacher, seems to have had an eye to the preservation of appearances, and wrote upon the document the words, "Not accepted," but by what authority is not explained. It is further said by this secretary that he procured the teacher to make an amended report, omitting therefrom all statistics except those pertain-

ing to the school in the upper room. But if those schools were not in fact one and under the same control, if they were distinct and independent as is now claimed, it is quite incredible that the sister in charge, being called upon for a report of her school, could have been led into the blunder of including therein all the statistics of both. She was not produced as a witness, and no attempt is made to explain this inconsistency. It is much easier to believe that in the honest simplicity of her heart she made her report in accordance with what she understood to be the simple truth.

But it is argued in support of the appeal that, conceding the impropriety of teaching the catechism and the giving of religious instruction in the school, it was a mere irregularity which occurred without the knowledge or consent of the board of directors, and that when the practice became known to them they caused it to be abandoned. It is simply imposing too great a tax upon human credulity to believe that this school could have been conducted in the manner described for nine consecutive years, and no notice or knowledge thereof have come to the ears of these officers. All of them had for considerable periods been members of the board, or held other official positions having to do with the public schools of the township. Some of them had children of their own attending this school. Several of them had served as directors of this subdistrict. The religious character and practices of the school do not appear to have been hidden from the directors under any veil of secrecy, and, assuming that these officers gave any attention whatever to their official trust, they must have known the facts as they existed, as indeed they must have been a matter of common knowledge throughout the district. The only explanation compatible with the entire candor of these denials is that, having surrendered the school to the care of the church, the officers cast

off all thought of its further care or attention, except to go through the form from time to time of contracting with the teachers and providing for the support of the school from the public funds. That there is a large grain of truth in this theory is corroborated by the admission in testimony, that during all this period not one of the directors ever visited the school, or gave to the sister in charge any instruction, direction, or rule with reference to her duties. The nominal rent reserved to St. Francis Church for the use of the schoolroom was never demanded and never paid. Nonresident pupils attended the school without paying tuition to the district. The statement that upon complaint made the board ordered a discontinuance of the use of the catechism is not borne out by the record. There is no showing that the board or any officer or director of the district, even after complaint was made, took any action whatever to interfere with the practice, or gave any order or instruction to the sister in charge of the school to discontinue it. When complaint was made to the board, instead of taking up the investigation officially, it did no more than tell the complaining parties to investigate themselves and report again in the future. The county superintendent does say that when he "heard of the teaching of the catechism in this room" he at once "took measures to prevent it," and that such study was thereafter abandoned. The abandonment spoken of was in the form rather than in the substance of the practice by which the school was made a potent factor of religious propaganda. The change adopted was the omission of the catechism from the daily program of exercises, only to be taken up at once in the church building near at hand, where the children were assembled each morning immediately before the school was open for the day, and there received instructions at the hands of the priest. Conceding for argument's sake that such at-

tendance was voluntary in the sense that no requirement or command was laid upon non-Catholic pupils to attend to take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly open door of the church and receive with their companions the instructions there given? That these conditions show any real or substantial removal of the objectionable features which differentiate this school from the public school provided for by law, we cannot admit. When we speak of these matters as objectionable, it is not because of any danger of injury, morally or religiously, to children of another faith, but because they cannot be tolerated in public schools without infringing upon the common right of every citizen, whatever his faith, to rear his own children in his own way so long as he keeps within the law.

Again, it is argued that this school was approved by the acquiescence or consent of the people of

**School—sec-  
tarian—use of  
public money—  
consent of  
people.**

the district, but this is setting up a standard which the law does not recognize. The board of

directors had no authority to clothe a religious school with the character

**Estoppel—  
acquiescence  
in sectarian  
school—effect  
on patron.**

of a public school, and no estoppel could arise against the complaint of any patron or taxpayer simply because of delay in entering his protest.

Again, it is said that the public character of the school was guarded by providing that no child should be

required to attend the school in the lower room, and by directing the teacher in the upper room to receive all children of any grade applying for admission, and to give them instruction suited to their several needs. There is not a word of this kind in the records of the board or of the school which have been put in evidence. Some of the directors say, in substance, that such was their understanding, and the county superintendent testifies that in his talk with the board he "understood that, *if anyone refused to attend the parochial school*, he was at liberty to attend the other school, and take work in the regular courses." This statement is a practical, though perhaps unconscious, admission that the general plan of the school was a grading of the pupils in both rooms in such manner as to send the lower grades into the lower room (an admittedly parochial department) and the higher grades into the upper room, except when such plan was interrupted by the refusal of a young child to conform thereto, an exception which may well be dismissed as being a very negligible possibility. There is no evidence that any pupil below the sixth grade was ever taught in the upper room. The county superintendent himself says that when he visited this room he found Sister Estella teaching the sixth, seventh, and eighth grades, and, if it ever occurred to his supervisory discretion to inquire into the absence of the younger pupils who as a rule constitute the larger part of every public school, he does not mention it.

It is also not without a bearing on this phase of the case that, before the leasing of the parochial building of which we have spoken, the attendance at the parochial school was so general as to materially deplete the attendance at the public school; but when the change was made the attendance was very largely increased, and soon thereafter the compensation paid to Sister Estella was increased from \$56 to \$70 per month. Two of the di-

rectors testify that this advance was made to enable this sister to divide her salary in some proportion with the sister who taught in the lower room. This is denied by others of the directors, while still others say they heard nothing of that kind. Neither of the teachers who could have settled the truth of this dispute was called as witness. But, whatever the truth may be in this particular instance, it is an illuminating circumstance that when the public school had been metamorphosed or reorganized into the school in the second story of the parochial building under the auspices and organization which we have described, the objections which had led the supporters of the parochial school to found and maintain it at their private expense, and to withdraw or withhold their patronage from the public school, were somehow obviated, and the so-called public school became the recipient of the favor and confidence which it had before been denied. That these patrons had abandoned or renounced their religious scruples is scarcely to be believed, but if they accepted the school conducted by Sister Estella as affording their children all the advantages of religious training for which they formerly relied upon the parochial school, then their conduct is not only easily understood, but their conclusion in this respect was a reasonable deduction from the admitted and proven facts.

In short, it must be said that with the abandonment of the public schoolhouse and the transfer of the school into the parochial building, and its organization and conduct as there perfected, the school ceased to have a public character in the sense contemplated by our laws, and became, has since been, and now is, a religious school, maintained and conducted with a special view to the promotion of the faith of the Church under whose favor and guardianship it was founded.

II. Appellants misconceive the nature and purpose of this action

when they undertake to treat it as a mere objection to the employment of a sister of charity as a teacher in a public school, or to the fact that such teacher arrays herself in the peculiar garb of her order, or to her practice of reading the Bible or repeating the Lord's Prayer in the presence of her school. The objection goes far deeper than that. The substance and effect of the complaint made by plaintiff is that a particular public school has been perverted into a sectarian or religious school, contrary to the laws of our state, and that the defendants, in their official capacity, are unlawfully appropriating the public funds to its support. That charge being denied, the plaintiff properly put in evidence such facts as he was able to develop having any legitimate tendency to disclose the real nature and character of the school in question. Among these circumstances were not only the study of the Catholic catechism, but also the display of emblems of the Catholic faith, the giving of religious instruction, the use of the Catholic prayer book, the design and purpose of the parochial building for which the public schoolhouse was abandoned, the immediate proximity of the church where the children assembled to be taught by the priest, the religious dress in which the teachers were arrayed, together with other pertinent facts from which the court could determine whether this was in fact an ordinary public school from which all sectarian instruction and influence were strictly excluded, or had been transformed into an efficient instrument of promoting and extending the work and influence of the church. That these are proper matters of evidence affording light upon the issues thus

**Evidence—character of school.**

joined is not only manifest to every person of common observation and common sense, but also, as we shall show in another paragraph of this opinion, they have been so treated by the courts over and over again.

The law does not prescribe the fashion of dress of man or woman; it demands no religious test for admission into the teacher's profession; it leaves all men to worship God or to refrain from worship according to their own consciences; it prefers no one church or creed to another. This principle of unfettered individual liberty of conscience necessarily implies, what is too often forgotten, that such liberty must be so exercised by him to whom it is given as not to infringe upon the equally sacred right of his neighbor to differ with him. To that end it is fundamental that the law itself shall be free from all taint of discrimination, and that the state shall be watchful to forbid the use or abuse of any of its functions, powers, or privileges in the interest of any church or creed. Nowhere is such abuse more likely to manifest itself than in our system of public schools, and it is not strange that the average parent is peculiarly sensitive concerning the influences there brought to bear upon his children. If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief. So well is this understood, it would be a waste of time for us at this point to stop for specific reference to authorities or precedents, or to the familiar pages of American history bearing thereon.

There is no such thing as a universally accepted religion, and differences of opinion and thought along these lines have developed an

almost numberless variety of churches, societies, and other voluntary organizations, each dedicated to the promotion of the peculiar views of its adherents. We speak of these diverse bodies as sects, and, while the word "sectarian" is sometimes used as a term of reproach, there is a very just and inoffensive sense in which it may be said that every religionist is a sectarian, for, believing that he is right and that his conception of the true relation between man and God is correct, he is conscientiously impelled to promote that faith by precept, example, and leadership. The idea that it is a proper function of government to assume authority on matters of religion and lend the powers of sovereignty to its advancement was once quite general, with result that the union of the state with the particular church which happened to be in the majority developed conditions so destructive of natural rights and individual liberty as to become the prolific occasion of revolution and bloodshed. To that cause more than any other we owe the settlement of this country by fugitives from religious persecution, and the foundation and development of a government here on the theory of an absolute divorce between civil and ecclesiastical affairs. The right of a man to worship God, or even to refuse to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical, is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of happiness. Included in that sacred right is that of the parent to instruct and guide his own children in religious training. He has no right, however, to ask that the state, through its school system, shall employ its power or authority or expend money acquired by public taxation in training his children religiously. The same principles which assure to him the right of perfect freedom of con-



science in matters of church affiliation and religious belief forbid the employment of public authority of any kind to impose his views upon his neighbor or his neighbor's children. For like reasons, while withholding from the state all authority in matters of religion, it is no less important that those who are employed in public stations, and especially in public schools, do not make use of the advantages of their position to teach or promote their peculiar religious notions. To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding religious exercises and religious teaching in all public schools, and all use or appropriation of public funds in support of sectarian institutions. These provisions have varied somewhat in form of expression, but their clear purpose and intent, when construed in the light of our history and development as a people, are for the most part quite similar. In this state, the Constitution (art. 1, § 3) forbids the establishment by law of any religion, or interference with the free exercise thereof, and all taxation for ecclesiastical support. We have also a statute forbidding the use or appropriation or gift or loan of public funds to any institution or school under ecclesiastical or sectarian management or control. Code, § 593. As we understand appellant's theory, they do not deny the general correctness of this statement of the law, but rest their contention solely upon the proposition that the facts in this case do not justify the finding that the school in question is sectarian, or that it has been or is now a religious school, as distinguished from a public school, under the laws of the state. If there be any mental reservation on either side of this discussion upon the definition of "sectarianism," the court cannot consider it. Neither Catholic nor Protestant can be heard to say: "We are not a sect; and our teaching is, there-

fore, not sectarian, for we alone are the Church."

That is a field of polemics into which the law and the court may not enter. At the bar of the court, every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching. To constitute a sectarian school or sectarian

School—what is sect.

—what is sectarian school.

instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching. In *State ex rel. Weiss v. School Bd.* 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, the court reached a decision somewhat at variance with our decision in *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, on the subject of Bible reading in the public schools, but its general discussion of the subject of religious and sectarian teaching covers the whole field of controversy on these subjects in a very able and convincing manner. Among other things, it says: "The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden. The relators as taxpayers of the district were compelled to aid in the erection of the school building in question and also to aid in the support of the school maintained therein. . . . Being thus compelled, . . . they have a legal right to object to its being used as 'a place of worship.'"

In *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256, where it was held that the Bible could properly

be used "as a reading book, and for the information contained in it, as the Koran might be, and not for religious instruction," the court further says: "The common schools are not for the purpose of instruction in theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction, and if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing sentiments."

The Nebraska court had occasion to consider the same question in *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 346, 93 N. W. 169. There it was held, in substantial accordance with our holdings in *Moore v. Monroe*, *supra*, that the prohibition of religious and sectarian instruction does not necessarily exclude the Bible from the public school, but it does deny "the right to use it for the purpose of imparting sectarian instruction. . . . The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse, where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist."

In that case it was shown that the teacher, as a part of the daily program, led the school in brief religious exercises, such as reading passages of her own selection from the King James version of the Bible, singing religious songs, and offering prayer according to the custom and uses of the so-called orthodox evangelical churches. The teacher as a witness said she regarded this part of the program as a religious exercise and an act of worship, though she denied that it was in any proper sense sectarian. The court held, however, that it was in viola-

tion of the law which exempts every person from attending, erecting, or supporting any place of worship against his consent, as well as of the law forbidding the giving of sectarian instruction in any school supported in whole or in part at public expense. As an important factor in the situation, the court there calls attention to the laws, in force in most of our states, providing for compulsory attendance upon school by children, and very justly says: "Unless opinions of universal acceptance in this country since the foundation of our government are at fault, it is a policy of the highest importance that the public schools should be the principal instruments and sources of popular education, because they exert more than any other institution an influence promotive of homogeneity among a citizenship drawn from all quarters of the globe. But if the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their own offspring elsewhere. It might be reasonably apprehended that such a practice, besides being unjust and oppressive, . . . would, by its tendency to the multiplication of parochial and sectarian schools, tend forcibly to the destruction of one of the most important, if not indispensable, foundation stones of our form of government."

On rehearing of the cause, the court, adhering to the views formerly expressed, says further: "In this country it has been the constant policy of government to unite the people, to bring them closer and closer together, to dissipate race and religious prejudices, and to fuse their sentiments and aspirations. One of the means to accomplish this

end was to give all religious sects and systems a free field and no favors. So far as religion is concerned, the laissez faire theory of government has been given the widest possible scope. The suggestion that it is the duty of government to teach religion has no basis whatever in the Constitution or laws of this state, nor in the history of our people. The teaching of religion would mean teaching the system of faith and worship of one or more of the religious sects. It would mean sectarianism in the public schools, and to put sectarianism into the schools would, according to the opinion prevailing when the Constitution was ratified, be to put venom into the body politic."

The same general question was thoroughly considered and discussed in *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233. There the board of education adopted a rule forbidding religious instruction and the reading of religious books in the common schools of the city of Cincinnati, and suit was brought to enjoin its enforcement. After refusing an injunction and stating more or less technical reasons therefor, the court enters upon a broader discussion in support of the theory that religious instruction in our public schools is wholly incompatible with our theory of free government. It says: "True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. . . . True Christianity never shields itself behind majorities. . . . Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. . . . The state can have no religious opinions; and if it under-

takes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? . . . Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest—that is, the intellectually, morally, and spiritually weakest—will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of 'church and state.' . . . The state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. It means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that, although in the minority, he shall be protected in the full and unrestricted enjoyment thereof."

In a Pennsylvania case, *Stevenson v. Hanyon*, 4 Pa. Dist. R. 395, the complaint charged that in a certain public school the daily sessions were opened by the teacher with a religious exercise after the form of worship usually employed in the Methodist Episcopal Church, consisting of responsive readings from the King James version of the Bible, Scripture readings, and hymn singing. It was also alleged that Protestant ministers of the gospel had been allowed to visit the school and talk to the children upon religious subjects. An injunction against such practices was asked. In overruling a demurrer to this com-

plaint, the court makes the following comment:

"It is too plain for argument that denominational religious exercises and instructions in sectarian doctrine have no place in our system of common-school education. They are not only not authorized by any law, common or statutory, but are expressly . . . forbidden by our . . . fundamental law of the commonwealth. . . .

"If it be true, as charged in the bill, that Mr. Haynon is conducting sectarian or denominational religious exercises with the pupils under his charge, whether these exercises be according to the form of the Methodist Episcopal Church, or of any other church, he ought to discontinue" the practice, "and it is the duty of the directors . . . to see that it is eradicated at once."

In New York, under a statute alleged to provide therefor, a certain orphan asylum was about to receive a share of the school fund on the theory that it was conducting a school in which its wards were receiving instruction after the manner of a common-school education. It appeared, however, that the asylum was founded and conducted by the Roman Catholic Church, and that its wards were there being instructed and trained religiously, and payment of the money was enjoined. In its opinion the court says: "If we are to sustain such a claim as this on behalf of a Roman Catholic asylum to-day, we shall probably be called on to-morrow to do the same for half a dozen Protestant denominations, who may desire to propagate their own peculiar views at the public expense. We do not intend to speak disparagingly of these institutions. In their proper sphere they are worthy of all praise and all legitimate support.

. . . If the object of this special legislation is to" furnish these orphans "such education as the state furnishes to all, it may as well . . . be obtained through the ordinary channel. If the object is to furnish them with instruction of a

partial or sectarian character, the state ought not, and cannot constitutionally, contribute to such a purpose." *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education*, 13 Barb. 408; *St. Patrick's Orphan Asylum v. Board of Education*, 34 How. Pr. 229.

The Illinois court has said:

"The law knows no distinction between the Christian and the pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. . . . The state is not, and . . . cannot be, a teacher of religion. All sects . . . stand on an equal footing. They have the same rights of citizenship, without discrimination. The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. . . .

"The Constitution and the law do not interfere with such [religious] teaching, but they do banish theological polemics from the schools. . . . This is done, not from any hostility to religion, but because it is no part of the duty of the state to teach religion,—to take the money of all, and apply it to teaching the children of all the religion of a part only." *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220.

In New York, the question of the propriety of a school-teacher wearing the unusual dress adopted exclusively by adherents of one religious faith while discharging her duties in the schoolroom was brought by appeal before the state superintendent of public instruction, and on the theory that such practice constitutes sectarian influence, and ought not to be permitted, it was decided that the

school directors should require the teachers to discontinue the practice while engaged in their work. The teachers refusing to comply with this decision, the matter became the subject of consideration by the courts in a suit brought to collect the wages of such teachers during the time they were in contempt of the superintendent's order. The Constitution of that state provides substantially in the words of our statute that neither the public property nor credit nor money may be used directly or indirectly in the aid of any school wholly or in part under the control of any religious denomination. Applying this provision of the law to the facts above noted, the court says: "Here we have the plainest possible declaration of the public policy of the state, as opposed to the prevalence of sectarian influences in the public schools. The regulation established by the state superintendent of public instruction through the agency of his order in the Bates appeal is in accord with the public policy thus evidenced by the fundamental law. There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine."

The court, distinctly refusing to recognize the authority of the majority opinion in *Hysong v. Gallitzin School Dist.* 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482 (a case which the appellants herein cite and rely upon), adopts and approves the following language from the dissenting opinion by Williams, J.: "They," the teachers when thus arrayed, says the opinion, "come into the schools, not as common school-teachers, or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedi-

cated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not. . . . It is not that holding an ecclesiastical office or position disqualifies, for it does not. It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers."

*O'Connor v. Hendrick*, 184 N. Y. 421, 7 L.R.A.(N.S.) 402, 77 N. E. 612, 6 Ann. Cas. 432.

In this Pennsylvania case just noted, it was held by a majority of the court that the mere wearing by teachers of the distinctively religious garb of a particular religious denomination did not constitute sectarian influence within the meaning of the law, when it did not appear that any attempt was made to impart religious instruction in the school. In view of the conceded facts in that particular case, the conclusion reached by a majority of the court is nothing if not remarkable. In a public school of eight apartments in the town of Gallitzin the eight teachers were all Catholics. Six of them were Catholic sisters. Instead of being employed in the usual manner, the situations were given only to "such sisters as were detailed for that purpose by the mother superior" of their order. It was further stated by the court that, while it was not proved that the board of directors had "resolved" to employ no teachers for six rooms in the public school building except sisters, "in the sense that a resolution had been formally adopted and recorded to that effect," yet, says the court, "it was as clearly established as though spread on the minutes in unambiguous terms that the intention existed to employ none but sisters in certain of the rooms." It was also proved

that these teachers were exempted from the usual regulations to which teachers in general were subjected. They did not submit to public examination as to their qualifications, but a complaisant county superintendent called upon them at the "mother house" to afford them a private examination. When the schools adjourned for the holding of teachers' institutes the sisters did not attend, but retired to the mother house. On "days of obligation or holidays" according to the Catholic calendar, their schools were closed. In school, as elsewhere, they invariably wore the distinctive garb of their order, together with crucifix, rosary, and girdle. In each room immediately after school hours the children of Catholic parents were expected to remain and recite the catechism and receive religious instruction. Between terms of the public school the sisters used the rooms for private free schools in which religious instruction was given. The sisters' contracts were signed by them in their religious names, and not in their family names. In entering their religious life these sisters had taken vows of obedience and poverty, and their earnings were paid to the mother superior, or the sister in charge of the house to which they had been assigned under the rules of their order. Children of Protestant parents objected to attending the schools taught by the sisters, but their objections were overruled, and they were compelled to yield on pain of expulsion. The majority of the court upon these admitted facts sustained the trial court in enjoining the teaching of the catechism and the giving of religious instruction in the school buildings, but held that the showing was insufficient to prove that the conduct of the school proper was sectarian in any objectionable sense. If the admitted facts there being considered do not clearly and emphatically show those schools to have been under sectarian domination and permeated throughout by an all-pervading

sectarian influence, it would be interesting indeed to know what proof would be regarded as sufficient to establish such fact. We unite with the New York court in the view that the opinion by Williams, J., is more nearly in accord with the true spirit and principle of the law. Among other things, and after setting forth some of the facts here mentioned, that jurist very pertinently says:

"The eight teachers are members of the same church or sect. This is unusual, but not unlawful. Six of these teachers presiding over six of the departments are nuns of the Sisterhood of St. Joseph. They have renounced the world, their own domestic relatives, and their family names. They have also renounced their property, their right to their own earnings, and the direction of their own lives, and bound themselves by solemn vows to the work of the church and to obedience to their ecclesiastical superiors. They have ceased to be civilians or secular persons. They have become ecclesiastical persons, known by religious names and devoted to religious work. Among other methods by which their separation from the world is emphasized and their renunciation of self and subjection to the Church is proclaimed is the adoption of a distinctively religious dress. This is strikingly unlike the dress of their sex, whether Catholic or Protestant. Its use at all times and in all places is obligatory. They are forbidden to modify it. Wherever they go this garb proclaims their Church, their order, and their separation from the secular world as plainly as a herald could do if they were constantly attended by such a person. The question presented in this state of facts is whether a school that is filled with religious or ecclesiastical persons as teachers, who come to the discharge of their daily duties wearing their ecclesiastical robes and hung about with the rosaries and other devices peculiar to their Church and order, is not necessarily dominated

by sectarian influences and obnoxious to the spirit of the constitutional provisions and the School Laws. This is not a question about taste or fashion in dress nor about the color or cut of a teacher's clothing. . . . It is deeper and broader than this. It is a question over the true intent and spirit of our common-school system as disclosed in the provisions referred to. If this is a proper administration of the School Laws in Gallitzin, it would be equally so in any other school district of the state, and if every common school was presided over by ecclesiastics in their distinctive ecclesiastical robes, supplying pupils with copies of their Church catechism on application, and teaching it before and after school hours to all who choose to remain for that purpose, it seems to me very plain that the common schools would cease to be such, and would become, to all practical intents and purposes, parochial schools of the Church whose ecclesiastics presided over them.

"The common schools are supported by general taxation. The Catholic and the Protestant, the Jew and the infidel, help support them and have an equal right to their benefits. The common schools cannot be used to exalt any given church or sect, or to belittle or override it, but they should be, like our political institutions, free from ecclesiastical control and sectarian tendencies."

That this discussion by Mr. Justice Williams accords with the great weight of authority is readily seen, not only in the precedents to which we have already referred, but in others as well. For example, the state of Illinois, by constitutional and statutory provision, forbids payment of any moneys from public funds for the support or aid of any school controlled by a church. A school was founded under the name of "Chicago Industrial School for Girls," and to this institution the courts were authorized by statute to

commit the custody of delinquent girls. As a matter of fact it subsequently appeared that this school existed on paper only, and served merely as a clearing house or medium which received the girls committed to its custody and passed them over immediately to two institutions, where religious instruction was given by Catholic sisterhoods. The expense thus nominally incurred by the Chicago Industrial School for Girls was charged by it to the county, and payment of such bills was contested on the theory that the instruction so given was sectarian or religious, and could not lawfully be paid for from public funds. In support of the claim of the school it was urged that religious instruction was given to Catholic children only, but the court notes the fact that the teachers and persons in charge were all Catholics, and that the sisterhoods were in complete command of all the school activities, and as evidence of the sectarian character of the institution points out that "all the paraphernalia of the Church, pictures, graven images, candles, crucifixes, crosses, were met at every quarter, in every passageway, in the schoolroom, on the desks, on the walls—everywhere."

The court held that such school was clearly sectarian, and could not lawfully be supported or aided by public funds, even in the form of payment for tuition given to the children. The opinion says: "The women whose names are written in this record are animated by the purest of motives. . . . We agree with counsel for appellee that they do their work faithfully and well. It is so shown by the proofs. But it is none the less true that by the command of the Constitution no county 'shall ever . . . pay from any public fund anything . . . to help support or sustain any school whatever . . . controlled by any church.' It is not for us to discuss the wisdom or unwisdom of this prohibition. There it is, couched in terms so emphatic that it cannot fail

to challenge attention. Any scheme, even though hallowed by the blessing of the Church, that surges against the will of the people as crystallized into their organic law, must break in pieces as breaks the foam of the sea against the rock on the shore."

[Cook County v. Chicago Industrial School, 125 Ill. 562, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183.]

Under somewhat similar circumstances the same doctrine has been affirmed in *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373. So also in *Dakota Synod v. State*, 2 S. D. 366, 14 L.R.A. 418, 50 N. W. 632, it was held, under a like provision of the law, that payment by the state for tuition charges in favor of a school under the control of the Presbyterian denomination could not be enforced, although the service so rendered was by the designation and direction of the state authorities pursuant to an act of the legislature, and although the studies pursued by the students were wholly secular. Having more or less bearing in the same direction, see *State Female Normal School v. Auditors*, 79 Va. 233; *Otken v. Lamkin*, 56 Miss. 758; *Jenkins v. Andover*, 103 Mass. 94.

The authorities to which we have referred show in the clearest possible manner the fixed policy of this nation and of its several states to maintain the common-school system free from sectarian influence or control, and to preserve the equal right of every citizen to have his children educated in these schools of the people without being subjected to the slightest sectarian leading upon the part of their teachers. If here and there may be found a case in which, to our thought, this fundamental principle has seemingly been disregarded, an examination thereof will show in every instance that the true principle is not denied, and that the decision has sought to be justified on the theory that the facts were insufficient to bring the case within the scope of the rule. In a few

other cases, where the facts have brought them dangerously near a breach of the constitutional and statutory inhibitions, the matter has been glossed over by pointing out that pupils objecting to the practice complained of were not required to take part therein, or could be excused therefrom at the request of their parents, and this, in substance, is made a point in this case in support of the claim that the law has not been violated. This reasoning is very aptly answered by *Orton, J.*, of the Wisconsin supreme court in *State ex rel. Weiss v. District Bd.* 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, as follows: "It is said, if reading the Protestant version of the Bible . . . is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason for one moment. The suggestion itself concedes the whole argument."

On the same subject the Louisiana court has said: "The excusing [of] such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act." *Herold v. Parish Bd.* 136 La. 1034, L.R.A.1915D, 941, 68 So. 116, Ann. Cas. 1916A, 806.

It is worth while also to note that in a large proportion of the cases where the courts have excluded Bible reading and other religious and sectarian exercises and practices from the public schools, the suits have been brought by or on behalf of Catholic complainants, and they have been allowed to prevail solely upon the theory that the law excludes from our public schools *all*



religious and sectarian teaching and training, Protestant and Catholic alike, and surely, having invoked the application of this principle and thereby debarred from the schools those things which savor of Protestant sectarianism, they cannot consistently complain if they are subjected to the operation of the same rule. We concede their right to the relief which has been obtained by them in the cases referred to, for the public school and its benefit are a common heritage which each and all may enjoy without interference by the religious propagandist, whatever his faith may be. The school is a secular and civil institution in which all have an equal interest, and none may lawfully make use of it as an instrument, or take advantage of its administration, as an opportunity for the promotion of his peculiar religious views.

"As the state can have nothing to do with religion except to protect everyone in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever. They are as completely secular as any of the other institutions of the state, in which all the people alike have equal rights and privileges." Orton, J., in *State ex rel. Weiss v. District Bd.*, supra.

Nothing in this opinion is to be construed as a departure from the decision of this court in *Moore v. Monroe*, 64 Iowa, 369, 52 Am. Rep. 444, 20 N. W. 475, where, while admitting the logical soundness of the opposing view, it was held that the constitutional provision against taxation for the support or maintenance of a house of worship was not violated by permitting the teacher of a public school to include in the daily exercises of such school the reading of the Scriptures and recitation of the Lord's Prayer; for, whatever might be our view of the question as an original proposition, we have no desire to introduce confusion into our cases by overruling that precedent. Nor is there any

occasion at this time to point out or discuss the limitations of the rule so laid down. If, therefore, the plaintiff in the case at bar had done no more than to show that the reading of the Bible in any version, or the use of the Lord's Prayer, was practised in this school, his complaint would, of course, be dismissed, but such, as we have seen, is not the state of the proof. Neither do we expressly or by implication disparage parochial or private schools for those whose consciences or preferences lead them to make use of such means for the education of their children. We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. If that feeling be allowed to prevail in a school district or a community where there is little or no sentiment to the contrary, ecclesiastic encroachment upon the legal nonreligious character of the public school is quite sure to become apparent. But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one

are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would make use of any of the powers or functions of the state to promote its own growth or influence, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy.

We have no criticism to offer of the great religious organization, a local branch of which happens to figure to some extent in the transaction here in controversy, a transaction which we have condemned on legal grounds alone. We cheerfully and without reservation express our appreciation of its great services to mankind; of the great names which adorn its history and its literature; of its boundless charities and its steadfast adherence to its conception of the true faith. What we have said with reference to this case we would repeat with no less emphasis if the parochial school in question were under the patronage of the followers of Martin Luther, or John Calvin, or John Wesley, or other Protestant leadership. The cry which is sometimes heard against the so-called "Godless school" is raised not by Catholics alone, and in not a few Protestant quarters there are manifestations at times of a disposition to wear away constitutional and legal restrictions by constant attrition, and bring about in some greater or less degree a union of Church and state. But, from whatever source they appear, such movements and influences should find the courts vigilantly on guard for the protection of every guaranty provided by Constitution or statute for keeping our common-school system true to its original purpose.

III. Appellants further argue that, it being within the discretion of the board of directors to abandon the schoolhouse and rent another

room for the use of this school, its action in that respect cannot be controlled by injunction. It is to be admitted that no action within the board's discretion

*Injunction—  
against discretion-  
ary act.*

can be thus controlled, and if this case involved no other question, the appeal would have to be sustained. But the discretion of the board is neither absolute nor unlimited. The statute provides that the board "may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse." Code 1897, § 2774.

That this restricted discretion may be so abused as to call for judicial interference we cannot doubt, and if, without necessity calling for such action, if there be no children in the district for whose accommodation no schoolhouse is provided, and if no better reason for abandoning the district's own schoolhouse is shown than to place the pupils under the sectarian influence of a parochial school, then this action is in excess of the granted power, and a clear abuse of the discretion given. A very recent case from North Dakota

*School—discretion of trustees—control by court.*

is here quite in point. There, as here, in a certain school district peopled largely by Catholics was a public school building, also a Catholic church, with a parochial school known as St. Joseph's Convent adjacent thereto. The board of directors of the public school submitted to a vote of the district a proposition to remove the school from the public school building to a room to be provided in St. Joseph's Convent, and it was carried by a decided majority. The director of the district refused to permit the removal, and mandamus was brought to compel it. In sustaining the director, the court says: "We are satisfied, indeed, that both the order of the school board and the election were void, and that the lease of the new building and the re-

removal of the school thereto were absolutely unwarranted by the law."

Speaking of the provisions of the statute of that state, which does not materially differ from our own, the opinion proceeds as follows:

"It is a self-evident proposition that the public schools of the state are under legislative control, and that school directors have no powers, except those which are conferred by the statute upon them. A perusal of the sections [naming them] will, we believe, make it apparent to all that the only instance in which a common-school board may lease a building is in the case where there are nine children of school age who reside  $2\frac{1}{2}$  miles from the schoolhouse already erected, and when an additional school [building] is needed for such persons.

"It is apparent that in every other case it was the purpose of the legislature that the public schools in the so-called common-school districts of the state should be exclusively conducted in buildings which are not only controlled by, but which are owned by, the public.

There is not, indeed, to be found anywhere in the statutes any authorization for the leasing of a building for school purposes when (as the record shows in the case at bar) there is already in the common-school district a school which is owned by the district, which is within  $2\frac{1}{2}$  miles of the students, and which is adequate to the needs of the district." *Pronovost v. Brunette*, 36 N. D. 288, 162 N. W. 300.

The rule thus announced is not only good law, but it has also the best foundation in the nature and policy of our common-school system. Let any other become the settled law of the state, and the day of the destruction of our system of nonsectarian public education will be far advanced. Let it once be understood that it is possible by any scheme or device to lawfully compass any public school about with religious influences in the interest of any sect or denomination, and

you will have offered a tempting prize to the propagandist and proselyter of every creed, and wherever the adherents of any particular creed can command a majority of any school board, it may abandon the schoolhouse provided for the common and equal use of all the people, move the school into some church or some parochial or private building established for sectarian use, put in charge of it trained ecclesiastics bound by solemn vows to devote their lives, their services, and all their God-given powers to the advancement of the interests of their church, fill the schoolroom with distinctive emblems of their faith, and by a multitude of influences, silent as well as expressed, shape the plastic minds and characters of the young children committed to their care in accordance with their own religious views, and saddle the expense of this sectarian education upon the taxpayers. We do not believe that the people of this country are ready for such a surrender of one of the most distinctive features of a free government, to ecclesiastical domination, and we are sure that, when properly construed, the law will not fail to place upon it the seal of condemnation.

IV. Finally, objection is made to the procedure which has been pursued in this case. The point made is that in any event plaintiff's objection should have been made to the board of directors, and, if there overruled, his remedy was by appeal to the county superintendent, and, if necessary, thence to the state superintendent. The objection cannot be sustained. The rule is thoroughly well settled that, while the discretion granted by statute to the board of directors can be reviewed only by appeal to the county superintendent, yet, where it "acts without jurisdiction, or has exceeded its powers, and by some act in an official capacity has done or attempted to do that which it has not a right to do, the courts have jurisdiction to set aside the

—controlled by courts.

unauthorized act." See *Templer v. School Twp.* 160 Iowa, 402, 141 N. W. 1054; *Kinzer v. Independent School Dist.* (Kinzer v. Toms) 129 Iowa, 443, 3 L.R.A. (N.S.) 666, 105 N. W. 686, 6 Ann. Cas. 996; *School Twp. v. Independent School Dist.* 110 Iowa, 30, 81 N. W. 184; *Rodgers v. Independent School Dist.* 100 Iowa, 317, 69 N. W. 544; *Perkins v. Independent School Dist.* 56 Iowa, 476, 9 N. W. 356; *Benjamin v. District Twp.* 50 Iowa, 650. We have found and are satisfied that the board of directors in the matters complained of acted in excess of its lawful authority, and therefore appeal to the superintendent was not required.

We reach the conclusion that the trial court's finding in favor of the plaintiff should be sustained. We are of the opinion, however, that the decree below should,

**Injunction—  
against paying  
public money  
to sectarian  
school.**

to a certain extent, be modified. As the parochial building is private property, and its owners and patrons have the right to maintain therein a religious school if they are so disposed, the court has neither

**—against re-  
ligious instruc-  
tion in private  
school.**

authority nor desire to deny or interfere with the exercise of such right. It has the authority, however, and it is its duty, to enjoin the defendants and their successors in office from directly or indirectly making any appropriation or use of the public funds for the support or in aid of such parochial school or of any so-called public school maintained or conducted in connection with such parochial school. They should also be enjoined from permitting or allowing religious or sectarian instruction of any kind to be provided or given in the public school, wherever the same may be established, such exclusion not to be construed

**Schools—read-  
ing of scriptures  
—validity.**

as prohibiting the reading of the Scriptures without note or comment, or the recitation of the Lord's Prayer. As obedience

to such injunction will make necessary the providing of accommodations for the public school in said subdistrict elsewhere than in connection with the church or church school, we think it must be assumed that the board of directors will do its duty in supplying the need so occasioned, and that the mandatory features of the decree as rendered below may properly be eliminated.

**Mandamus—to  
compel perform-  
ance of duties.**

As thus modified, the decree of the District Court must be affirmed at the cost of the appellants.

**Ladd, Evans, Gaynor, and Stevens, JJ., concur.**

**Salinger, J., dissenting:**

The majority holds injunction will lie to restrain the paying over of public funds to school officers, if such money is used in support of a school wherein practices are permitted which amount to a propaganda for some religious sect. If it be assumed such practices exist, either with the direct or implied consent of the school officers, that constitutes a wrong for which there is some remedy. But we should not trample upon wisely established usages of the law merely because we are convinced wrong has been done. I contend for no more than that hard cases shall not make bad law. In the last analysis, the injunction against the use of public money is here awarded because a school board, and school officers and teachers employed by them, are, in specified regards, committing acts which the law condemns. It would be affectation to cite authorities for the proposition that, no matter how clear it may be that a wrong exists to be remedied, the extraordinary remedy of injunction is not due unless it further be made to appear that injunction is the only adequate remedy. To be sure, starving a school out of existence is a most adequate method of stopping improper conduct of such school. So, burning down a house terminates the wrongful occupation of it. But,

ordinarily, eviction of the trespasser is resorted to instead. Is starving this school out of existence by injunction the only adequate method of abating the practices complained of?

It may not be denied that the laws of this state give to the department of public instruction, either by direct action or on the appellate side, or both, full power to discipline a teacher who misconducts himself, and to remedy a wrong either by omission or commission committed by boards of directors and school officers. And if it were true that this is an unwise delegation of power, the fact would not enlarge the powers of the courts.

It seems to be the thought of the majority that resort to the department of public instruction is not an adequate remedy: First, because the discretion of the board to abandon a schoolhouse and rent another room for the use of a school is not in the absolute discretion of the board, and that whether such abandonment and renting is authorized depends upon whether it is necessary to abandon one room and rent the other; second, that since the department of public instruction cannot enter a judgment for a money recovery nor enforce its own mandates that therefore injunction lies in this case. Grant that, where the board abandons one room and rents another, there may be an inquiry into whether the change was necessary. That proves that review may be had, but not that it may not be done by the department, and may or must be done on injunction. And if it be sound argument that injunction is the remedy because the department cannot enter a money recovery, and one must resort to the court if the lawful orders of the department are disobeyed, such argument proves too much. If that be the test of power, the department of public instruction has no power to act. If it should cancel the certificate of a teacher for misconduct, that order in and of itself will not stop the employment of the teacher

by school officers, nor paying the teacher out of public funds. Notwithstanding the cancelation of the certificate, the courts must be resorted to to prevent such teacher from acting or being so paid. Following the majority to the logical end, the department has no power to cancel a certificate, and where a teacher so conducts himself as that his certificate should be revoked, the revocation should be accomplished by enjoining him from teaching, and the board from paying him. That a quasi judicial department, or a ministerial one even, cannot take all the steps that a court may, does not establish that its powers are so inadequate as that equity may interfere by injunctive order. The orders of the Interstate Commerce Commission must be enforced by the courts. Will that authorize courts to fix rates by enjoining rates charged and making a mandatory order that different ones be charged? The finding of our Industrial Commissioner must be effectuated by decree of court. Can the court, therefore, make an original award under the Compensation Act? A trespass by use of a vacated highway may be punished by the courts only, but the vacation cannot be restrained, because the subject-matter is by statute given to the town council. *McLachlan v. Gray*, 105 Iowa, 259, 74 N. W. 773. While I agree that the cases cited by the majority hold that, when school officers act beyond their jurisdiction, appeal to the county superintendent is, if a remedy at all, not the exclusive remedy, I fail to see the applicability of it. Surely the school board had power to determine, in the first instance, whether it was wise to house a school sparsely attended in a better room and at a nominal rental. Theirs may have been an unwise decision. You may assume, for the sake of argument, that it was a corrupt one, but that does not go to power. Wherefore the county superintendent manifestly had power to review such action. See *Bogaard v. Independent*

Dist. 93 Iowa, 272, 61 N. W. 859; *Rodgers v. Independent School Dist.* 100 Iowa, 317, 69 N. W. 544. Surely the board had power to prevent a teacher from engaging in a religious propaganda while teaching on public pay. Surely the county superintendent had power, either originally or on appeal, to compel the cessation of the practice. Certainly he had power to disqualify such teacher from teaching at all. If he failed in his duty, surely the state superintendent could act effectively.

The majority is driven into inconsistency. It meets claims that the directors did not know what was being done, as if their knowing or not knowing was important. It declares that if "these officers gave any attention whatever to their official trust, they must have known the facts as they existed," and that "the only explanation . . . is that, having surrendered the school to the care of the church, the officers cast off all thought of its further care or attention [to the school] except to go through the form from time to time of contracting with the teacher and providing for the support of the school from the public funds," and that there is no showing that the board ordered a discontinuance of the use of the catechism, and that, even after complaint made, neither the board, any director, nor any officer "took any action whatever to interfere with the practice or gave any order or instruction to the sister in charge of the school to discontinue it;" that there is no showing of "any real or substantial removal of the objectionable features;" that when complaint was made no more was done than to "tell the complaining parties to investigate and report again in the future;" that "not one of the directors ever visited the school or gave to the sister in charge any instruction, direction, or rule with reference to her duties;" that, as to directions given, "there is not a word of this kind in the records of the board or of the school which

have been put in evidence," that it suffices to show the objectionable practices were sanctioned, though, as was the case in *Hysong v. Galitzin School Dist.* 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, there was no proof of formal and recorded resolution authorizing or sanctioning the practice; that the county superintendent does not say that, when he heard of the teaching of the catechism in this room, that he "took measures to prevent it, and that such study was thereafter abandoned," and that "if it ever occurred to his supervisory discretion to inquire into the absence of the younger pupils who, as a rule, constitute the larger part of every public school, he does not mention it." To cap all, the order below is modified to the extent of leaving it to the board to take the pupils from the room where they now are, and provide them with accommodations elsewhere in the sub-district, which is done with a statement that "it must be assumed that the board of directors will do its duty in supplying the need so occasioned, and that the mandatory features of the decree as rendered below may properly be eliminated."

The inconsistency is most marked. After disposing of the appeal by holding that the court has jurisdiction to enjoin because no officer in the department of public instruction has efficient power to act, granting the injunction is sustained because these officers did not act. If the department had no power to act, and therefore the courts may act, it becomes entirely immaterial that the department did not act. It can base no argument to point out that there was a failure to do what there was no power to do. And, after holding that injunction must be sustained because the board and others had no power to remedy, the final word leaves the remedy to the board. If the board can now take the children from where they are and put them into another school-room, it always had that power; and the county superintendent and

the state superintendent had power to see that they did this. It must follow that the remedy by injunction is not sustainable upon the ground that the department could not give an adequate remedy.

II. It is true both the statute and the Constitution prohibit the appropriation of public money in aid of any private or sectarian school, but, while that establishes that this must not be done, it does not in the least enlarge the powers of the court of chancery or injunctions. The law prohibits murder. Does that justify an order restraining one from committing it? A school should not be transplanted without good reason, and renting a place for it to be conducted in was held to be wrongful in *Pronovost v. Brunette*, 36 N. D. 288, 162 N. W. 300. But how does that authorize injunctive relief rather than a resort to the department of public instruction? The majority says this act was wrongful. But that does not prove that injunction is the remedy. My views seem to me to be supported by what the authorities negative and affirm, and as much by those relied on by the majority as by others. One striking instance is found in *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233. The case is squarely against the majority holding, and the opinion is driven to disregard what is the *decision*, and to support itself by its general language, "broader discussion," to the effect that true Christianity asks no aid from government. The *decision* is repudiated because it is "technical," and the only use made of the case is to set out said "broad" language. What the Ohio case *decides* is that an injunction should not issue restraining a board of education, and certain of its members and officers, from carrying into effect or enforcing certain resolutions adopted by the board which prohibit religious instruction and a reading of religious books, including the Holy Bible, in the common schools; and the refusal is put upon the ground that, the legislature hav-

ing placed the management of public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instructions shall be given or what books shall be read therein. The citation of *Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256, is also of doubtful use. In the first place, it was a damage suit, and no injunction was sought. In the next, it is authority against several positions taken by the majority. It was an action by next friend against the superintending school committee to recover damages for maliciously, wrongfully, and unjustifiably expelling a pupil from one of the town schools. She was expelled for refusing to read in the school the Protestant version of the English Bible which had previously been ordered to be used therein by the defendants. The exact holding is that the legislature has reposed the power of directing the general course of instructions and what books shall be used in the schools to this committee, and it may rightfully enforce obedience to all the regulations by it made within the sphere of its authority; that for a refusal to read from the books thus prescribed the committee may expel the disobedient scholar; that no scholar can escape or evade such requirement when made by the committee, under the plea that his conscience will not allow the reading of such a book, nor can the ordinance be nullified because the church of which the scholar is a member holds, and has so instructed its members, that it is a sin to read the books prescribed; that a law is not unconstitutional because it may prohibit what one may conscientiously think right, or require what he may conscientiously think wrong; and that a requirement by this committee that the Protestant version of the Bible shall be read in the public schools by the scholars who are able to read is no unconstitutional provision, and is binding on all the members

of the school, although composed of divers religious sects. Whether we care to go as far as this or not, it certainly affords no support for the majority.

In *O'Connor v. Hendrick*, 184 N. Y. 421, 7 L.R.A.(N.S.) 402, 77 N. E. 612, 6 Ann. Cas. 432, the state superintendent of public instruction had, under delegated authority from the legislature, made a rule prohibiting teachers from wearing a distinct religious garb while engaged in the work of teaching, and, the question being whether this rule was reasonable, it was held that he could exercise any powers the legislature might, and that it might require all teachers to wear a particular garb as an emblem of their profession, and no one could complain. Wherefore this regulation was a reasonable one. Now, while it is perhaps true that the power of regulation which the New York legislature gave to the superintendent of public instruction is not conferred upon the county superintendent in Iowa as an original power, such power is given the school boards, and it must follow that, this being so, what the school board does or fails to do in this regard can be regulated on appeal to the county superintendent, because giving such power to the board of necessity gives the superintendent jurisdiction to regulate that power on appeal.

In *Com. v. Herr*, 299 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422, a statute which prescribed the wearing in the public school by a teacher of any dress, etc., indicating the fact that such teacher is an adherent or member of any religious order, etc., and imposing a fine upon the board of directors permitting the same, is held not to be violative of constitutional right to freedom of conscience and religious belief, because it is directed against actions, and not beliefs, and only against the acts of the teachers while engaged in the performance of their duties as such,—something which the legislature has the right to control.

The case was a prosecution of the school directors for failure to enforce this statute. Several cases cited for the opinion do sustain the granting of injunctions. But it does not appear that statutes gave power in the premises to a department of public instruction, and in each of them the *practices* complained of, and not the support of the school, was enjoined. See *Stevenson v. Hanyon*, 4 Pa. Dist. R. 395; *Herold v. Parish Bd.* 136 La. 1034, L.R.A.1915D, 941, 68 So. 116, Ann. Cas. 1916A, 806; *Hysong v. Gallitzin School Dist.* 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482. All I can find in *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, is that the statute as it stood at the time of the decision makes it a matter of individual option with school-teachers as to whether they will use the Bible in their schoolroom, that such option is restricted only by the provisions that no pupil shall be required to read it contrary to the wishes of his parent or guardian, and that such option is not in conflict with the Constitution. The prayer was for injunction to prevent the reading or repeating of passages in the Bible. It certainly is held that this injunction will not lie, although it is not put upon the express ground that there is adequate remedy at law. It is said, *arguendo*, that there is, at all events, no ground for enjoining religious exercises in the public schools where it does not appear that attendance thereupon is compulsory, and that the burden of taxation is thereby increased.

In *Jenkins v. Andover*, 103 Mass. 94, it is held that a town may not independently of statute law raise, and by reason of constitutional provisions may not take authority by statute to raise, by taxation, and appropriate money to support as a public school a school founded by a charitable bequest which vests the order and superintendence in trustees who, though a majority of them are to be chosen by the inhabi-



tants of the town, yet are limited to be members of certain religious societies, wherefore there may be an injunction restraining the enforcement of a vote by which it is attempted to raise money by taxation to appropriate the same to the support of such school. It should not require elaborate argument to distinguish restraining the raising of a tax for the support of what is confessedly not a public school, either in form or substance, and an injunction to restrain the use of money already raised and settling on injunction whether certain practices make a parochial out of what was a public school. The other citations involve a suit to collect public money for school aid (*Dakota Synod v. State*, 2 S. D. 366, 14 L.R.A. 418, 50 N. W. 632); mandamus ordering the payment of such money (*Otken v. Lamkin*, 56 Miss. 758; *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 376); mandamus to remove a school to a place leased as ordered by resolution of the board (*Pronovost v. Brunette*, 36 N. D. 288, 162 N. W. 300); and mandamus to compel desistance from objectionable practices (*People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220; *State ex rel. Weiss v. District Bd.* 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169. In this last, the fact that the court entertained an application for mandamus by the state, running to the school board, to compel it to have these practices discontinued, demonstrates that the school board might efficiently provide a remedy, and therefore demonstrates that failure to do so makes a case, not for the court, but for the department of public instruction.

III. It has been demonstrated that the school whose means of life the majority proposes to cut off at the root is still in form, at least, a public school; that is to say, no ac-

5 A.L.R.—55.

tion has dissolved it and declared it to be a parochial school. Its officers are still acting on authority of statute. The opinion itself says that misusing the alleged appropriation of funds is an act which is being done by "the defendants in their official capacity." I have pointed out that abating the evil by transplanting the school to proper quarters is by the majority left to the district board.

Assume the practices might be enjoined, and that is still different from enjoining the use of school money. To the reasons I have already given why the latter should not be done, it may be added that, if the *practices* be restrained, desistance will automatically end the misuse of money. But where the payment of support money is restrained because of the practices, their abandonment would still leave the injunction in force. Enjoining the practices might lead to some contempt prosecutions while the school was going on. The remedy sustained here stops the school until, on another hearing, it is proved that the practices have been discontinued, and, as the school was not going, it could not well be shown that it was being properly conducted. The difficulty may be avoided by obeying the legislative will and proceeding before the department of public instruction.

In one word, where the use of public money is unlawful only because certain things are being done by school officers, it is true that stopping the money will stop the doing of these things. Is it not as true that, if the acts are stopped, the use of the money will not be unlawful? I have stated as well as I am able why I think it better to force legalization of the use of the money by stopping the acts that make the use unlawful than to prevent the unlawful use of money by the destruction of the object upon which it will be expended.

I think we should reverse on the ground that injunction to stop the use of public money was not the

proper procedure, because there is an adequate remedy by appeal to the department of public instruction.

Preston, Ch. J.:

My views in regard to the right of appeal to the school authorities are indicated in the recent case of

Hume v. Independent School Dist. 180 Iowa, 1233, 164 N. W. 188. I concur in the dissent of Justice Salinger in so far as it holds that there is an adequate remedy through the school authorities, and that the injunctive remedy will not lie, at least until the other has been exhausted.

## ANNOTATION.

### Sectarianism in schools.

- I. Scope of note, 866.
- II. Reading Bible and the like:
  - a. Introductory, 866.
  - b. Mere reading of Bible, 867.
  - c. Reading Bible and saying Lord's Prayer, 871.
  - d. Teaching Ten Commandments, 872.
  - e. Reading Bible and singing hymns, 872.
  - f. Saying prayers, 874.
  - g. Use of Bible as textbook, 875.
  - h. Use of textbook founded on Bible, 876.
  - i. Resolution prohibiting reading of Bible, 877.
- III. Wearing of religious garb by teacher, 877.
- IV. Public aid of sectarian school, 879.
- V. Employment of sectarian teacher, 883.
- VI. Use of church or sectarian building for school, 884.
- VII. Religious meeting in schoolhouse:
  - a. Use permitted, 886.
  - b. Use not permitted, 889.
  - c. Rule in Connecticut, 890.
- VIII. Miscellaneous, 890.
- IX. Rule in Canada:
  - a. Introductory, 892.
  - b. Constitutional provisions:
    1. In Manitoba, 893.
    2. In New Brunswick, 895.
    3. In Ontario, 895.
  - c. Separate schools:
    1. Rights of ratepayer, 896.
    2. Company taxes, 898.
    3. Miscellaneous, 901.
  - d. Teaching French language, 903.
  - e. Examination of teacher, 907.

#### *I. Scope of note.*

The note includes all cases bearing in any way on sectarianism in schools, either as violative of constitutional or statutory provisions or as passing on any phase of the question without reference to constitution or statute.

#### *II. Reading Bible and the like.*

##### *a. Introductory.*

The question whether the reading from any version of the Bible in schools violates any constitutional guaranty or inhibition with regard to religious liberty, sectarianism, or the use of public funds in the aid of sectarian purposes, has been passed on in a number of jurisdictions, and while, due to the varying constitutional provisions invoked as prohibiting such practices, and the facts in each case, there would appear to be some conflict, it would seem that, as between sects of

the Christian religion at least, the question is whether the Bible-reading exercises in question merely emphasize fundamental morality, or do in fact amount to religious instruction. It might be stated as a broad general rule, deducible from the cases, that while Bible reading and exercises which merely tend to inculcate fundamental morality in the pupils, and quiet them for their studies, are not prohibited, such exercises may be carried so far as to emphasize the teachings of a particular sect or denomination, and thus come within a constitutional inhibition.

The cases analyzed on the facts in accordance with this principle are practically without conflict, with the exception of jurisdictions wherein the religious rights of non-Christian persons have been discussed and protected. It would seem that the con-

stitutions and statutes of some states recognize the broad principles of Christianity, at least as a system of moral teaching, although at the same time prohibiting sectarianism, while in other jurisdictions, on broad constitutional provisions, the rights of Jews and nonbelievers are recognized and protected to the same extent as the Christian denominations and sects.

The cases, however, have dealt largely with sectarianism as applied to Christianity, the objection to Bible reading and religious exercises being usually based on the differences between the Douai version of the Bible used by the Roman Catholic Church, and the King James version generally used by the Protestant churches.

*b. Mere reading of Bible.*

It has been held that the mere reading of selections from the Bible, in the King James version thereof, in schools, without comment by the teachers, does not of itself violate any constitutional prohibition of sectarianism or interference with religious freedom. *Hackett v. Brooksville Graded School Dist.* (1905) 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; *Donahoe v. Richards* (1854) 38 Me. 379, 61 Am. Dec. 256; *State ex rel. Freeman v. Scheve* (1902) 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, motion for rehearing overruled in (1903) 65 Neb. 876, 59 L.R.A. 932, 93 N. W. 169; *Curran v. White* (1898) 22 Pa. Co. Ct. 201; *Hart v. School Dist.* (1885) 2 Lanc. Law Rev. (Pa.) 346; *Stevenson v. Hanyon* (1898) 7 Pa. Dist. R. 585. See also *Moore v. Monroe* (1884) 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, reviewed *infra*, II. e.

Thus, in *Hackett v. Brooksville Graded School Dist.* (Ky.) *supra*, it was held that the King James translation of the Bible is not of itself a sectarian book; that the reading thereof in a school, without note or comment from the teachers, was not sectarian instruction; and that such use of the Bible did not make the school-house a house of religious worship, since to be sectarian the book itself must teach the peculiar dogmas of a sect, as such, and not merely be so

comprehensive as to include them by the partial interpretation of its adherents, and since a book is not sectarian merely because it is edited or compiled by those of a peculiar sect.

And in *Stevenson v. Hanyon* (Pa.) *supra*, it was held that reading portions of the Bible in either the Douai or the King James version as a part of the daily opening exercises of a public school, without comment thereon by the teachers did not constitute sectarian instruction within a constitutional provision (art. 10, § 3) that money raised for the support of public schools shall not be used for the support of any sectarian schools, or another provision that "no money raised for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school." The court said: "In a state where Christianity seems to pervade its laws, customs, and institutions to such a universal extent, can it be said for a moment that the reading of the Bible in the public schools, without comment, is sectarian instruction, or that such an act violates the rights of conscience, or is in derogation of any constitutional principle? We decidedly think not. We do not understand how the reading of the Bible in the public schools can be termed sectarian instruction. The Bible is not a sectarian book. On its broad foundation Christianity rests. Without it there is no Christianity. This proposition is recognized by every division of Christendom throughout the whole world. It is not the book of any sect. Our attention is called to the fact that there are two versions of the Holy Scriptures, the Douai and the King James version, and that they differ in many particulars. The study of these differences is interesting to the theologian and the Bible scholar. We have noted over fifty points of difference, some minor and some important, but they do not concern us. The Bible in either version is substantially and essentially the same book. The following definition of the word 'sect,' taken from the Standard Dictionary, is as good as any we have seen: 'A body of

persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system. Specifically, the adherents, collectively, of a particular creed or confession; a denomination; communion; as the Presbyterian sect; the various sects of Jews, Mohammedans, or Christians.' The assertion that the Bible in either version is a sectarian book borders on sacrilege, and this phase of the question deserves no further consideration at our hands. . . . The reading of the Bible may also be allowed, and even commended, from a standpoint which does not involve the question of sectarian instruction nor the rights of conscience. It is conceded by men of all creeds that the Bible teaches the highest morality." See *Stevenson v. Hanyon* (Pa.) *supra*, cited *infra*, II. e (the same case on demurrer to the petition).

So, in *Donahoe v. Richards* (1854) 38 Me. 379, 61 Am. Dec. 256, it was held that the use of the Bible as a reading book in the public schools did not violate a constitutional provision (art. 1, § 3) reading in part, "No one shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, providing he does not disturb the public peace, nor obstruct others in their religious worship;" or a provision "that no subordination nor preference of any sect or denomination to another shall ever be established by law."

An injunction to prevent the reading of the King James version of the Bible in the public schools, by authority of school directors, was denied in *Hart v. School Dist.* (1885) 2 Lanc. L. Rev. (Pa.) 346.

In *State ex rel. Freeman v. Scheve* (1902) 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, motion for rehearing overruled in (1903) 65 Neb. 876, 59 L.R.A. 932, 93 N. W. 169, it was held that the use of the Bible in either version in the public schools was not forbidden either by Constitution or statute, and the courts may not declare its use unlawful because it is possible or prob-

able that those who use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions; the question whether it is prudent or politic to permit Bible reading in the public schools being one for the school authorities to determine, but the courts may rightfully intervene where legitimate use has degenerated into abuse, so that the question whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts upon evidence, so it cannot be presumed that the law has been violated, but the alleged violation must in every instance be established by competent proof. The court said: "The decision does not go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that 'exercises by a teacher in a public school building in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organizations, is forbidden by the Constitution of this state.' Certainly, the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral; its language is unequalled in purity and elegance; its style has never been surpassed; among the classics of our literature it stands pre-eminent. It has been suggested that the English Bible is, in a special and limited sense, a sectarian book. To be sure there are, according to the Catholic claim, vital points of difference with respect to faith and morals between it and the Douai version. In a Pennsylvania case cited by counsel for respondents,

the author of the opinion says that he noted over fifty points of difference between the two versions,—some of them important and others trivial. These differences constitute the basis of some of the peculiarities of faith and practice that distinguish Catholicism from Protestantism and make the adherents of each a distinct Christian sect. But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used."

In *Curran v. White* (1998) 22 Pa. Co. Ct. 201, a petition for mandamus, it was contended by the plaintiff taxpayers, who were Roman Catholics, that the practice of reading the King James version of the Bible in schools was a violation of the Constitution (art. 1, § 3). The court found it unnecessary to express an opinion on the constitutional question, having disposed of the case on the ground that mandamus was not the proper remedy to compel the school directors to cause the teachers to discontinue such exercises, but referred to two cases decided by common pleas judges, who held that the reading of the Bible, whether the King James or the Douai version, as a part of the opening exercises of the public schools, was not in contravention of any constitutional provision.

A resolution of the school authorities requiring or permitting the Bible to be read in the schools is not necessarily a violation of any constitutional provision, if done merely for the purpose of inculcating morality, and not with a view to sectarian instruction. *Com. ex rel. Wall v. Cooke* (1859) 7 Am. L. Reg. (Mass.) 417; *Spiller v. Woburn* (1866) 12 Allen (Mass.) 127; *Nessle v. Hum* (1894) 1 Ohio N. P. 140, 2 Ohio S. & C. P. Dec. 60. See also *McCormick v. Burt* (1880) 95 Ill. 263, 35 Am. Rep. 163. And see *Church v. Bullock* (1908) 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115, affirming (1907) — Tex. Civ. App. —, 100 S. W. 1025, reviewed *infra*, II. c.

Thus, a regulation of a school board, requiring that a portion of the Bible shall be read as an opening exercise of the school, does not violate

a constitutional provision that "no person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent;" or a provision that no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state; such regulation being exclusively within the jurisdiction of the school board. *Nessle v. Hum* (1894) 1 Ohio N. P. 140, 2 Ohio S. & C. P. Dec. 60.

In *Spiller v. Woburn* (1866) 12 Allen (Mass.) 127, it was held that the public school committee did not exceed its statutory authority in passing an order that the Bible should be read and a prayer offered at the opening of the schools in the morning of each day, since no more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education is to impress on the minds of children and youth the principles of piety and justice, and a regard for truth. It was said, however, that an order or regulation of the school committee requiring pupils to conform to any religious rite or observance, or to go through with any religious forms or ceremonies which were inconsistent with or contrary to their religious convictions, would be a violation of the spirit of the constitutional provision (pt. 1, art. 2) which provides that no one shall be hurt or molested in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; and it would also be inconsistent with the plain intention of the legislature in providing that no one shall be excluded from a public school on account of religious opinions (Gen. Stat. chap. 41, § 9): and in requiring that the daily reading of the Bible in public schools shall be without written note or oral comment; and in providing that no pupil shall be called on to read any particular version, whose parent or guardian shall declare that he has conscientious scruples against allowing him to read therefrom (Stat. 1862, chap. 57).

The validity of a statute or regula-

tions of the school authorities providing for the use of the Bible in public schools depends in some measure on the purpose for which it is used, and the constitutional guaranty of religious liberty is not infringed by reading the Bible in school for the purpose of inculcating morality, and not for sectarian instruction. *Com. ex rel. Wall v. Cooke (Mass.) supra.*

In *McCormick v. Burt (Ill.) supra*, it appeared that the plaintiff was suspended by the school directors for the nonobservance of a rule allowing teachers to read as an opening exercise every morning, not occupying more than fifteen minutes, a chapter from the King James translation of the Bible, no pupil being required to be present at or participate in such exercise, but while such exercise was being conducted every pupil was required to lay aside his books and remain quiet. The plaintiff, a Catholic pupil failed to observe the rule, which was alleged to be void as interfering with the religious convictions of himself and his father. The absence of an averment in the declaration that the directors had acted either wantonly or maliciously was held to be a fatal defect.

However, in at least two jurisdictions it has been held that reading the Bible in schools results in sectarian instruction, and violates the constitutional right to the enjoyment of religious liberty, of Jews and other non-Christian peoples. *People ex rel. Ring v. Board of Education (1910) 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251; 19 Ann. Cas. 220; Herold v. Parish Bd. (1915) 136 La. 1034, L.R.A. 1915D, 941, 68 So. 116, Ann. Cas. 1916A, 806. See also State ex rel. Weiss v. District Bd. (1890) 76 Wis. 177, 7 L.R.A. 330, 2 Am. St. Rep. 41, 44 N. W. 967, reviewed infra, II. g.*

Thus, in *People ex rel. Ring v. Board of Education (Ill.) supra*, it was held that the reading of the King James version of the Bible in schools constitutes sectarian instruction in that it requires Catholic children to use a prayer taught by another sect, and that the Bible is a sectarian book as to the Jew and every believer in

any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox, and thereby violates the constitutional provision (art. 8, § 3) prohibiting the appropriation of any public fund in aid of any sectarian purpose. The court said: "There are many sects of Christians, and their differences grow out of their differing construction of various parts of the Scriptures,—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them. . . . It is true that this is a Christian state. The great majority of its people adhere to the Christian religion. No doubt this is a Protestant state. The majority of its people adhere to one or another of the Protestant denominations. But the law knows no distinction between the Christian and the pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. There can be no distinction based on religion. The state is not, and under our Constitution cannot be, a teacher of religion. All sects, religious or even antireligious, stand on an equal footing. They have the same rights of citizenship, without discrimination. The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular and not religious in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. No one denies their importance. No one denies that they should be taught to the youth of the state. The Constitution and the law do not interfere with such teaching.

but they do banish theological polemics from the schools and the school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the state to teach religion,—to take the money of all, and apply it to the teaching the children of all the religion of a part, only. Instruction in religion must be voluntary. Abundant means are at hand for all who seek such instruction for themselves or their children. Organizations whose purpose is the spreading of religious knowledge and instruction exist, and many individuals, in connection with such organizations and independently, are devoted to that work. Religion is taught, and should be taught, in the churches, Sunday schools, parochial and other church schools, and religious meetings. Parents should teach it to their children at home, where its truths can be most effectively enforced. Religion does not need an alliance with the state to encourage its growth. The law does not attempt to enforce Christianity. Christianity had its beginning and grew under oppression. Where it has depended upon the sword of civil authority for its enforcement it has been weakest. Its weapons are moral and spiritual, and its power is not dependent upon the force of a majority. It asks from the civil government only impartial protection, and concedes to every other sect and religion the same impartial civil right."

In *Herold v. Parish Bd. (La.)* supra, it was held that opening exercises, consisting of reading from the King James version of the Bible, without note or comment, and the offering of the Lord's Prayer, amounted to religious Christian instruction in violation of the constitutional provisions that (art. 4) "every person has the natural right to worship God, according to the dictates of his conscience, and no law shall be passed respecting an establishment of religion" and (§ 53) that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no pref-

erence shall ever be given to, or any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." By permitting "lessons and truths" to be read or taught from the New Testament, particularly concerning the Son of God and His resurrection from the dead, etc., such instruction was held to give a preference to the children of Christian parents, and to discriminate against the children of Jews, who are guaranteed the natural right to worship God according to the dictates of conscience.

*c. Reading Bible and saying Lord's Prayer.*

So it has been held that reading the Bible and repeating the Lord's Prayer do not come within any constitutional inhibition, of sectarianism or interference with religious liberty. *Billard v. Board of Education* (1904) 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 442, 2 Ann. Cas. 521; *Church v. Bullock* (1907) — Tex. Civ. App. —, 100 S. W. 1025, affirmed in (1908) 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115. And see the reported case (*KNOWLTON v. BAUMHOVER*, ante, 841).

Thus, in *Billard v. Board of Education* (Kan.) supra, it was held that the repetition of the Lord's Prayer and the Twenty-third Psalm from the Bible as a morning exercise, without comment or remark, for the purpose of quieting pupils and preparing them for their daily studies, was not a form of religious worship or the teaching of sectarian or religious doctrine, and did not violate constitutional provisions (Bill of Rights, §§ 7 and 8) as follows: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted. . . ." "No religious sect or sects shall ever control any part of the common-school or university funds of the state." Neither did it violate a statute (Gen. Stat. 1901, § 6284) providing: "No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of the city;

but nothing in this section shall be construed to prohibit the reading of the Holy Scriptures."

In *Church v. Bullock* (Tex.) *supra*, it appeared that the opening exercises in schools, prescribed by the city school superintendent by virtue of a resolution of the school board, consisted of a reading of selected passages from the King James version of the Bible, without comment, explanation, or interpretation; the recital of the Lord's Prayer, in which the pupils were invited, but not required, to join; and the singing of patriotic and other songs found in the school music books. The only requirement enforced was that the pupils should be present and during the exercises behave in an orderly manner, the pupils being requested, but not required, to bow the head during the Lord's Prayer. These exercises were held not to convert the schoolroom into a place of worship within the meaning of a constitutional provision (art. 1, § 6) that "no man shall be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent." Neither did the exercises render the public schools "sectarian" within the intent and meaning of constitutional provisions (art. 1, § 7) that "no money shall be appropriated or drawn from the treasury for the benefit of any sect or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purposes;" and (art. 1, § 5) that none of the money of the school fund shall "ever be appropriated to, or used for the support of, any sectarian school." Neither did the exercises convert the public schools into a sect, religious society, or theological or religious seminary within the intent of the Constitution (art. 1, § 7), since it is only where a school or institution has a distinctive denominational name, descriptive or indicative of the fundamental doctrines of the sect to which it belongs, or is under exclusive control of a sect having such name, and, by a course of instruction excluding all others, seeks to inculcate its tenets alone, that it becomes sectarian.

However, see *People ex rel. Ring v. Board of Education* (1910) 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220, reviewed *supra*, II. b.

In the reported case (*KNOWLTON v. BAUMHOVER*, ante, 841) it is held that the reading of the Bible in any version, or the use of the Lord's Prayer, in schools, is not illegal, and does not violate the constitutional provision against taxation for the support or maintenance of a house of worship.

#### *d. Teaching Ten Commandments.*

The teaching of the Ten Commandments in schools does not violate any constitutional prohibition of sectarianism or interference with religious liberty. *Pfeiffer v. Board of Education* (1898) 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Com. ex rel. Wall v. Cooke* (1859) 7 Am. L. Reg. (Mass.) 417.

Thus, in the case first cited, it was held that the reading of extracts from the Bible, emphasizing the moral precepts of the Ten Commandments, as a supplemental textbook which was used at the close of the school session, and from which any pupil might be excused on the application of parent or guardian, did not violate a constitutional provision that no person shall be compelled to attend or support any place of religious worship, or to pay taxes for the support of any minister of the gospel, or teacher of religion.

And in *Com. ex rel. Wall v. Cooke* (Mass.) *supra*, it was held that a rule of a school committee requiring pupils, among other things, to learn the Ten Commandments and repeat them once a week, was not a violation of a constitutional provision which secures to the citizen liberty of conscience and worship.

#### *e. Reading Bible and singing hymns.*

Morning exercises in public schools, consisting of reading from the Bible and singing hymns, has been held to be a violation of the constitutional provision against the use of money raised for the support of schools, in the aid or support of sectarian schools or purposes. *People ex rel. Ring v. Board of Education* (1910) 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19



Ann. Cas. 220; *State ex rel. Freeman v. Scheve* (1902) 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, motion for rehearing overruled in (1903) 65 Neb. 876, 59 L.R.A. 932, 93 N. W. 169; *Stevenson v. Hanyon* (1895) 4 Pa. Dist. R. 395. Compare *North v. University of Illinois* (1891) 137 Ill. 296, 27 N. E. 54.

Thus, in *People ex rel. Ring v. Board of Education* (Ill.) *supra*, it was held that requiring the children of a school to listen to the reading of the King James version of the Bible, and join in repeating the Lord's Prayer in the language used in that version, and in the singing of hymns, violated a provision of the state Constitution guaranteeing "the free exercise and enjoyment of religious profession and worship, without discrimination," since such exercises were the ordinary forms of worship usually practised by Protestant Christian denominations, the court saying: "If these exercises of reading the Bible, joining in prayer, and in the singing of hymns were performed in a church, there would be no doubt of their religious character, and that character is not changed by the place of their performance. If the petitioner's children are required to join in the acts of worship, as alleged in the petition, against their consent and against the wishes of their parents, they are deprived of the freedom of religious worship guaranteed to them by the Constitution. The wrong arises, not out of the particular version of the Bible or form of prayer used,—whether that found in Douai or the King James version,—or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship."

In *Stevenson v. Hanyon* (1895) (Pa.) *supra*, it was held that a petition which alleged that at the opening of a school religious exercises were held according to the form of worship of the Methodist Episcopal Church, with responsive readings from the King James version of the Bible, the pupils being required to memorize certain portions of the Scripture, the exercises

being closed by singing hymns from the Protestant hymn books, disclosed a violation of a constitutional prohibition (art. 10, § 2) that no money raised for the support of the public schools shall be used for the support of any sectarian school. The court said: "The defendants having demurred to the bill of complaint, we must, under the well-established rule of pleading, treat the allegations contained in the bill as if they were true. The only question left for consideration, therefore, is simply and purely one of law, and on that question there is no room for doubt. It is too plain for argument that denominational religious exercises and instruction in sectarian doctrine have no place in our system of common-school education. They are not only not authorized by any law, common or statutory, but are expressly prohibited and forbidden by our Constitution, the fundamental law of the commonwealth." However, see hearing on merits (1898) 7 Pa. Dist. R. 585.

In *State ex rel. Freeman v. Scheve* (1902) 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, motion for rehearing overruled in (1903) 65 Neb. 876, 59 L.R.A. 932, 93 N. W. 169, it was held that the acts of a teacher in a public school during school hours and in the presence of the pupils, in engaging in certain religious and sectarian exercises, consisting of the reading of passages of her own selection from the King James version of the Bible, the singing of religious and sectarian songs and hymns, and offering prayer to the Deity in accordance with the doctrines, beliefs, customs, or usages of the so-called Orthodox Evangelical Churches, the pupils joining in the singing of such songs or hymns, admittedly conducted as religious worship, constituted religious worship, and were sectarian in character within the meaning of a constitutional provision (art. 8, § 11) that "no sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes," and of a provision (art. 1, § 4) that "all persons have a natural and indefeasible right to wor-

ship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his own consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted," and it was said on motion for rehearing that it is immaterial whether the objection of a parent to his children attending and participating in a religious service conducted by a teacher in the schoolroom during school hours is reasonable or unreasonable, the right to be unreasonable in such matters being guaranteed by the Constitution.

In *Moore v. Monroe* (1884) 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, it was held that the reading of the Bible, repeating the Lord's Prayer, and singing religious songs in a school does not make it a place of worship within the meaning of the constitutional provision (Bill of Rights, art. 1, § 3) against taxation for building or repairing a place of worship, the court saying: "We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the schoolhouse is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship within the meaning of the Constitution we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden. It is, perhaps, not to be denied that the prin-

ciple carried out to its extreme logical results might be sufficient to sustain the appellant's position, yet we cannot think that the people of Iowa, in adopting the Constitution, had such extreme view in mind. The burden of taxation, by reason of the casual use of a public building for worship, or even such stated use as that shown in the case at bar, is not appreciably greater. We do not think, indeed, that the plaintiff's real objection grows out of the matter of taxation. We infer from his argument that his real objection is that the religious exercises are made a part of the educational system into which his children must be drawn, or made to appear singular, and perhaps be subjected to some inconvenience. But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regarded it as of greater weight than we do, we should have to say that we do not find anything in the Constitution or law upon which the plaintiff can properly ground his application for relief. Possibly the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission."

However, in a case not involving the common schools (*North v. University of Illinois* (1891) 137 Ill. 296, 27 N. E. 54) it was held that a rule of a university requiring all students to attend morning chapel services, consisting of the reading of a portion of the New Testament, the repetition of the Lord's Prayer, singing of religious hymns, and occasional brief talks, which were not sectarian, and did not exceed five to ten minutes, from which anyone might be excused who would sign a request to that effect, was not prohibited by a constitutional provision (art. 2, § 3) that "no person shall be required to attend or support any ministry or place of worship against his consent."

#### *f. Saying prayers.*

In *Hackett v. Brooksville Graded*

School Dist. (1905) 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36, it was held that the following prayer, offered at the opening of school, was not sectarian: "Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupils have mutual love and respect. Watch over these children, both in schoolroom and on the playground. Keep them from being hurt in any way, and at last, when we come to die, may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen." Neither children of the Roman Catholic faith, nor others conscientiously opposed, were required to attend. It was further held that the prayer did not constitute the school a sectarian or denominational school, within the constitutional provision (§ 189) that no portion of any tax raised shall be used in aiding schools of that character, or a statute (Ky. Stat. 1903, § 4368) providing, "No books or other publications of a sectarian, infidel, or immoral character, shall be used or distributed in any common school; nor shall any sectarian, infidel or immoral doctrine be taught therein," and that the school did not become a place of worship. Neither did it constitute the teacher a minister of religion within the meaning of a constitutional provision (§ 5) that no person shall be compelled to attend any place of worship, or contribute to the support of any minister of religion."

In *State ex rel. Conway v. Joint School Dist.* (1916) 162 Wis. 482, L.R.A.1916D, 399, 156 N. W. 477, Ann. Cas. 1918C, 584, it was held that the offering of a nonsectarian prayer by a Catholic priest or Protestant minister at a graduation exercise of the schools was not sectarian instruction within the meaning of a constitutional provision (art. 10, § 3) that no sectarian instruction shall be allowed in the district schools, or a provision (art. 1, § 18) as follows: "The right

of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." The court said: "No man is compelled to worship, nor compelled to attend a place of worship, nor does he, as before stated, attend such a place except in the most technical sense when he attends graduation exercises. Pupils do not congregate on such an occasion for the purpose of worship, and the short nonsectarian invocation that is usually given is a mere incident which occupies but a few moments of the two hours or more that are usually occupied with the program prepared for such occasions. If the prayer be nonsectarian it does not interfere with any right of conscience that the law recognizes, and neither is the matter of permitting it the giving of any preference to any religious establishment or religious mode of worship in a constitutional sense. A very different question would arise if an attempt were made to introduce the practice of having prayer as a part of the daily routine in our public schools."

*g. Use of Bible as textbook.*

The use of the Bible as a textbook in schools is a violation of constitutional provisions against sectarianism or interference with religious liberty. *State ex rel. Weiss v. District Bd.* (1890) 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *State ex rel. Dearle v. Frazier* (1918) 102 Wash. 369, L.R.A.1918F, 1056, 173 Pac. 35. Compare *Pfeiffer v. Board of Education* (1898) 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250, reviewed *supra*, II. d.

Thus, in *State ex rel. Dearle v. Frazier* (Wash.) *supra*, in which it appeared that there was required an examination of high school pupils on

"the historical, biographical, narrative, and literary features" of the Bible, in accordance with a syllabus outline furnished pursuant to a resolution of the school board, which also provided that all personal instruction and interpretation should be received at home or by the religious organizations with which the students were affiliated, the following of that outline in examinations on which high school credit was given, was held to involve religious instruction in violation of a constitutional provision (art. 1, § 11) that "no public money shall be appropriated for, or applied to, any religious worship, exercise, or instruction, or the support of any religious establishment."

It was also held that such instruction is also violative of a constitutional provision (art. 9, § 4) that "all schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence," since all citizens are not agreed that the King James translation of the Bible is a true version of the Scriptures, or as to the narrative and historical worth of the Bible, or whether many of the events narrated therein are historical or allegorical, which questions tend to excite differences and controversy.

And in *State ex rel. Weiss v. District Bd.* (Wis.) supra, it was held that the daily reading, without comment, to pupils during school hours, of portions of the King James version of the Bible selected by the teacher without restriction, although all children were not compelled to remain in the schoolroom during the reading, but were at liberty to withdraw, was sectarian instruction prohibited by the Constitution (art. 10, § 3) and had "a tendency to inculcate sectarian ideas within the meaning of" § 3, chap. 251, Laws of 1883, amending § 514, Rev. Stat. which "provides that in cities 'no textbooks shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas,'" since the Bible contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and such passages may reasonably be under-

stood to inculcate the doctrines predicated upon them. It was further held that the stated reading of the Bible in the public schools as a textbook may be "worship," and constitute the schoolroom a place of worship, so that money drawn from the state treasury for such school was for the benefit of a religious school within the meaning of the constitutional provision (art. 1, § 18) that "(1) the right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed;" (2) "nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent;" (3) "nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship;" (4) "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

#### *h. Use of textbook founded on Bible.*

The use of textbooks founded on the Bible, and emphasizing its fundamental teachings, does not violate any constitutional provision securing religious liberty, or prohibiting sectarian instruction. *State ex rel. Weiss v. District Bd.* (1890) 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *Pfeiffer v. Board of Education* (1898) 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250.

The use of textbooks founded on the fundamental teachings of the Bible or which contain extracts therefrom, although they may contain passages from which some inferences of sectarian doctrine might possibly be drawn, is not within the constitutional prohibition of sectarian instruction. *State ex rel. Weiss v. District Bd.* (Wis.) supra.

In *Pfeiffer v. Board of Education* (1898) 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 25, it was held that the use in public schools, for fifteen minutes, of a book entitled "Readings from the Bible," largely consisting of moral precepts affirming and emphasizing the moral obligations laid down in the Ten Commandments, intended merely

to inculcate good morals, the teachers not being allowed to make any comment thereon, and being required to excuse from that part of the session any pupil upon application of his parent or guardian, is not a violation of the following constitutional provisions: (art. 4, § 39) "The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion." (§ 40) "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose." (§ 41) "The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person, on account of his opinion or belief concerning matters of religion."

*I. Resolution prohibiting reading of Bible.*

A resolution of the school authorities prohibiting the reading of the Bible in schools is valid, and not violative of any constitutional provision with regard to sectarianism or religious liberty, and is a matter entirely within the jurisdiction of such authorities. *Board of Education v. Paul* (1900) 7 Ohio N. P. 58, 10 Ohio S. & C. P. Dec. 17; *Board of Education v. Minor* (1872) 23 Ohio St. 211, 13 Am. Rep. 233.

A resolution of a school board prohibiting religious instruction and the reading of religious books, including the Holy Bible, in schools, is valid, being a matter, in the absence of statute, exclusively within the jurisdiction of the board; the Constitution providing that no person shall be compelled to attend religious worship, nor shall any sect ever have any exclusive right to, or control of, any part of the school funds of the state. *Board of Education v. Minor* (Ohio) *supra*. And to the same effect see *Board of Education v. Paul* (Ohio) *supra*.

In *Board of Education v. Paul* (Ohio) *supra*, a resolution of the board of education of a city prohibiting the reading of religious books, including the Bible, in the common schools of the city, having been made and sustained, it was held that a court of equity will not interfere or grant a board of education an injunction to restrain the violation of the rule by a teacher who opened her school each morning by reading at length portions of the Bible, followed by prayer, and who threatened to continue unless restrained by order of the court, it being within the power of the board of education to discharge the teacher if the rule was to remain in force.

*III. Wearing of religious garb by teacher.*

In *O'Connor v. Hendrick* (1906) 184 N. Y. 421, 7 L.R.A. (N.S.) 402, 77 N. E. 612, 6 Ann. Cas. 432, affirming 109 App. Div. 361, 96 N. Y. Supp. 161, it was held that the state superintendent of public instruction had power to order that a distinctive religious garb should not be worn by teachers in the class room; and that it should be discarded by them on penalty of dismissal. The court said that the distinctive religious costume of teachers who were members of a religious society connected with the Roman Catholic Church, worn at all times in the presence of their pupils, would tend to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belonged, and to that extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine. The court mentioned the opposite view taken in *Hysong v. Gallitzin School Dist.* (Pa.) *infra*, and quoted with approval the dissenting opinion in that case.

However, in *Sargent v. Board of Education* (1902) 76 App. Div. 588, 79 N. Y. Supp. 127, affirming (1901) 35 Misc. 321, 71 N. Y. Supp. 954, it was said that the religious garb worn by Catholic sisters in an orphan asylum could in no way affect the children injuriously while receiving the secular instruction towards which public money had been contributed, it appearing that they received no religious

instruction during that time, but devoted other hours of the day to religious training.

In *Com. v. Herr* (1909) 39 Pa. Super. Ct. 454, the court sustained a statute (Act June 27, 1895, P. L. 395), the preamble of which declared that the legislature deemed it "important that all appearance of sectarianism should be avoided in the administration of the public schools of this commonwealth," and which read as follows: "No teacher in any public school in this commonwealth shall wear in said school or whilst engaged in the performance of his or her duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination." The judgment in that case was affirmed in (1910) 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422, on the opinion of the lower court.

Prior to the act just mentioned, it was held in *Hysong v. Gallitzin School Dist.* (1894) 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, that in the absence of proof that sectarian religious instruction is imparted by them during school hours, or sectarian religious exercises engaged in, the court could not restrain by injunction sisters of a religious order of the Catholic Church from teaching in the public schools, nor the school directors from employing or permitting them to act in that capacity. It was said that the matter involved was solely the exercise of discretion by the school board in the performance of an official duty, for which it is alone responsible, and this discretion, when it does not transgress the law, is not reviewable by any court, so that when a teacher of good moral character applies for a school and presents a certificate of qualifications as to scholarship and aptness to teach, there is no further judicial inquiry into the action of the board in appointment. It was further held that the wearing of religious garb is not the sectarian teaching which the law prohibits, the court saying: "But it is further argued that, if the appointment of these Catholic teachers was

lawful, they ought to be enjoined from appearing in the schoolroom in the habit of their order. It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, sectarian teaching, which the law prohibits? The religious belief of many teachers, all over the commonwealth, is indicated by their apparel. Quakers or Friends, Ommish, Dunkards, and other sects wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many Protestant denominations wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the schoolroom on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belong. The dress is but the announcement of a fact,—that the wearer holds a particular religious belief. The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the courts to decide that the cut of a man's coat, or the color of a woman's gown, is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of the teacher being known, a pure unselfish life, exhibiting itself in tenderness to the young and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly, in both young and old, there is a disposition to reverence such a one, and, at least to some extent, consider the life as the fruit of the particular religion. Therefore irreproachable conduct to that degree is sectarian teaching. But shall the education of the children of the commonwealth be intrusted only to those men and women who are destitute of any religious belief? Our recollection extends back almost to the beginning of the common-school system of the commonwealth; in many counties

there never was a time when ministers of Protestant sects were not frequently selected as teachers; some of them wore in the schoolroom, where children of Catholic parents were pupils, a distinctively clerical garb; when the office of county superintendent was first created in 1854, in many counties preachers were chosen to fill the office; the present state superintendent of public instruction is a Protestant preacher. It is fair to presume that high moral character, the result of Christian sectarian teaching, as well as scholarly attainments, prompted their selection. Ordination vows binding them to a particular creed were considered no disqualification; it was not assumed that the fact of membership in a particular church, or consecration to a religious life, or the wearing of a clerical coat or necktie would turn the schools into sectarian institutions. In the sixty years of existence of our present school system, this is the first time this court has been asked to decide, as matter of law, that it is a sectarian teaching for a devout woman to appear in a schoolroom in a dress peculiar to a religious organization of a Christian church. We decline to do so; the law does not so say. The legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals. But we doubt if even this would repress knowledge of the fact of a particular religious belief; that, if the teacher had any, would still be effectively taught by unselfish devotion to duty; no mere significance or insignificance of garb could conceal it; the daily life would either exalt or make obnoxious the sectarian belief of the teacher."

#### IV. Public aid of sectarian school.

State constitutions often prohibit specifically the appropriation of any part of the school fund to the aid or support of any sectarian school, or at least for any other than school purposes.

**Illinois.**—*Dunn v. Chicago Industrial School* (1917) 280 Ill. 613, L.R.A. 1918B, 207, 117 N. E. 735; *Cook County v. Chicago Industrial School* (1888) 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183.

**Kansas.**—*Atchison, T. & S. F. R. Co. v. Atchison* (1892) 47 Kan. 712, 28 Pac. 1000.

**Kentucky.**—*McDonald v. Parker* (1908) 130 Ky. 501, 110 S. W. 810; *Williams v. Stanton Graded Common School Dist.* (1916) 172 Ky. 133, 188 S. W. 1058, reversed on rehearing in (1917) 173 Ky. 708, L.R.A. 1917D, 453, 191 S. W. 507.

**Massachusetts.**—*Jenkins v. Andover* (1869) 103 Mass. 94; *Opinion of Justices* (1913) 214 Mass. 599, 102 N. E. 464. Compare *Barnes v. Falmouth* (1810) 6 Mass. 401, reviewed in subdivision V.

**Mississippi.**—*Otken v. Lamkin* (1879) 56 Miss. 764.

**Nevada.**—*State ex rel. Nevada Orphan Asylum v. Hallock* (1882) 16 Nev. 385.

**New York.**—*St. Patrick's Church Soc. v. Heermans* (1910) 68 Misc. 487, 124 N. Y. Supp. 705; *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education* (1851) 13 Barb. 400; *Sargent v. Board of Education* (1904) 177 N. Y. 317, 69 N. E. 722, affirming (1902) 76 App. Div. 588, 79 N. Y. Supp. 127, which affirms (1901) 35 Misc. 321, 71 N. Y. Supp. 954.

**Pennsylvania.**—*Com. ex rel. Wehrle v. Plummer* (1911) 21 Pa. Dist. R. 182.

**South Dakota.**—*Dakota Synod v. State* (1891) 2 S. D. 366, 14 L.R.A. 418, 50 N. W. 632.

**Texas.**—*Jernigan v. Finley* (1896) 90 Tex. 213, 38 S. W. 24.

In *Jernigan v. Finley* (Tex.) *supra*, although the question of sectarianism was not involved, the court quoted a section of the Constitution (art. 7, § 5) which provides, among other things, that no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school.

In *Com. ex rel. Wehrle v. Plummer*

(Pa.) *supra*, it was held that an act which provided that certain educational institutions should be open, not only to regular pupils of the public schools, but to other persons residing in the school district, did not violate a constitutional provision (art. 10, § 2) that "no money received for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school," simply because it would allow the admission to a manual training school of pupils who had received their elementary training in private sectarian schools, which taught substantially the same branches as the public high school.

In *Dakota Synod v. State* (S. D.) *supra*, it was held that the payment by the state of the tuition of a designated class of students in a sectarian university, controlled by a Presbyterian corporation, for instruction in the methods of teaching in the public schools, was an appropriation for "the benefit of" or "aid to" a sectarian school, and violative of the constitutional provisions that (art. 6, § 3) "no money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution," and (art. 8, § 16) that "no appropriation of lands, money, or other property or credits, to aid any sectarian school, shall ever be made by the state or any county or municipality within the state. . . . No sectarian instruction shall be allowed in any school aided or supported by the state."

In *Williams v. Stanton Graded Common School Dist.* (1917) 172 Ky. 133, 188 S. W. 1058 it was held that the circumstances relied on did not sustain the charge that the occupation of rooms in a sectarian college by graded school pupils and teachers, pursuant to a contract with the school authorities, involved the use of a portion of the school fund in the aid of such college, in violation of the constitutional prohibition of such aid. That decision was reversed on rehearing in (1917) 173 Ky. 708, L.R.A. 1917D, 453, 191 S. W. 507, wherein it was held that a contract by which

the pupils and teachers of a graded school district, which owned no building, were taught in a sectarian school building, the lower grades by teachers paid by the district but selected by the school management, and the upper grades by the teachers of the school, all under the control of the school management, in consideration of the payment by the district of a tuition fee for pupils of a high school grade, and the cost of repairs and incidental expenses attached to the building and grounds, was a violation of the constitutional provision (§ 189) prohibiting the appropriation of any part of the common-school fund in aid of any church, sectarian, or denominational school. The court said: "Having these views, and to make clear and certain our determination to preserve the spirit of the Constitution and its efforts to keep separate church and school, we not only hold that it is a violation of the Constitution to appropriate any part of the common-school fund 'in aid of any church, sectarian, or denominational school,' but equally unlawful for the trustees of any common or graded school, or educational institution supported in whole or in part by public funds raised by taxation, or dedicated to common-school purposes, to enter into any contracts, agreements, or arrangements through or under which such school or educational institution may be brought directly or indirectly under the influence, control, or supervision of any denominational or sectarian institution or school."

In *Cook County v. Chicago Industrial School* (1888) 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183, it was held that the prohibition of the Illinois Constitution (art. 8, § 3) of any payment from public school funds in aid of any sectarian school, institution, or purpose precluded payments by Cook county for the tuition and maintenance of dependent girls committed by the county court under the Act of May 28, 1879, to the Chicago Industrial School for Girls, a corporation which did not own or lease any building or conduct a school, but



which placed the girls committed to it in certain institutions under the control of the Roman Catholic Church, and to which institutions such payments would in fact go, although tuition, maintenance, and care were furnished in return for such payment.

But in a recent case involving the same institution (*Dunn v. Chicago Industrial School* (1917) 280 Ill. 613, L.R.A.1918B, 207, 117 N. E. 735) the court sustained a payment to the Chicago Industrial School for Girls, an institution under the control and management of the Roman Catholic Church and in charge of a mother superior, there being a chapel on the grounds where religious services according to the doctrines of the Roman Catholic Church were held, which all inmates were required to attend. The sum paid was less than the cost of food, clothing, medical care, and less than the actual cost, aside from religious exercises, of maintaining each girl in a similar state institution. The payments were made only for each girl of Catholic parents committed by the juvenile court to such institution.

In *Sargent v. Board of Education* (1904) 177 N. Y. 317, 69 N. E. 722, affirming (1902) 76 App. Div. 588, 79 N. Y. Supp. 127, which affirms (1901) 35 Misc. 321, 71 N. Y. Supp. 954, the court sustains the action of a city in paying the salaries of four teachers in an orphan asylum called "St. Mary's Boys' Orphan Asylum," as a contribution towards the secular education of orphans under the charge of said asylum, which education corresponded with that furnished to children of like age in the public schools of the city, it appearing that under the rules of said asylum, which was subject to visitation by the state board of charities, no denominational tenet or doctrine was taught, or religious instruction imparted, during the school hours prescribed by the board of education. This action, it was held, was not in violation of a constitutional provision (art. 9, § 4) that "neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in

5 A.L.R.—56.

aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

In *Sargent v. Board of Education* (N. Y.) supra, the judgment in the case last cited was affirmed on the grounds that there was express statutory authority given to the board to employ the four teachers by the city charter (Laws 1880, chap. 14, § 131), which gave the board authority to employ teachers in schools, "including common schools, now existing therein," it appearing that this section does not limit the board to the maintenance of what are called the common schools, and that the constitutional provision (art. 9, § 4) prohibiting the use of public money in aid or maintenance of a school under religious control or direction, or in which denominational doctrine is taught, had no application to an orphan asylum, which is neither a school nor institution of learning, the court calling attention to another provision (art. 8, § 14) which provided: "Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities."

A school maintained by a Roman Catholic orphan asylum is not a "common school" within the meaning of a

provision of N. Y. Const. (art. 9) that the revenue of the common-school fund shall be applied to the support of common schools. *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education* (1851) 13 Barb. (N. Y.) 400.

In *St. Patrick's Church Soc. v. Heermans* (1910) 68 Misc. 487, 124 N. Y. Supp. 705, it was held that a contract pursuant to which waterworks were leased to a private concern for a term of years with the right to sell or rent water to private individuals, but providing that water shall be furnished free to all "schoolhouses," although not specifically requiring that water be furnished to any private charitable association or eleemosynary corporation, required the furnishing of water gratuitously to a school supported by contributions from the members of a church and congregation, but under the direction of the board of Catholic regents, and under visitation of the superintendent of schools of the city. The furnishing of such free water was not violative of the following constitutional provision: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

In *State ex rel. Nevada Orphan Asylum v. Hallock* (1882) 16 Nev. 385, it was held that a school connected with an orphan asylum supported by charitable donations, controlled exclusively by the officers of the asylum who were sisters of charity of the Roman Catholic Church, in which religious instruction was given to Roman Catholic children, was a sectarian institution within a constitutional provision (art. 11, § 10) against using public funds for "sectarian purposes," although the funds contributed by the state might be needed for the physical necessities of the orphans, since such contribution would be used for the

relief and support of a sectarian institution, and in part, at least, for sectarian purposes.

In *McDonald v. Parker* (1908) 130 Ky. 501, 110 S. W. 810, it was held that the hiring under contract of male teachers employed in a denominational college before its destruction by fire, and the acceptance of the services of female teachers donated by the authorities of such college, it not being shown that any school district funds were paid to the college, was not a violation of a constitutional provision (§ 189) that "no portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian, or denominational school."

In *Opinion of Justices* (1913) 214 Mass. 599, 102 N. E. 464, the court answered the following question, transmitted by the general court: "Do the existing provisions of the Constitution of Massachusetts, and especially article 18 of the amendments thereto, adequately prohibit the appropriation by the commonwealth or by any county or municipality of money raised by taxation for maintaining or aiding any church, religious denomination or religious society, or any institution, school, society, or undertaking which is wholly or in part under sectarian or ecclesiastical control? It was said that all moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words have generally been understood, must be disbursed exclusively for the support of such schools, and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect, but there is no constitutional prohibition of appropriations for higher educational institutions, societies, or undertakings under sectarian or ecclesiastical control.

In *Otken v. Lamkin* (1879) 56 Miss. 764, it was held that an act allowing children to receive the same share of a public fund for attendance at a private school of a certain grade, making no exception as to schools under the control of religious societies, as for

attendance on public schools, is in violation of a Constitution which provides (art. 8) for a "uniform system of public schools," and also (art. 8, § 9) that no religious sect shall ever control any part of the school fund, the court saying: "It is manifest under these provisions that no portion of the school fund can be diverted to the support of schools which, in their organization and conduct, contravene the general scheme prescribed. That is to say, the fund must be applied to such schools only as come within the uniform system devised, and under the general supervision of the state superintendent and the local supervision of the county superintendent, are free from all sectarian religious control, and ever open to all children within the ages of five and twenty-one years; though this freedom of admission to all will not preclude the classification of the schools according to the age, sex, race, or mental acquirements of the pupils,—provided only they remain free to all who come within the class to which the particular school is set apart."

In *Jenkins v. Andover* (1869) 103 Mass. 94, it was held that a free school, founded by charitable bequest, and maintained as a charity under the direction of trustees elected by the town, some of whom, although elected at town meetings, must be members of certain designated religious societies, was not a public school, entitled, under the Massachusetts Constitution, to money raised by taxation for the support of public schools.

Without mention of any constitutional provision, in *People v. McAdams* (1876) 82 Ill. 356, it was held that the legislature could not rightfully invest with the power of taxation the corporate officers of a primary school, established pursuant to a bequest therefor to be appropriated to the erection of a building suitable for a school and for a place of public worship, since the incorporation was not for governmental purposes, nor for any purpose belonging to the carrying out of the common-school system of the state, but rather for the purpose of the administration of a private char-

ity. However, beyond the mention of a place of worship, no religious question was discussed in this case.

In *Atchison, T. & S. F. R. Co. v. Atchison* (1892) 47 Kan. 712, 28 Pac. 1000, an action to recover certain taxes paid, it was held that the officers of a city had no authority to impose a tax on the property of the citizens to aid private sectarian schools, the court saying: "Of course, the public is interested in education, and taxes may be authorized and properly levied for the maintenance of public institutions of learning; but in this case the subscription and levy were for private and sectarian institutions. We are concluded by the statements in the petition as to the character of the colleges proposed to be aided by the city. The demurrer admits that they are not public schools or colleges, such as can be maintained by money drawn from the public treasury. While it is argued that the public is benefited by the increase of schools and the spread of learning and knowledge, it is not contended that the colleges in question are under the supervision and control of the public, or that there is or could be any legislative authority to expend the public revenues for their support. The officers of the city had no power to impose a tax on the property of the citizens of Atchison to aid private interests and enterprises."

#### *V. Employment of sectarian teacher.*

In *Millard v. Board of Education* (1887) 121 Ill. 297, 10 N. E. 669, it was said that, under a statute which does not prescribe any religious belief as a qualification of a teacher in a public school, the school authorities may select a teacher who belongs to any church, or no church, as they may think best.

In *McDowell v. Board of Education* (1918) 104 Misc. 564, 172 N. Y. Supp. 590, it was held that a school-teacher who was a Quakeress was properly dismissed, not because of her religion, but because of certain views and beliefs which she declared were based on her religion, which prevented her from properly discharging the duty she had assumed, in that she was opposed to

war, and to the existing war with the German government, would not uphold this country in forcibly resisting invasion, would not help, or urge her pupils to help, the United States government in carrying on the war with Germany, or to perform Red Cross services, or to buy thrift stamps, and did not believe that a teacher was under special obligation to train her pupils to support the government of the United States in its measures for carrying on the war. Answering the contention that there was a violation of the Federal and state Constitutions in that she was discriminated against on account of her religion, and that there was an attempted restraint on the observance of the Quaker faith, the court said: "It is further urged that in dismissing the petitioner upon the grounds assigned there was a violation of the Federal and state Constitutions in that she was discriminated against on account of her religion, and that there was an attempted restraint upon the observance of the Quaker faith. Such is not the case. The petitioner was not dismissed because she was a Quakeress. It has simply been found that certain views and beliefs, which she declares are based upon her religion, prevent her from properly discharging the duty she assumed. Where a person agrees with the state to perform a public duty, she will not be excused from performance according to law merely because her religion forbids her doing so. While the petitioner may be entitled to the greatest respect for her adherence to her faith, she cannot be permitted, because of it, to act in a manner inconsistent with the peace and safety of the state."

In *Barnes v. Falmouth* (1810) 6 Mass. 401, it was held that a teacher of an unincorporated religious society cannot be regarded as a public Protestant religious teacher, so as to be entitled to any part of the funds raised by a town, parish, precinct, etc., for such a teacher, based on the Constitution of the state as it existed until 1833, providing for the choice of such a teacher in each town, precinct, parish, etc., the only person entitled

thereto being a Protestant teacher of piety, religion, and morality, of some incorporated religious society, elected by such society.

See also *supra*, III.

#### VI. *Use of church or sectarian building for school.*

The necessary use of a portion of a church or other sectarian building for school purposes, or the payment of rent therefor, is not an appropriation or aid to the church or a sectarian school within the meaning of constitutional prohibitions of such aid. *Millard v. Board of Education* (1886) 19 Ill. App. 48, on appeal in (1887) 121 Ill. 297, 10 N. E. 669; *Scripture v. Burns* (1882) 59 Iowa, 70, 12 N. W. 760; *KNOWLTON v. BAUMHOVER* (reported herewith) ante, 841; *Swadley v. Haynes* (1897) — Tenn. —, 41 S. W. 1066; *State ex rel. Conway v. Joint School Dist.* (1916) 162 Wis. 482, L.R.A.1916D, 399, 156 N. W. 477, Ann. Cas. 1918C, 584; *Dorner v. School Dist.* (1908) 137 Wis. 147, 19 L.R.A.(N.S.) 171, 118 N. W. 353. See also *Pronovost v. Brunette* (1917) 36 N. D. 288, 162 N. W. 300.

Thus, in *Millard v. Board of Education* (1886) 19 Ill. App. 48, it was held that the payment of rent to a church organization for the use of a room in the basement of the church for school purposes was not such an appropriation or aid to the church as to come within the constitutional prohibition, since the public in such a case receives the full benefit of its contract, and the funds paid are not a gift, appropriation, or aid to the church, nor paid for any sectarian purpose. And in the same case, on appeal (1887) 121 Ill. 297, 10 N. E. 669, it was held that temporary leasing, when necessary, of the basement of a church under the control of Roman Catholics, for a public school, which remains under the control of the school board and is taught by their teachers and under the system of instruction prescribed by them, does not make the school a sectarian one under a constitutional provision (art. 8) declaring against the use of public funds to aid sectarian schools, the court saying: "As to the first allegation, that the schools have been

maintained in the basement of a Catholic church, no importance whatever can be attached to a fact of that character. If the district where the school was maintained had no schoolhouse, and it became necessary for the board of education to procure a building to be used for school purposes, they had the right to rent of any person who had property suitable for school purposes, and whether the owner of the property was a Methodist, a Presbyterian, a Roman Catholic, or of any other denomination, was a matter of no moment; nor was it material that the building selected had been used as a church."

See also *Millard v. Board of Education* (1886) 116 Ill. 23, 5 N. E. 533, wherein it was held that an appeal did not lie to the supreme court directly from the circuit court, because no question was involved of the construction or interpretation of the constitutional provisions (art. 8, § 3) inhibiting school authorities from appropriating public funds for the support of a public school, or any school under the domination or control of any church or sectarian denomination; or of § 3 of the Bill of Rights providing that "the free exercise and enjoyment of religious profession and worship, without discrimination, shall be forever guaranteed."

In *State ex rel. Conway v. Joint School Dist.* (1916) 162 Wis. 482, L.R.A.1916D, 399, 156 N. W. 477, Ann. Cas. 1918C, 584, it was held that the use of a church building in which to hold graduation exercises, which are a part of the school curriculum and under the control of the school board, without payment for such use, does not compel parents or pupils to attend a place of worship within the meaning of a constitutional provision (art. 1, § 18) which reads as follows: "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be per-

mitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." The court said: "When the Constitution protects the individual from being compelled to attend a place of worship, it undoubtedly means that he shall not be required to attend a place where religious instruction is being given at the time he is required to be present. It protects a man from being obliged to attend the services of the Salvation Army in our public streets, or from being compelled to enter a hall or opera house while such services are being carried on, just as much as it does against being forced to enter a church. It is what is done, not the name of the place where it is done, that is significant."

In *Swadley v. Haynes* (1897) — Tenn. —, 41 S. W. 1066, it was said, without mention of any constitutional provision, that, while it was contrary to law and public policy to allow the public school money to be invested in property in which any religious denomination or society had any interest or rights, this does not prevent or inhibit school directors, when necessary, from using a building of that character by permission of the trustees, or from making any suitable arrangement for the rent and occupation of the building for the use of the public schools.

In view of the express statutory power of a school district to hire a schoolhouse (Stat. 1898, § 430, subd. 5) and the statutory authority of the school board (Stat. 1898, § 430) when directed by the electors, in the alternative, to purchase or lease a site for a schoolhouse, and to build, hire, or purchase a schoolhouse, etc., it has been held that a school district might properly maintain a common school in rooms rented in a parochial school building, where it owned a schoolhouse obviously wholly inadequate for a common school, free to all the scholars of the district. *Dorner v. School Dist.* (1908) 137 Wis. 147, 19 L.R.A. (N.S.) 171, 118 N. W. 353.

In *Scripture v. Burns* (1882) 59 Iowa, 70, 12 N. W. 760, a petition for mandamus to require school authorities to discontinue the holding of the public school in a room rented in a building owned by a bishop of the Catholic Church, where the Catholic creed was taught, and to hold it in the public schoolhouse, it was held that the directors of a school district may, when the public schoolhouse is out of repair or insufficient, and in other cases when the best interests of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public school building, and that their action in such a case, although dependent on the determination of facts and the lawful exercise of their discretion, may be reviewed by proper proceedings before a tribunal having jurisdiction thereof.

In the reported case (*KNOWLTON v. BAUMHOVER*, ante, 841) it is held that a school board could not, in the exercise of power given it to rent a room and employ a teacher where there are ten children for whose accommodation there is no schoolhouse, appropriate school funds to rent a room in a parochial school building for the use of the public school, where it appeared that the pupils were by this action placed under the sectarian influence of such school, the room being left in charge of members of a religious order who regularly gave instruction in the doctrines of their particular faith.

In *Nance v. Johnson* (1892) 84 Tex. 401, 19 S. W. 559, a suit by citizens and taxpayers against school trustees and the teacher of a school to enjoin the payment of the school fund allotted to the community, pursuant to a contract with the teacher of a school alleged to be sectarian, the appellate court, having found that the plaintiffs were not entitled to an injunction because other remedies open to them had not been exhausted, found it unnecessary to express an opinion on the merits, but recited the conclusions of fact of the trial judge, showing that the school was taught by a member of the Baptist Church, in a house belonging to a Baptist association, a body or-

ganized for the purpose of maintaining a school for the advancement of the ends "of their religious or sectarian association;" that, on account of a partial destruction of their building, the association, feeling unable to establish a school as originally designed, turned over its school property to the community to be used for public free school purposes; that the contract in question was with the teacher of such school by the lawfully appointed trustees of the school community, with the approval of the county judge; that all the teachers engaged held first-grade certificates, and that the school was commenced with daily prayers, but no religious or sectarian instruction of any character was given.

See also *Pronovost v. Brunette* (1917) 36 N. D. 288, 162 N. W. 300, wherein it appeared that the room to be leased for school purposes was in a Roman Catholic institution, but the court, without discussing that point, based its decision on the ground that the board had no statutory authority to lease additional school buildings, where those in existence were sufficient for all purposes.

#### *VII. Religious meeting in schoolhouse.*

##### *a. Use permitted.*

In some jurisdictions it is held that a schoolhouse may be used for religious meetings at times when such meetings will not interfere with the school work. *Nichols v. School Directors* (1879) 93 Ill. 61, 34 Am. Rep. 160; *School Directors v. Toll* (1909) 149 Ill. App. 541; *Hurd v. Walters* (1874) 48 Ind. 148; *Baggerly v. Lee* (1905) 37 Ind. App. 189, 73 N. E. 921; *Townsend v. Hagan* (1872) 35 Iowa, 194; *Davis v. Boget* (1878) 50 Iowa, 11; *State ex rel. Gilbert v. Dilley* (1914) 95 Neb. 527, 50 L.R.A. (N.S.) 1182, 145 N. W. 999; *Greenbanks v. Boutwell* (1870) 43 Vt. 207. And see *Lagow v. Hill* (1909) 238 Ill. 428, 87 N. E. 369.

Thus, in *State ex rel. Gilbert v. Dilley* (1914) 95 Neb. 527, 50 L.R.A. (N.S.) 1182, 145 N. W. 999, it was held that the occasional use of a schoolhouse for Sunday school and religious meetings over a period of five years, and not more than four

times in any one year, on Sundays, when such meetings did not interfere with the school work, did not constitute the schoolhouse a place of worship within the meaning of the constitutional provisions prohibiting compulsory attendance on places of worship, or taxation for the maintenance thereof.

In *Townsend v. Hagan* (1872) 35 Iowa, 194, it was held that, under a statute conferring authority on the electors of a school district to direct the sale or "other disposition" to be made of any schoolhouse, they have the power, by vote, to permit the use of such building for religious purposes.

So, in another case decided on the authority of *Townsend v. Hagan* (Iowa) *supra*, and *Davis v. Boget* (1878) 50 Iowa, 11, it was held that the electors of a district township, by virtue of the authority given them by statute, have power by vote to order that a schoolhouse be opened for Sabbath school, religious worship, and lectures on moral and scientific subjects, at such times as would not interfere with the regular progress of the public schools, and such use is not in conflict with a constitutional provision (art. 1, § 3) against compelling any person to pay taxes for building or repairing places of worship, especially where such use was temporary and occasional, and abundant provision was made for securing damages. The court said: "Aside from the consideration that in *Townsend v. Hagan*, *supra*, it was determined that the district electors did have such power as is here complained of, and that such use was not unreasonable, we incline to think that the use of a public school building for Sabbath schools, religious meetings, debating clubs, temperance meetings, and the like, and which, of necessity, must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so where, as in the case at bar, abundant provision is made for securing any damages which the taxpayer may suffer by reason of the use of the house for the purposes named. With

such precaution, the amount of taxes anyone would be compelled to pay by reason of such use would never amount to any appreciable sum. We may further say that the use for the purposes named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the schoolhouse into a building for worship, within the meaning of the Constitution. The same reasoning would make our halls of legislation places of worship, because in them, each morning, prayers are offered by chaplains."

In Illinois, the specific authority of statutes for such use has been invoked. In *Nichols v. School Directors* (Ill.) *supra*, it was held that a statute (Ill. Rev. Stat. 1874, p. 958, § 39) authorizing the directors of a school district to grant the temporary use of a schoolhouse, when not occupied by school, for religious meetings and Sunday schools, and for such other meetings as the directors might deem proper, and the act of a school district in granting the use of a schoolhouse for religious meetings and Sunday school, was authorized, and did not contravene a constitutional provision (art. 2, § 3) that no person should be required to support a place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship, or a provision (art. 8, § 3) which forbade any school district from making an appropriation in aid of any church, or for sectarian purposes, or a provision (art. 8, § 2) which required all school property to be faithfully applied to the object for which such gifts or grants were made. The court said: "It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. The latter one relates to the subject of a gift or grant, which this schoolhouse is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way in interference with school purposes, would in any reasonable

sense be inconsistent with its faithful application to the object of the gift or grant. The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the schoolhouse is such. In what manner, from the holding of religious meetings in the schoolhouse, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly at some future time he might, as a taxpayer, be made to contribute to the expense of repairs, rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the schoolhouse might in that way cause damage in some degree to the building, upon the idea that continual dropping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, 'De minimis,' etc. The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled, without his consent, to contribute to the support of any ministry or place of worship. Such a matter as the subject of complaint here, we do not regard as within its purview. Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the taxpayer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of the possibility of en-

hanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the schoolhouse. There is no pretense that it is in any way an interference with the occupation of the building for school purposes."

Where by statute (Rev. Stat. 1909, p. 2013) school directors have control and supervision of the schoolhouse and the right to permit use thereof for certain purposes other than school purposes, a church organization has no right to use the school building for religious meetings without permission of the school directors, such rights being permissive only, and revocable at any time at the discretion of the school directors. *School Directors v. Toll* (1909) 149 Ill. App. 541.

See also *Lagow v. Hill* (1909) 238 Ill. 428, 87 N. E. 369, which involved a construction of the statute in question, but concerned the meeting of certain fraternal organizations.

And in Indiana, under a similar statute, in *Hurd v. Walters* (1874) 48 Ind. 148, it was said that if, in accordance with a statute (act approved March 3, 1859, § 6) so providing, a majority of the legal voters of a school district had expressed a desire that the schoolhouse might be used for religious worship, the action of the school trustee in permitting such use would be clearly right, but refused to express any opinion as to the power of the trustee, in the absence of any expressed desire on the part of the majority of the legal voters of the district.

However, in *Baggerly v. Lee* (1905) 37 Ind. App. 139, 73 N. E. 921, it was held that a schoolhouse is occupied for school purposes from the beginning of the school term to its end, including school days, Saturdays, Sundays, and nights, and a statute permitting, under certain conditions, the use of a schoolhouse for other than school purposes, "when unoccupied for common-school purposes," does not prevent a trustee from enjoining, and does not permit him to grant, the use of the building for religious purposes during such time. Suggesting a doubt as to the



validity of the act, the court said that if it was valid the school trustee might properly grant the use of the school for religious purposes during the time intervening between the close of the school term in the spring and the commencement of the succeeding term in the fall.

In at least one jurisdiction, the authority to decide the question seems to be in the school authorities by virtue of the powers conferred upon them. Thus, under a statute (Sand. & H. Dig. § 7042) giving school directors the care and custody of the schoolhouse and grounds, books, papers, etc., and imposing upon them the duty to preserve the same, and to prevent waste and damage, it was held that they have the power to prohibit the use of such building for religious purposes, where it appears that by such use the building and its contents are being injured, although a certain sum contributed by individuals to be used in erecting the building was given on the understanding that the house was to be used for a schoolhouse and for religious worship. *Boyd v. Mitchell* (1901) 69 Ark. 202, 62 S. W. 61.

In Michigan, it has been held that the electors of a school district may, by vote, refuse to permit certain persons the use of a schoolhouse for the purpose of holding religious meetings. *Eckhardt v. Darby* (1898) 118 Mich. 199, 76 N. W. 761.

*b. Use not permitted.*

But in other jurisdictions public school buildings may not be used for religious meetings. *Spencer v. Joint School Dist.* (1875) 15 Kan. 259, 22 Am. Rep. 268; *George v. Second School Dist.* (1843) 6 Met. (Mass.) 510; *Dorton v. Hearn* (1878) 67 Mo. 301; *Hysong v. Gallitzin School Dist.* (1894) 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482; *Bender v. Streabich* (1896) 17 Pa. Co. Ct. 609, affirmed in (1897) 182 Pa. 251, 37 Atl. 853; *Spring v. School Directors* (1900) 31 Pittsb. L. J. N. S. (Pa.) 194.

Thus, in *Dorton v. Hearn* (1878) 67 Mo. 301, it was held that, in the absence of express authority, a school board cannot permit the use of a

school building for Sunday school purposes.

In *Spencer v. School Dist.* (Kan.) supra, it was held that the use of a public schoolhouse for even one religious or political gathering is illegal, since taxation is invoked to raise funds to erect the building, and taxation, being illegitimate to provide for any private purpose, will not lie to raise funds to build a place for a religious society, a political society, or a social club, and what cannot be done directly cannot be done indirectly. The court said: "We are fully aware of the fact that all over the state the schoolhouse is, by general consent, or at least without active opposition, used for a variety of purposes other than the holding of public schools. Sabbath schools of separate religious denominations, church assemblies, sometimes political meetings, social gatherings, etc., are held there. Now, none of these can be strictly considered among the purposes for which a public building can be erected, or taxation employed. But it often happens, particularly in our newer settlements, that there is no other public building than the schoolhouse, no place so convenient as that. The use for these purposes works little damage. It is used by the inhabitants of the district whose money has built it, and used for their profit or pleasure. Shall it be said that this is illegal? Doubtless, if all in the district are content, no question will ever be raised; and, on the other hand, if a majority object, the use for such purposes will cease. It is only when the majority favor, and a minority object, that the courts are appealed to. That minority may be but a single individual; may be influenced by spite or revenge, or any other unworthy motive; but, whatever the motives which prompt the litigation, the decision must be in harmony with the absolute right of all. It seems to us that upon well-settled principles the question must be answered in the negative. The public schoolhouse cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but

taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a schoolhouse and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps no immediately perceptible, injury to the building, and results in the receipt of immediate pecuniary benefit. The extent of the injury or benefit is something into which courts will not inquire. The character of the use is the only legitimate question."

So, in *Hysong v. Gallitzin School Dist.* (1894) 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, it appeared that the lower court, whose decision was affirmed by the appellate court, held to be unauthorized the use of a public school building for imparting religious instruction after school hours.

In *Bender v. Streabich* (1896) 17 Pa. Co. Ct. 609, it was held that the prohibition by the Constitution of the appropriation of money raised for the support of public schools, to sectarian schools, includes the use of the public school buildings erected by such money for any sectarian purpose, such as the holding of Sunday school and church therein, outside of school hours, by permission of the school directors. The decree in this case was affirmed in (1897) 182 Pa. 251, 37 Atl. 853, on the authority of *Hysong v. Gallitzin School Dist.* (Pa.) *supra*, the court saying that this view of the law did not forbid the use of the buildings for any purpose directly related to the instruction of the pupils of the schools, and did not exclude their use for lectures or debates which were made a part of the course of instruction.

To the same effect, see *Spring v. School Directors* (Pa.) *supra*.

In *George v. Second School Dist.* (1848) 6 Met. (Mass.) 510, it was said that if, under color of corporate power

of a school district, the inhabitants should vote to erect an expensive and ornamental building with a view to enhance the value of real estate, to accommodate societies, lectures, dramatic exhibitions, or even to have a convenient place for religious meetings or public worship, or for any other use than that of a district town school, it would not be within the legitimate authority of a school district, and any vote to levy a tax on the inhabitants for such a purpose would be void, but that a school district had power to make a contract with the builder to erect a schoolhouse for a certain sum, giving him the liberty to build a public hall over the same as the builder's property, the district to have the use of the same, free of charge, for district meetings, school examinations, and the like.

#### *c. Rule in Connecticut.*

In *Sheldon v. Centre School Dist.* (1856) 25 Conn. 224, it was said that no court would hold to be void a vote of a district directing a suitable and proper schoolhouse to be built, merely because it authorized religious meetings to be held in it in the evenings, but that it might, in a proper case, prohibit the use of it for improper purposes.

However, in *Scofield v. Eighth School Dist.* (1858) 27 Conn. 499, it was held that, notwithstanding a favorable vote of the district, the school committee had no power to grant the right to use a schoolhouse of the district for religious meetings, Sunday school, and other religious exercises on Sundays and other days, and a taxpayer of the district objecting was entitled to an injunction against such use, although the injury to the schoolhouse and other property might be very slight.

#### *VIII. Miscellaneous.*

In *New Braunfels v. Waldschmidt* (1918) — Tex. —, 207 S. W. 308, an ordinance providing that no person should be permitted to attend the public or private schools of the city without presenting a physician's certificate of vaccination within six years was held not to undertake to control or in-

terfere with any rights of conscience in matters of religion, the plaintiffs being Christian Scientists who did not believe in vaccination, but conscientiously believed in the Christian Science treatment of small-pox, which is "a denial of the reality of sickness and disease." The court said that the religious freedom guaranteed by the United States Constitution does not deprive Congress of legislative power, whereby actions may be reached which violate social duties, and the Bill of Rights of the state Constitution (§ 6) does not relieve a person from obedience to reasonable health regulations, enacted under the police power of the state, because such regulations happen not to conform to one's religious belief.

A provision in a bequest establishing a college that no ecclesiastic, missionary, or minister of any sect whatsoever shall hold or exercise any duty therein, or ever be admitted for any purpose or as a visitor, made for the express purpose of keeping the minds of the children free from the excitement of sectarian controversy, and not to cast any reflection on any sect or person, was held not necessarily to exclude Christianity or the Bible, there being no restriction as to the religious opinions of the instructors or officers, and was not, therefore, inconsistent with the Christian religion nor opposed to the policy of the state of Pennsylvania as expressed in a constitutional declaration that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." *Vidal v. Philadelphia* (1844) 2 How. (U. S.) 127, 11 L. ed. 205.

In *Quick Bear v. Leupp* (1908) 210 U. S. 50, 52 L. ed. 954, 28 Sup. Ct. Rep. 690, affirming (1907) 30 App. D. C. 151, the court considered the following pro-

vision of a United States statute (Act June 7, 1897, chap. 3, § 1, 30 Stat. at L. 62, 79, Comp. Stat. § 4165, 3 Fed. Stat. Anno. 2d ed. p. 909): "And it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school." The act was held not to prevent the application of an Indian "trust fund" for education in Catholic schools, where the owners of the fund so desired it, such fund belonging to the Indians as a matter of right, the "treaty" and "trust" moneys being the only sums to which they are entitled as theirs for the purposes of education, and to prohibit them from receiving religious education at their own cost would be "to prohibit the free exercise of religion" among the Indians. The court said: "These appropriations rested on different grounds from the gratuitous appropriations of public moneys under the heading, 'Support of Schools.'" The two subjects were separately treated in each act, and naturally, as they are essentially different in character. One is the gratuitous appropriation of public moneys for the purpose of Indian education, but the 'treaty fund' is not public money in this sense. It is the Indians' money, or at least is dealt with by the government as if it belonged to them, as morally it does. It differs from the 'trust fund' in this: the 'trust fund' has been set aside for the Indians, and the income expended for their benefit, which expenditure required no annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum by the Act of 1889, 25 Stat. at L. 888, chap. 405. This 'trust fund' is held for the Indians, and not distributed per capita, being held as property in common. The money is distributed in accordance with the discretion of the Secretary of the Interior, but really belongs to the Indians. The President declared it to be the moral right of the Indians to have this 'trust fund' applied to the education of the Indians in the schools of their choice, and the same view was entertained by the supreme court of

the District of Columbia and the court of appeals of the District. But the 'treaty fund' has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the government. The only difference is that in the 'treaty fund' the debt to the Indians created and secured by the treaty is paid by annual appropriations. They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in instalments. We perceive no justification for applying the proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature and having no relation to each other, except that both are technically appropriations. Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian missions. It is not contended that it is unconstitutional, and it could not be. *Roberts v. Bradford* (1898) 12 App. D. C. 475, affirmed in (1899) 175 U. S. 291, 44 L. ed. 168, 20 Sup. Ct. Rep. 121. But it is contended that the spirit of the Constitution requires that the declaration of policy that the government 'shall make no appropriation whatever for education in any sectarian schools' should be treated as applicable, on the ground that the actions of the United States were to be always undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence, that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof."

In *Hale v. Everett* (1868) 53 N. H. 9, 16 Am. Rep. 82, it was held that art.

6 in the Bill of Rights, which authorizes "the support and maintenance of public Protestant teachers of piety, religion, and morality," considered with other constitutional provisions guaranteeing liberty of conscience, etc., does not directly forbid the support and maintenance of other teachers of religion, who may not be Protestants, by those who may choose to do so, and that the legislature may grant to "any religious sect," or to "any denomination of Christians," whether Protestant or Catholic, the same rights that are granted to Protestants. It was further held that the legislature may grant to towns, parishes, bodies corporate, or religious societies, the power, the right, and the privilege of making "adequate provision, at their own expense, for the support and maintenance" of public teachers of any "denomination of Christians," whether Romanist or Protestant, and not only so, but of any "religious sect," whether of the Christian religion or of any other.

#### *IX. Rule in Canada.*

##### *a. Introductory.*

In Canada, the question of sectarianism in schools and the rights of the various sects and denominations with regard to schools is governed generally by the provisions of § 93 of the British North America Act of 1867, or, as in the case of Manitoba, by a special act, Manitoba Act of 1870, a Dominion statute taking the place, so far as Manitoba is concerned, of the British North America Act of 1867. These acts, in granting control over the subject of education to the provincial legislatures, reserve to the people of any sect, as a class, all rights and privileges as to denominational schools existing at the time of the Union, and inhibit provincial legislation prejudicially affecting such rights and privileges.

The British North America Act 1867, § 93, provides as follows: 'Education. 93.—In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law

shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union. (2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec. (3) Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education. (4) In case any such provincial law as from time to time seems to the Governor General in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in council under this section."

In reviewing this question as arising in the Canadian provinces, it has been thought advisable to include all cases touching the question of separate denominational schools, or in which a violation of § 93 of the British North America Act 1867, or a Dominion statute substituted therefor, has been alleged, although the specific question of sectarianism is in some cases but remotely involved, it being a mixed question of language and religion.

#### *b. Constitutional provisions.*

##### *1. In Manitoba.*

The Constitutional Act of Manitoba

1870, § 22 (33 Vict. chap. 2), which assigns to the provincial legislature the exclusive right to make laws with respect to education, provides as follows: "22. In and for the province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union. (2) An appeal shall lie to the Governor General in council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education. (3) In case any such provincial law, as from time to time seems to the Governor General in council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General in council under this section."

In *Barrett v. Winnipeg* [1892] A. C. (Eng.) 445, 61 L. J. P. C. N. S. 58, 67 L. T. N. S. 429, reversing (1891) 19 Can. S. C. 374, which reversed (1891) 7 Manitoba L. R. 273, and also reversing *Logan v. Winnipeg* (1891) 8 Manitoba L. R. 3, the court sustained the Manitoba "Public Schools Act 1890" (53 Vict. chap. 38), which enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the act, and that all public schools should be free schools, entirely sweeping away the denominational system of public education, and provided, with regard to religious exercises, as follows: "(6) Religious exercises in the public schools shall be conducted according to the regulations

of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place. (7) Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it shall be the duty of the teachers to hold such religious exercises. (8) The public schools shall be entirely nonsectarian, and no religious exercises shall be allowed therein except as above provided." At the time when Manitoba was admitted to the Union there was no law, or regulation, or ordinance, with respect to education, in force. There were no public schools in the sense of state schools, but there existed throughout the province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds nor were any of them in any way regulated or controlled by any public officials. In 1871, however, the year after the admission of Manitoba to the Union, a law was passed which established throughout the province a system of denominational education in the common schools, as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the province had, by the Manitoba act, been divided, was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be con-

sidered Roman Catholic school districts. These schools were to be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions from the people of each school district. Such contributions might be raised by an assessment on the property of the school district. The laws relating to education were modified from time to time. From the year 1876 to 1890, enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between Protestant and Roman Catholic sections of the board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts. The system of denominational education was maintained in full vigor until 1890, when the Public Schools Act was passed. It was held that the Act of 1890 did not contravene the Manitoba Constitutional Act of 1870. The court said that if the state of things existing before Manitoba became a province of the Dominion had been a system established by law, the rights and privileges of the Roman Catholics with respect to denominational schools would have been to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets, and possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it as a necessary or appropriate incident, the right to exemption from any contribution, under any circumstances, to schools of a different denomination, and it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain de-

nominal schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.

In another privy council case, *Brophy v. Atty. Gen.* [1895] A. C. (Eng.) 202, 64 L. J. P. C. N. S. 70, 11 Reports, 385, 72 L. T. N. S. 163, wherein the constitutionality of the Public Schools Act of 1890 was assumed, and the situation with regard to denominational schools and education in Manitoba reviewed in *Barrett v. Winnipeg* (Eng.) supra, appeared, it was held that subsec. 2 of the Manitoba act, regarding appeal to the Governor General in council extended to the rights and privileges of the Roman Catholic minority acquired by legislation in the province after the union. It was further held that the rights and privileges of the Roman Catholic minority, acquired by the statutes establishing denominational schools, were affected by the Act of 1890; and that the Governor General in council has the power to make declarations or remedial orders modifying the system established by the Act of 1890 which will remove the grievance, it not being necessary to re-enact the repealed statutes, or that their precise provisions be again made the law.

The judgment in the case last cited reversed the decision, in *Re Certain Statutes* (1893) 22 Can. S. C. 577, wherein it was held that the right of appeal given by § 22, subsec. 2, of the Manitoba act, is only from legislative acts affecting privileges existing at the time of the Union, and no right of appeal exists because of the effect of the Act of 1890 upon alleged rights and privileges gained by the Roman Catholic minority under the acts establishing denominational schools, following the Manitoba act and prior to the Act of 1890.

### 2. In New Brunswick.

In *Ex parte Renaud* (1873) 14 N. B. 273, 2 Cartw. 445, there was involved the Parish School Act of 1858 (21 Vict. chap. 9), under which the common-school system of the province was carried on at the time of the Union, which provided, among other things, that no

books of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology were to be admitted; that teachers were to use their best endeavors to impress upon the minds of the children the principles of Christianity, morality, justice, etc.; but "no pupil shall be required to read or study in or from any religious book, or join in any act of devotion, objected to by his parents or guardian;" and that the board shall, "by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in parish schools; and the Bible, when read in parish schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douai version, without note or comment." By the Common Schools Act 1871, it was provided that the schools shall be nonsectarian. It was contended that the rights and privileges of the Roman Catholic inhabitants of the province existing under the Parish School Act, as a class of persons, were prejudicially affected by the Common Schools Act of 1871, contrary to the provisions of the British North America Act 1871, § 93, subsec. 1. It was held that, although as a matter of fact denominational doctrines had been taught in some of the schools, the Parish School Act did not recognize or provide for the establishment of denominational schools, or the teaching of denominational doctrines, and as the Roman Catholics had no right as a class to claim any control over or insist that the doctrine of their church should be taught in all or any schools under the act, at the time of the Union, the Common Schools Act of 1871 was not ultra vires or contrary to the provisions of the British North America Act 1867, § 93, subsec. 1.

### 3. In Ontario.

In *Belleville Roman Catholic Separate School Trustees v. Grainger* (1878) 25 Grant, Ch. (U. C.) 570, 1 Cartw. 816, it was held that a statute changing or affecting the mode of election of trustees of separate schools did not contravene § 93 of the British North America Act 1862, it not being suggested that the statute could "prej-

udicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province."

*c. Separate schools.*

*1. Rights of ratepayer.*

Generally under the provincial acts governing separate schools, either Protestant or Catholic, where a separate school has been established in a district, all ratepayers of the same faith as that of the separate school, and only those of that faith, are to be assessed for the support of the school, and all other ratepayers must be assessed for the support of the public schools of the district, there being no option to the individual, his faith being established, to give his support to one or the other. *Re Tiernan* (1856) 15 U. C. Q. B. 87; *Re Ridsdale* (1862) 22 U. C. Q. B. 122; *School Comrs. v. Bowman* (1865) 16 Lower Can. Rep. 204; *McCarthy v. Regina* (1901) 5 Terr. L. R. 71, 21 Can. L. T. Occ. N. 321; *McCarthy v. Regina* (1917) 10 Sask. L. R. 29, 32 D. L. R. 755, 1 West Week. Rep. 1088; *Regina v. McCarthy* [1918] A. C. (Eng.) 911, 43 D. L. R. 112, 119 L. T. N. S. 661, 3 West Week. Rep. 302, affirming (1917) 10 Sask. L. R. 14, 32 D. L. R. 741, 1 West Week. Rep. 1105, which affirms (1916) 10 West Week. Rep. 494. See also *Sandwich East Roman Catholic Separate School Trustees v. Walkerville* (1905) 10 Ont. L. Rep. 214, 5 Ont. Week. Rep. 211; *La Corporation of St. Michel-Archange de Montreal v. Wall* (1916) Rap. Jud. Quebec 49 C. S. 536.

Thus, in *McCarthy v. Regina* (1901) 5 Terr. L. R. 71, 21 Can. L. T. Occ. N. 321, there were involved two statutes: One (North-West Territories Act, § 14, later School Ordinance, § 36) providing that "the ratepayers establishing such separate schools (i. e., here the Roman Catholic ratepayers of the Gratton separate schools district) shall be liable only to assessment of such rates as they impose upon themselves;" and the other (§ 40) providing that after the establishment of a separate school district it shall possess and exercise all rights, powers, privileges, and be subject to the same

liabilities and methods of government as is (by the ordinance) provided in respect to public schools. It was held that the ratepayers of a separate school district are liable to be assessed only for such rates as are imposed by the board of trustees of the separate school district, and are not liable to assessment to pay a debenture indebtedness created by the public school district for the erection of school-houses in the district, before the separate school district was organized.

In *School Comrs. v. Bowman* (1865) 16 Lower Can. Rep. (Dec des Tribunaux) 204, it was held that dissentients having a personal right, regardless of locality, to determine and limit the application of their school assessments and rates to schools of their own religion, the intention of the legislature in passing the School Act being to protect and guarantee every religious belief against teaching repugnant to it, one who belonged to a dissentient minority and was a proprietor of land within the municipality, although not a resident therein, who had notified the school commissioners of his dissent and claimed his right to pay to the dissentient trustees, could not be required to pay to the school commissioners, the dissentient trustees alone being entitled to the amount of school assessment payable by him. The court said: "In order that there should be a corporation of dissentients in a municipality, it follows that there should be in the municipality itself a number of inhabitants to organize and carry out the functions of such a corporation. But once such a body is constituted the law makes no further distinction; it declares that the council of dissentients will have the sole right to assess and levy the school rates from the dissentients. Religious faith alone limits and designates those who may belong to such corporation; in fact, it is but logical and impartial that a separation of the majority and minority should take place on the simple demand of the latter. . . . The present organization was established for the purpose of guaranteeing Catholics as well as Protestants from the fear and possibility of seeing their



contributions employed in propagating doctrines which they hold in repugnance. The law would destroy itself if, by its application under any circumstances whatever, it did away with this guaranty. The reasons of inconvenience urged by the plaintiffs in support of their pretensions cannot be supported, inasmuch as their system does not provide any remedy, can only tend to hinder public education, and would inaugurate everywhere the provocative policy which the legislature has endeavored to prevent. It would be as just in Canada as it is in England, to say with Baron Parke: 'We must always construe an act so as to suppress the mischief and advance the remedy according to the true intent of the makers of the law.' The examination which I have made into this subject leads me to believe that it is demonstrable to evidence that the right of the ratepayer to superintend the employment of his rate in public education is the corollary of his right to the exercise of his religion and of his faith; and that the law, examined as to its object in its whole, and in its details, has consecrated a principle so just and necessary to peace, in a country where races find shelter in their contrast, and religions protect one another by their diversities."

In the case of *Re Ridsdale* (1862) 22 U. C. Q. B. 122, it was held that under the Common School Act (U. C. Consol. Stat. chap. 64), and chap. 65, providing for separate schools, and chap. 55, the Assessment Act, the provisions creating the common-school system, and for working and carrying that out, were intended by the legislature as the rule, and all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favor; and those who claim exemption from rates relating to common schools because they are subscribers to a Roman Catholic separate school must also be Roman Catholics to be of the class of persons the legislature provided for.

In the case of *Re Tiernan* (1856) 15 U. C. Q. B. 87, it was held that a school  
5 A.L.R.—57.

had power to assess, or call on the municipal council to assess, the school division for the costs it is put to in defending a suit unjustly brought against them, and Roman Catholic supporters of a separate school under a statute (18 Vict. chap. 131, §§ 4 and 12) providing that whoever shall belong to a separate school, and is a supporter of it, on giving notice of those facts, shall be exempted from the payment of all rates imposed for the support of common schools, would not, even if they gave notice to the clerk of the municipality of their supporting a separate school, be exempted from the payment of their share of the expenses of the defense of a lawsuit incurred before the separation.

See also *Sandwich East Roman Catholic Separate School Trustees v. Walkerville* (1905) 10 Ont. L. Rep. 214, 5 Ont. Week. Rep. 211, wherein it was held that the supporters of separate schools, resident in one town where there was no separate school, might, by giving proper notice, become supporters of the nearest separate school in a contiguous town, within the limit of 3 miles from that school, thus practically withdrawing such persons from contributing to the public schools of the town of their residence, and rendering them liable to be assessed for the maintenance of the nearest separate school in the adjoining town.

In *La Corporation of St. Michel-Archange de Montreal v. Wall* (1916) Rap. Jud. Quebec 49 C. S. 536, it was held that the fact whether a ratepayer is a Roman Catholic for the purpose of being assessed for school taxes can be proved by the one who is taxed, notwithstanding the fact that the certified copy of the municipal valuation roll describes him as a Catholic, since this document, although authentic, binds only the ratepayers who are subject to it.

The Saskatchewan School Acts involved in the three following cases are the School Act (chap. 23 of 1915), the School Assessment Act (chap. 25 of 1915), and the City Act (chap. 16 of 1915). "The pertinent sections of these acts are as follows: [The School

Assessment Act] 34. (1) In town districts the city or town municipality, within which the district is situated in whole or in part, shall assess and levy in each year such rates as shall be sufficient to meet the sums required to be raised within the municipality for school purposes for the year; and all the provisions of the City Act or the Town Act, as the case may be, with reference to assessment and taxation shall, so far as may be applicable, apply to such rates. [The City Act] 385. Subject to the other provisions of this act the municipal and school taxes of the city shall be levied upon: (1) Lands; (2) businesses; (3) income; and (4) special franchises. [The School Act] 39. The minority of the ratepayers in any district, whether Protestant or Roman Catholic, may establish a separate school therein; and in such cases the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof." *Regina v. McCarthy* [1918] A. C. (Eng.) 911, 43 D. L. R. 112, 119 L. T. N. S. 661, 87 L. J. P. C. N. S. 171, 3 West. Week. Rep. 302, under the School Act (chap. 23 of 1915), the School Assessment Act (chap. 25 of 1915), and the City Act (chap. 16 of 1915), it was held that a person of the faith of the minority, which has established a separate school district, cannot demand that he shall be entered as a public school supporter. That decision affirmed the judgment in (1917) 10 Sask. L. R. 14, 32 D. L. R. 741, 1 West. Week. Rep. 1105, wherein it was held that in a district in which a separate school has been established by a minority, either Protestant or Roman Catholic, the ratepayers of the religious faith of that minority must be rated as supporters of that separate school, and is not, at his option, entitled to be rated as a supporter of the public school.

The decision last cited in turn affirmed the judgment of the local government board in (1916) — Sask. —, 10 West. Week. Rep. 494, wherein it was held that the test to be applied by

the assessor in making up the assessment roll as to the supporters of public and separate schools is that of "religious faith," and that all ratepayers of the religious faith of the minority, Protestant or Roman Catholic, establishing the separate school district, shall be assessed as separate school supporters, and all other ratepayers shall be assessed as public school supporters.

In *McCarthy v. Regina* (1917) 10 Sask. L. R. 29, 32 D. L. R. 755, 1 West. Week. Rep. 1088, it was held that a ratepayer who is not of the religious faith of the minority which has established a separate school is not entitled to the immunity from taxation for general school purposes which is granted by the School Act (§ 39) to the members of that minority.

#### 2. *Company taxes.*

The Saskatchewan Act, § 17, subsec. 1, "when embodied in the British North America Act as applied to this province," reads as follows: "In and for the province of Saskatchewan the legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories passed in the year 1901 or with respect to religious instruction in any public or separate school as provided for in the said ordinance."

The Saskatchewan School Assessments Act (§ 93) provides that a company may, by notice to the municipality, require any part of its real property to be assessed for the purposes of the separate school, provided that the share of the property of the company assessed for separate school purposes shall bear the same ratio to the whole assessable property of the company in the school district as the shares or stock of the company held by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of the stock of the company. And § 93a reads as

follows: "In the event of any company failing to give a notice as provided in § 93 hereof the board of trustees of the separate school district may give to the company a notice in writing in the following form or to the like effect, that is to say:—The board of trustees of ——— separate school district No. ——— of Saskatchewan hereby give notice that unless and until your company gives a notice as provided by § 93 of the School Assessment Act the school taxes payable by your company in respect of assessable property lying within the limits of the ——— school district No. ——— of Saskatchewan (naming the public school district in relation to which the separate school is established) will be divided between the said public school district and the said separate school district in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively."

In *Regina Public School v. Gratton Separate School* (1914) 7 Sask. L. R. 451, 18 D. L. R. 571, 29 West. L. R. 399, 7 West. Week. Rep. 7, an interpleader issue which came before the court by way of a "special case," and involved the determination of the respective rights of public school trustees and Roman Catholic separate school trustees to certain school taxes collected from certain companies having assessable property within the limits of the school district, the plaintiffs, public school trustees, claimed to be entitled to the whole of the said taxes, whereas the defendant separate school trustees claimed to be entitled to a portion thereof.

It was held in the first instance by Brown, J. (whose opinion is also reported in (1914) 6 West. Week. Rep. 1068, 29 West. L. R. 221), that while School Assessment Act, § 93a, prejudicially affected every public school district and supporter where a separate school district exists, it was not for that reason ultra vires the legislature;

since subsec. 1, § 17, of the Saskatchewan act does not mean that no legislation shall be enacted in the interests of separate schools which prejudicially affects the public school or the public school supporter; it means, rather, that no legislation shall be passed which shall in any way curtail the rights or privileges which any class of persons has to or in separate schools. In other words, it is separate school protective legislation, affording protection for, but not protection against, separate schools, and in view of this section the legislature may not deprive the separate school of its rights and privileges; but there is nothing in the section which curtails the power of the legislature in extending those rights and privileges, even though in doing so the public school and public school supporter may be prejudicially affected; hence, the trustees of the defendant separate school are entitled to a portion of the taxes paid by the said companies, none of which had given notice requiring its property to be assessed for separate school purposes, and each of which had been served with the notice prescribed by § 93a.

This judgment was affirmed on appeal to the Saskatchewan supreme court, en banc, by whom it was held that as § 93a, the validity of which was impeached, was concerned with the subject of education, it is therefore within the legislative competence of the legislature, unless it prejudicially affects a right or privilege with respect to separate schools which a class of persons had at the passing of the Saskatchewan act, and as a right or privilege with respect to separate schools is some special right or claim belonging to, or immunity, benefit, or advantage enjoyed by, a person or class of persons with reference to separate schools, over and above those rights enjoyed at common law or under statutory enactment by the inhabitants of the province at large, it follows that the only classes of persons who can have rights or privileges with respect to separate schools are those who, at the date of the passing of the Saskatchewan act, had the right under

the ordinances, of establishing separate schools, that is, the minority in any school district. It was, however, said that the majority in a district under the ordinances had no rights with respect to separate schools, because the school of the majority, whether Protestant or Catholic, in any district, is always the public school, and the power of the legislature, therefore, is absolute in dealing with education, unless its legislation prejudicially affects the minority, whether Protestant or Catholic, in any school district.

But on appeal to the supreme court of Canada this judgment was reversed in (1915) 50 Can. S. C. 589, 21 D. L. R. 162, 7 West. Week. Rep. 1248, 8 West. Week. Rep. 156, 31 West. L. R. 82 (per Fitzpatrick, Ch. J., and Anglin, J.) wherein it was held that the separate school district was not entitled to any part of the taxes of a company which had not given a notice under § 93 of the act, Idington, J., on the ground that § 93a was *ultra vires* the provincial legislature, and Davies and Duff, JJ., on the ground that § 93a did not apply to companies in which there are no shareholders of the religious faith of the separate school seeking a share of the taxes collected.

School Assessments Act, § 93b, an amendment which did not come in force until after the matters in question in the preceding cases arose, provides in part: "A company may notify the council of the municipality in writing on or before the 1st day of May in any year, or, where the council has adopted the provisions of § 847b of the City Act, on or before the 1st day of December in the year in which the assessment is made, that it is practically impossible, owing to the number of its shareholders and their wide distribution in point of residence, to ascertain the proportions of the stock of the company held by Protestants and Roman Catholics respectively." Section 93 provides that the notice to be given on behalf of the company shall require the property of the company liable to assessment to be entered, rated, and assessed in the

manner to be designated by the notice; and it further provides that the proper assessor shall thereupon enter said company in the assessment roll, etc. Section 93a, subsec. 2, provides, unless and until any company to which notice has been given as aforesaid gives a notice as provided in § 93, the whole of the assessable property of such company, etc., shall be entered, rated, and assessed upon the assessment roll for the public school district, etc. *Gratton Separate School Dist. v. Regina Public School Dist.* (1917) — Sask. —, 35 D. L. R. 158, 2 West. Week. Rep. 565.

In *Gratton Separate School v. Regina Public School* (1917) — Sask. —, 35 D. L. R. 158, 2 West. Week. Rep. 565, a case apparently between the same parties, involving the disposition of taxes collected from companies for school purposes for the year 1916, after § 93b became of effect, it was held that since § 93b was passed the effect is that the notice provided for by § 93a must be given at a time when it is possible for the company to comply with that notice, since the use in subsec. 2 of § 93a of the words, "shall be entered, rated, and assessed," indicates that this notice must be given before the completion of the roll and after December 1. The company which has received notice either before or after December 1, and which has not complied with § 93b, must give the notice required by § 93, or else the results provided by § 93a for noncompliance follow. Hence, it appearing that the plaintiffs, Roman Catholic separate school trustees, gave notice after the date upon which all notices of appeal from the assessment were required to be lodged, they were held not to be entitled to any part of the taxes collected from any of the companies for that year.

That judgment was affirmed in (1918) 10 Sask. L. R. 455, 38 D. L. R. 217, 1 West. Week. Rep. 16, wherein it was held, without regard to whether the School Assessment Act of 1909 as amended, or the Act of 1915, applied to the case, that notices given by a separate school board after the completion of the assessment roll can-

not affect the distribution of company taxes for the year for which the assessment roll was made. It was further held by Haultain, Ch. J., McKay, J., concurring, that §§ 43 and 44 of the Saskatchewan School Assessment Act of 1915, which are identical with the corresponding sections of the Act of 1909 amended, are not ultra vires the Saskatchewan legislature, since the legislation in question does not take away, but rather adds to, the privileges with respect to separate schools by giving them an opportunity of obtaining a share of the taxes paid by companies to a greater extent than was possessed by them under the Ordinances of 1901, and while the exclusive right to make laws in relation to education given to the provincial legislature by § 93 of the British North America Act 1867, is fettered only by conditions relating to rights or privileges of religious minorities in relation to education; majorities and public schools not being dealt with; but the Saskatchewan Act differs slightly in the latter regard, for it safeguards rights or privileges with respect to religious instruction in public schools, as provided for in the Ordinances of 1901, and provides against discrimination against schools of any class, including public schools, described in those ordinances, in the appropriation by the legislature or distribution by the government of the province of any moneys for the support of schools.

### 3. Miscellaneous.

In *Pinsler v. Protestant Bd. of School Comrs.* (1903) Rap. Jud. Quebec 23 C. S. 365, it was held that the son of a Jew who did not own real estate in the city, and was not a Protestant, was not entitled to admission to a Protestant separate school as a matter of right, and, having been admitted by grace of the Protestant school commissioners, the commissioners had power at any time to provide by regulation that he should not be eligible to compete for a commissioners' scholarship, although his standing in classes and examinations would ordinarily have entitled him thereto.

Under a statute forbidding the allowance of any Protestant separate

school in any school section except where the teacher of the common school in such section was a Roman Catholic, there is no power, upon the mere motion of the council, to extend the area of a Protestant separate school section into a school section where the teacher is not a Roman Catholic, and a town by-law purporting to extend the Protestant school district in this way is ultra vires. *Banks v. Anderdon Twp.* (1890) 20 Ont. Rep. 296.

In *Re Separate Schools Act* (1901) 1 Ont. L. Rep. 584, there was involved an act whose provisions were stated by the court as follows: (§ 61) "That any ratepayer who was a separate school supporter at the time when the loan was effected on the security of the rates or property shall, while resident within the section or municipality within which the separate school is situate, continue to be liable for the rate to be levied for the repayment of the loan. Section 47 is the earlier enactment of the two. It enables a Roman Catholic to withdraw his support from a separate school in the manner prescribed, and provides that such withdrawal shall not exempt him from the payment of any rate for the support of separate schools, or separate school libraries, or for the erection of a separate schoolhouse, imposed before the time of his so withdrawing. This is what may be called a general enactment." It was held that, since the provision of § 61 is a particular and specific enactment applying in terms to any ratepayer who was a separate school supporter at the time when the loan was effected, and to this provision full effect must be given notwithstanding the general provisions of the earlier enactment (§ 47), property which was owned by the separate school supporter, and so assessed for rates imposed under by-laws passed before the time when the separate school supporter has withdrawn his support, does not remain liable for such rates in the future, unless such property is still owned by him at the time of each assessment, and he resides in the section; but the attempt to withdraw from payments

under § 61 is nugatory, and the ratepayer who was such when the loan was affected remains liable for future assessments to the extent of the ratable property he possesses, so long as he is resident within the school district.

In *Re Roman Catholic Separate Schools* (1889) 18 Ont. Rep. 606, a case submitted to the chancellor by the minister of education, it was held in answer to numbered questions that if the assessor is satisfied with the prima facie evidence of the statement, made by or on behalf of any ratepayer, that he is a Roman Catholic, and thereupon (seeking and having no further information) places such person on the assessment roll as a separate school supporter, this ratepayer, though he may not, by himself or his agent, give notice in writing pursuant to the Separate Schools Act (Ont. Rev. Stat. chap. 227, § 40), may be entitled to exemption from the payment of rates for public school purposes, he being, in the case supposed, assessed as a supporter of Roman Catholic separate schools. It was further held that the court of revision has jurisdiction on application of the person assessed, or of any municipal elector [or ratepayer, as in the Separate School Act, Ont. Rev. Stat. 1887, chap. 227, § 48 (3)], to hear and determine complaints in regard to the religion of the person placed on the roll, as Protestant or Roman Catholic; as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf, and [which appears to be involved in (b)] whether such person has been placed in the wrong column of the assessment roll for the purposes of the school tax. It was further held that it is competent for the court of revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll should be inserted therein upon the complaint of the person himself, or of any elector [or ratepayer]. It was further held that as to the trial of any other fact or particular, under § 120 of the Public Schools Act, the answers already given appear to exhaust all facts and par-

ticulars thereunder. It was further held that the assessor is not bound to accept the statement of, or made on behalf of, any ratepayer under Ont. Rev. Stat. 1887, chap. 225, § 120 (2), in case he is made aware or ascertains before completing his roll that such ratepayer is not a Roman Catholic, or has not given the notice required by § 40 of the Separate Schools Act, or is, for any reason, not entitled to exemption from public school rates. It was further held that a ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who, through inadvertence or other causes, does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming, with reference to the assessment of the following or future year, that he is not a Roman Catholic. It was further held that a ratepayer, being a Roman Catholic, and appearing in the assessment roll as a Roman Catholic and supporter of separate schools, who has not given the notice in writing of being such supporter, mentioned in § 40 of the Separate Schools Act, is not (nor are the other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in § 47 of the Separate Schools Act.

Under a statute (U. C. Consol. Stat. chap. 65, § 6) providing that "no Protestant separate school shall be allowed in any school section, except when the teacher of the common school in such section is a Roman Catholic," and other provisions, a municipality may repeal a by-law establishing a Protestant separate school, as soon as the public school-teacher ceases to be a Roman Catholic, but the appointment of a Protestant teacher to the public school does not of itself put an end to such separate school. *Free v. McHugh* (1874) 24 U. C. C. P. 13.

In *Roman Catholic School v. School Trustees* (1853) 10 U. C. Q. B. 469, there was a rule to show cause why mandamus should not issue to compel

the payment to Roman Catholic separate school trustees of their alleged share of the common-school fund. The case was disposed of on the grounds that the teacher, and not the trustees, was the person entitled to the money, and that other statutory remedies had not been exhausted.

In *La Commission des Écoles Catholiques v. St. Denis* (1909) Rap. Jud. Quebec 19 B. R. 322, it was held that school commissioners cannot escape the duties imposed on them by entering into a contract whereby teaching is done by religious orders, but the schools nevertheless remain under the control of such commissioners within the meaning of the statute (62 Vict. chap. 28, § 215), and hence it is their duty to insist on the use of uniform books, recognized by authority in these and other schools, and therefore they cannot plead to a writ of mandamus the contracts which they may have entered into contrary to the provisions of the law.

In the case of *Re Hayes* (1854) 3 U. C. C. P. 478, there was under consideration a statute (13 & 14 Vict. chap. 48) regarding schools, which repealed former acts and continued existing school sections and divisions, except as affected by the act. Section 19 provided that the municipal councils of townships, or the boards of school trustees of cities, on the written application of twelve or more resident heads of families, shall authorize the establishment of separate schools for Protestants, Roman Catholics, or colored people, and prescribe the limits of the sections for such schools, and provide for the first meeting for the election of trustees; and for such schools going into operation, (see § 18, No. 4) with power to make alterations in school sections; that none but the parties petitioning for or sending children to a separate school shall vote for trustees of such school; and further providing for the proportions in which such schools shall share in the school fund; and that no Protestant separate school shall be allowed in any school division except when the teacher of the common school is a Roman Catholic; nor shall any Roman Cath-

olic separate school be allowed except when the teacher of the common school is a Protestant, and that the trustees of the common-school sections, within the limits of which such separate school section or sections shall have been formed, shall not include the children attending such separate school or schools in their return of children of school age residing in their school sections. It was held that the limits of separate schools are in the discretion of the board of trustees, and that they are not restricted by the request of the applicants to a particular section or sections assigned as limits for common schools generally; which last-mentioned limits the board is also empowered to alter *ad libitum*; that the board, and not the applicants, is to prescribe the limits of separate schools, and that applications should therefore be for the establishment of one or more such schools in general terms, leaving it to the board of trustees to define the limits,—a duty which no doubt ought to be performed with a due regard to the number of children for whom such schools are required and are to be provided, and the residence of the families to which they belong.

In *Re Therriault* (1913) 24 Ont. Week. Rep. 964, 5 Ont. Week. N. 26, the court refused to quash a by-law fixing a tax rate on property liable for separate school purposes, where it appeared that the council acted in good faith and pursued the same system in regard to the public and separate schools.

In *Public School Trustees v. Nottawasaga Twp.* (1888) 15 Ont. App. Rep. 310, the difference between the authority of public and separate school trustees to levy school rates appeared.

#### *d. Teaching French language.*

The validity of regulations regarding the use of French as a language of communication and instruction in the schools, and the constitutionality of an act of the provincial legislature of Ontario authorizing the minister of education to suspend the powers of the trustees of a Roman Catholic separate school in the event of their failure to comply with such regulations, was in-

volved in two decisions of the privy council.

Thus, in *Roman Catholic Separate Schools v. Ottawa* [1917] 1 A. C. (Eng.) 76, 86 L. J. P. C. N. S. 73, 115 L. T. N. S. 797, 33 Times L. R. 41, 32 D. L. R. 10, there was applied a statute (§ 3 of 5 Geo. V. chap. 45, 1915 Ontario) giving the minister of education the power, on the failure of a board of trustees of Roman Catholic separate public schools to comply with regulations restricting and regulating the use of the French language in English-French schools, to appoint a commission and vest in and confer on it all or any of the powers possessed by the board of school trustees under statute or otherwise, the minister being further given broad power to suspend, withdraw, and restore all powers and privileges of the board, as well as to use and dispose of the legislative grant, otherwise payable to the board for the use of schools. It was held that the act authorized the minister of education to suspend or withdraw legal rights and privileges with respect to denominational schools which the board had by virtue of the *Separate Schools Act* 1863, § 2, which confers the right of electing trustees for the management of separate schools for Roman Catholics on the application of not less than five heads of families and freeholders resident in a school section, and was invalid under the *British North America Act*, 1867, § 93.

That decision reversed the holding in *Ottawa Separate School Trustees v. Ottawa* (1916) 36 Ont. L. Rep. 485, 30 D. L. R. 770, 10 Ont. Week. N. 98, wherein it was held that the statute (5 Geo. V. chap. 45) providing for the suspension of the powers of the *Ottawa Roman Catholic school board*, for failure to obey regulations regulating the use and teaching of French as a language of instruction and communication in the public and separate schools, did not contravene *British North America Act* 1867, § 93, as it did not prejudicially affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law

at the Union. The decision thus reversed affirmed the decision to the same effect in (1915) 34 Ont. L. Rep. 624 24 D. L. R. 497, 9 Ont. Week. N. 193.

The validity of the regulations and instructions in question was involved in *Roman Catholic Separate Schools v. Mackell* [1917] 1 A. C. (Eng.) 62, 86 L. J. P. C. N. S. 65, 115 L. T. N. S. 793, 33 Times L. R. 37, 32 D. L. R. 1, wherein it appeared that by the *Common Schools Act* 1859 (22 Vict. chap. 64, Upper Canada), common schools, now called public schools, were established for free primary education in the province. By the *Separate Schools Act* 1863 (26 Vict. chap. 5, Upper Canada), Roman Catholics in the province were given the right to establish separate schools, Roman Catholic ratepayers being allowed to have the school rates which they paid allocated to those schools. Under § 7 of the latter act the elected trustees of separate schools had in relation thereto the powers of management and control given to the trustees of common schools by the *Common Schools Act* 1859. Both classes of schools were attended by children, some of whom spoke English, some French, and some both languages. *Common Schools Act*, § 29, provides that no persons shall require any pupil to read or study in or from any religious book, or join in any exercise of devotion or religion objected to by his or her parents or guardian. The department of education, as successors to the council of public instruction, had power to make regulations for common schools under § 119, subsec. 4, of the *Act* of 1859, and for separate schools under § 26 of the *Act* of 1863. The material part of *Regulation* 17 of 1913, was to the following effect: Clause 1 stated that for the convenience of reference the term English-French was applied to those schools, whether public or separate, in which French was a language of instruction and communication, and which should be annually designated by the minister of education. By clause 2, the courses of study prescribed for public schools, except as to religious teaching, and allowing separate schools to use Roman Cath-



olic readers, were to be in force in English-French schools. By clause 3, in both public and separate schools, the use of French was not to be continued beyond the first (i. e., the lowest) form, except upon the approval of the chief inspector. By clause 4, French was preserved as a subject of study, provided that it did not interfere with the adequacy of the instruction in English. Clause 5 provided for the inspection of English-French schools, the inspectors being required (clause 10) to report if any regulation was not properly carried out. Clause 13 required that teachers in English-French schools should possess a knowledge of English sufficient to teach the prescribed courses of study. A mandatory order was issued against the trustees of Roman Catholic separate schools requiring them to conform to and enforce the regulations in all schools under their control. It was contended that the instructions were beyond the powers of the Minister of Education because they were contrary to and in violation of § 93, British North America Act 1867. It was held that the words in the circular, "The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers," brought the instructions into agreement with the provision as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act, so that the whole course of religious teaching in the separate schools was outside of the operation of the circular, which applies to public schools and separate schools alike; and the regulation of the use of the French language was not inconsistent with any natural right vested in the French-speaking population, or the right of the trustees to manage the schools or appoint teachers, and the regulations were not in violation of the British North America Act 1867, § 93, and hence were valid and binding.

That judgment affirmed the decision in *Mackell v. Ottawa Separate School*

*Trustees* (1915) 34 Ont. L. Rep. 335, 24 D. L. R. 475, 8 Ont. Week. N. 596, affirming (1914) 32 Ont. L. Rep. 245, 18 D. L. R. 456, 7 Ont. Week. N. 35, wherein it was held that objection to the validity of the regulations was no longer open because of a declaratory act (5 Geo. V. chap. 45), which act was also held valid and not ultra vires in prejudicially affecting a right or privilege of French-speaking people, contrary to the provisions of British North America Act 1867, § 93.

In *Ottawa v. Quebec Bank* (1918) 41 Ont. L. Rep. 594, consolidated actions to recover certain moneys and property taken over by the defendants under the authority of the act of the Ontario legislature, 5 Geo. V. chap. 45, which was declared ultra vires by the privy council because it prejudicially affected the right conferred by Act of 1863 on the supporters of the Roman Catholic public schools of Ottawa, to elect trustees for the management of the schools, it was held that expenditures by the commission appointed under the act, being made by an authority declared to be ultra vires, were wholly illegal and themselves ultra vires, in spite of subsequent statutes attempting to avoid this effect; but that expenditures incurred in the payment of teachers formerly employed, and continued by the board, and expenses of management and control, having actually been paid out of the fund applicable to that use, would be deducted from the amount of recovery.

But that judgment was reversed in (1918) 43 Ont. L. Rep. 637, wherein it was held that an act (7 Geo. V. chap. 60) validating the necessary expenditures made by the commission as if made on behalf of and at the request of the board of trustees, and providing that the act may be pleaded as a defense to any action in respect of any of the moneys received and disbursed by the commission as aforesaid, was a valid enactment and did not violate the provisions of § 93 of the British North America Act 1867, Meredith, C. J. O., saying: "In my view, the legislation does not violate the provisions of § 93. Assuming that legisla-

tion which diverts from a separate school money which by law should be applied for carrying it on would be invalid, I am unable to see how legislation which validates expenditures properly made in carrying on a school or a number of schools by a de facto body not lawfully created can be said to affect any such right or privilege as the section deals with, still less prejudicially to affect it within the meaning of the section. The situation as disclosed on the evidence was that the school board was conducting the schools under its charge in contravention and defiance of the law, and had brought about such a state of things that the legislature, in order to secure for the children of the supporters of separate schools in Ottawa the education to which they were by law entitled, found it necessary to intervene and to place the schools under the control and management of a commission; the commissioners appointed entered upon their duties, and in good faith carried on the schools and expended the moneys in question in carrying them on; and what is argued is that because the commission, as it has been held, had no legal existence, the supporters of the schools are entitled, though they have enjoyed the benefit of that expenditure, to say that it was improperly made, and that the commissioners must pay the money out of their pockets, with the result that the schools will have been carried on while the commission was in charge of them, free of expense to the supporters of the schools, and that the commissioners must pay over to the school board what will probably suffice to carry them on for a further period of one year or more. It cannot, I think, be that the legislature is powerless to prevent such a wrong from being perpetrated. While the school board is a separate entity, it is a trustee for the supporters of the separate schools, and what is argued is that these supporters, who have enjoyed the benefit of having their schools carried on, are entitled to say to the commissioners: 'You have carried them on without authority, and must lose all that you have expended in so doing.' The com-

mission was the de facto trustee for the time being of the separate school supporters, and in all justice is entitled to be recouped the expenditure it has made for the benefit of its *cestuis que trust*."

In *McDonald v. Lancaster Separate School Trustees* (1914) 31 Ont. L. Rep. 360, it was held that the use and teaching of the French language for one hour, each day in a Roman Catholic separate school was unauthorized, the department of education having properly ruled that there was no legal method by which French could be admitted as a subject of study in that school, § 15 of the "Regulations and Course of Study of the Public Schools of the Province of Ontario, Amended and Consolidated, 1911," providing as follows: "In school sections where the French or the German language prevails, the trustees may, in addition to the course of study prescribed for public schools, require instruction to be given in reading, grammar, and composition to such pupils as are directed by their parents or guardians to study either of those languages, and in all such cases the authorized textbooks in French or German shall be used. But nothing herein contained shall be construed to mean that any of the textbooks prescribed for public schools shall be set aside because of the use of authorized textbooks in French or German."

That judgment was affirmed in (1915) 34 Ont. L. Rep. 346, 24 D. L. R. 868, 8 Ont. Week. N. 598, wherein it was held, after a discussion of the statutes and school regulations, that the teaching of French was unauthorized in a school not designated by the minister of education as an English-French school, and without the fulfilment of the conditions embodied in regulations regarding the use of French as a language of instruction or communication, which did not permit the use of French beyond form I. except with the approval of the chief inspector, or where French had been the subject of study, and where the parents of guardians so direct.

*McDonald v. Lancaster Separate School Trustees* (1916) 35 Ont. L. Rep.

614, 29 D. L. R. 731, 9 Ont. Week. N. 444, was a motion to commit the defendants, separate school trustees, for breach of an injunction restraining the employment of a disqualified teacher, and the use of the French language as a language of instruction or communication in a Roman Catholic separate school, contrary to law. The defendants were found guilty of contempt of court in neglecting to obey the injunction.

*e. Examination of teacher.*

Exceptions in the Ontario statutes with regard to the examination of teachers apply to those persons only who were qualified as teachers at the time of the passing of the British North America Act 1867. *Grattan v. Ottawa Separate School Trustees* (1904) 9 Ont. L. Rep. 433, 25 Can L. T. Occ. N. 104, 4 Ont. Week. Rep. 389, affirming (1904) 24 Can. L. T. Occ. N. 319, 8 Ont. L. Rep. 135, 4 Ont. Week. Rep. 58; *Brothers of Christian Schools v. Minister of Education*, Can. R. [1907] A. C. 16, [1907] A. C. (Eng.) 69, 76 L. J. P. C. N. S. 22, 95 L. T. N. S. 630, 23 Times L. R. 29, affirming *Re Roman Catholic Separate Schools* (1906) 7 Ont. Week. Rep. 141.

Thus, in *Re Roman Catholic Separate Schools* (1906) 7 Ont. Week. Rep. 141, the facts stated were as follows: Certain religious communities for educational purposes, including the Brothers of the Christian Schools, and certain religious communities composed of persons of the female sex, including the Community General Hospital, Alms House, and Seminary of Learning of the Sisters of Charity of Ottawa (commonly called the "Grey Nuns"), were in the year 1860, and had been for several years prior thereto, engaged in educational work in the province of Lower Canada, and the members of such communities were, at the time of the passing of the British North America Act 1867, exempt from undergoing an examination as teachers in the province of Quebec under the provisions of L. C. Consol. Stat. 1860, chap. 15. The question submitted was as follows: Having regard to the various pre-confederation provincial enactments relating to the

subject of education in the late provinces of Upper and Lower Canada, and to the terms of the British North America Act, and to the enactments of the province of Ontario since Confederation, and especially to the provisions contained in the following statutes, viz.: L. C. Consol. Stat. chap. 15, § 110, subsec. 10, ¶ 5; 26 Vict. chap. 5, § 13 (C); the British North America Act 1867, § 93, subsec. 1; Ont. Rev. Stat. 1877, chap. 206, § 30; 49 Vict. chap. 46, § 62 (O); Ont. Rev. Stat. 1887, chap. 294, § 36:—Are members of the above-mentioned communities who became members of such communities since the passing of the British North America Act 1867, to be considered qualified teachers for the purposes of the Separate Schools Act, and therefore eligible for employment as teachers in the Roman Catholic separate schools within the province of Ontario, when such members have not received certificates of qualification to teach in the public schools of the province? The statute respecting the qualification of teachers of separate schools (Ont. Rev. Stat. 1897, chap. 294, § 36) declares that "the teachers of a separate school under this act shall be subject to the same examinations and receive their certificates of qualification in the same manner as school-teachers generally; but the persons qualified by law as teachers, either in the province of Ontario, or at the time of the passing of the British North America Act 1867, in the province of Quebec, shall be considered qualified teachers for the purposes of this act. Public Schools Act, Ont. Rev. Stat. 1897, chap. 292, prescribed the qualifications of public school-teachers. Answering that question, the court held that the legislative authority of the province in relation to education, involving as it does the power of establishing public schools for the education of the youth of the country, necessarily includes the power to declare and prescribe the quality of the teaching to be given to the pupils attending them, and, as necessary and incident thereto, the control of the qualifications of the teachers in the schools, and in the absence

of a manifest intention to place a greater restriction on the plain unambiguous declarations as to the qualification required in general, and giving to the language of the latter part of § 3 of Ont. Rev. Stat. 1897, chap. 294, the fair and natural meaning that should be attributed to it, there is nothing in it requiring any greater restriction on the earlier part than is necessary to protect the rights of those persons who, being qualified by law either in the province of Ontario or at the time of the passing of the British North America Act 1867, in the province of Quebec, were entitled to exemption from such examinations.

On appeal, on a reference of the lieutenant governor in council, this judgment was affirmed by the privy council in *Brothers of Christian Schools v. Minister of Education*, Can. R. [1907] A. C. 16, [1907] A. C. Eng. 69, 76 L. J. P. C. N. S. 22, 95 L. T. N. S. 630, 23 Times L. R. 29, wherein it was held that the concluding words of § 36 of the Ontario Separate Schools Act served only to protect the rights of those persons who, as individuals, were, at the date of [the] passing of the British North America Act 1867 in the province of Quebec, entitled to exemption from examination, their Lordships being satisfied to adopt the

reasons in which the conclusion of the Ontario court of appeal was founded.

So, in *Grattan v. Ottawa Separate School Trustees* (1904) 8 Ont. L. Rep. 135, 24 Can. L. T. Occ. N. 319, 4 Ont. Week. Rep. 58, it was held by MacMahon, J., that the latter part of Separate Schools Act, Ont. Rev. Stat. 1897, chap. 294, § 36, was an addition, made in 1886, to § 30 of the Separate Schools Act, Ont. Rev. Stat. 1877, chap. 206, by Vict. chap. 46, § 62, and is an enabling act solely for the benefit of those who, at the time of the passing of the British North America Act in 1867, were qualified teachers under the law as it then existed, either in Ontario or Quebec, and no person after the year of 1867 became qualified as a teacher in Ontario without passing the examinations and obtaining the certificates required by § 78 of the act. This judgment was affirmed in (1904) 9 Ont. L. Rep. 433, 25 Can. L. T. Occ. N. 104, 4 Ont. Week. Rep. 389, wherein it was said that the general policy by later enactments was to require the teachers of separate schools to undergo the same examinations and receive the same certificates as common-school teachers, and that the exceptions applied solely to those who were qualified as teachers at the time of the passing of the British North America Act of 1867.

R. H. H.

## ISAIAH FOUNTAIN, Appt.,

v.

## STATE OF MARYLAND.

*Maryland Court of Appeals — July 17, 1919.*

(— Md. —, 107 Atl. 554.)

### Appeal — flight from attempt to lynch — abuse of discretion.

1. It is reversible error to refuse to adjourn or postpone a trial of one accused of crime, where a mob attempted to lynch him when he was passing from the court room to the jail, from which he escaped by flight, and was brought back under heavy guard.

[See note on this question beginning on page 914.]

Criminal law — right to impartial trial.

2. A person charged with crime has an absolute and fundamental right to

have the question of his guilt or innocence determined by a fair and impartial trial according to law.

[See 8 R. C. L. 67.]

— defense of alibi.

3. One charged with crime has the right to present the defense that he was, at the time of the offense, a number of miles distant from the scene of the crime, and have that issue determined by the jury under circumstances which would enable it to exercise its independent judgment.  
[See 8 R. C. L. 124, 224.]

— trial under threat of lynching.

4. One cannot secure a fair and impartial trial where a large and menacing crowd assembles in the immediate neighborhood of the court in which

the trial is being conducted, determined to lynch the prisoner, from which he escapes and flees, and the court is compelled to take unusual measures to safeguard him upon his recapture.

Appeal — refusal to suspend trial — discretion.

5. The ruling of the trial court upon a petition to suspend or postpone the trial will not be disturbed on appeal unless such action is plainly required in the interest of justice.  
[See 6 R. C. L. 553.]

APPEAL by defendant from a judgment of the Circuit Court for Talbot County (Adkins and Wickes, JJ.) convicting him of rape. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Eugene O'Dunne and James C. Mullikin, for appellant:

Procedure of this character is a denial of constitutional right of trial by jury.

Dutton v. State, 123 Md. 387, 91 Atl. 417, Ann. Cas. 1916C, 89; Massey v. State, 31 Tex. Crim. Rep. 371, 20 S. W. 758; Capps v. State, 109 Ark. 193, 46 L.R.A. (N.S.) 741, 159 S. W. 193, Ann. Cas. 1915C, 957; Woolfolk v. State, 81 Ga. 551, 8 S. E. 724; Long v. State, 59 Tex. Crim. Rep. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; Collier v. State, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608, 115 Ga. 17, 41 S. E. 261; Harjo v. United States, 1 Okla. Crim. Rep. 590, 20 L.R.A. 1013, 98 Pac. 1021; Dempsey v. People, 47 Ill. 323; Fredrickson v. State, 44 Tex. Crim. Rep. 288, 70 S. W. 754; Thompson v. State, 33 Tex. Crim. Rep. 472, 26 S. W. 987; Hamilton v. State, 36 Tex. Crim. Rep. 372, 37 S. W. 431; Powell v. State, — Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim. Rep. 5; Smith v. State, 44 Tex. Crim. Rep. 137, 100 Am. St. Rep. 849, 68 S. W. 995; People v. Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; Robinson v. State, 6 Ga. App. 696, 65 S. E. 792; Myers v. State, 97 Ga. 92, 25 S. E. 252; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; Little v. Com. 142 Ky. 92, 34 L.R.A. (N.S.) 257, 133 S. W. 1149, Ann. Cas. 1912D, 241; State v. Manns, 48 W. Va. 480, 37 S. E. 613, 14 Am. Crim. Rep. 245; State v. Weldon, 91 S. C. 29, 39 L.R.A. (N.S.) 667, 74 S. E. 43, Ann. Cas. 1913E, 801; Raines v. State, 81 Miss. 489, 33 So. 19, 13 Am. Crim. Rep. 404; Doyle v. Com. 100 Va. 808, 40

S. E. 925; Robinson v. State, 6 Ga. App. 696, 65 S. E. 792.

Messrs. Albert C. Ritchie, Attorney General, Ogle Marbury, Assistant Attorney General, and Charles J. Butler, for the State:

Defendant was not improperly prejudiced by the report of his escape made to the jury by the court.

12 Cyc. 610; Wright v. State, 18 Ga. 383; People v. Fielding, 158 N. Y. 542, 46 L.R.A. 641, 70 Am. St. Rep. 495, 53 N. E. 497, 11 Am. Crim. Rep. 88; Shawnee v. Sparks, L.R.A. 1918D, 34, note; Freud v. State, 129 Md. 647, 99 Atl. 934; Esterline v. State, 105 Md. 637, 66 Atl. 269; Consolidation Coal Co. v. Shannon, 34 Md. 144; Beatty v. Mason, 30 Md. 409; Citizens Mut. F. Ins. Co. v. Conowingo Bridge Co. 116 Md. 422, 82 Atl. 372; Beam Motor Car Co. v. Loewer, 131 Md. 552, 102 Atl. 908.

There was no such abuse of discretion on the part of the lower court as to warrant this court in reviewing its action.

Downs v. State, 111 Md. 241, 73 Atl. 893, 18 Ann. Cas. 786; 12 Cyc. 900; Moore v. State, 59 Fla. 23, 52 So. 971; Walker v. State, 136 Ind. 663, 36 N. E. 356; State v. Decker, 217 Mo. 315, 116 S. W. 1096; State v. Gordon, 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442; State v. Anselmo, 46 Utah, 137, 148 Pac. 1071.

Urner, J., delivered the opinion of the court:

In the course of the trial of the appellant for rape, in the circuit court for Talbot county, he filed a motion for a postponement of the

trial on the ground that it could not be fair and impartial under the conditions then existing. The motion alleged and offered to prove, in substance and effect, that when the court adjourned at 10 o'clock at night on the first day of the trial about 2,000 persons were assembled on the courthouse grounds, on which the county jail was also located, and while the appellant was being taken from the courthouse to the jail through the crowd a determined effort, accompanied by personal violence inflicted upon him, was made to take him from the custody of the officers of the law and lynch him, this purpose being openly declared by members of the crowd, some of whom were armed with various weapons and provided with ropes; that the officers attempted to hold the crowd at bay with their pistols as it surged upon the porch of the jail while the appellant was pushed through the outer door of the building, and that, prompted by his fear and the immediate danger of lynching, he took advantage of an opportunity to escape in the dark through an open window, and was not retaken until two days later; that the fact of his escape was announced by the court to the jury as a reason for the suspension of the trial until his recapture; and that a reward of \$5,000 was offered by the court for the rearrest of the appellant and his safe return to the court room. It was at the time of the resumption of the trial on the morning after the recapture of the accused that his motion just referred to was filed. In addition to the allegations already summarized the motion averred that the defendant, "by reason of the interruption of the orderly procedure of the administration of justice, due to mob violence actually perpetrated upon him while in the custody of the law and in the actual trial of his case (from which mob violence he attempted to escape by flight because of insufficient protection of law), finds himself so prejudiced in the further progress of said case as to be utterly and hopelessly unable

to receive a fair and impartial trial by any further action in the present so-called trial and proceeding; and that the same amounts to a denial of due process of law, to a denial of all constitutional guaranty of a fair and impartial trial, or to the constitutional right of a jury trial." It was further alleged that the defendant was confronted with the alternative of "being prejudiced before the jury by the announcement made to the jury, by the court, that the defendant had made his escape from the authorities during the progress of the trial, from which the inference of guilt as a cause for flight may be drawn by the jury," or of "rebutting said presumption by proof of flight from mob violence perpetrated upon him in the courthouse grounds within five minutes of the adjournment of court, and while the jury was still in the box," but that "by adopting the latter course he becomes prejudiced in the trial of said case by injecting into the minds of the jury the intensity of the feeling of the populace surrounding the courthouse to such an extent that the jury itself becomes thereby intimidated, and unable fully and freely to do its duty in the premises, as it may see it, solely from the standpoint of the law and the evidence given under oath in open court."

The application of the defendant for a stay of the proceedings was refused, and the trial was continued, resulting in his conviction and a sentence of death.

The record contains a certificate of the trial court, signed at the instance of the defendant's counsel, as follows:

"After the case of *State v. Isaiah Fountain* had been assigned for trial on Easter Monday, April 21, 1919, the court was desirous of knowing whether the case was to be tried on that day, so as to make its arrangements for other work in the circuit, or for sitting in the court of appeals, and to that end caused inquiry to be made informally of Mr. O'Dunne as

to whether the case was to be removed or not.

"In response to a long-distance telephone call, Mr. O'Dunne came to Easton on Friday night, April 18th, and stated to the presiding judge of the court that he brought with him an affidavit of removal, signed by Isaiah Fountain and sworn to by him, for the purpose of asking a removal. Mr. O'Dunne suggested that the case be removed to Baltimore city, but the court declined to entertain the suggestion of removal to Baltimore city, and said that in the event of the case being removed it would not be sent out of the circuit, whereupon Mr. O'Dunne stated that he would therefore not file the affidavit of removal.

"The circumstances under which the \$5,000 reward was offered were brought about by the escape of the defendant a few minutes after 10 P. M. on the night of April 21, 1919, the court having held a night session until 10 o'clock, and when the prisoner was removed from the courthouse room to the jail building in the courthouse square, a large concourse of people had assembled on the courthouse grounds, and certain threats of violence towards the prisoner were made by some of those assembled there, which resulted in his then and there escaping from the crowd, and from the officers who had him in custody. The next morning the presiding judge of the court in the court room commented upon the disgraceful proceeding resulting in the escape of the prisoner, and offered a reward on behalf of the citizens of Talbot county of \$5,000 for his capture and return unharmed to the custody of the sheriff of Talbot county, and suggested to the sheriff in open court the swearing in of all assembled who would volunteer as deputy sheriffs for that purpose. Several hundred persons volunteered and were sworn in as deputy sheriffs, including Mr. O'Dunne, the prisoner's counsel.

"(In the afternoon before the prisoner was returned and before

the occurrences hereinafter set out, the jury had retired with the bailiffs to another part of the town, where they ate and slept, out of sight and hearing of the occurrences now about to be stated.)

"The prisoner was reported captured late in the afternoon of April 23d at a point in the state of Delaware, and as news of his capture reached Easton a large crowd of people assembled at the courthouse square between the courthouse door and the jail door, both located on the same plot of ground, inclosed by an iron railing fence. As the news reached Easton that the defendant was about to be brought back to the jail by his captors in an automobile, addresses were made to the assembled crowd from the porch of the jail, in which the populace was exhorted to be peaceful and law-abiding and let the law take its course in an orderly fashion. Chief Judge William H. Adkins addressed the crowd along this line, also the mayor of Easton, W. Mason Sheehan, and Eugene O'Dunne, the prisoner's counsel, at the close of whose remarks the prisoner arrived, and was safely conducted into the jail and back into the custody of the sheriff without any interference on the part of the crowd. The presiding judge invited those who had been sworn in as deputy sheriffs and others who desired to be sworn in as deputy sheriffs to report to the court room across the open green; that he had further matters to communicate to them. The court room was quickly filled, whereupon the presiding judge stated to those assembled that he desired to take them into his confidence to say that he had just been in communication with the chief executive of the state, and that he was reliably informed that the present crowd in Easton was likely to be augmented that night by 3,000 or 4,000 additional persons, who it was expected would arrive in Easton some time that night. He asked those assembled whether they felt able and were disposed to take care of the

situation in Easton that night, or whether they would prefer that he avail himself of the offer of the governor to send the constituted legal authority of the state, to wit, a company of uniformed state militia, augmented by an auxiliary force of policemen from Baltimore city, who could arrive there in machines during the night. The matter being further discussed by various speakers, the sense of those assembled finally was that the court was asked to use its judgment for preserving law and order by the use of such power and authority as it deemed expedient, including the use of the state militia and an auxiliary police force from Baltimore city, with the result that between midnight and dawn a company of uniformed state militia arrived at the courthouse, and was augmented by some twenty-five members of the Baltimore police force, who came down by machine, in addition to the fifteen members already there. On the arrival of the state militia, they were stationed to guard the approaches to the courthouse and the jail, and were placed as pickets on the inside of the iron rail fence around the courthouse plaza, and, with drawn bayonets, permitted no one to enter the courthouse square except those having official business with the court, and the several hundred persons who had been sworn in as deputy sheriffs two days before, and other persons who were properly vouched for. The court of its own motion inserts the following in brackets: [The jury were absent from the courthouse at the place where they ate and slept, in another part of the town, at the time of the return of the prisoner after the capture and at the time of the addresses to the crowd and the conference in the court room, last above referred to.] From the adjournment, 10 P. M. Monday night, to 9:30 A. M. Thursday, April 24th, the hour set for resuming the further trial of the case, the jury were held together in charge of bailiffs

with the use of the courthouse room and the grand jury room and they were escorted under proper custody through the town of Easton to and from the place where their meals were served, and where they slept, and on April 24, 1919, shortly before the hour set for the opening of court, they were properly escorted in charge of the regular bailiffs through the town of Easton to the court room, which necessitated their passing through the picket line of state militia guarding the courthouse square.

"(At the resumption of the trial the jury were especially cautioned by the court against permitting themselves to be prejudiced against the prisoner on account of his escape after the beginning of the trial, and were told that in the opinion of the court no inference of guilt could properly be drawn from the fact of such escape, which was due to fear of the crowd.)

"Trial ended late in the afternoon of Thursday, April 24, 1919, and on the verdict of guilty by the jury and sentence of death then and there pronounced by the court upon the defendant, he having stated through his counsel that he had nothing further to say why sentence should not be pronounced, the defendant, by authority of the court, was directed to be lodged in the Baltimore city jail awaiting the day to be set by the governor for his execution.\*

The appeal in this case presents a question of vital importance in the administration of justice. It is concerned with the right of a person charged with crime to have the ques-

**Criminal law—  
right to impar-  
tial trial.**

tion of his guilt or innocence determined by a fair and impartial trial according to law. This right is absolute and fundamental. It rests upon the clearest and strongest principles of justice, and it is safeguarded in the most imperative terms by constitutional provisions which directly declare the will and mandate of the people.

The issue tried before the jury in



this case was whether the prisoner at the bar, who is a colored man, was in fact the negro who committed the rape charged in the indictment. There was no question that the unfortunate girl who testified as prosecuting witness had been brutally outraged, but the defense was that the accused was not the perpetrator of the horrible crime, and that he was in reality a number of miles distant from the scene of the assault at the time it occurred.

It was his undoubted right to raise such an issue of fact and to have it determined by the verdict of a jury under circumstances which would enable it to exercise its independent judgment. He was entitled to have the verdict represent solely the effect of the evidence, and not the influence of popular sentiment. In order that the defense interposed might be impartially considered, it was necessary that the jurors should have the opportunity to calmly weigh the evidence without having their minds distracted and dominated by undue manifestations of public hostility against the prisoner.

The conditions under which the appellant was tried were such as to make it almost impossible for the issue upon which his life depended to be impartially considered and decided by the jury. It is in the highest degree improbable that the jury as a whole could have kept its judgment free from the influence of the demonstrations made against the accused in the immediate neighborhood of the court in which the trial was being conducted. The presence of a large and menacing crowd, determined that the prisoner should die, and unwilling to await the orderly processes of the law, which had been set in motion with the utmost promptness, the attempt to forestall by lynching the verdict of the jury and a judicial sentence, the flight of the defendant to escape immediate death at the hands of the mob and the unusual measures taken by the court to insure his safety

when recaptured, evidencing the belief of the judges as to the extreme gravity of the emergency with which they were confronted, combined to create an atmosphere and environment incompatible with the right of the accused to a fair and impartial trial.

According to the general rule, the suspension or postponement of a trial is recognized as being within the discretion of the trial court, and its ruling on a question of that nature will not be disturbed on appeal unless such action is plainly required in the interests of justice. In 16 C. J., p. 484, a discussion of the law relating to applications for continuances in criminal cases, on the ground of public excitement and prejudice, includes the following statement: "In any event, such excitement must be such that its natural tendency would be to intimidate or swerve the jury; and as the court in which the cause is pending can much better determine the propriety of a postponement on this ground than can the appellate court, it requires a very strong showing to induce the upper court to interfere.

There can be no doubt that the court below made earnest efforts to protect the defendant's right to a fair trial, but the conditions with which the court had to deal appear to have rendered such a trial at that time and place impracticable. In such an extraordinary situation as that in which the lower court was placed in this case, and with such vital issues involved, its ruling upon the application to have the trial deferred could not properly be held to be so far discretionary as to be beyond the scope of appellate review.

The argument on behalf of the state proceeded in part upon the theory that the jury is not shown

—defense of alibi.

—trial under threat of lynching.

Appeal—refusal to suspend trial—discretion.

—flight from attempt to lynch—abuse of discretion.

by the record to have been fully cognizant of the occurrences and conditions to which the defendant's motion refers. It is difficult to imagine that the jurors could have remained in ignorance of the presence, temper, and conduct of the crowd on the courthouse grounds through which they passed repeatedly on their way to and from the sessions of the court. But it affirmatively appears from the record that the court informed the jury of the flight of the prisoner to escape the violence of the crowd. As we understand the record, it shows also that the comments of the court "upon the disgraceful proceeding resulting in the escape of the prisoner," and its offer of a reward of \$5,000 for his recapture and safe return, and its suggestion to the sheriff as to "the swearing in of all assembled who would volunteer as deputy sheriffs for that purpose," were made in the presence of the jury. The certificate of the court, narrating with perfect candor and fairness the incidents which impeded and disturbed the trial, furnishes ample and compelling reasons for our conclusion that the prisoner did not have a fair trial, and that his motion for a temporary stay of the proceeding should have been granted.

While we should be entirely satisfied to rest our decision simply upon the elementary rule of right and justice which the appellant has invoked, there are adjudications in other states which fully support the conclusion we have reached. *State v. Weldon*, 91 S. C. 29, 39 L.R.A.(N.S.) 667, 74 S. E. 43, Ann. Cas. 1913E, 801; *Massey v. State*, 31 Tex. Crim. Rep. 371, 20 S. W. 758; *Fredrickson v. State*, 44

Tex. Crim. Rep. 288, 70 S. W. 754; *Collier v. State*, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536, 12 Am. Crim. Rep. 606; *People v. Fleming*, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613, 14 Am. Crim. Rep. 245; *Capps v. State*, 109 Ark. 193, 46 L.R.A.(N.S.) 741, 159 S. W. 193, Ann. Cas. 1915C, 957; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29.

It is not our duty or right to pass upon the weight of the evidence and to express an opinion as to its sufficiency to support the verdict actually rendered. That was a question which the appellant was entitled to have decided by a jury exempt from such influences as those which operated in this case, and by which any jury of ordinary human sensibilities would have been practically certain to have been affected prejudicially to the accused.

It is natural that popular wrath and indignation should be aroused by such an atrocious offense as this record discloses. But the identification and punishment of the criminal must be left to the careful and regular processes of the law, however deep and just may be the public sense of horror at the crime. The law does not tolerate any interference with the right of the humblest individual to be accorded equal and exact justice, and, when charged with crime, to have the question of his guilt or innocence fairly and impartially determined. It is of the highest concern to the people and courts alike that this vital and sacred right shall be preserved inviolate.

Judgment reversed, and new trial awarded.

### ANNOTATION.

**Refusal of continuance in criminal trial, asked for on account of occurrences during trial, as abuse of discretion.**

Continuances on the ground of the absence of witnesses or counsel are excluded.

As will be seen, this note lies in narrow compass. Very little has been found directly within its scope.

It will be noted that it is held in the reported case (*FOUNTAIN v. STATE*, ante, 908) that it was error to deny the defendant's motion for continuance on account of the presence on his trial for rape, of a large and menacing crowd.

On a trial for rape, after the prosecuting witness had been asked a few preliminary questions by the state, the defendant's counsel was given leave to ask her a few questions, and asked if she was in a family way; after an affirmative reply, he asked whether she expected to give birth to a child in due time; the witness broke down and did not reply; counsel then moved for a continuance on the ground of the witness's pregnancy. It was held that there was no error in overruling the motion. *State v. Carpenter* (1904) 124 Iowa, 5, 98 N. W. 775.

It is no error for the court to refuse a continuance and direct a criminal trial to proceed in the absence of the official stenographer, when the court had no authority to supply a

stenographer and there was no one accessible. *Wilson v. State* (1911) 2 Ala. App. 203, 56 So. 114.

It may be noted that it was held in *Lutton v. State* (1883) 14 Tex. App. 518, that it was error to refuse a postponement until a witness could go and bring into court books which he had been subpoenaed to produce, but had not brought with him.

(It may be noted in this connection that a new trial was granted in the rape case of *Massey v. State* (1892) 31 Tex. Crim. Rep. 371, 20 S. W. 758, where, after the trial had been called but adjourned for the day, no proceedings being taken, while a mob was surging round the jail, one of the defendant's attorneys applied to the court, and asked him of his own motion to change the venue, as the defendant could in no event obtain a fair trial in the county, and the court refused to do so for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid.") B. B. B.

## MAYOR AND CITY COUNCIL OF BALTIMORE et al., Appts.,

v.

AUGUSTUS J. SACKETT et al.

*Maryland Court of Appeals—June 26, 1919.*

(— Md. —, 107 Atl. 557.)

### Injunction — refusal — scope.

1. An application for injunction to prevent a municipal corporation from hauling garbage to a certain farm, or reducing it or establishing a piggery thereon, or proceeding with the erection of a temporary reduction plant there for the reduction of the garbage, is too broad and will be refused.

[See note on this question beginning on page 920.]

### Equity — jurisdiction — nonresident.

2. That defendant resides without the jurisdiction does not deprive a court of equity of jurisdiction of a suit to enjoin the establishment of a nuisance, if the subject-matter and the property which will be injured are within its jurisdiction.

### Injunction — against municipality — legislative authority.

3. A municipal corporation will not

be enjoined from doing an act which it is authorized by law to do.

— against act necessary to public health.

4. An act by a municipal corporation which is essential to the health and comfort of the public at large will not be enjoined unless under very extraordinary circumstances, but complainant should be left to his remedy at law.

— to prevent threatened nuisance.

5. Injunction will not lie to restrain the carrying on of a legitimate and lawful business which is a threatened nuisance any further than is absolutely necessary to protect the rights of the one seeking it.

[See 20 R. C. L. 439.]

**Nuisance — piggery — damages.**

6. A city may be liable in damages for operating a piggery in such a

manner as to be a nuisance to neighboring property.

[See 20 R. C. L. 424.]

**Pleading — threatened nuisance — sufficiency.**

7. A mere allegation in a bill to enjoin a threatened nuisance that irreparable injury will ensue is not sufficient unless facts are stated which satisfy the court that the apprehension is well founded.

[See 20 R. C. L. 479.]

**APPEAL** by defendants from an order of the Circuit Court for Anne Arundel County (Moss, J.) overruling demurrers to a bill filed to enjoin a threatened nuisance. *Reversed.*

The facts are stated in the opinion of the court.

Mr. S. S. Field, for appellants:

The court below was without jurisdiction.

Barth v. Rosenfeld, 36 Md. 604; Dorsey v. Omo, 93 Md. 74, 48 Atl. 741; Baltimore v. Fairfield Improv. Co. 87 Md. 366, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; Longley v. McGeoch, 115 Md. 187, 80 Atl. 843; Worthington v. Lee, 61 Md. 530.

Disposal of the city's garbage cannot be stopped by injunction.

Taylor v. Baltimore, 130 Md. 146, L.R.A.1916C, 1046, 99 Atl. 900; O'Brien v. Baltimore Belt R. Co. 74 Md. 363, 13 L.R.A. 126, 22 Atl. 141; Garrett v. Lake Roland Elev. R. Co. 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830; Northern C. R. Co. v. Oldenberg & Kelley, 122 Md. 237, 89 Atl. 601; Baltimore v. Bregenzer, 125 Md. 79, 93 Atl. 425.

The plaintiffs must aver what the method is that they say the city ought to adopt, so that the court can see whether the method proposed by the city is improper and is likely to result in more damage than the method proposed by them.

Lipson v. Evans, — Md. —, 105 Atl. 312; Lamm v. Burrell, 69 Md. 272, 14 Atl. 682; Miller, Eq. § 92; Phelps, Juridical Eq. § 55.

There was no sufficient allegation of irreparable damage.

Blaine v. Brady, 64 Md. 373, 1 Atl. 609; Consolidated Gas, Electric Light & P. Co. v. Northern C. R. Co. 107 Md. 671, 69 Atl. 518; West Arlington Land Co. v. Flannery, 115 Md. 274, 80 Atl. 965; Pope v. Clark, 122 Md. 1, 89 Atl. 387; Fowler v. Pendleton, 121 Md. 301, 88 Atl. 124; Miller, Eq. § 93; 3 Enc. Pl. & Pr. pp. 363, 364, and notes.

An injunction should not be issued

in advance on account of apprehended danger, except in a very clear case.

Pope v. Clark, 122 Md. 1, 89 Atl. 387; Warren Mfg. Co. v. Baltimore, 119 Md. 222, 86 Atl. 502; Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516.

Briscoe, J., delivered the opinion of the court:

This case is presented, on an appeal from an order of the circuit court for Anne Arundel county, overruling the defendant's demurrers to a bill in equity, for an injunction to restrain a prospective or probable nuisance.

The original bill was filed by a number of property owners and residents of Anne Arundel county against the mayor and city council of Baltimore, D. A. Gaumitz, and Lewis Towing & Lighterage Company.

Subsequently, by an amended or supplemental bill, other persons and corporations were made parties defendants.

The object and purpose of the proceedings, it will be seen from the allegations of the bill, is to restrain the defendants by injunction from disposing of the garbage from the city of Baltimore, on a farm, known as the Jubb farm and owned by the city, on Bodkin creek, in Anne Arundel county.

The prayers for relief are substantially the same in both bills, and appear to be as follows:

(1) That the defendants may be permanently enjoined against haul-

ing to, dumping upon, or reducing the garbage of Baltimore city on the Jubb farm, or establishing a piggery on the farm for the consumption of the garbage.

(2) That the mayor and city council of Baltimore may be enjoined from further consummating or carrying out or doing anything in the furtherance of the actual or proposed contract between it and the defendant D. A. Gaumitz, looking to the establishment of a piggery on the Jubb farm and conveying the garbage of Baltimore city to the Jubb farm for that purpose.

(3) That the mayor and city council of Baltimore and the Lewis Towing & Lighterage Company may be enjoined by the peremptory enjoining order of this court, issued on such notice as the court may prescribe, unless cause to the contrary be shown, from conveying to or dumping upon the Jubb farm the garbage from Baltimore city or any portion thereof.

(4) That the mayor and city council of Baltimore may be enjoined from proceeding with the erection of a temporary reduction plant on the Jubb farm for the purpose of reducing the garbage of Baltimore city thereon, and from conveying to the Jubb farm all or any portion of such garbage from Baltimore city for the purpose of there being so reduced.

The facts upon which the relief is asked as set forth in the bill are thus stated:

First. That the plaintiffs are severally seised and possessed of land near Bodkin creek in the third election district of Anne Arundel county, most of them residing upon their holdings.

Second. That the mayor and city council of Baltimore have recently purchased a tract of land from Charles H. Jubb, containing 125 acres on the south side of Bodkin creek, and have taken possession of this farm.

Third. That the mayor and city council of Baltimore have awarded

to the defendant D. A. Gaumitz a contract for the disposal of the garbage of Baltimore city for a term of five years, beginning January 1, 1919, with the understanding that the garbage would be transported from Baltimore city to the Jubb farm, and there fed to some 15,000 pigs to be kept thereon, and the board of awards of the city estimating that by this manner of disposing of the garbage of Baltimore city the city would receive a net revenue of \$16,500 for the garbage, and save the annual cost of \$75,000 heretofore paid for the disposition of the same, making a net saving to the city of \$91,500 a year.

Fourth. That until the piggery is permanently established the garbage of Baltimore city is to be transported in scows to the Jubb farm, there to accumulate until the piggery is established, and the mayor and city council have made plans for the location of a temporary plant for the reduction of all or a portion of the garbage between January 1 and March 1, 1919, and that the feeding contract has been assigned to the American Feeding Company and others.

It is thus averred in substance that the removal and transporting by the city to the Jubb farm of the garbage from Baltimore city, and there causing it to be reduced in a temporary reduction plant or fed to pigs in the manner proposed, will result in a nuisance and destroy the value of property holdings in that section and render the property unmarketable, and, for certain reasons stated, will deprive the owners of the reasonable use and enjoyment of their property rights, and will cause irreparable loss, damage, and injury to each of the plaintiffs.

The defendants, the appellants here, demurred to the bill, and, as the demurrers of all the defendants are similar, the cause and grounds of the demurrer of the mayor and city council of Baltimore will be here set out:

(1) That this court is without jurisdiction, because upon the face

of the bill it appears that none of the defendants are residents of Anne Arundel county, and the bill contains no averment of any fact or facts giving this court jurisdiction over this defendant.

(2) That this court is without jurisdiction, because there is no sufficient allegation of any wrong actually committed or threatened, remediable in a court of equity, and because there is no sufficient allegation of any fact or facts showing irreparable damages to the plaintiffs or any of them.

(3) That the bill does not aver facts showing any wrong committed or threatened which is remediable in a court of equity.

(4) That the bill contains no sufficient statement of facts showing any irreparable damages to the plaintiffs or either of them, either suffered or impending.

The first objection presented by the defendants' demurrer, that the circuit court of Anne Arundel county was without jurisdiction to maintain the suit because the defendants are nonresidents of Anne Arundel county, cannot, under the authorities, be sustained.

It is averred in the bill that the situs of the subject-matter of the proceedings is within Anne Arundel county, and the property to be affected by the threatened nuisance is situate in that county.

In *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33, it is said if the subject of the injury be real estate or an easement, such as a right of way, whether private or public, obviously the action must be local, for the reason that the injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated.

In *Crook v. Pitcher*, 61 Md. 510, the court held, if the cause of action could only have arisen in a particular place, the action is local, and the suit must be brought in the county or place in which it arose. *Baltimore v. Meredith's F. & J. Turnp. Co.* 104 Md. 351, 65 Atl. 35,

10 Ann. Cas. 35; *Taylor v. Baltimore*, 130 Md. 133, L.R.A.1917C, 1046, 99 Atl. 900.

The cases in this court are reviewed and considered in *Phillips v. Baltimore*, 110 Md. 436, 25 L.R.A. (N.S.) 711, 72 Atl. 902, and it is there held that, in this state, the rule requiring local actions to be brought in the jurisdiction where the cause of action arose is well settled, and it applies as well to municipal corporations as to all other corporations.

The general rule is thus stated, in 29 Cyc. 1237, to be that a suit to abate or restrain a nuisance can be brought in the county or district where the nuisance is situated, and should be tried there unless a change of venue is granted by the court. 40 Cyc. 73-75; 26 Enc. Pl. & Pr. 829; 1 Chitty, Pl. 16; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311.

Whatever, then, may be the decisions elsewhere, we think it is clear that, under the decisions and the statutes of this state, the circuit court for Anne Arundel county had jurisdiction to entertain a bill for an injunction to restrain a nuisance, or a threatened nuisance, directly affecting property in that county, although the defendants are nonresidents of the county. Code of Pub. Gen. Laws, art. 16, §§ 86 and 189; *Fowler v. Pendleton*, 121 Md. 297, 88 Atl. 124; *Graham v. Harford County*, 87 Md. 321, 39 Atl. 804.

The second and third grounds of the demurrer are in effect that the bill does not aver facts showing any wrong committed or threatened which is remediable in a court of equity.

It appears by chapter 205 of the Acts of 1908 that the city of Baltimore is prohibited from disposing of its garbage within the city, and the act prohibits the erection of any garbage reduction plant within 9 miles from the Lazaretto lighthouse, on the Patapsco river. It was, as stated, because of this act the Jubb farm in Anne Arundel county was

Equity-jurisdiction-non-resident.

selected as the point for the disposal of the city garbage, and where it is now proposed to operate a reduction plant for this purpose.

While the general principle may be conceded that a municipality will

**Injunction—  
against munic-  
ipality—legis-  
lative authority.**

not be stopped by injunction from doing an act which it is authorized by law to do, but, as was said by this court in *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081, the delegation of a power to do an act, whilst conferring full authority to perform the act itself, does not, therefore, without more essentially and without exception, carry the right to so do it as to inflict loss or injury upon an innocent individual. It was further said in that case that, however free from interference by the public acts of this character may be when authorized to be done by a municipality under competent and sufficient legislative grant, the right of an individual to complain of the special injury sustained by him as a consequence of this being done is, ordinarily, in no way impaired or affected.

In *Taylor v. Baltimore*, 130 Md. 145, L.R.A. 1917C, 1046, 99 Atl. 900, the authorities upon this subject are collected and reviewed, and it is there said, in a case such as the one now before us, where the plant is essential to the health and comfort

**—against act  
necessary to  
public health.**

of the people at large, an injunction should not issue unless under very extraordinary circumstances, but the party should be left to his or her remedy at law.

The law controlling the rights of parties to an injunction to restrain a prospective or threatened nuisance is well established by numerous decisions of this court, and it is settled, where the ap-

**—to prevent  
threatened  
nuisance.**

plication is to restrain the carrying on of a legitimate and lawful business, the courts will go no further than is absolutely necessary to pro-

tect the rights of the parties seeking such injunction.

In *Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. Supp. 710, the court said, when a person is engaged in carrying on a lawful business, he should not be absolutely prohibited from doing so unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner. *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516; *Hamilton Corp. v. Julian*, 130 Md. 602, — A.L.R. —, 101 Atl. 558.

Upon the allegations of the bill in this case, we are unable to hold that the conditions complained of are of such a character, or so injurious in their present effect upon the property and other interests of the appellees, as to invoke the restraining power of a court of equity.

The prayer for relief not only asks that the mayor and city council of Baltimore shall be enjoined from hauling to, dumping upon, or reducing the garbage on the Jubb farm or establishing a piggery on this farm, but from proceeding with the erection of a temporary reduction plant on the farm for the purpose of reducing the garbage of Baltimore city thereon, and from conveying to this farm all or any portion of the garbage from Baltimore city for the purpose of there being so reduced.

This court has frequently held that a prayer for relief as here set out is too broad and

general to grant an **Injunction—  
refusal—scope.**

injunction, and the application should be at once refused. *Haines v. Taylor*, 2 Phill. Ch. 209, 41 Eng. Reprint, 922, 11 Jur. 73; *West Arlington Co. v. Flannery*, 115 Md. 274, 80 Atl. 965; *Warren Mfg. Co. v. Baltimore*, 119 Md. 222, 86 Atl. 502; *Pope v. Clark*, 122 Md. 1, 89 Atl. 387.

It is conceded that if in the disposal of the garbage or in the operation of the reduction plant a nuisance is created, whereby the prop-

erty of the plaintiffs is injured or seriously affected, the defendant could be made to respond in damages for the injuries thus sustained. *Baltimore v. Merryman*, 86 Md. 584, 39 Atl. 98; *Taylor v. Baltimore*, 130 Md. 133, L.R.A. 1917C, 1046, 99 Atl. 900.

We cannot hold, however, as this case is now presented, the appellees have brought themselves within rules of law, to justify an injunction to restrain a prospective or threatening nuisance, and unless such a case is presented a court of equity will not interfere. *Dittman v. Ropp*, 50 Md. 516, 33 Am. Rep. 325; *Lohmuller v. Samuel Kirk & Son Co.* 133 Md. 86, 104 Atl. 270.

The mere allegation in a bill that irreparable damages will ensue is not sufficient, unless facts be stated which will satisfy the court that the apprehension is well founded, and they do not sufficiently appear in this case to justify a court of equity to

Nuisance—  
pigsty—  
damages.

Pleading—  
threatened  
nuisance—  
sufficiency.

interfere. *Lamm v. Burrell*, 69 Md. 272, 14 Atl. 682; *Johnston v. Glenn*, 40 Md. 200; *West Arlington Land Co. v. Flannery*, 115 Md. 280, 80 Atl. 965; *Warren Mfg. Co. v. Baltimore*, 119 Md. 221, 86 Atl. 502.

For the reason stated, we think the court below committed an error in overruling the demurrers to the plaintiff's bill of complaint, except the demurrer as to the jurisdiction of the court.

These demurrers should have been sustained, and the bill dismissed, but without prejudice to any future application for proper redress, if the use of the city's property as proposed results in injury or material damage to the plaintiff's property rights, sufficient to justify an injunction or an action at law for damages.

It follows that the order of the Circuit Court for Anne Arundel county, dated the 22d day of April, 1919, will be reversed, and the bill dismissed, without prejudice.

Order reversed, with costs, and bill dismissed, without prejudice.

## ANNOTATION.

### Injunction to prevent establishment or maintenance of garbage or sewage disposal plant.

The cases seem to be in accord in holding that, while the disposal of garbage or sewage is a police function of a municipality with which the courts are loath to interfere by injunction, yet injunction relief will be granted against a plant for the reduction or other disposition of garbage, if it appears that the plant is so constructed or operated as to amount to a serious nuisance. *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178; *Munk v. Columbus Sanitary Works* (1897) 7 Ohio N. P. 542, 5 Ohio Dec. 548; *Fisher v. American Reduction Co.* (1899) 189 Pa. 419, 42 Atl. 36; *San Antonio v. Hamilton* (1915) — *Tex. Civ. App.* —, 180 S. W. 160; *Swanson v. Bradshaw* (1916) — *Mo.* —, 187 S. W. 268. And see the reported case (*BALTIMORE v. SACKETT*, ante, 915).

In *Fisher v. American Reduction Co.* (1899) 189 Pa. 419, 42 Atl. 36, the plaintiffs sought to enjoin the operation of a reduction plant by the defendant. The plant was constructed and operated under a contract with the city of Pittsburg, which was authorized by a city ordinance passed in pursuance of a legislative enactment. The plant was located in the most unobjectionable place that could be found within the city limits, being on the bluff of a river, in a district occupied chiefly by factories. It was operated under the direction of the city health officer, and in a careful and efficient manner, having various scientific devices for deodorizing gases and preventing their escape into the air. It appeared that the only means by which noxious odors could go out of the building was from a vat in which



the garbage was first emptied and kept for several hours. The court refused to enjoin the operation of the plant, but entered a mandatory injunction, ordering that the defendant dispose of the garbage as fast as it was brought to the pit, and take other practical steps which would render the operation of the plant less objectionable.

A similar situation was presented in *Munk v. Columbus Sanitary Works* (1897) 7 Ohio N. P. 542, 5 Ohio Dec. 548, wherein the court found that the defendant, in the operation of his garbage plant, was creating a nuisance in "casting upon plaintiff's land and in and about his dwelling, noxious vapors, odors, and gases, causing material inconvenience and discomfort to him and his family." The operation of the plant was not enjoined, but a decree was entered restraining the defendant from operating his plant so as to cause the injuries complained of, and the operation of the order was postponed until a fixed date in the future, directing the defendant, in the meantime, to make such alterations in his plant that it could be operated without creating a nuisance, with a provision that if the defendant did not at once, in good faith, take steps to prevent the nuisance, the injunction would become effective immediately.

In *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178, decided without opinion, the facts and the holding were stated in the official syllabus as follows: "Generally, equity will not enjoin the construction of a building not in itself a nuisance, but the person erecting the building will proceed at his peril; the whole subject being for the jury on trial. *Mygatt v. Goetchins* (1856) 20 Ga. 350; *Cunningham v. Rice* (1859) 28 Ga. 30. Where the business itself is legal, it only becomes a nuisance when conducted in an illegal manner, to the hurt, inconvenience, or damage of another. *Simpson v. Du Pont Powder Co.* (1915) 143 Ga. 467, L.R.A.1015E, 430, 85 S. E. 344. . . . Where a municipal corporation was proceeding, under contract with a crematory company,

to erect an incinerator, or crematory, for the consumption of the garbage of the city, on a lot selected by it about 300 yards from the business center of the city, upon a guaranty by the crematory company that the plant, when completed, would consume the garbage without offensive odors, etc., and where the construction of the garbage plant had proceeded to within two days of completion, and an equitable petition was filed by certain citizens with families, living within 100 yards of the creamery, to enjoin the further progress of the work because of the offensive odors, gathering of flies, etc., which it was alleged would be caused from the hauling and dumping of the garbage, thus endangering the life and health of the citizens and depreciating the value of their property, and where, on the trial before a jury, there was evidence from which the jury could find that within the city there were other available vacant lots in a different and more remote section, away from the heart of the city and the residential section thereof, and that the hauling of the garbage by the residences of the petitioners would cause flies and noxious fumes and poisonous gases emanating from the garbage to pester petitioners and endanger their health and lives and depreciate the value of their property, a verdict against the defendant, enjoining the completion of the crematory, was authorized."

In *San Antonio v. Hamilton* (1915) — Tex. Civ. App. —, 180 S. W. 160, it appeared that the defendant was about to construct an incinerator for burning the garbage of a city. It was alleged in the petition that the operation of the incinerator in the place contemplated would become a nuisance to that vicinity, by emission of smoke, gases, noxious odors, etc. It was claimed in the answer that the plant was to be constructed under a guaranty that the waste matter would be evaporated and incinerated to a complete mineral ash, without creating any obnoxious odors or gases. The trial court granted a temporary injunction until a hearing on the merits could be had. The only issue

raised on the appeal was whether the court abused its discretion in granting the injunction. It was held that since there was evidence that a nuisance would be created by the plant it was proper that its construction should be temporarily enjoined. The court said: "The rule is that, if it be made reasonably to appear that the homes of plaintiffs would be rendered less comfortable, or that their health would be jeopardized, by the concentrating and burning of garbage and dead animals, a temporary injunction would properly issue pending the determination of the issues upon a trial. . . . The evidence does tend to show that the operating of same would endanger the health and comfort of plaintiffs. . . . We determine no issue in this case, and are not called upon to determine any, save whether the trial court abused his discretion in granting a temporary injunction, and, since there was evidence given upon the hearing which tends to substantiate the allegations of the petition that a nuisance is about to be created on Knob hill by the erection and operation of this incinerator, we would not be justified in saying that the trial court erred in maintaining the status quo until the issues can be determined by a trial on the merits."

In *Swanson v. Bradshaw* (1916) — Mo. —, 187 S. W. 268, it appeared that the defendant, under a contract with a city, undertook to dispose of dead animals and garbage, which he did in part by burying in shallow trenches, and in part by feeding to hogs, using for that purpose a tract of land owned by him near the city. As a result the odors polluted the atmosphere for over a mile around, and the proof showed danger of springs and wells being rendered unwholesome. Sustaining the grant of an injunction, the court said: "It is true that the garbage of the city must be taken care of and that defendant is engaged in a lawful business. The evidence shows, however, that by some increased expense this garbage can be disposed of in a far more safe and sanitary way. The health officers of the city, both by report to the city and by oral evidence, pronounce the present method as improper and unsanitary. Even if defendant was using an approved method and was disposing of the garbage in a careful manner, this fact would not justify his interference with the reasonable and comfortable enjoyment by another of his property or his causing material injury thereto."

R. M. F.

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BERT L. SKILLINGS, Respt.,

v.

F. A. ALLEN, Appt.

*Minnesota Supreme Court — July 18, 1919.*

(— Minn. —, 178 N. W. 668.)

**Physician — wrong advice as to contagiousness of disease — liability.**

1. A complaint states a cause of action when it is alleged therein that defendant, a physician, was employed by plaintiff to attend his minor daughter professionally while she was sick; that, knowing that the child's disease was scarlet fever, he negligently advised plaintiff's wife, who inquired in his behalf as well as in her own, that it was safe to visit the child, then in a hospital and under defendant's care; that he also advised her that it was safe to remove the child from the hospital to plaintiff's home, and that there

Headnotes by LEES, C.

was no danger that the disease would be communicated, although it was then at a stage when great danger of infection existed; and that plaintiff and his wife did not know of the infectious nature of the disease and relied on defendant's advice, and accordingly visited their child at the hospital and removed her to their home, and plaintiff thereby contracted scarlet fever to his damage.

[See note on this question beginning on page 926.]

#### Negligence — rule of liability.

2. Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own

conduct he will cause injury to that person. This principle is applicable to the facts stated, and the court properly overruled a demurrer to the complaint.

[See 20 R. C. L. 45.]

**APPEAL** by defendant from an order of the District Court for Crow Wing County (McClenahan, J.) overruling a demurrer to the complaint in an action brought to recover damages for illness from an infectious disease alleged to have been caused by defendant's negligence in allowing plaintiff to visit his sick child. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. C. D. O'Brien and R. D. O'Brien, for appellant:

There can be no liability attached to the expression of defendant's opinion that neither of the plaintiffs would be infected.

21 R. C. L. § 35, pp. 390, 391.

Messrs. A. D. Polk and L. B. Kinder, for respondents:

In case of infectious diseases there is a legal obligation on the sick person and on those who have the custody of him not to do anything that can be avoided which shall tend to spread the infection.

Missouri, K. & T. R. Co. v. Wood, 95 Tex. 223, 56 L.R.A. 592, 93 Am. St. Rep. 835, 66 S. W. 449; Gilbert v. Hoffman, 66 Iowa, 205, 55 Am. Rep. 266; Kliegel v. Aitken, 94 Wis. 432, 35 L.R.A. 249, 59 Am. St. Rep. 900, 69 N. W. 67; State v. Butts, 3 S. D. 577, 19 L.R.A. 725, 54 N. W. 603; Piper v. Menifee, 12 B. Mon. 465, 54 Am. Dec. 547; Span v. Ely, 8 Hun, 256; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; Edwards v. Lamb, 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480.

The relation of physician and surgeon is not a creature of contract.

21 R. C. L. § 22, p. 375; Du Bois v. Decker, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511; Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793, Ann. Cas. 1915A, 257.

Defendant is liable to plaintiff who was injured through his negligence.

Viita v. Fleming, 132 Minn. 128, L.R.A.1916D, 650, 155 N. W. 1077, Ann. Cas. 1917E, 678; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Edwards v. Lamb, supra; 21 R. C. L. p. 375.

Lees, C., filed the following opinion:

This is an appeal from an order overruling a demurrer to the complaint interposed on the ground that no cause of action was stated. The court certified that the question raised was important and doubtful.

In substance, the complaint alleged that defendant was a practising physician, employed by plaintiff and his wife to treat their minor daughter, who was ill. The defendant knew that the disease from which the child was suffering was scarlet fever, and that it was infectious. Plaintiff's wife, acting in his and her own behalf, consulted defendant as to the nature of the disease and the danger of infection. Defendant wrongfully and negligently advised her that they might safely visit their child, who was then at a hospital under his care. He negligently permitted them to visit the child at the hos-

pital, and later on wrongfully and negligently advised plaintiff's wife that she could be safely removed from the hospital to her home, and that there was no danger that the disease would be communicated, although it was then at the "peeling off" stage, when the greatest danger of infection exists. In reliance upon defendant's advice, the child was removed to her home. Neither plaintiff nor his wife knew of the infectious nature of the disease. Both relied on defendant's advice in visiting their child while sick at the hospital and in taking her from the hospital to her home. By reason of their contact with her, both contracted scarlet fever, and plaintiff suffered pain and was kept from his work for many weeks, to his damage in the sum of \$1,000.

The case is a novel one. Counsel for defendant assert that none like it has heretofore been presented to any court so far as they have been able to ascertain. They contend that a cause of action is not stated because there were no contractual relations between plaintiff and defendant. The statement in the complaint that the child was under defendant's care, "pursuant to solicitation and employment by plaintiff and his wife," amounts, we think, to an allegation that there were such relations. True, the child was defendant's patient, but can it be said that therefore he owed no contractual duty to her parents by whom he was employed? The child would have a cause of action against defendant for the consequences of any failure on his part to treat her with ordinary professional skill and care, though she did not employ him. Plaintiff might also have a cause of action entirely separate and apart from that of his child, for the loss of her services, due to the same failure to exercise ordinary professional care which gave rise to the child's cause of action. 21 R. C. L. 398.

Generally speaking, one is re-

sponsible for the direct consequences of his negligent acts when-  
Negligence—  
rule of liability.  
 ever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person. *Depue v. Flatau*, 100 Minn. 299, 8 L.R.A.(N.S.) 485, 111 N. W. 1. It was remarked in *Farrell v. Minneapolis & R. R. Co.* 121 Minn. 357, 361, 45 L.R.A.(N.S.) 215, 141 N. W. 492, that "it is now generally recognized that each member of society owes a legal duty, as well as a moral obligation, to his fellows."

Assuredly this is a case where there is every reason to hold that defendant was under a legal duty to plaintiff, and it is of little practical consequence whether we call the duty contractual or noncontractual. The health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. To the individual nothing is more valuable than health. The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable diseases. Scarlet fever is classed as such a disease. The state board of health is charged with the duty of prescribing regulations for the disinfection and quarantine of persons and places as an incident in the treatment of all infectious diseases, and physicians are required to report all infectious cases to their local boards of health. Chapter 345, Gen. Laws (Minn.) 1917 (Gen. Stat. Supp. 1917, § 4640). When defendant discovered that plaintiff's child was suffering from an infectious disease, it became his duty to comply with the laws of the state in the particulars mentioned in order that the public health might be protected. His duty did not stop there. The child's parents were naturally exposed to infection to a greater degree than anyone else. To advise them that they ran no risk in visiting her at

the hospital or in taking her into their home necessarily exposed them to danger if they acted on the advice, and defendant was bound to know that they would be likely to follow his advice. It is alleged that the advice was given negligently, and all the necessary elements of a cause of action based on negligence are present. The following cases, in one respect or another, bear on the questions mooted here: *Peterson v. Phelps*, 123 Minn. 319, 143 N. W. 793, Ann. Cas. 1915A, 257, holding that a physician's responsibility to use due care is not dependent on an express agreement of employment or promise to pay for his services; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, holding that there may be liability for negligence where the purpose of an examination made by a physician was not medical treatment, but information; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621, holding that a hospital association was liable to a student nurse for putting her in charge of a diphtheria patient without warning her of the danger of contagion, she having contracted the disease through failure to take proper precautions to guard against infection; *Piper v. Menifee*, 12 B. Mon. 465, 54 Am. Dec. 547, holding that a physician was liable for communicating smallpox to a patient, when he was attending several persons who had the disease and advised plaintiff that there was no danger of his contracting it because he changed his clothes after visiting smallpox patients, and so was allowed to continue to visit him as his physician; *Missouri, K. & T. R. Co. v. Wood*, 95 Tex. 223, 56 L.R.A. 592, 93 Am. St. Rep. 834, 66 S. W. 449, holding that a railway company was liable to plaintiff for negligently permitting one of its employees to escape from a detention hospital where he was undergoing treatment for smallpox at the hands of its physician. After escaping, he came in contact with plaintiff and his family and

communicated the disease to them; *Span v. Ely*, 8 Hun, 255, holding that a physician who employed a man to whitewash a house in which one of his patients had recently died of smallpox, assuring him that the house had been disinfected and that he would be safe in entering it, was liable to the man who contracted the disease while whitewashing the house; *Edwards v. Lamb*, 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480, holding that a physician was liable to a woman for negligently advising her that it was safe for her to assist in dressing an infectious wound her husband had received, she having acted on the advice and being infected. The essential facts which furnished the basis of the decision last cited are closely parallel to those in the case at bar. We quote a portion of the opinion as apposite to this case: "The situation was such that she needed the advice of a physician. This the defendant knew. He knew of her danger and negligently advised her as to it, and she was injured by following his advice. That when he advised her he assumed the obligation to use due care in so doing is not open to doubt. . . . If the contract to attend the plaintiff's husband were eliminated from the case, the liability would be the same. The gratuitous character of the services rendered to the plaintiff would not excuse the defendant's failure to exercise such care as the circumstances demanded. . . . On the other hand, if the advice to the wife is treated as a part of the performance of the contract with the husband, the defendant still owed her the noncontractual duty to use care in the performance of such of his services as concerned her personally."

We conclude that the complaint is not demurrable, although it may be true, as suggested by defendant's counsel, that it is a matter of common knowledge that

Physician—  
wrong advice as  
to contagious-  
ness of disease—  
liability.

scarlet fever is an infectious disease, and that plaintiff may not have been greatly influenced by defendant's alleged assurance that he

might visit his child or take her to his home without running any risk of infection.

Order affirmed.

### ANNOTATION.

#### **Liability of physician for permitting exposure to infectious or contagious disease.**

It is held in the reported case (*SKILLINGS v. ALLEN*, ante, 923) that a physician employed by the plaintiff to attend his minor daughter, who, knowing that the patient has scarlet fever, advises that there is no danger of infection in removing her from a hospital to the plaintiff's home, is liable in damages to the plaintiff, who contracts the disease from his daughter after she has been removed to his home in accordance with the defendant's advice.

Where a physician employed the plaintiff to whitewash a house in which one of his patients had recently died of the smallpox, assuring him that the house had been thoroughly disinfected and that he would be entirely safe in entering and whitewashing it, it was held to be a question for the jury whether the physician was liable to the plaintiff, who contracted smallpox while whitewashing the house, and the finding of the jury for the plaintiff was not disturbed. *Span v. Ely* (1876) 8 Hun (N. Y.) 255.

In *Hand v. Philadelphia* (1890) 8 Pa. Co. Ct. 213, denying the liability of a municipal corporation for the physician's blunder, it is stated that the plaintiff, who had measles, was, on his physician's diagnosis of smallpox, removed to the city hospital and placed in the smallpox ward, where he contracted smallpox, and that he had, in another action, recovered from the physician who made the incorrect diagnosis.

A physician may be liable for injuries from poison to one voluntarily assisting in caring for a wound, if, knowing of infectious poison in the wound, he assures the attendant that there is no danger, although he is ignorant of slight abrasions on the

attendant's hands, in the absence of which the danger would not exist. *Edwards v. Lamb* (1900) 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480. The plaintiff was the wife of the wounded person.

In an action by a physician against his patient for his fees, it was held to be error to exclude evidence that, although he was warned by the patient's wife that he must not come there if he was attending smallpox patients, that he did attend smallpox patients, stating to her that if he did so he would change his clothes and there would be no danger, and that the defendant in about three weeks came down with the smallpox, and soon afterwards his son also. *Piper v. Menifee* (1851) 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547. The court said: "It cannot be doubted that, upon the facts offered to be proved, and which are now to be taken as true, the plaintiff was prima facie liable to an action. Even if there had been no warning to him by the defendant's wife, it was his duty, in passing from his patients who were afflicted with an infectious and dangerous disease, to others who were not so affected, to take such precautions as experience may have shown to be necessary to prevent the communication of the infection by his own visits."

In *Haas v. Tegtmeier* (1906) 128 Ill. App. 280, appeal dismissed in (1907) 225 Ill. 275, 80 N. E. 130, where the court declined to disturb the finding of the jury for the defendant in an action against a physician for carrying smallpox to the plaintiff and his children while he was attending the plaintiff's wife for another disease, there was evidence that the physician took every reasonable care and precaution, and that the plaintiff and his

children were exposed to the disease through others than the defendant. (N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621, is sufficiently referred to in the reported case (*SKILLINGS v. ALLEN*, ante, 923). *B. B. B.*

*Hewett v. Women's Hospital Aid Asso.* (1906) 73 N. H. 556, 7 L.R.A.

LA COSSETTE HENDREN, Trustee, etc.,

v.

FREDERICK W. NEEPER et al.

*Missouri Supreme Court, Division No. 2 — July 5, 1919.*

(— Mo. —, 213 S. W. 839.)

**Corporation — power of directors to sell real estate.**

The majority of the directors of a corporation organized to deal in real estate may sell the real estate of the corporation against the protest of the minority, although it will result in annihilating the corporation, if such was not the purpose of the sale.

[See note on this question beginning on page 930.]

**CERTIFICATION** by the St. Louis Court of Appeals for the determination by the Supreme Court of questions arising upon appeal by plaintiffs from a decree of the Court of Common Pleas (Ragland, J.) in favor of defendants, in an action brought to enjoin the sale of certain land. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. F. L. Schofield, for plaintiffs:

Neither the directors of a corporation nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.

2 Cook, Corp. § 670; Morawetz, Priv. Corp. 238, 239; Chicago City R. Co. v. Allerton, 18 Wall. 233, 21 L. ed. 902; Buford v. Keokuk Northern Line Packet Co. 3 Mo. App. 166; 7 Am. & Eng. Enc. Law, 735; 26 Am. & Eng. Enc. Law, 965; Hunt v. American Grocery Co. 81 Fed. 532; Feld v. Roanoke Invest. Co. 123 Mo. 603, 27 S. W. 635; Gill v. Balis, 72 Mo. 433; Cummings v. Parker, 250 Mo. 441, 157 S. W. 629; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

Messrs. Eby & Hulse, and F. W. Neeper, for defendants:

If the charter of a corporation expressly authorizes a lease or sale of the corporate property, such a lease or sale may be made by a majority of the directors in meeting assembled, and the minority are bound thereby.

2 Cook, Corp. 3d ed. § 898; 1 Beach, Priv. Corp. § 227; Feld v. Roanoke Invest. Co. 123 Mo. 603, 27 S. W. 635;

Tanner v. Lindell R. Co. 180 Mo. 17, 103 Am. St. Rep. 534, 79 S. W. 155; Mercantile Library Hall Co. v. Pittsburgh Library Asso. 25 Pittsb. L. J. N. S. 345; St. Louis v. St. Louis Gaslight Co. 70 Mo. 98.

Mozley, C., filed the following opinion:

Injunction by the minority of the board of directors of the Hannibal, Missouri, Land Company, against the majority of said board, seeking to restrain said majority from selling about 2,800 acres of land owned by the Hannibal, Missouri, Land Company, a corporation.

The said land company was duly organized as a corporation on or about the 9th day of June, 1904, under article 7, chapter 12, of the Revised Statutes of Missouri of 1899. The land involved was formerly owned by William A. Munger and his brother, Lyman P. Munger, and is situated in Marion county, Missouri. The two Mungers and Lucy A. Munger, the wife of Lyman P. Munger, formed the incorporation.

William A. Munger had 500 shares, his brother, Lyman P. Munger, had 499 shares, and Lucy A. Munger one share, all of the par value of \$100 each; that upon the organization of said corporation, said William A. Munger, said Lyman P. Munger, and his wife, Lucy A. Munger, deeded the whole of the lands referred to, to the corporation, the Hannibal, Missouri, Land Company, and received therefor certificates of stock in proportion to the shares they had subscribed. In the articles of incorporation it was provided as follows: "The purposes for which this incorporation is formed are to buy and sell real estate, both farm and city property, at any place within the United States of America; and to own and hold, operate and control, such real estate and to exercise such acts of ownership and control over the same as may be exercised over the ownership and control of real estate by a private citizen of the state of Missouri."

Lyman P. Munger departed this life on or about the 28th day of February, 1906, leaving a will in which he bequeathed all of his said capital stock in said corporation to his wife, Lucy A. Munger. On the — day of May, 1911, the said William A. Munger departed this life, leaving a will in which plaintiffs, La Cosette Hendren and Thomas P. Head, were named and appointed executors, and bequeathing his said 500 shares of the capital stock in said corporation to the said executors as trustees, with power of ultimate sale and distribution to certain named parties who were to be the beneficiaries of the said William A. Munger. Thereafter the said Lucy A. Munger transferred one share of said stock to the defendant Frederick W. Neeper, and afterwards died, leaving a will duly proved and admitted to probate, whereby she bequeathed all of her remaining capital stock, namely 499 shares, to the defendant Leigh A. Neeper. In addition to the lands above referred to, the Mungers owned about 1,650 acres each in

Illinois, and it, after the organization of the corporation, was handled through the corporation. The corporation owned other property besides that mentioned, and had about \$5,000 in cash. It is conceded in the record that the defendants constituted a majority of the board of directors of said corporation.

At the regular annual meeting of the board of directors of said company, one William A. Rinehart had submitted a proposition in writing to buy said 2,800 acres referred to, and pay therefor to said company the sum of \$124,500; that all of the members of said board were present at said regular meeting of said board, and the proposition of Rinehart was duly laid before the board by defendant Frederick W. Neeper, one of said directors and the then president of said corporation. The matter was passed over from time to time until the 14th day of March, when said proposition was accepted by a majority vote of said board of directors, by resolution duly passed, and said board contracted to sell said lands for \$124,500 as follows: Twenty thousand dollars cash upon the execution of the deed, and the further sum of \$104,500 in three annual instalments, payable, respectively, in one, two, and three years from date of said sale, with interest on each of said deferred payments at 5½ per cent per annum from the date of sale, and the said Rinehart was to convey by trust deed, to the corporation, said lands, to secure the payment of the balance on the purchase price of same. The plaintiffs as trustees at this juncture instituted this action to enjoin the consummation of said sale. On trial in the Hannibal court of common pleas the chancellor found the issues for defendants, denied plaintiffs injunctive relief, or any relief, and dismissed the bill. From that decree, plaintiffs appealed to the St. Louis court of appeals, which court, because the amount involved is in excess of its jurisdiction, certified the cause to this court.



Appellants assign error as follows:

(1) Under the law and all the evidence the finding and decree should have been for plaintiff, awarding the relief prayed. The court erred in finding for defendant and in rendering a decree dismissing plaintiffs' bill.

(2) The court erred in overruling plaintiffs' motion for rehearing and new trial and their motion in arrest of judgment.

Under these assignments the contention is made by appellants that, if the sale of the land in controversy is consummated, it will result in annihilating the corporation, and

that this cannot be done without the consent of all the stockholders. We

cannot subscribe to that view. To do so would be to lose sight of the purposes for which the corporation was formed. Its charter powers expressly authorize it to buy and sell real estate—in fact, recites that the corporation was formed for that purpose. The sale of the land in question has no reference to the destruction of the corporation, it is merely carrying out the specific charter power the corporation possesses. Nor is there anything in the record that discloses any attempt or desire in making this sale, upon the part of the majority of the directors, to interfere with the integrity of the corporation.

Cook, in his admirable treatise on Corporations, states the following as the law: "The law seems to be clear that all corporate contracts are to be made by the directors. This includes original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult

5 A.L.R.—59.

the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts." Vol. 3, ¶ 709, p. 2423.

Further in the same volume, ¶ 712, p. 2435, it is said: "All contracts of a corporation are to be made by or under the direction of its board of directors. . . . And in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions. The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors makes or authorizes the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation."

We think there is no doubt that the majority of the board of directors were acting expressly within the charter powers of the corporation in making said contract of sale to Rinehart, and that said sale is legal and the corporation bound thereby.

Entertaining these views, it results that the decree of the lower court will be affirmed. It is so ordered.

Railey, C., absent.

White, C., concurs.

Per Curiam:

The foregoing opinion of Mosley, C., is adopted as the opinion of the court.

All concur.

## ANNOTATION.

### Power of directors to sell property of corporation without consent of stockholders.

- I. Introductory, 930.
- II. Solvent corporations:
  - a. Sale in course of business, 930.
  - b. Sale of all property, 931.
- III. Insolvent corporation, 932.

#### I. Introductory.

This note is confined strictly to the power of directors to sell the property of a corporation without the consent of its stockholders. It does not consider the power of the corporation itself to sell its property, nor does it discuss the relative powers of majority and minority stockholders with respect to a sale of the corporate property.

#### II. Solvent corporation.

##### a. Sale in course of business.

Where a corporation is a going and solvent concern, and has corporate power to sell its property in the ordinary course of the corporate business, the directors may make such sales without the consent of the stockholders. *Buell v. Buckingham* (1864) 16 Iowa, 284, 85 Am. Dec. 516; *McCloskey v. New Orleans Brewing Co.* (1911) 128 La. 197, 54 So. 738. And see the reported case (*HENDREN v. NEEPER*, ante, 927).

The directors are ordinarily intrusted with the management of the corporate business. *McCloskey v. New Orleans Brewing Co.* (La.) supra, wherein it was said that "stockholders cannot take the business out of the hands of the board of directors without very good causes."

In *Buell v. Buckingham* (Iowa) supra, it was held that directors of a corporation had power to sell the corporate real estate, though that power was not expressly mentioned in the articles of incorporation, by reason of the fact that the law under which the corporation was formed conferred on it such powers.

In *Sewell v. East Cape May Beach Co.* (1892) 50 N. J. Eq. 717, 25 Atl. 929,

the court held that where the purchase and sale of real estate were the principal purposes of a corporation, the board of directors had the power to specify the terms of the disposition of such property. The reported case (*HENDREN v. NEEPER*) is to be same effect.

In *Hendree v. Pinkerton* (1867) 14 Allen (Mass.) 381, it appeared that it was provided in the by-laws of a corporation that the directors were to have such powers, coextensive with those of the corporation, as were "not in violation of the rights of stockholders," etc. The court, in considering the validity of a mortgage authorized by the directors, said that under the powers given them the directors had authority to exercise the corporation's power to sell lands not necessary to the corporate business.

In *Buell v. Buckingham* (Iowa) supra, it was shown that the bulk of the property of a corporation was sold by a quorum of the directors thereof to one of their own number, to which sale a judgment creditor objected. It was held that, since the corporation had power to acquire and transfer property, that power was vested in the directors by the by-laws which provided that the president and two directors should form a quorum for the transaction of business. The sole right to manage the affairs was in the directors, and not in the stockholders.

In *McCloskey v. New Orleans Brewing Co.* (La.) supra, the action was brought by a stockholder to restrain the corporation from selling one of its breweries. The power to sell all the property of the corporation was restricted by the charter to the stockholders, but the proposed sale involved only part of the corporate property, and no element of bad faith was shown. It was held that the directors might not be restrained in their management of the business, and that the

only remedy of the stockholder was his right to get other stockholders to join with him in electing new directors at the proper time. The court said that there was no violation of the charter nor was the sale to be regarded in any degree as a liquidation of the corporation.

*b. Sale of all property.*

In the absence of special provision in the charter or by-laws, the directors of a corporation which is not in financial difficulty may not sell all the corporate property without the consent of the stockholders. *Hull v. Burr* (1909) 58 Fla. 432, 50 So. 754; *Rollins v. Clay* (1851) 33 Me. 132; *Feld v. Roanoke Invest. Co.* (1894) 123 Mo. 608, 27 S. W. 635.

In *Union Trust Co. v. Carter* (1905) 139 Fed. 717, the court remarked, obiter, that the directors of a corporation, which was in sound financial condition and able to carry on its business, could not sell all of its property.

In *Martin v. Continental Pass. R. Co.* (1880) 14 Phila. (Pa.) 10, concerning the power of directors over the entire property of a corporation, the court said: "To give it away or to sell it, or in any way to put it out of their control, and to delegate to others the powers which have been intrusted to them, is clearly in excess of their authority."

In *Hull v. Burr* (Fla.) *supra*, it was shown that a corporation, in order to obtain a loan, conveyed all of its property to the lender, the transaction having been accomplished by the directors without submission to the stockholders. It was held by the court that it would be presumed that a lawful transaction was intended, and that since the directors had no power to sell all the assets of the corporation without the assent of the stockholders the transaction could not be considered a sale.

In *Rollins v. Clay* (1851) 33 Me. 132, the action was in trespass for the taking away of the plaintiff's boom. The defendants asserted that the boom had been placed on property to which the defendants held a lease for a term of years. This leasehold had been the

property of a corporation from which the defendants claimed to have received it by a conveyance from the directors. It was held that while directors may take such measures as are necessary for the ordinary transaction of their corporation's activities they may not, without special authority, sell property necessary to the conduct of the corporate business. The leasehold term in question being of such a character, it was held that it could not be conveyed by the directors.

In *Feld v. Roanoke Invest. Co.* (Mo.) *supra*, it appeared that the directors of a fair company conveyed to the defendant all the assets of the fair company in consideration of a large amount of stock in the defendant corporation. The court said: "The officers of a corporation cannot, against the wishes of its stockholders or any one of them, sell and transfer the entire property from which it derives its emoluments, or which forms the basis of its business operations."

The directors of a solvent corporation may sell all its property without the consent of its stockholders, where such a sale is expressly authorized by the charter. *Union Trust Co. v. Carter* (Fed.) *supra*; *Reichwald v. Commercial Hotel Co.* (1883) 106 Ill. 439; *St. Louis v. St. Louis Gaslight Co.* (1879) 70 Mo. 69.

In *Union Trust Co. v. Carter* (Fed.) *supra*, it appeared that a corporation was formed, by the charter of which it was provided that the stockholders thereof might not vote, or control the management of the corporation in any way, the entire control thereof being delegated to the directors, who were given power to do all that the stockholders might ordinarily do. The directors of the corporation, which had been formed to sell certain property, sold all of its property to a fellow director. The complainant, a stockholder, thereupon sought to enjoin the transfer of the property to the vendee. It was held that since the stockholders had provided rules for the management of the corporation they must be guided thereby, and that, since the

sale in question was a matter coming within the provision, the stockholders of the corporation were necessarily bound. The result of the by-law was to authorize the directors to sell the property.

In *Reichwald v. Commercial Hotel Co.* (1883) 106 Ill. 439, it appeared that the directors of a hotel company had conveyed all of its property by a bill of sale to a creditor, to which sale other creditors objected on the ground, *inter alia*, that such an act was beyond the power of the directors. The stockholders had passed a resolution stating that no by-laws were considered necessary for the time being, since the articles of incorporation provided that the control of the corporation should be in the hands of the directors. It was held that, by virtue of this resolution, the directors were vested with complete management of the corporation, including the power to sell the hotel property.

In *St. Louis v. St. Louis Gaslight Co.* (Mo.) *supra*, it appeared that an act had been passed providing that the city of St. Louis and the board of directors of the St. Louis Gaslight Company might contract with "relation to the business of the company as may be beneficial to them and the public." The city, in accordance with a contract with the company, decided to purchase the property of the company, but the corporation denied the right of the city to enforce the contract, contending, *inter alia*, that, being a contract for the sale of all the property of the company, it was void, because not made with the assent of the stockholders. The court said: "The general doctrine that a board of directors of a corporation cannot sell out its business and property and defeat the object of its organization, without the consent of the stockholders, may be conceded, but it has no application in a case where, in the charter creating it, such power has been conferred on the directors."

### III. Insolvent corporation.

By the weight of authority, in the absence of a statute requiring the consent of stockholders, the directors of a corporation in failing circum-

stances may sell either part or all of the corporate property without the consent of the stockholders. *Beardstown Pearl Button Co. v. Oswal* (1906) 130 Ill. App. 290; *Rothwell v. Robinson* (1890) 44 Minn. 538, 47 N. W. 255; *Sewell v. East Cape May Beach Co.* (1892) 50 N. J. Eq. 717, 25 Atl. 929.

In *Beardstown Pearl Button Co. v. Oswal* (Ill.) *supra*, the action was to recover salary due from a corporation, the suit being brought against the defendant, another corporation, which had purchased the assets of the original debtor. The stockholders of the vendor company had passed resolutions directing a sale of the property for sufficient to pay the indebtedness, but at another meeting the directors resolved to sell the assets to the defendant for \$14,000. It was held that the plaintiff could not recover from the defendant, which had not undertaken to pay the indebtedness of the vendor corporation, but which purchased the assets thereof following the resolution of the directors. The vendor company was in financial straits at the time of the sale. The court said: "In the absence of express restrictions, the directors of a corporation, as managers thereof, have the power to sell and convey all of its property, without the consent of the stockholders, when it becomes necessary to do so to pay its debts."

In *Rothwell v. Robinson* (1890) 44 Minn. 538, 47 N. W. 255, wherein a minority stockholder complained that the directors of his corporation had suspended operations and were selling the tools and machinery of the corporation in order to pay its debts, it was held that since the business was unprofitable the directors were acting for the best interests of all parties.

In *Sewell v. East Cape May Beach Co.* (N. J.) *supra*, it appeared that the directors of the company had entered into a contract to sell its property, which was threatened with foreclosure. The plaintiff, a stockholder in the company, contended that the sale would deprive the company of all of its property, and that the directors might not take such proceedings with-

out the consent of all the stockholders. It was held that, since the charter of the corporation contemplated the purchase and sale of real estate, the court would not interfere with the directors in their management of the business, which included the making of contracts similar to the one in question. Nor, said the court, would the contemplated sale of all the company's property result in winding up the organization; such a sale was necessary under the circumstances.

It has been held, however, that the directors of an unprofitable corporation may not sell all its property with-

out the consent of its stockholders, where statutory provision has been made for dissolution or suspension of business. *Hunt v. American Grocery Co.* (1897) 81 Fed. 532.

In that case it appeared that the directors of a corporation had decided to sell the business thereof. It was held that the duties of directors were limited to the conduct of the business, and that they had no power to sell all the property of their corporation. If the business were unprofitable, the directors might take steps to dissolve the company, as provided by statute.

R. S.

MARTHA CAVANAGH et al., Respts.,

v.

HOBOKEN LAND & IMPROVEMENT COMPANY, Appt.

*New Jersey Court of Errors and Appeals—June 20, 1919.*

(— N. J. —, 107 Atl. 414.)

**Highways — ice on walk — liability of abutting owner.**

1. One who, having constructed a leader or down pipe to conduct water from his roof to a sewer in the street, temporarily permits it to be out of repair so that the water flows over the sidewalk and freezes, making the way dangerous for pedestrians, is not liable for injury to a pedestrian who is injured by falling upon the ice when attempting to use the walk with knowledge of the defective condition of the pipe.

[See note on this question beginning on page 936.]

**Negligence — duty to continue protection against legal acts.**

2. A person who assumes to protect others against injury which may result to them from the exercise by him

of a legal right in a legal manner is under no obligation to continue that protection indefinitely.

[See 20 R. C. L. 8.]

(Swayze, Bergen, and Williams, JJ., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Hudson County in favor of plaintiffs in an action brought to recover damages for personal injuries sustained by the plaintiff's wife, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. M. Casewell Heine, for appellant:

Defendant's motion for a nonsuit and its motion for the direction of a verdict should have been granted.

Jessup v. Bamford Bros. Silk Mfg. Co. 66 N. J. L. 641, 58 L.R.A. 329, 88 Am. St. Rep. 502, 51 Atl. 147; Bowlsby

v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; Aull v. Lee, 84 N. J. L. 155, 85 Atl. 1018; Lightcap v. Lehigh Valley R. Co. 87 N. J. L. 64, 94 Atl. 35.

Plaintiff's testimony as to water flowing from the pipe is in contraven-

tion of physical law and legally incredible.

*St. Louis Southwestern R. Co. v. Britton*, 111 C. C. A. 216, 190 Fed. 316; *Smitson v. Southern P. Co.* 37 Or. 74, 60 Pac. 907; *Gessner v. Metropolitan Street R. Co.* 137 Mo. App. 47, 119 S. W. 528; *Tillson v. Maine C. R. Co.* 102 Me. 463, 67 Atl. 407; *The Avon*, 22 Fed. 905; *Ferris v. Hershheim Bros.* 51 La. Ann. 178, 24 So. 771.

The action is one sounding in negligence, and not in nuisance.

*Aull v. Lee*, 84 N. J. L. 155, 85 Atl. 1018; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Hinmon v. Somers Brick Co.* 75 N. J. L. 869, 70 Atl. 166.

Mr. Arthur B. Archibald for respondents.

Gummere, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment in favor of Mrs. Cavanagh and her husband in an action brought to recover compensation for injuries received by the wife from a fall upon the pavement in front of the defendant company's property, caused by slipping upon ice which had formed there. The theory upon which the plaintiffs' case was rested, and upon which it was left to the jury, was that the presence of the ice upon the pavement was due to the wrongful act of the defendant, and that consequently it was responsible for injuries received by Mrs. Cavanagh, which were the direct result of that wrongful act.

The proofs showed that the roof upon the defendant's building was constructed with a gutter which gathered together the rain water, or the water resulting from melting snow, which had fallen thereon, and discharged it through a pipe or leader, which ran down the front of the building and into a drain which had been laid below the surface of the street; that this pipe or leader had been permitted by defendant to become broken and out of repair, so that the water thus collected, instead of passing down through it, ran down the outside thereof in large quantities and spread upon the sidewalk; and that the ice upon

which Mrs. Cavanagh slipped was formed by the freezing of the water which escaped from the leader by reason of its impaired condition.

In the case of *Jessup v. Bamford Bros.* Co. 66 N. J. L. 641, 58 L.R.A. 329, 88 Am. St. Rep. 502, 51 Atl. 147, which was a case somewhat similar to that now before us (the plaintiff having fallen upon ice which had formed upon the sidewalk in front of the defendant's premises from surface water cast thereon by the defendant), the trial judge instructed the jury that no person had a right to gather together the surface water on his own property, and throw it upon the sidewalk in a stream, thereby rendering the street more dangerous, or less convenient, than it otherwise would be for public travel; and that if he did so he was responsible for injuries caused thereby. This court held the instruction erroneous, for the reason that the concentration of the flow of water and its altered transmission to and upon a public highway was a necessary incident to the legitimate beneficial user of its property by the defendant, and that consequently any injury arising therefrom was not actionable.

If the defendant in the present case had not constructed a leader for the purpose of carrying off the water which had accumulated on the roof of its building, but had merely made an opening in the gutter for the purpose of permitting the water which had gathered therein to fall upon the street, the doctrine of the cited case would be applicable.

But it is argued that, conceding the defendant was under no legal obligation to construct the leader for the purpose of carrying the water into the drain, yet, having assumed to do this, he was bound to use reasonable care to maintain the leader in such a condition that it would perform the function for which it was intended; this being the doctrine, as it is said, laid down by the supreme court in *Wolcott v. New York & L. B. R. Co.* 68 N. J. L.

421, 53 Atl. 297, and approved by this court in *Brown v. Erie R. Co.* 87 N. J. L. 494, 91 Atl. 1023, Ann. Cas. 1917C, 496.

The doctrine of these cases, however, is not so broad as it seems to have been considered. A person who assumes to protect others against injury which may result to them from the exercise by him of a legal

**Negligence—  
duty to continue  
protection  
against legal  
acts.**

right, in a legal manner, is under no obligation to continue that protection indefinitely.

He may abandon his purpose at his own will, and, having done so, is under no obligation to afford further protection to third persons who have knowledge or notice of such abandonment. For instance, in the *Wolcott Case* the railroad company had stationed a flagman at a point where its road crossed a public highway, although it was under no legal obligation to do so, and, by reason of the negligent manner in which the flagman performed the duty imposed upon him by his employer, *Wolcott* was injured while passing over the crossing in front of a moving train. The court held that, having voluntarily assumed to protect the crossing, it was answerable for injuries to *Wolcott* which resulted solely from the flagman's negligence. But it cannot be doubted, we think, that if the railroad company, prior to the accident, had abandoned its purpose of protecting the crossing, either permanently or for an indefinite time, and had withdrawn its flagman, and caused actual notice of its action to be given to *Wolcott*, no recovery could have been had by the latter upon the theory that the company, at the time of the accident, owed him the duty of protecting the crossing by the presence of a flagman there, and had unlawfully failed to perform that duty.

The present case is similar in its essence to that suggested. The defendant had permitted the leader to become broken so that it no longer served the purpose for which it had been installed, and, although it had notice of this condition, it made no attempt to repair. Its failure to restore the leader was an abandonment, *pro tempore* at least, of its purpose to protect travelers along the sidewalk against dangers resulting from the formation of ice caused by the freezing of water discharged from the roof. Mrs. Cavanagh had personal knowledge of this situation, for she testified that on the evening before the accident, while walking past the defendant's premises upon the same sidewalk where she afterwards fell, she observed the water escaping out of the broken pipe and running down to and spreading over the sidewalk to such an extent that the street was all ice. The defendant having abandoned its purpose, at least temporarily, of taking care of the flow of water by conducting it through the leader into the drain, and Mrs. Cavanagh having knowledge of such abandonment, she is not entitled to recover against the defendant upon the theory that, having once assumed to protect travelers using the sidewalk against danger from accumulating ice, it was under a legal obligation to her to continue that protection.

**Highways—  
ice on walk—  
liability of  
abutting owner.**

We think that for the reasons indicated the defendant company was entitled to the direction of a verdict in its favor, and that the refusal of the trial court to do so on the application of defendant's counsel was legal error.

The judgment under review will be reversed.

Swayze, Bergen, and Williams, JJ., dissent.

### ANNOTATION.

#### **Duty of abutting owner to continue safeguard against injury which he has voluntarily furnished.**

In the reported case (*CAVANAGH v. HOBOKEN LAND & IMPROV. Co.* ante, 933), it appears that the plaintiff was injured by falling on ice which had formed in front of the defendant's property from the drip of a defective drainpipe on the roof. The plaintiff maintained that the discharge of water onto the sidewalk was a wrongful act, for the consequences of which liability would ensue. The construction of the pipe was concededly a voluntary act to protect pedestrians against dangers resulting from a formation of ice in this manner, and the defendant contended that his failure to make repairs was an abandonment of the project. The court states that the case is governed by the proposition that one who

assumes to protect others against possible injury from his exercise of a legal right is under no obligation to continue the protection indefinitely, and holds that no liability attaches for injuries to third persons having notice of the abandonment of the protection.

On analogous facts, the courts hitherto seem to have confined themselves to a discussion of the law of negligence or nuisance, and the reported case (*CAVANAGH v. HOBOKEN IMPROV. Co.*) appears distinctive in this respect. An extended search has not revealed any cases presenting a previous application of the proposition as to the duty of an abutting owner to continue a safeguard once voluntarily established.

R. E. B.

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EVA PEASE, Respt.,

v.

ROBERT COCHRAN, Appt.

*South Dakota Supreme Court — June 24, 1919.*

(— S. D. —, 173 N. W. 158.)

#### **Highway — load which frightens horse — negligence.**

1. Operating upon the highway a motor car loaded in such manner that a horse drawing a buggy on the highway becomes frightened at it is not actionable negligence.

[See note on this question beginning on page 940.]

— what constitutes negligence.

2. To render one liable for frightening a horse by a load transported in a motor car on a highway there must have been something about the appearance of the car or the manner in which it was loaded that would suggest to the ordinarily prudent man that it would terrify or frighten an ordinary horse.

[See 13 R. C. L. 255.]

— use of unbroken horse.

3. One attempting to drive upon a highway a horse which would take fright at any automobile does so at his peril.

[See 13 R. C. L. 470.]

— negligence in loading car.

4. A passenger automobile loaded with an article of furniture extending above the back seat, bags of grain on the front seat, and a short ladder strapped to the side, is not so loaded as to suggest to a reasonably prudent person that it would frighten or terrify an ordinary horse.

**Evidence — speed of automobile prior to accident.**

5. Upon the question of liability for frightening a horse by the excessive speed at which an automobile was driven, evidence is not admissible of the speed at which the car was driven



some time before the accident and before it stopped to await its turn to cross a bridge before meeting the frightened horse, if there is nothing to show its speed after it crossed the bridge, when it was first seen by the horse.

**Highway — duty to stop automobile — fright of horse.**

6. The driver of an automobile meeting a horse on a highway is not negligent in failing to stop his car before the horse is frightened into upsetting

the buggy if it did not show signs of fright until it suddenly turned around, when the automobile was still some distance from it, so quickly that the car could not be stopped before the accident.

**— signs of fright— duty to stop.**

7. One driving an automobile upon a highway when he meets a horse is bound to stop his car at once when the horse shows signs of fright, whether signaled to do so or not.

[See 2 R. C. L. 1187.]

**APPEAL** by defendant from a judgment of the Circuit Court for Brookings County (Skinner, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Cheever & Cheever, C. O. Trystad, and Olaf Eidem for appellant.

Messrs. Hall, Alexander, & Purdy for respondent.

Polley, J., delivered the opinion of the court:

While the plaintiff was riding in a buggy along a highway, in Brookings county, her horse ran away, upsetting the buggy and throwing the plaintiff to the ground, thereby causing her serious, and probably permanent, injury. Claiming the runaway was caused by the negligent manner in which defendant was operating a motor car on said highway, plaintiff brought this action to recover damages caused by said injury. She recovered judgment and defendant appeals.

The negligence attributed to defendant is charged in the plaintiff's complaint in the following manner: "That plaintiff's said injuries and damage were directly and proximately caused by the unlawful, careless, and negligent act of said defendant in so driving his said automobile, loaded in the manner aforesaid, at an excessive speed on the highway, and in failing to stop when the horse driven by plaintiff showed signs of fright and of being unmanageable.

This allegation charges three distinct acts of negligence: First, the improper and negligent manner of

loading the automobile; second, the excessive rate of speed at which defendant was driving at the time of the injury; and, third, the failure of defendant to stop said car when it became apparent to him that plaintiff's horse was becoming frightened. Either of these acts, if shown to have been the proximate cause of the injury, would entitle plaintiff to recover.

To prove the first act of negligence, it was shown that, at the time of the accident, defendant was carrying in his car an article of furniture, commonly known as a chiffonnier. Said chiffonnier was 4 feet high, 37 inches wide, and 18 inches deep. It was in the rear of the car, resting upon the floor of the car and against the cushion of the rear seat. It was brown, and had a polished surface. Plaintiff saw this piece of furniture in defendant's car at the time of the accident, and testified that it extended 3 or 4 feet above the back of the seat, and that it appeared to be white; but other witnesses who saw it testified that it did not extend more than about 18 inches above the back of the seat. From the height of the chiffonnier and the manner in which it was riding in the car, this latter estimate must be approximately correct. There was some conflict in the testimony as to what other articles were in the car. Defendant testified that

the only other article in the car was a 10-pound jar of butter that was beside him on the front seat. One or two witnesses who saw the car after the accident testified that there was a sack or two of grain on the front seat, and that there was a ladder some 12 feet in length, tied or strapped to the outside of the car. This may be a correct description

Highway—load  
which frightens  
horse—  
negligence.

of the appearance of the car, and it may be a fact that there was something about the appearance of the articles in said car that frightened plaintiff's horse; but these facts alone do not constitute actionable negligence on the part of the defendant.

In order to constitute actionable negligence on this branch of the case, there must have been something about the appearance of the car or the manner in which it was loaded that would suggest to an ordinarily prudent man that it

—what con-  
stitutes negli-  
gence.

would terrify or frighten an ordinary horse; i. e., a horse that had become accustomed to automobiles on the road. There are horses that would take fright at any automobile, regardless of whether it was loaded at all; but people are not required to refrain from using automobiles on the highway to avoid fright-

—use of un-  
broken horse.

ening such horses, and a person taking such horse on the highway would do so at his own peril. On the other hand, there are horses that would not take fright at an automobile, no matter how it might be loaded or what its appearance might be. But this fact would not justify a person in going upon a highway with an automobile so loaded, or having such an appearance, that it would be calculated to frighten or terrify an ordinary horse.

In this case, we do not believe that defendant's automobile was loaded in such a manner as to suggest to a reasonably

—negligence in  
loading car.

prudent person that it would frighten or terrify an ordinary horse. The article of furniture that defendant was hauling was one that he had a right to have in his possession and to move from one place to another, if he so desired, and to move it in an automobile if that were his most convenient mode of conveyance. To hold otherwise would be to prohibit him from moving such article of furniture over the public highway, unless he did so at a time when he knew there would be no horse-drawn vehicles on the road.

Upon the question of excessive speed, the trial court charged the jury as follows:

"You are hereby instructed that, under the laws of the state of South Dakota, 'every person operating a motor vehicle on a public highway of this state shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another, or the life or limb of any person; provided, that a rate of speed in excess of 25 miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another.'

"You are instructed that, if you shall find by a preponderance of the evidence that at the time of the accident which is the subject of this action the said defendant was driving his car at a rate of speed in excess of 25 miles per hour, then and in that case you would be justified in finding that the said defendant was not careful and prudent in the operation and management of his automobile."

The giving of this instruction is assigned as error. While said instruction may be correct as an abstract proposition of law, it has no application to the facts in this case. There is no evidence to show that the defendant was driving his car in excess of 25 miles per hour at the time of the accident, nor that the rate of speed at which he was driving contributed to the cause of

the accident. One witness, who met defendant just prior to the accident, testified that, as defendant approached the witness, he was driving at a rate of about 25 miles per hour, but it is an admitted fact that, before the witness passed defendant, defendant had stopped his car and waited while the witness crossed a bridge that was between him and the defendant. The defendant then crossed the bridge, going towards the plaintiff, who was some 40 to 60 rods from the bridge. There is no evidence to show that plaintiff's horse had seen defendant's car up to that time.

**Evidence—speed of automobile prior to accident.**

The rate of speed at which defendant had been traveling was therefore wholly immaterial; and it constituted error on the part of the trial court to permit this evidence to go to the jury. There is no evidence to show that, from the time the defendant crossed the said bridge until he met the plaintiff, his car exceeded a speed of 12 miles per hour.

As to whether defendant exercised proper diligence in stopping his car after it became evident that plaintiff's horse was frightened, plaintiff testified that her horse began to prick up its ears and to act frightened when defendant's car was still some 500 or 600 feet away; but it did not jump nor rear nor turn to the right nor to the left until it was within 300 or 400 feet from the car, when it suddenly stopped and backed into the shafts of the buggy, then threw its head to the right, then whirled to the left and upset the buggy; that the car was still 300 feet, or more, away when this occurred; that this all happened so quickly she did not have time to gather up the lines; that "it was all just one spasm; . . . there wasn't any first and second spasm;" that the horse did not go ahead any "between the time she first threw herself back in the shafts and the time she turned abruptly to the left and upset us." Plaintiff's mother, who was in the

buggy with plaintiff at the time of the accident, testified that she did not notice that the horse showed any signs of fright "until she came back in the shafts." A witness on behalf of plaintiff, who was in the road at a distance of about 60 rods behind the plaintiff and who saw the accident, testified that plaintiff's horse "just started to shy off a little, but just at pretty near the same time the whole thing happened, the buggy went over just, as you might say, in a twinkling, you might call it, when this horse pulled this other way. You might say there was no length of time between. It all happened in a very short time from the time he began to shy, I am pretty sure. I had the idea, by the looks of things, she had turned just a little to the right. I did not think it was jumping at that time, not at that time."

Another witness testified: "I noticed the horse turn a little out to the east and then whirl right around, facing the south across the road, and the buggy was upset and the horse faced the south. . . . Before the horse turned to the right, I noticed nothing to indicate that the horse was stopping, nor anything to indicate that it was settling back in the shafts. . . . The whole thing happened as quick as you can tell about it."

The testimony of the defendant does not materially differ from that of plaintiff on this point, except that defendant testified that the horse did not shy nor show signs of fright until he was within a distance of three times the length of his car from the horse, and that he then stopped his car as quickly as possible.

Under these circumstances, negligence cannot be imputed to defendant because he did not stop his car before the accident occurred. When the horse showed signs of fright, it was defendant's duty to at once stop the car, wheth-

**Highway—duty to stop automobile—fright of horse.**

**—signs of fright—duty to stop.**

er he was signaled to do so or not; but he was under no obligation to stop the car until the horse showed signs of fright, and the evidence clearly shows that there was not sufficient time to stop the car after the horse showed signs of fright and before the buggy was upset, or that anything defendant could have done would have prevented the accident. Therefore it is immaterial whether he stopped the car imme-

diately, and it is immaterial whether the car was 300 feet or only three times the length of the car from the horse when the horse first showed signs of becoming frightened.

Upon a careful examination of the whole record, we are of the opinion that the evidence is insufficient to support the verdict, and the judgment must be reversed.

### ANNOTATION.

#### **Liability of person transporting or conducting on highway an object which frightens horse.**

It is not intended to include cases of the ordinary automobile as an object of fright to horses, but one or two of such cases are cited in illustration. Steam rollers are excluded as it is often not possible to tell from the report of the case whether the roller is at work on the highway or is a passenger thereon.

The highway is for the use of the public. From time to time new kinds of vehicles come into common use thereon and become entitled to use it equally with the horse, as in the case of the bicycle, the automobile, and the electric car. It remains true, however, that in the transport of things unusually terrifying to horses great care is required. "The liability for injuries resulting from horses being frightened by unusual sights in the highway, caused by a defendant, has been distinctly recognized." *McCann v. Consolidated Traction Co.* (1896) 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888, 1 Am. Neg. Rep. 478. And in cases of certain things there are particular statutes declaring the rules applicable to the transport thereof upon the highway.

It is a general rule that one proceeding along the highway is not required to anticipate that the appearance of the object he is transporting or conducting will be terrifying to horses.

**Indiana.**—*Holland v. Bartch* (1889) 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; *Indiana Springs Co. v. Brown* (1905) 165 Ind. 465, 1 L.R.A.(N.S.)

238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Bostock-Ferari Amusement Co. v. Brocksmith* (1905) 34 Ind. App. 566, 107 Am. St. Rep. 260, 73 N. E. 281.

**Michigan.**—*Macomber v. Nichols* (1876) 34 Mich. 212, 22 Am. Rep. 522.

**Minnesota.**—*Thompson v. Dodge* (1894) 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545, 12 Am. Neg. Cas. 181.

**Missouri.**—*Atkinson v. Illinois Milk Co.* (1891) 44 Mo. App. 153.

**New York.**—*Scribner v. Kelley* (1862) 38 Barb. 14, 1 Am. Neg. Cas. 387.

**Pennsylvania.**—*Hazel v. People's Pass. R. Co.* (1890) 132 Pa. 96, 18 Atl. 1116.

**Porto Rico.**—*Torres v. Rubert y Catalá* (1913) 6 Porto Rico Fed. Rep. 701.

**South Dakota.**—The reported case (*PEASE v. COCHRAN*, ante, 936).

**Tennessee.**—*Coca Cola Bottling Works v. Brown* (1917) 139 Tenn. 640, 202 S. W. 926 (as stating the rule).

**Texas.**—*Patton-Worsham Drug Co. v. Drennon* (1911) 104 Tex. 62, 133 S. W. 871, 3 N. C. C. A. 859.

Thus one is not required to anticipate the fright of horses in transporting or conducting upon the highway cattle (*Torres v. Rubert y Catalá* (1913) 6 Porto Rico Fed. Rep. 701), a bear (*Bostock-Ferari Amusement Co. v. Brocksmith* (1905) 34 Ind. App. 566, 107 Am. St. Rep. 260, 73 N. E. 281), an elephant (*Scribner v. Kelley*

(1862) 38 Barb. (N. Y.) 14, 1 Am. Neg. Cas. 387), a horse car (*Hazel v. People's Pass. R. Co.* (1890) 132 Pa. 96, 18 Atl. 1116), a bicycle (*Holland v. Barch* (1889) 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; *Thompson v. Dodge* (1894) 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545, 12 Am. Neg. Cas. 181), or an automobile (*Indiana Springs Co. v. Brown* (1905) 165 Ind. 465, 1 L.R.A. (N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *PEASE v. COCHRAN* [reported herewith] ante, 936).

"Any person has a right to transport over the highway elephants and animals which may frighten horses. The right is undoubted, but it is to be so exercised as not to endanger the lives or property of others who have equal rights upon the highway." *Baker v. Lease* (1884) 2 Chester Co. Rep. (Pa.) 377 (obiter).

Where the jury found for the plaintiff when her horse was frightened by cattle driven along the highway in the evening, the court charged the jury that "if you believe from the evidence that the cattle in question were accompanied by two or more peons, that they were accompanied by one or more lamps or lights, and that they were conducted on the right side of the road, then such cattle were conducted in a lawful way, and you cannot find for the plaintiff." *Torres v. Rubert y Catalá* (1913) 6 Porto Rico Fed. Rep. 701, supra.

"It is certainly not true in law that street car companies are responsible for horses taking fright at the movements of their cars. They have just as much right to run cars on the streets of the city as other citizens have to drive through the streets with their horses and carriages." *Hazel v. People's Pass. R. Co.* (1890) 132 Pa. 96, 18 Atl. 1116, supra (case of a horse car).

Bicycles are on an equality with other vehicles on the highway, they are not supposed to frighten horses, and no negligence is alleged by stating the riding of the bicycle upon and along the center of the highway, at the rate of 15 miles per hour, up to and within 25 feet of the faces of the

horses. *Holland v. Barch* (1889) 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83, supra.

It has been said that "automobiles have not been regarded by the courts as dangerous things in the sense that extraordinary care in their operation is required by the law." *Coca-Cola Bottling Works v. Brown* (1917) 139 Tenn. 640, 202 S. W. 926.

It will be seen that in the reported case (*PEASE v. COCHRAN*, ante, 936) it is held that, in order to constitute actionable negligence in a person transporting on the highway an object which frightens a horse, there must be something that would suggest to an ordinarily prudent man that it would frighten or terrify an ordinary horse; and that, in the absence of such an object, the traveler is not required to stop his vehicle until the horse shows signs of fright, the traveler in this case conducting an automobile carrying a small piece of furniture.

In *Jeffery v. St. Pancras Vestry* (1894) 63 L. J. Q. B. N. S. (Eng.) 618, *Collins, J.*, said: "Now, if a person places his carriage, painted green, brown, or any ordinary colour, on a highway, and a certain horse has an aversion to the particular colour the carriage is painted and takes fright, no action would lie against the owner of that carriage, because he has violated no law, and is lawfully using the highway in an ordinary manner; but, on the other hand, if he has his carriage constructed and painted in such a manner as to be very conspicuous indeed, it might then become a nuisance."

The cases of steam engines are usually complicated by particular statutes. Apart from statute, the decisions are not entirely agreed.

In holding *inter alia* that it was error to instruct the jury that "the defendant had no right to run his steam engine on the public street or highway if such engine was calculated to frighten horses of ordinary gentleness," the court said: "The bringing of an unsightly object into the common highway is no more of a wrong because of its tendency to frighten horses of ordinary gentleness, than is the construc-

tion of a bridge over a river a wrong because of its tendency to delay vessels. . . . It would be difficult to pass through the streets of our large towns without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they become accustomed to them, but which nevertheless are used and moved about for proper and lawful purposes. . . . Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals, but they may nevertheless be lawfully taken on the public highways under proper precautions." *Macomber v. Nichols* (1876) 34 Mich. 212, 22 Am. Rep. 522.

But in *Lincoln Rapid Transit Co. v. Nichols* (1893) 37 Neb. 332, 20 L.R.A. 853, 55 N. W. 872, where the street railway was operated by steam, it was held that the granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the company from liability for injuries caused by its negligence in frightening horses, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars.

In *Watkins v. Reddin* (1861) 2 Fost. & F. (Eng.) 629, where the declaration charged the owner of a steam traction engine with using it on a highway for the purpose of drawing trucks and carriages, the court charged that the plaintiff was entitled to a verdict if the engine was calculated by noise and appearance to frighten horses, so as to make its use in the highway dangerous to persons riding or driving horses, and the owner knew of the danger, whether his knowledge was derived from the nature of the engine or otherwise.

While beyond the scope of this note, reference may be made in this connection to *Jeffery v. St. Pancras Vestry* (Eng.) *supra*, holding that while a steam roller returning from work had a right on the highway, whether it was so operated as to be likely to frighten horses was a question for the jury.

There are several cases where horses have been frightened by vehicles unnecessarily decorated.

It was held to be a case for the jury when the plaintiff's horse became frightened at the defendant's electric interurban car driven along the highway having attached to the front end thereof a large banner, composed of white cloth or muslin, upon which were printed large, black letters, advertising a street carnival which was at that time about to be given. *Indianapolis & G. Rapid Transit Co. v. Haines* (1903) 33 Ind. App. 63, 69 N. E. 187.

Similarly, it was held to be a question for the jury where the defendant propelled rapidly three excursion cars 600 to 1,000 feet apart, decorated with strips of white cotton cloth about a yard wide, with the words "Butchers' & Grocers' Association of Nashua" printed thereon, one of these strips being over the dashboard and others along the sides of each of the excursion cars, and the plaintiff's horse was frightened while harnessed to an ordinary delivery wagon, standing in the street in front of his store, between the defendant's tracks and the sidewalk, and secured by a rope and an ordinary pound weight. There was a great amount of noise made by the passengers on one of the excursion cars, in singing, shouting, and blowing horns. *Joyce v. Exeter, H. & A. Street R. Co.* (1906) 190 Mass. 804, 76 N. E. 1054.

Where black coats were hanging on a projection at the side of a street water sprinkler operated by electricity by, along, and on the tracks of an electric street railway, and the coats, by waving to and fro in the wind, or by operation of the car sprinkler along the tracks, frightened a well-broken horse of gentle disposition, and caused injury to the plaintiff, who was thrown from his carriage, the question whether the employees of the defendant, the street-railway company, were in the exercise of reasonable care to prevent injury in operating such street-car sprinkler, is one which the trial court must submit to the jury for their determination, even though it be that the

coats belonged to such employees, and were by them hung upon the projection of the car. The car being in such a condition as to cause fright to the horse and consequent injury to the plaintiff, it became a question for the jury to determine whether the defendant company was negligent in the performance of its duty to exercise reasonable care, by its servants, in the use of the public street, by operating the car while in this condition. *McCann v. Consolidated Traction Co.* (1897) 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888, 16 Am. Neg. Rep. 478.

So the case was for the jury where the defendant was using his wagon as a medium for advertising his business of selling bicycles, and to this end the wagon had upon it several nickel-plated bicycles, with flags also upon the wagon, flying from one side to the other, and frightened an ordinarily gentle horse of a third person, which ran away into the plaintiff's horse and buggy. The court said: "The evidence clearly shows that the wagon was so arranged and decorated as to readily frighten horses of ordinary gentleness, and that the display was not such as was really necessary for carrying on defendant's business, except in the way of advertising it." *Jones v. Snow* (1894) 56 Minn. 214, 57 N. W. 478.

But, on the other hand, the court affirmed a judgment for the defendant where the plaintiff, a physician, had hitched his horse on the side of the street, and he introduced evidence tending to prove that a milk wagon

belonging to the defendant was driven along at a rapid rate; that the horse attached to the wagon, and the wagon itself, were decorated with flags, it being a day known as "Centennial day;" and that the horse and wagon were driven so near the plaintiff's horse that the latter took fright, broke loose and ran away, and smashed the plaintiff's buggy to pieces. The court said: "It cannot be maintained, and we do not understand that the plaintiff's counsel so contends, that the decoration of the horse and wagon with flags amounted to negligence. The reasonable exercise of this and kindred rights must be accorded to all citizens on occasion of national holidays or festivities. All persons must expect this, and govern themselves accordingly." *Atkinson v. Illinois Milk Co.* (1891) 44 Mo. App. 153.

And in *Patton-Worsham Drug Co. v. Drennon* (1911) 104 Tex. 62, 133 S. W. 871, 3 N. C. C. A. 859, the court said: "We do not think that it should be held that the mere allegation that one drove 'a team of horses decorated with cloths upon which were various letters in bright colors,' without further statement of any of the attending circumstances, would state a cause of action when accompanied with no other allegation than that the team so decorated was calculated to frighten horses driven by persons upon such streets, and that in the exercise of ordinary care this danger should have been apprehended by the person driving such team." B. B. B.

## GULF, COLORADO, & SANTA FE RAILWAY COMPANY, Plffs. in Err., v.

T. E. LEMONS.

*Texas Supreme Court—November 6, 1918.*

(— Tex. —, 206 S. W. 75.)

### Domicil — of minor — effect of emancipation.

1. The domicil of an emancipated minor for jurisdictional purposes remains at the place of his father's residence until his disabilities have been removed in the statutory method, although he has taken up his residence in another county.

[See note on this question beginning on page 949.]

**Infant — settlement for injuries — ratification.**

2. Conversion by a minor whose disabilities have been removed, to his own use, of the fruits of a settlement made prior to such removal, of a claim for personal injuries inflicted upon him, is a ratification of such settlement.

[See 14 R. C. L. 251.]

**Domicil — of minor — residence of parent.**

3. The domicil of a minor child is always that of the father, and changes with the change of the father's domicil.

[See 9 R. C. L. 547.]

**Definition — reside.**

4. The word "resides," in a statute providing that proceedings to remove disabilities of a minor shall be instituted in the county where he resides,

does not mean his bodily presence, but his legal domicil, which is that of his father.

**Domicil — change by minor — permission of father.**

5. That a father had given his minor son permission to go out and make a living for himself, in response to which he had taken up his residence in another county, does not effect a change of residence within the meaning of a statute providing that proceedings to remove the disabilities of a minor must be brought in the county of his residence.

**Infant — removal of disabilities — statutory method.**

6. The statutory method must be pursued to remove the disabilities imposed by law upon a minor with respect to domicil.

**ERROR** to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Parker County (Patterson, J.), in plaintiff's favor in an action brought to recover damages for personal injuries received by plaintiff Lemons when a minor, and for a writ to revise and correct an order of the court approving a settlement, alleged to be grossly inadequate, made by plaintiff's father and defendant for the injuries received. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Terry, Cavin, & Mills, H. C. Shropshire, and Lee & Lomax, for plaintiffs in error:

By appropriating and disposing of property bought with part of the proceeds of settlement with defendant, plaintiff ratified the settlement.

Ferguson v. Houston, E. & W. T. R. Co. 73 Tex. 344, 11 S. W. 347; Robertson v. Tonn, 76 Tex. 542, 13 S. W. 385; Stewart v. Houston & T. C. R. Co. 62 Tex. 246; Jones v. Phoenix Bank, 8 N. Y. 228; Kennedy v. Baker, 159 Pa. 146, 28 Atl. 252; Wheaton v. East, 5 Yerg. 41, 26 Am. Dec. 251; Woerner, Guardianship, pp. 175, 293, 294.

Plaintiff, in contemplation of law, resided in Parker county where his father lived, regardless of where he at that time may have been living.

34 Cyc. 1645; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Shattuck v. Maynard, 3 N. H. 123; Lanning v. Gregory, 100 Tex. 310, 10 L.R.A. (N.S.) 690, 123 Am. St. Rep. 809, 99 S. W. 542; Trammell v. Trammell, 20 Tex. 407; Wheeler v. Hollis, 19 Tex. 522, 70 Am. Dec. 363; Russell v. Randolph, 11 Tex. 465; Hardy v. De Leon, 5 Tex. 237; Hoskins v. White, 13 Mont. 70,

32 Pac. 163; Franks v. Hancock, 1 Posey, Unrep. Cas. (Tex.) 554; Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293, Ann. Cas. 1913E, 1197; 22 Cyc. 516, 517; Young v. Hiner, 72 Ark. 299, 79 S. W. 1062.

Messrs. Adams & Stennis and J. C. Wilson, for defendant in error:

The court erred in declaring that the words in the statute, "where he may reside," were intended by the legislature to mean where the father of the minor may reside, and that by the use of the word "reside" the legislature meant the domicil of the father of the minor, as distinguished from the place "where the minor resides"—i. e., is bodily present.

First State Bank v. Fain, — Tex. Civ. App. —, 157 S. W. 454; Brown v. Boulden, 18 Tex. 435; Pearson v. West, 97 Tex. 238, 77 S. W. 944; Gulf, C. & S. F. R. Co. v. Rogers, 37 Tex. Civ. App. 99, 82 S. W. 822; O'Connor v. Cook, — Tex. Civ. App. —, 26 S. W. 1113; Taylor v. Wilson, 99 Tex. 651, 93 S. W. 109; Pecos & N. T. R. Co. v. Thompson, 106 Tex. 456, 167 S. W. 801; Durril v. Robison, — Tex. —, 138 S. W. 439; Cunningham v. Robison,



104 Tex. 227, 136 S. W. 439; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

**Greenwood, J.**, delivered the opinion of the court:

This was a suit by T. E. Lemons, referred to in this opinion as the defendant in error, to recover of the Gulf, Colorado, & Santa Fe Railway Company, plaintiff in error, damages for personal injuries sustained by defendant in error, when a minor. Defendant in error averred that a settlement had been made of his cause of action for said damages, between the guardian of his estate, acting under an order of the probate court, and the Railway Company, and sought by means of a certiorari, to revise the settlement, on certain grounds which need not be here stated. The plaintiff in error pleaded, among other defenses, that the defendant in error had ratified the settlement made with it by the guardian, after the disabilities of defendant in error, by reason of his minority, had been removed as prescribed by statute. Defendant in error alleged, in avoidance of plaintiff in error's plea of ratification, that the proceedings relied on for the removal of the disabilities of defendant in error were void, because had in the county of Parker, when he then resided in the county of Dallas.

The trial in the district court resulted in a verdict and judgment for defendant in error, which was affirmed in the court of civil appeals; it being held by the latter court that the question was one of fact as to whether defendant in error resided in the county of Parker or in the county of Dallas, when the order was made for the removal of his disabilities, and that the finding of the jury that defendant in error resided in the county of Dallas should not be disturbed, and that, considering the proceedings in Parker county for the removal of the minor's disabilities as void, there was no binding ratification of the settlement of the guardian with the railway company. *Gulf, C. & S. F. R. Co. v.*

5 A.L.R.—60.

*Lemons*, — *Tex. Civ. App.* —, 152 S. W. 1189.

The undisputed evidence disclosed that the father of the minor had his domicil in Parker county, without removing therefrom, from the date of the minor's injury to the date of trial of this cause; that in 1904, when the minor was about eighteen years old, his father had given him permission to go and make a living for himself, and from that date until subsequent to the order removing the disabilities he had worked and boarded at Dallas, receiving his own wages, and paying his own board and other living expenses; that on March 12, 1906, an application was filed for the minor in the district court of Parker county, alleging that he resided in Parker county, that he was a minor over nineteen years of age, that he owned property both real and personal, that he was capable of managing his property and had been managing his own affairs for some time, and that it was advisable and would be to his interest and advantage in person and property, to have his disabilities as a minor removed; that he would be twenty-one years old on February 22, 1907; that he and an older brother desired to go into business together at Dallas on May 1, 1906, and he would need money to put into the business; that he owned real estate in Parker county, which he had an opportunity to sell at a good price, and that unless he was enabled to make the sale he could not go into the desired business; that his father was living and resided in Parker county, and the application closed with the customary prayer for notice and for an order removing the minor's disabilities; that on April 3, 1916, a judgment was entered by the district court of Parker county, reciting that, said application coming on to be heard, the minor appeared by attorney, and the father of the minor also appeared and consented to the application, and it having appeared to the court that the grounds set out in said petition were suf-

ficient, and that the minor was over nineteen years of age, and that it would be advantageous to the minor to have his disabilities removed, it was therefore ordered, adjudged, and decreed by the court that the disabilities of minority of said T. E. Lemons be and the same were removed, and that the said T. E. Lemons should be deemed and held, for all legal purposes, of full age, and should be held responsible, and should have all the privileges and advantages as if he were of full age, saving only that he should not vote until he arrived at the full age of twenty-one years; that the land referred to in the above-mentioned application was purchased by the guardian with \$1,000 of the money obtained from the settlement of the minor's claim for damages against plaintiff in error; and that defendant in error, subsequent to the entry of the order removing his disabilities, first mortgaged and then sold and conveyed the land, with full knowledge of all material facts, and after having had advice of counsel with respect to his rights.

Since the land, which defendant in error mortgaged and sold, was obtained through the contract of settlement in behalf of the minor with the railway company, he could

Infant—settle-  
ment for in-  
juries—ratifica-  
tion.

not with full knowl-  
edge convert the  
land to his own use,  
without having im-  
puted to him a ratification of the

contract of settlement, unless he was under the disabilities of minority at the time he mortgaged and sold the land. 14 R. C. L. 251; Lemons v. Gulf, C. & S. F. R. Co. 63 Tex. Civ. App. 524, 134 S. W. 742.

We have concluded, after giving careful consideration to the question, that on the undisputed facts the law fixed the venue of the proceedings for the removal of the disabilities of T. E.

Domicil—of  
minor—effect of  
emancipation.

Lemons, as a minor, in Parker county, and that such order was valid. Article 5947, Vernon's Sayles's Texas Civil Statutes, provides that

the bill or petition, showing the cause or causes which make it advisable or advantageous to a minor to have his disabilities removed, shall be presented by any minor in this state, over the age of nineteen years, who may desire to have his disabilities removed, to the district court of the county where he may reside. It is certain that the domicil and residence of T. E. Lemons, under any meaning which may be ascribed to those words, was in Parker county until his removal to Dallas and his alleged emancipation; for T. E. Lemons was living in Parker county, and that was the domicil of his father, and it is settled law in Texas that the domicil of a minor child is al-  
ways that of the <sup>—of minor—resi-</sup>  
father, and neces- <sup>dence of parent.</sup>

sarily changes with any change of the father's domicil. Russell v. Randolph, 11 Tex. 465; Franks v. Hancock, 1 Posey, Unrep. Cas. (Tex.) 561, 562; Lanning v. Gregory, 100 Tex. 314, 315, 10 L.R.A. (N.S.) 690, 123 Am. St. Rep. 809, 99 S. W. 542; First State Bank v. Fain, — Tex. Civ. App. —, 157 S. W. 454. The reason for this rule is given by Judge Wheeler in the following language of Judge Story in his Conflict of Laws, § 44: "Minors are generally deemed incapable, proprio marte, of changing their domicil during their minority." Hardy v. De Leon, 5 Tex. 237.

Schouler states: "The domicil of origin remains until another is lawfully acquired, and, since minors are not sui juris, they may not change their domicil during their minority, though they may when of full age." Schouler, Dom. Rel. p. 313.

It is obvious that the disability of a minor to effect a change of domicil by act of his will rests, at least in large measure, on his presumed lack of capacity to form the intention, which is the all-important element in effecting such a change, and the law makes no distinction with respect to this lack of capacity at the varying stages of minority; the

presumption being the same at eighteen years as at eighteen months. Since there is no important difference between the intention required to effect a change of domicile and to effect a change of residence, whenever the word "residence" is used in the sense of a home fixed by intention, concurring with bodily presence, it must be held that the disability which prevents the minor, through lack of capacity to have the essential intention, from acquiring a new domicile, likewise prevents him from acquiring such a new residence as is above mentioned. *Brown v. Boulden*, 18 Tex. 435; *Brisenden v. Chamberlain* (C. C.) 53 Fed. 311; *Cannon's Estate*, 15 Pa. Co. Ct. 312, 314.

It was necessarily determined by this court that the word "reside," as used in article 5947, means something different from being bodily present, when it was decided in *Durrill v. Robison*, — Tex. —, 138 S. W. 107, that a proceeding for the removal of a minor's disabilities showed upon its face that the minor did not reside in Travis county, because the application showed that the minor came to Travis county for the purpose of having her disabilities removed, and the order granting the application recited that the minor "was temporarily a resident of Travis county."

The word "residence" not being used in article 5947 to denote the mere place of a minor's bodily presence, and a minor having no residence, separate from his domicile, when the word "residence" is used in any other sense than the place where one is bodily present, article 5947 fixes the venue of proceedings for the removal of a minor's disabilities in the county in which he has his domicile, and that is the county of his father's domicile.

The reason why the legislature has prescribed that proceedings for the appointment of a guardian and for the removal of the disabilities of a minor shall ordinarily be in the

county of the domicile or residence of the father, and that the father is entitled before all others to be appointed guardian of the estate of his minor child, and is entitled to notice of a petition for the removal of the disabilities of minority of his child, is, no doubt, because of the natural affection of the father and his parental obligations and duties. In no other way could the welfare of the child be better safeguarded.

If the father be living in this state, upon him alone devolves the duty of resisting the application, if the true interests of the minor require its defeat. In effect, this makes the father, when living in Texas, the sole real defendant in the proceeding, and our construction of this statute accomplishes what is recognized as the principal general object of our Venue Statutes, viz., "to bring litigation to the home of the defendant." *Pearson v. West*, 97 Tex. 243, 77 S. W. 945. Notice is not to be given the father unless he is living within the state, because if he is living without the state our courts would have no jurisdiction, as determined in *Lanning v. Gregory*, 100 Tex. 315, 10 L.R.A. (N.S.) 690, 123 Am. St. Rep. 809, 99 S. W. 542.

In Arkansas, the venue of proceedings to remove disabilities of minority is fixed in the circuit court of the county in which the minor "is a resident." In affirming the jurisdiction in the county of the minor's domicile, the supreme court of Arkansas said: "It is contended that the circuit court of Sebastian county, for the Fort Smith district, did not have jurisdiction of John Rollinson at the time it undertook to remove his disabilities as a minor, because he was not a resident of that district, and for that reason the order made for that purpose is void. But the last domicile of the deceased father was in that district, and by reason thereof it was the legal residence of the minor son, John Rollinson, and, according to the general rule, so remained, and could not be

**Definition—**  
**reside.**

changed or removed by his own act until he reached his majority. *Grimmett v. Witherington*, 16 Ark. 377, 63 Am. Dec. 66; *Johnston v. Turner*, 29 Ark. 280; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; *Allgood v. Williams*, 92 Ala. 551, 8 So. 722. And see *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857; *Young v. Hiner*, 72 Ark. 299, 79 S. W. 1063.

The supreme court of Maryland, in *Sudler v. Sudler*, 121 Md. 46, 49 L.R.A. 866-869, 88 Atl. 26, Ann. Cas. 1913E, 1191, stated at some length the reasons which require that residence be construed as synonymous with domicile in arriving at the meaning of a statute providing for the appointment of a guardian of an infant by "the orphans' court of the county in which such infant shall reside."

In our opinion the fact that T. E. Lemons's father had given him permission to go out and make a living for himself, and he had thereafter gone

**Domicil—change by minor—permission of father.**

to Dallas and made and spent his own earnings, did not affect the jurisdiction in Parker county. We think the correct principle is that announced in *Ruling Case Law*, that such an emancipation does not remove the disabilities of minority except as to the father's interest in, and control over, the minor's labor and earnings. 20 R. C. L. 608, 609. The father has a true property right in the fruits of the minor's labor, which he may release, though the general rule appears to be that the father may even revoke this release, if it does not interfere with rights acquired on the faith thereof. 20 R. C. L. 611. But the father's right to the custody and control of the person of his minor child, apart from his right to the benefit of his labor and earnings, is in no sense a property right of the father. Instead, the right of the father here springs from the duty and trust imposed on him by law, for the child's

protection and benefit, and it is therefore held that the father, under the common law, cannot divest himself, even by contract with the mother, of the custody and control of his minor child. *Lanning v. Gregory*, 100 Tex. 314, 315, 10 L.R.A.(N.S.) 690, 123 Am. St. Rep. 809, 99 S. W. 542; *Schouler, Dom. Rel.* § 251, p. 346; *Legate v. Legate*, 87 Tex. 252, 28 S. W. 281.

In an early case in Massachusetts, it was contended that upon a minor acquiring a right, as against his father, to apply his own earnings to the support of one whom the minor had married with the father's consent, he also acquired the right to fix the residence of himself and family. But the supreme court of Massachusetts held that the laws of that state recognized no such consequences of emancipation, saying: "But it [emancipation] did not give him [the minor] a capacity to make binding contracts, beyond other infants; or any political or municipal rights, which do not belong by law to minors." *Taunton v. Plymouth*, 15 Mass. 203.

To the same effect is *Jacobs, Domicil*, §§ 229, 231.

In order for a minor in Texas to be relieved of the disabilities imposed on him by law, with respect to domicile, for his own special protection, the statutory method for the removal of his disabilities must be pursued. *Vernon's Sayles's Tex. Civ. Stat. art. 5947*. There is authority for the proposition that, even where the proceedings to remove a minor's disabilities, as in Texas, are held to be special, and not to be supported by the presumptions which usually uphold judicial proceedings, yet the recital of facts on the face of the proceedings, which sustain the jurisdiction, cannot be collaterally impeached. *Young v. Hiner*, *supra*; *Hindman v. O'Connor*, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052. But the conclusions we have reached render it unnecessary

**Infant—removal of disabilities—statutory method.**

for us to determine the correctness of this proposition.

It is ordered that the judgments of the District Court and of the

Court of Civil Appeals be reversed, and that judgment be here rendered for plaintiff in error.

Petition for rehearing denied.

### ANNOTATION.

#### **Emancipation by parent as affecting right of infant to change domicil or settlement.**

I. Scope and introduction, 949.

II. Domicil,

III. Pauper settlement, 950.

##### *I. Scope and introduction.*

The present annotation is confined to cases of emancipation by the parent or parents of a minor child, and therefore does not include decisions where the emancipation was by circumstances, such, for instance, as the death of the parents, etc.

Both domicil and pauper-settlement cases have been included, although, as subsequently shown, they are generally distinctive.

As to approximation to maturity as affecting rule that an infant cannot change his domicil, see annotation to Bjornquist v. Boston & A. R. Co. post, 958.

##### *II. Domicil.*

The universally recognized rule is that a domicil once acquired is presumed to have continued the same until a new one is acquired, that to effect a change of domicil an intent must be established, and that a minor, being non sui juris, is legally incapable of forming such an intent. Then arises the question of the effect of emancipation of the minor by the parent, or, in other words, whether or not emancipation removes the incapacity of the infant as regards his right to choose a domicil for himself. A leading text-writer has said that emancipation, in the law of infancy, generally signifies the release of the infant from parental dominance or control, so far, at least, as to legally entitle him to his own time and earnings, and to sue for and recover such earnings in his own name and right, and for wrongs interfering with his earning capacity or opportunities (Spencer, Dom. Rel.

§ 475), from which it would seem that emancipation is limited to matters relating to services and earnings.

In keeping with this conclusion and definition, as well as with the above-stated general rule, is the decision in the reported case (GULF, C. & S. F. R. CO v. LEMONS, ante, 943) to the effect that an emancipation by a parent, effected by allowing his minor son to labor and live away from home and to retain his earnings, does not remove the disabilities of minority except as to the father's interest in and control over such labor and earnings, wherefore the emancipation does not affect the domicil of the infant or give him the right to change it.

And again in Delaware, L. & W. R. Co. v. Petrowsky (1918) 162 C. C. A. 570, 250 Fed. 554, writ of certiorari denied in (1918) 247 U. S. 508, 62 L. ed. 1241, 38 Sup. Ct. Rep. 427, in answering the question, "Does emancipation confer upon the child a right to choose his own domicil?" the court applied the rule that emancipation merely relates to wages and earnings, and held that an emancipated minor could not acquire a new domicil.

And that under statutes providing that the domicil of a minor is that of his father, if alive, unless he has voluntarily relinquished his parental control to "some other person," a change of domicil does not result from a minor's leaving the parental abode by consent of his father and going into another county to live in order to be convenient to a partnership business which such minor conducts in his own name for himself and his father, was the holding in Jackson v. Southern Flour & Grain Co. (1917) 146 Ga. 453, 91 S. E. 481.

However, in Russell v. State (1901)

62 Neb. 512, 87 N. W. 344, it was expressly held that a minor who has been emancipated by his parents is capable of acquiring a legal domicile or residence of his own, the court saying that such a case formed an exception to the general rule that an infant is incapable of changing his domicile. But in this connection it is worthy of note that the court, as its sole authority for the ruling, cited "10 Am. & Eng. Enc. Law, 2d ed. 31, note and cases there cited." The cases there cited, however, as the note to text shows, are a few early cases upon the question of the right of an emancipated minor to gain a "settlement" of his own as a pauper under "Poor Laws," that are dependent upon peculiar statutory provisions which clearly distinguish them from the general question of domicile of infants. For a case which expressly points out the distinction between "domicil" and "settlement" cases, see *Delaware, L. & W. R. Co. v. Petrowsky* (Fed.) *supra*.

### III. Pauper settlement.

As before stated, the adjudications upon the question of the effect of the emancipation of a minor by a parent, upon the right of the former to acquire for himself a poor settlement, turn upon the peculiar statutes which define the rights of infant paupers, and generally make settlements dependent upon the time of residence, which is not an element in acquiring a domicile.

In Iowa, under statutes providing that a person, having attained majority, may gain a settlement in the county of his residence, and that legitimate minor children follow and have the settlement of their father, etc., but containing no provision relating specifically to emancipated minors, it has been held that a legitimate minor child who has been emancipated by agreement with his father cannot acquire by residence a settlement independent of that of his father. *Clay County v. Palo Alto County* (1891) 82 Iowa, 626, 48 N. W. 1053. The court said that "while a minor, emancipated, may have some additional rights or privileges, he does not from that fact alone attain his majority."

And in Maine, under a statutory provision (Rev. Stat. chap. 24, § 1) that "a person of age" and "having his home in a town for five successive years" thereby acquires a settlement, the rule is that an emancipated minor cannot acquire a settlement by having his home in any particular town for five years. *Veazie v. Machias* (1861) 49 Me. 105; *North Yarmouth v. Portland* (1881) 73 Me. 108; *Brooksville v. Bucksport* (1882) 73 Me. 111; *Thomaston v. Greenbush* (1909) 106 Me. 242, 76 Atl. 690; *Bangor v. Veazie* (1914) 111 Me. 371, 89 Atl. 193. Nor can any of the years of his residence while under age be tacked to those after age to make up the requisite five. *Veazie v. Machias* and *North Yarmouth v. Portland* (Me.) *supra*.

But under some modes and conditions prescribed by statute for acquiring a settlement, an emancipated pauper may acquire a settlement in his own right.

Thus, in Maine, under the provisions of the Act of 1821, chap. 122, § 2, that "any person resident in any town at the date of the passage of this act," who had not within a specified time received supplies therefrom as a pauper, "shall be deemed to have a settlement in the town where he then dwells and has his home," it has been held that a minor emancipated by his parents is capable of gaining a settlement during his minority. *Lubec v. Eastport* (1824) 3 Me. 220; *Wells v. Kennebunk* (1831) 8 Me. 200; *Portland v. New Gloucester* (1840) 16 Me. 427.

So, in New Hampshire, under Rev. Stat. chap. 65, § 1, which provided that "upon the division of any town any person having his settlement therein shall thereafter have his settlement in that town in which his last dwelling place shall have been," it has been held that an emancipated minor, having a dwelling place in a different part of town from that of his parents, acquired a new and different settlement when such parts of the town were divided. This conclusion, it was pointed out, was the result of the statute, as it was not claimed that the minor had gained a settlement by his own act.

And in *Dennysville v. Trescott* (1849) 30 Me. 470, where an emancipated pauper was not a resident of T. at the time of its incorporation, it was said that he did not follow the settlement of his parent (because emancipated), which was in T. because of residence there at the time it was incorporated, but was "to be regarded in the same manner as if he had been twenty-one years of age," so that, if he had no settlement in the state, the town in which he fell into distress would be bound to support him.

And generally, to the effect that an emancipated minor may gain a settlement for himself, see *Washington v. Beaver* (1842) 3 Watts & S. (Pa.) 548,

and *Rex v. Witton* (1789) 3 T. R. 355, 100 Eng. Reprint, 617, 1 Revised Rep. 717.

However, in *Brooksville v. Bucksport* (1882) 73 Me. 111, the court said: "It has frequently been said, speaking generally, that a minor who has been emancipated may acquire a legal settlement in his own right, and the statement, without qualification, is misleading. He may acquire a settlement in his own right under certain modes and conditions, but not in all the modes prescribed by statute." And see *Taunton v. Plymouth* (1818) 15 Mass. 203, as quoted in the reported case (*GULF, C. & S. F. R. Co. v. LEMONS*, ante, 943). G. J. C.

CHARLES J. BJORNQUIST, by Next Friend, Plff. in Err.,  
v.

BOSTON & ALBANY RAILROAD COMPANY.

*United States Circuit Court of Appeals, First Circuit — June 21, 1918.*

(163 C. C. A. 179, 250 Fed. 929.)

**Domicil — change by minor.**

1. An orphan minor whose grandparents are dead, and who has arrived at years of discretion, may change his domicil.

[See note on this question beginning on page 958.]

**Appeal — failure to plead in abatement — effect of admissions of evidence.**

2. Although a plea in abatement is necessary to raise the question of jurisdiction, the appellate court may consider the question if evidence relating to it was admitted, although no plea in abatement was filed.

**Evidence — burden of proof — want of jurisdiction.**

3. Where plaintiff in a Federal case alleges in his declaration all the facts essential to Federal jurisdiction, the burden of proof is on defendant denying such jurisdiction to establish facts showing want of jurisdiction.

**Infant — change of domicil.**

4. Generally, a minor is incapable of changing his domicil and acquiring a new one during his minority.

[See 9 R. C. L. 547.]

**Jurisdiction — evidence — domicil.**

5. Domicil is the test of citizenship for the purpose of jurisdiction of the courts of the United States.

[See 7 R. C. L. 1035.]

**Railroad — duty to trespasser.**

6. In Massachusetts, a railroad company owes a trespasser on its train only the duty of refraining from wilfully, recklessly, or wantonly exposing him to injury.

[See 22 R. C. L. 924.]

**— injury to trespasser — liability.**

7. A railroad company is liable for injury to a boy trespassing on its train, who is caused to fall from it by fright at the threats and conduct of a trainman.

[See 22 R. C. L. 927, 928.]

**Trial — question for jury — wilful negligence.**

8. The question of wilful negligence in an action for forcing a boy off a moving train is for the jury, where reasonable men might differ on the questions whether the trainman who pushed the boy off the train was acting within the scope of his authority and whether the injury was the direct result of such conduct.

**Master and servant — authority of trainman.**

9. A trainman who is the sole representative of the railroad company upon a section of a train making a flying switch may be found to have authority to remove trespassers from the train.

**Trial — jury — cause of fall from train.**

10. The jury must determine whether or not the fall of a trespassing boy from a moving train was caused by the threats and attitude of a trainman rather than his own volition.

**ERROR** to the District Court of the United States for the District of Massachusetts (Morton, J.) to review a judgment in favor of defendant in an action brought to recover damages for personal injuries, alleged to have been caused by the negligence of defendant and its servants. *Judgment vacated and verdict set aside.*

The facts are stated in the opinion of the court.

Argued before Bingham and Johnson, Circuit Judges, and Hale, District Judge.

Messrs. Bernard J. Killion, Charles Toye, and Samuel A. Fuller, for plaintiff in error:

There has been, at the time of the institution of this suit, a change in the "citizenship" of the plaintiff, he having arrived at the age of discretion, being nineteen years of age.

Rex v. Roach, 6 T. R. 247, 101 Eng. Reprint, 536, 3 Revised Rep. 169; Rex v. Walpole St. Peter's, Burr. Sett. Cas. 638; Rex v. Offchurch, 3 T. R. 114, 100 Eng. Reprint, 484; Rex v. Witton cum Twambrookes, 3 T. R. 355, 100 Eng. Reprint, 617; Rex v. Collingbourn Ducis, 4 T. R. 199, 100 Eng. Reprint, 972; Fremont v. Sandown, 56 N. H. 300; Tunbridge v. Eden, 39 Vt. 17; Porter v. Powell, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295; Alexandria v. Bethlehem, 16 N. J. L. 119, 31 Am. Dec. 229; Re Dunavant, 96 Fed. 542; Russell v. State, 62 Neb. 512, 87 N. W. 344; Lamar v. Micou, 114 U. S. 219, 29 L. ed. 94, 5 Sup. Ct. Rep. 857; Rex v. Greenhill, 4 Ad. & El. 624, 111 Eng. Reprint, 922, 6 Nev. & M. 244; Com. v. Graham, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706; Pottinger v. Wightman, 3 Meriv. 67, 36 Eng. Reprint, 26, 17 Revised Rep. 20; Johnstone v. Beattie, 10 Clark & F. 138, 8 Eng. Reprint, 693; Holyoke v. Haskins, 5 Pick. 20, 16 Am. Dec. 372; Cutts v. Haskins, 9 Mass. 543; Guyer v. O'Daniel, 1 Binn. 349, note; Upton v. Northbridge, 15 Mass. 239; School Directors v. James, 2 Watts & S. 568, 37 Am. Dec. 525; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Macpherson, Infants, 579; Stephens v. M'Farland, 8 Ir. Eq. Rep. 444; Woolridge v. McKenna (C. C.) 8 Fed. 650; Lubec v. Eastport, 3 Me. 220; Monroe v. Jack-

son, 55 Me. 55; Thomaston v. Greenbush, 106 Me. 242, 76 Atl. 690; Lowell v. Newport, 66 Me. 78; Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Williamson v. Osenton, 232 U. S. 619, 58 L. ed. 758, 34 Sup. Ct. Rep. 442.

From the testimony, the jury would have been justified in finding that the brakeman acted with such a wilful and wanton disregard of human life and personal safety as would make the defendant liable to the plaintiff, even though he was a trespasser, and, on the evidence, this was a question of fact for the jury, and not one of law for the court.

Albert v. Boston Elev. R. Co. 185 Mass. 210, 70 N. E. 52; Ansteth v. Buffalo R. Co. 145 N. Y. 211, 45 Am. St. Rep. 607, 39 N. E. 708, 5 Am. Neg. Cas. 382; McKeon v. New York, N. H. & H. R. Co. 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329, 14 Am. Neg. Rep. 74; Lovett v. Salem & S. D. R. Co. 9 Allen, 557, 3 Am. Neg. Cas. 754; Doggett v. Chicago, B. & Q. R. Co. 134 Iowa, 690, 13 L.R.A. (N.S.) 364, 112 N. W. 171, 13 Ann. Cas. 588; Chicago, M. & St. P. R. Co. v. West, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672; Kline v. Central P. R. Co. 37 Cal. 400, 99 Am. Dec. 282, 8 Am. Neg. Cas. 58; Benton v. Chicago, R. I. & P. R. Co. 55 Iowa, 496, 8 N. W. 330, 3 Am. Neg. Cas. 349; Illinois C. R. Co. v. Brown, — Miss. —, 39 So. 531; Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. 437; Enright v. Pittsburg Junction R. Co. 198 Pa. 166, 53 L.R.A. 330, 82 Am. St. Rep. 795, 47 Atl. 938, 9 Am. Neg. Rep. 364; Texas & P. R. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Houston & T. C. R. Co. v. Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W.



496; Texas & N. O. R. Co. v. Buch, — Tex. Civ. App. —, 102 S. W. 124; Biddle v. Hestonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485; Hestonville, M. & F. Pass. R. Co. v. Biddle, 1 Monaghan (Pa.) 553, 16 Atl. 488; Pierce v. North Carolina R. Co. 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; Thompson v. Yazoo & M. Valley R. Co. 72 Miss. 715, 17 So. 229.

Messrs. George L. Mayberry, George P. Furber, and Lowell A. Mayberry, for defendants:

The decision of the state court should be followed.

Bjornquist v. Boston & A. R. Co. 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; Albert v. Boston Elev. R. Co. 185 Mass. 210, 70 N. E. 52; Massell v. Boston Elev. R. Co. 191 Mass. 491, 78 N. E. 108; Anternoitz v. New York, N. H. & H. R. Co. 193 Mass. 542, 79 N. E. 789; Lebov v. Consolidated R. Co. 203 Mass. 380, 26 L.R.A. (N.S.) 265, 89 N. E. 546; Shelly v. Boston Elev. R. Co. 211 Mass. 516, 98 N. E. 575; Kallio v. Worcester Consol. Street R. Co. 222 Mass. 121, 109 N. E. 814; Planz v. Boston & A. R. Co. 157 Mass. 377, 17 L.R.A. 835, 32 N. E. 356; Mugford v. Boston & M. R. Co. 173 Mass. 10, 52 N. E. 1078, 5 Am. Neg. Rep. 611; New York C. & H. R. R. Co. v. Price, 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

It was necessary for the plaintiff to introduce evidence tending to show that the person who ordered the plaintiff to get off the car was acting within the scope of his authority.

Corcoran v. Concord & M. R. Co. 6 C. C. A. 231, 5 U. S. App. 453, 56 Fed. 1014; Harrington v. Boston & M. R. Co. 213 Mass. 338, 45 L.R.A. (N.S.) 813, 100 N. E. 606, Ann. Cas. 1914A, 597; Marion v. Chicago, R. I. & P. R. Co. 59 Iowa, 428, 44 Am. Rep. 687; Farber v. Missouri P. R. Co. 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, 8 Am. Neg. Cas. 475; Towanda Coal Co. v. Heeman, 86 Pa. 418; Chesapeake & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947, 8 Am. Neg. Cas. 651; International & G. N. R. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; Bess v. Chesapeake & O. R. Co. 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126; Chicago, R. I. & P. R. Co. v. Brackman, 78 Ill. App. 141; Lake Shore & M. S. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480; Illinois C. R. Co. v. King, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552.

Plaintiff offered no evidence which would warrant a finding that he was a citizen of Maine at the time this action was brought.

Lindsay-Britton Live Stock Co. v. Justice, 111 C. C. A. 525, 191 Fed. 163; Roberts v. Lewis, 144 U. S. 653, 36 L. ed. 579, 12 Sup. Ct. Rep. 781; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Voss v. Neineber, 68 Fed. 947; Woolridge v. McKenna, 8 Fed. 668; Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 48; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; Dedham v. Natick, 16 Mass. 135; Freetown v. Taunton, 16 Mass. 52.

Bingham, Circuit Judge, delivered the opinion of the court:

This is an action of tort for personal injuries sustained by the plaintiff through the alleged wilful, reckless, and wanton conduct of the defendant, its agents, and servants.

The defendant filed a plea in abatement, setting forth the pendency of a prior suit for the same cause of action in the superior court for the county of Suffolk and commonwealth of Massachusetts. It also filed an answer, denying each and every allegation of the plaintiff's writ and declaration, and each and every count thereof, and further alleged that the plaintiff was guilty of negligence which contributed to his injury. No plea in abatement or answer in abatement, setting forth that the plaintiff was a citizen and resident of Massachusetts, was filed. Under the practice in Massachusetts, the question of jurisdiction must be raised either by a plea in abatement or an answer in abatement. Rev. Laws 1902, chap. 173, §§ 18, 19. And it is held that a plea to the merits waives all matters in abatement not taken in a plea or an answer in abatement. Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116. The plaintiff in his declaration alleged all the facts essential to Federal jurisdiction. The allegation of these facts, *prima facie*, was true. If the defendant had filed a plea in abate-

ment or an answer in abatement, it would have been necessary to have averred therein that the plaintiff was a citizen of the commonwealth of Massachusetts, and under that plea the burden of proof would have fallen upon the defendant. *Adams v. Shirk*, 55 C. C. A. 25, 117 Fed. 801, 895. Evidence, however, relating to the question of jurisdiction

**Appeal—failure to plead in abatement—effect of admissions of evidence.**

having been admitted at the trial, we think we should consider the case as though a plea

in abatement or an answer in abatement raising the jurisdictional question had been filed. The burden of proof, however, still remains on the defendant on this issue.

The decisions in *Lindsay-Bitton Live Stock Co. v. Justice*, 111 C. C. A. 525, 191 Fed. 163, *Roberts v. Lewis*, 144 U. S.

**Evidence—burden of proof—want of jurisdiction.**

653, 36 L. ed. 579, 12 Sup. Ct. Rep. 781, and *Chicago, B.*

& Q. R. Co. v. *Willard*, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460, are not applicable, as the practice prevailing in the jurisdictions in which they arose differs materially from that in Massachusetts.

The accident occurred on the 12th of August, 1899. The plaintiff was born at Worcester, Massachusetts, April 29, 1891. He lived there up to the time of his mother's death, when he moved to Cambridge with his father, who died shortly thereafter. In the latter place he lived with his uncle, Alfred Wiggin, for about five years. It was while he was living in Cambridge that the accident occurred. Shortly after the accident his uncle moved to Arlington Heights, and the plaintiff continued to live with him until 1910. He then went to Maine to live with an aunt, intending to make his permanent home there. He was at this time nineteen years old. He remained in Maine until the fall of 1912. The present action was brought April 17, 1911, while he was residing in that state. In the fall of 1912 his aunt and her husband

left Maine and moved to Massachusetts, and he returned there with them.

In the district court the jury was directed to return a verdict for the defendant. The plaintiff excepted, and this writ of error was prosecuted.

The defendant contends that, on the facts above stated, the district court was without jurisdiction to entertain the action; that, the plaintiff having been born in Massachusetts, and his parents having been domiciled there at the time of their death, his residence and domicile continued during his minority to be in Massachusetts, notwithstanding his removal to Maine, and, the action having been brought before he reached his majority, the requisite diversity of citizenship was wanting to confer jurisdiction on the district court.

It is undoubtedly true that the general rule is that a minor is incapable of changing his domicile and acquiring a new one during his minority; that he has the domicile of his father, if living, and, if he is dead, that of the mother (*Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221); that, if both father and mother are dead, by taking up his residence with his grandfather, or, if he is dead, with his grandmother, he may, in that way, acquire a domicile (*Lamar v. Micou*, 114 U. S. 218, 222, 29 L. ed. 94, 95, 5 Sup. Ct. Rep. 857).

**Infant—change of domicile.**

The reason stated for the general rule is that a minor is non sui juris, which no doubt, as here applied, means that a person who is under the power and authority of another possesses no right to choose a domicile. *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597. Under the common law the father is the natural guardian of the minor, and entitled to his custody and control until he reaches majority; and the same is true of the mother (the father having died), and, if she is dead, of the grandfather. When either stands in the relation of natural guardian

to the minor, he or she may change the domicil of the minor to another place within or without the state of his previous domicil. 14 Cyc. 843, 844. It would seem, however, that this doctrine of natural guardianship has never been extended to uncle or aunt, when they stand as next of kin to the minor. *Munday v. Baldwin*, 79 Ky. 121; *Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. Dec. 481.

When the plaintiff went to Maine he was nineteen years old. At that time he had neither father nor mother, nor, so far as appears, grandparents, living. The uncle with whom he had been living in Massachusetts was unable and apparently unwilling further to maintain a home for him. In this situation he determined to go to Maine and make his permanent home there with his aunt; and the question is whether a minor of his years of discretion may, under these circumstances, acquire a new domicil, or whether he is restricted to the domicil of his father at the time of his death.

None of the cases which have come to our attention has gone to the extent of holding that, under such circumstances, a minor who has attained years of discretion may not acquire a new domicil. In all of them, where it has been held that the minor may not acquire a new domicil of his own volition, it has appeared that he was of immature years, or that he was subject to the direction and control of a person standing in the position of a natural or statutory guardian. See *Glos v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; *Re Benton*, 92 Iowa, 202, 54 Am. St. Rep. 546, 60 N. W. 614; *Sudler v. Sudler*, 49 L.R.A.(N.S.) 860, and note, 121 Md. 46, 88 Atl. 26, Ann. Cas. 1913E, 1191; *Churchill v. Jackson*, 49 L.R.A.(N.S.) 875, and note, 132 Ga. 666, 64 S. E. 691, Ann. Cas. 1913E, 1203.

In *Russell v. State*, 62 Neb. 512, 87 N. W. 344, *Estler*, a minor, twenty years and five months old, who

up to that time had had his domicil in the state of New York, was emancipated by his father and went to Nebraska to make his permanent home. The question was whether, having been emancipated and freed from the power and authority of his parents, he could acquire a domicil apart from theirs. The question arose in an indictment for murder. Having resided eight months in Nebraska, *Estler* was called as a juror in the case. He became of age August 21, 1900, a month preceding the trial. By § 657 of the Civil Code of Procedure of that state male persons over the age of twenty-one years, having the qualifications of electors, were made competent as jurymen. To constitute one a qualified voter he had to be twenty-one years of age or upwards, and have resided in the state six months, in the county forty days, and in the precinct, township, or ward ten days. Comp. Stat. chap. 26, § 8. The defendant contended that the residence of an infant is that of his parents or guardian, and that, as *Estler* was an infant when he went to Nebraska, he was incapable of changing his domicil until he reached his majority, which was less than six months prior to his being called as a juror. It was held that, having been emancipated by his parent, he was capable of acquiring a legal domicil in Nebraska, and that, having reached the age of twenty-one years and having resided there more than six months prior to being called as a jurymen, he was a duly qualified voter. The court said: "The general rule as to the power of an infant to change his own residence is doubtless in harmony with the contention of defendant. But that rule, like many others, has its exceptions. A minor who has been emancipated by his parents is capable of acquiring a legal domicil or residence of his own. 10 Am. & Eng. Enc. Law, 2d ed. 31, note."

See also *Woolridge v. McKenna* (C. C.) 8 Fed. 650, 681-685; *Lubec v. Eastport*, 3 Me. 220, 222; *Monroe v. Jackson*, 55 Me. 55, 58; *Thomas-*

ton v. Greenbush, 106 Me. 242, 76 Atl. 690; Lowell v. Newport, 66 Me. 78.

In 29 Cyc. at page 1675, emancipation is defined as "the entire surrender of all the parent's right to the care, custody, and earnings of the child, as well as a renunciation of parental duties, and leaves the child, so far as the parent is concerned, free to act on its own responsibility and in accordance with its own will and pleasure, with the same independence as though he had attained majority."

If a minor, having reached years of discretion, on being emancipated, may acquire a domicile apart from that of his parents, it must be upon the theory that, having been released from the power and author-

**Domicil—  
change by  
minor.**

ity of the one entitled to his custody and control, he has the right to choose a domicile; and we are of the opinion that, inasmuch as the plaintiff, when he went to reside with his aunt, had reached years of discretion, and there was no one at that time entitled to his custody and control as a natural guardian or otherwise, he had a right to choose a domicile for himself.

It would seem that we are further supported in this conclusion by the fact that it has been held that a married woman who has left her husband for cause may establish a domicile apart from that of her husband, and acquire citizenship in another state for the purpose of Federal jurisdiction, such as will entitle her to maintain an action for damages. Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Williamson v. Osenton, 232 U. S. 619, 58 L. ed. 758, 34 Sup. Ct. Rep. 442.

As domicile is the test of citizenship for the purpose of the jurisdiction of the courts of the United States (Poppenhauser v. India-Rubber Comb Co. (C. C.) 14 Fed. 707; Dresser v. Edison Illuminating Co. (C. C.) 49 Fed.

257; Woolridge v. McKenna, supra), and as we are of the opinion that the plaintiff acquired a domicile in Maine, the requisite citizenship for Federal jurisdiction appears.

The accident occurred in Massachusetts. The plaintiff was a trespasser upon one of the defendant's cars, and, according to the law of that state, the only duty the defendant owed him was "to refrain from wilfully, recklessly, or wantonly exposing him to injury." Albert v. Boston Elev. R. Co. 185 Mass. 210, 211, 70 N. E. 52. Being a trespasser, it owed him no duty of protection. "Its servants had the right to remove him from the car, but in doing so were required to subject him to no unneces-

**Railroad—duty  
to trespasser.**

sary hazard. They had no right to seize him and throw him from the car whilst it was in motion, or to so violently assault or frighten him as to cause him to fall from the car. In order to justify a recovery, the acts of the defendant's servant must have been improper, unnecessarily dan-

**—injury to  
trespasser—  
liability.**  
gerous, the proximate cause of the injury, and done for the purpose of removing the plaintiff from the car." Ansteth v. Buffalo R. Co. 145 N. Y. 211, 45 Am. St. Rep. 607, 39 N. E. 708, 5 Am. Neg. Cas. 382.

The defendant contends that there was no evidence from which it could have been found that the plaintiff's injury was due to the wilful conduct of the defendant for the reasons (1) that it could not be found that the trainman

**Trial—question  
for jury—wilful  
negligence.**

who, in a threatening manner, ordered the plaintiff off the car was acting within the scope of his authority, or (2) that the injury was the direct result of such conduct. If, on the evidence, fair-minded men might differ as to these questions, the case should have been submitted to the jury.

The plaintiff at the time of the accident was a little over eight years of age. He was living at his uncle's

home on Sixth street, in Cambridge, distant some 200 feet or more from where defendant's railroad crossed the street. There was a platform beside the street near the crossing. On that side of the street, and between it and the railroad, were located the factories of the Speare Oil Works, and beyond the railroad was a field where boys were accustomed to play. The day of the accident the plaintiff left home to go fishing with two other boys, one of whom was about his age and the other some three or four years older. On their way home they stopped at the platform above referred to and played tag. On the side of the street opposite the platform stood a train, consisting of an engine, two flat cars, and a tank car. The plaintiff and one of his companions, understanding that the cars were to be backed across the street and down the siding to the Speare Oil Works, crossed the street and climbed upon the tank car, which was the rear car in the train. In the center of this car and extending lengthwise of it was a large oil tank, about the height of a man. The platform of the car extended out a sufficient distance from the tank to afford a passageway. Along the side of the car was a rail, and at the end of the car, or near there, on the right side, facing the engine, was a step extending towards the ground. Whether the step was at the end, or at the side of the car near the end, the evidence fails clearly to disclose. It was by means of this step that the plaintiff climbed upon the car. After reaching the platform, he lay there on his stomach, with his feet hanging over the end of the car. While in this position he saw a trainman between the first and second cars pull the pin and give a signal to kick the detached cars across the street, and down into the yard of the Speare Oil Works, and board the same. When the cars had gone about half-way down the yard, the trainman, who was then about the center of the tank car, was seen coming to-

ward the plaintiff, shouting at him to get off, or he would break his neck. The trainman was a large, rough-looking man, and his conduct so frightened the plaintiff that he jumped, and in doing so fell under the cars. He testified: "I jumped right off, just as soon as he hollered. I didn't think for a minute, or do anything; I just jumped."

The result was the cars ran over him and cut off both his legs. The evidence further showed that the plaintiff had no intention of getting off the car until it stopped, which it was soon to do, and that it was going at a pretty good speed at the time. No one but the trainman was in charge of the cars after they were kicked across the street.

We think that, in view of the immature age of the plaintiff and the conduct of the trainman in going towards him and threatening to break his neck if he

did not get off, it was for the jury to

-jury-cause of fall from train.

say whether the plaintiff's action, under the circumstances, was not due to restraint induced by fear rather than his own volition, and that, as no one but the trainman was in charge of the cars after they were kicked across the street, it could also be found that he was acting within the scope of his authority.

Master and servant-authority of trainman.

It is not the province of the court to determine questions of fact that properly should be submitted to a jury, and, being of the opinion that the evidence presented such questions, the court erred in directing a verdict for the defendant.

The judgment of the District Court is vacated, the verdict set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the plaintiff in error.

Petition for a writ of certiorari denied by the Supreme Court of the United States, October 28, 1918, 248 U. S. 573, 63 L. ed. 427, 39 Sup. Ct. Rep. 11.

## ANNOTATION.

**Approximation to maturity as affecting the rule that an infant cannot change his domicile.**

As the title suggests, the note presupposes the general rule, which is well settled, that an infant cannot change his domicile of his own volition (9 R. C. L. p. 547), and considers simply the effect upon that rule of the infant's approximation to maturity, in connection with the other circumstances bearing upon the question. The annotation is confined strictly to the question of domicile, and does not purport to cover the question of the settlement of an infant pauper, which, as subsequently pointed out, is distinctive.

In the reported case (*BJORNQUIST v. BOSTON & A. R. Co.* ante, 951), the circuit court of appeals, first circuit, expressly laid down the rule that an orphan minor, having reached years of discretion (nineteen in this instance) and having no grandparents or statutory guardian, may change his domicile from that of his deceased parents to another state so as to confer Federal jurisdiction in a personal injury action. In reaching this conclusion the court recognized the general rule that a minor is incapable of changing his domicile and acquiring a new one during his minority, and the reason therefor, namely, that a minor is non sui juris, but held that such reason, "as here applied, means that a person who is under the power and authority of another possesses no right to choose a domicile," and consequently that since the minor in question had arrived at years of discretion, and was under no one's control, he could change his domicile for the purpose above mentioned. It is worthy of note, however, that the court placed considerable reliance upon the case of *Russell v. State* (1901) 62 Neb. 512, 87 N. W. 344, wherein the court ruled that an emancipated minor, twenty years and five months old, could change his domicile. But, as shown in the annotation to *Gulf, C. & S. F. R. Co. v. Lemons*, ante, 949,

upon the question of emancipation by parent as affecting the right of infant to change domicile or settlement, the decision in the *Russell Case* was based entirely upon pauper settlement cases, which are distinctive because controlled by express statutory provisions. This distinction has also been pointed out by the United States circuit court of appeals, second circuit, in *Delaware, L. & W. R. Co. v. Petrowsky* (1918) 162 C. C. A. 570, 250 Fed. 554, certiorari denied in (1918) 247 U. S. 508, 62 L. ed. 1241, 38 Sup. Ct. Rep. 427, wherein the court, in considering the status of an infant sixteen years old, arrived at a conclusion contrary to that in the *Nebraska case of Russell v. State*, supra. However, if we regard an orphan minor who has arrived at the age of discretion and has no legal or natural guardian, as upon the same footing as an emancipated minor, and accept Spencer's definition of emancipation as given in § 475 of his work on *Domestic Relations*, we find justification for the decision in the *BJORNQUIST CASE*, provided the rule there laid down be confined strictly to the facts of the case. The definition referred to is to the effect that emancipation, in the law of infancy, generally signifies the release of the infant from parental dominance or control, so far, at least, as to legally entitle him to his own time and earnings, and to sue for and recover such earnings in his own name and right, "and for wrongs interfering with his earning capacity or opportunities." It will be remembered that the reported case was one for personal injuries to the minor complainant, and that the question of domicile was one involving jurisdiction, since if the minor had changed his domicile there was diverse citizenship, giving the Federal court jurisdiction of the action. These facts would seem to bring the case within Spencer's definition, and to justify the conclusion of the court.

And in Georgia, the rule, according to an early case, was that an infant orphan who had come to years of discretion was not subject to the control of his guardian as regards residence, and therefore that he could remove his legal residence to another county, even as against the objection of his guardian. *Roberts v. Walker* (1855) 18 Ga. 5.

And later, in Georgia, by virtue of express statutory provision, a minor having neither father, mother, nor guardian, could choose his residence at will. See *Dampier v. McCall* (1887) 78 Ga. 607, 3 S. E. 568, holding that an infant "over fourteen years of age" had legally changed his residence under § 1693 of the Georgia Code. And see also *Hayslip v. Gillis* (1905) 123 Ga. 263, 51 S. E. 326.

The court in the reported case (*BJORNQUIST v. BOSTON & A. R. Co.* ante, 951) also remarked that, in all of the cases which had come to its attention where it had been held that a minor may not acquire a new domicile of his own volition, it had appeared that he was of immature years, or that he was subject to the direction and control of a person standing in the position of a natural or statutory guardian. In this connection the following cases may be of interest: In *Maddox v. State* (1869) 32 Ind. 111, the general rule that an infant cannot change his domicile was applied to an orphan infant nineteen years of age who, with the consent of the master to whom he was apprenticed, went to another state to live. And the rule that an infant is absolutely incapable of himself changing his domicile during minority was again applied in *Ex parte Petterson* (1908) 166 Fed. 536, to an alien infant who was alone in this country, and who resided in Minnesota from the time she was sixteen years of age until about the time she reached her majority. And the same rule was applied to a minor sixteen years of age, in *Delaware, L. & W. R. Co. v. Petrowsky* (1918) 162 C. C. A. 570, 250 Fed. 554, certiorari denied in (1918) 247 U. S. 508, 62 L. ed. 1241, 38 Sup. Ct. Rep. 427, wherein both parents were dead, and the case was regarded

the same as if the minor had been expressly emancipated. So, in *Jopp v. Wood* (1865) 4 De G. J. & S. 616, 46 Eng. Reprint, 1057, 11 Jur. N. S. 212, 34 L. J. Ch. N. S. 212, 12 L. T. N. S. 41, 5 New Reports, 422, 13 Week. Rep. 481, which contains no reference to any guardian, either natural or legal, the general rule was applied to a domiciled Scotchman, who, when nineteen years of age, went to India to reside and engage in business.

Where a parent is living it seems that an unemancipated infant cannot, under any circumstances, change his domicile during such minority. For instance, in *Prieto v. St. Alphonsus Convent* (1900) 52 La. Ann. 631, 47 L.R.A. 656, 27 So 153, where an infant seventeen years of age sought to enter a convent and become a nun without her mother's consent, it was held that since, by statute, "the domicile of a minor not emancipated is that of his father, mother, or tutor," such infant was without legal capacity to leave the parental domicile permanently, and select another domicile or residence without the parent's consent, and that the period of incapacity could not be affected by reason "of her age and intelligence." And in *Blumenthal v. Tanneholz* (1879) 31 N. J. Eq. 194, it was held that an unemancipated married female infant (exact age not stated in report of case), whose parents resided in Canada, could not, by living in New Jersey for eighteen months, acquire a domicile there so as to give a state court jurisdiction of a suit to annul her marriage, the court saying: "The complainant indeed swears that she resides here, but she also swears that her parents reside in Montreal . . . and that when this suit was instituted she was and still is a minor. She does not claim to have been emancipated from her parents, nor does she give any reason for her change of abode from Canada to New Jersey. Her domicile, therefore, must be adjudged to be that of her parents. The domicile of the legitimate unemancipated minor who is not sui juris, and whose will, therefore, cannot concur with the fact of his residence, is, if his father be alive, the domicile of the latter.

Phillimore, Domicil, 37. It is an undisputed position of all jurists, says that writer, that of his own accord, *proprio marte*, the minor cannot change his domicil." And the court in *Hess v. Kimble* (1911) 79 N. J. Eq. 454, 81 Atl. 363, followed the same line of reasoning adopted in the *Blumenthal Case*, and held that a male unemancipated infant between sixteen and seventeen years of age, whose father resided in Pennsylvania, could not acquire a domicil in New Jersey so as to give the courts of that state jurisdiction of a suit to annul his marriage to a nonresident.

And in a number of other cases where the minor was more than an immature infant, but had a natural or legal guardian, it has been held, although without special reference to the effect of approximation to maturity, that the minor could not change his domicil. See the following cases: *Daniel v. Hill* (1875) 52 Ala. 430 (male infant eighteen or nineteen years of age, having a legal guardian); *Beekman v. Beekman* (1907) 53 Fla. 858, 43 So. 923 (female twenty

years old, father living); *Ames v. Duryea* (1871) 6 Lans. (N. Y.) 155 (male between eighteen and nineteen years of age, father living); *Von Hoffman v. Ward* (1880) 4 Redf. (N. Y.) 244 (holding that an infant having a father domiciled in the United States, who resided in France until he was twenty-one, had not and could not establish a domicil in the latter country until he became of age); *Franks v. Hancock* (1880) 1 Posey, Unrep. Cas. (Tex.) 554; *Mears v. Sinclair* (1865) 1 W. Va. 185 (female seventeen or eighteen years old, having a legal guardian who concurred in the change, but who, as such, had no right to change the ward's domicil); *Forbes v. Forbes* (1854) Kay, 341, 69 Eng. Reprint, 145, 2 Eq. Rep. 178, 18 Jur. 642, 23 L. J. Ch. N. S. 724, 2 Week. Rep. 253 (Scotchman having a living father, who, when about twenty years of age, went to India to reside); *Re Macreight* (1885) L. R. 30 Ch. Div. (Eng.) 165, 55 L. J. Ch. N. S. 28, 53 L. T. N. S. 146, 33 Week. Rep. 838 (male nineteen years of age, with both parents living). G. J. C.

### OGDEN CITY, Respt.,

v.

### JOHN DOE LEO, Appt.

*Utah Supreme Court — June 26, 1919.*

(— Utah, —, 182 Pac. 530.)

#### **Municipal corporation — reasonableness of ordinance — power of court.**

1. The court cannot declare that a municipal ordinance prohibiting booths in restaurants is unreasonable on its face.

[See note on this question beginning on page 965.]

#### **— power to prohibit booths in restaurant.**

2. Power to prohibit booths in a restaurant is conferred upon municipal corporations by statutes authorizing them to regulate restaurants and pass all ordinances necessary and proper to improve the morals, peace, and good order of the city.

#### **— scope of authority.**

3. Power conferred upon a municipal corporation to regulate restaurants authorizes it to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary and wholesome in conducting the business in a proper and orderly manner.



—reasonableness of ordinance.

4. A municipal corporation under statutory authority to regulate restaurants cannot pass ordinances that are oppressive and a mere arbitrary interference with the business.

[See 19 R. C. L. 805.]

**Evidence — assumption by court — reason for passing ordinance.**

5. In the absence of evidence to the contrary, the court must assume that municipal authorities were warranted in passing an ordinance prohibiting booths in restaurants.

**APPEAL** by defendant from a judgment of the District Court for Weber County (Pratt, J.) convicting him of violating an ordinance of the plaintiff city regulating restaurants or public eating places. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. G. Horn and George Halverson, for appellant:

The ordinance in question is void.

*Bennett v. Pulaski*, — Tenn. —, 47 L.R.A. 278, 52 S. W. 913; *Champer v. Greencastle*, 138 Ind. 339, 24 L.R.A. 768, 46 Am. St. Rep. 390, 35 N. E. 14, 19 R. C. L. 835; *Long v. Taxing Dist. 7 Lea*, 133, 40 Am. Rep. 55; *Yee Gee v. San Francisco*, 235 Fed. 757; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *People ex rel. Huntley Dairy Co. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *State v. Ray*, 131 N. C. 814, 42 S. E. 960; *Buffalo v. Linsman*, 113 App. Div. 584, 98 N. Y. Supp. 737; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A.(N.S.) 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Messrs. W. H. Reeder, Jr., and David L. Stine, for respondent:

An ordinance may derive its validity from several grants of power, and not depend solely upon any single clause or section of a statute.

*Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B, 514; *Seattle v. Hewetson*, 95 Wash. 612, 164 Pac. 236.

Power to govern men and things is inherent in government, and when an owner devotes his property to the use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good.

*Woodburn v. Public Service Commission*, 82 Or. 114, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; *Park City v. Daniels*, 46 Utah, 554, 149 Pac. 1094, Ann. Cas. 1918E, 107; 2 Dill. Mun. Corp. 5th ed. § 646, p. 984; *Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139; *Denning v. Yount*, 62 Kan. 217, 50 L.R.A. 103, 61 Pac. 803.

An ordinance, to be void for unreasonableness, must be clearly unreasonable, and there must be evidence of

weight that it was not enacted by mistake, but in a spirit of fraud or wantonness.

*Seattle v. Hurst*, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454.

In determining whether a law is within the police power, it is enough that a state of facts can reasonably be presumed to exist which would justify it; in which case it will be presumed that they did exist and that the law was passed for that reason.

*State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; *Re San Chung*, 11 Cal. App. 511, 105 Pac. 609; *Re Junqua*, 10 Cal. App. 602, 103 Pac. 159; *Re Barmore*, 174 Cal. 286, L.A.R.1917D, 688, 163 Pac. 51; *Canada Atlantic Transit Co. v. Chicago*, 126 C. C. A. 587, 210 Fed. 7; *Pacific Gas & E. Co. v. Police Ct.* 28 Cal. App. 412, 152 Pac. 928; *People ex rel. Lockwood & S. Co. v. Grand Trunk Western R. Co.* 232 Ill. 292, 83 N. E. 839; *Tacoma v. Keisel*, 68 Wash. 685, 40 L.R.A.(N.S.) 757, 124 Pac. 137; *State ex rel. Dawson v. Atchison*, 92 Kan. 431, 140 Pac. 873, Ann. Cas. 1916B, 501.

Cities have, from the earliest times, in America, exercised the power of regulating eating houses.

*St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571.

The court is bound to assume that the city commissioners had the good order, the welfare, and the decency of the community in mind in passing the ordinance, and sustain it.

*State v. Snipes*, 161 N. C. 242, 76 S. E. 243; *State v. Freeman*, 38 N. H. 426; *Albert v. Brewer*, 9 La. Ann. 64.

Where power to regulate a particular business is conferred on a municipality, it is legislative power, and the motive of the lawmakers in exercising this power by ordinance is not open to judicial inquiry.

*Re Smith*, 143 Cal. 368, 77 Pac. 180; *Shepard v. Seattle*, 59 Wash. 363, 40 L.R.A.(N.S.) 647, 109 Pac. 1069; *Soon*

*Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Gardiner v. Bluffton*, Ann. Cas. 1912A, 716, note; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

When an ordinance is passed relating to a matter which is within the legislative power of the city, all presumptions are in favor of the validity; and when it is attacked, the burden is on the party alleging its invalidity to establish that fact.

*Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; *Re Berry*, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44; *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B, 514; *State ex rel. Dawson v. Atchison*, 92 Kan. 431, 140 Pac. 873, Ann. Cas. 1916B, 500.

When a question as to the reasonableness of a municipal ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on its face or is established by proper evidence.

*St. Louis v. Western U. Teleg. Co.* 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct. Rep. 608; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714; *State ex rel. Dawson v. Atchison*, Ann. Cas. 1916B, 504, note.

Where there is doubt as to the reasonableness of the ordinance, the doubt must be resolved in favor of its validity.

*Re McCoy*, 10 Cal. App. 116, 101 Pac. 419; *Re Berry*, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44.

Ordinances regulating and licensing a business are generally presumed to be reasonable.

*State ex rel. Dawson v. Atchison*, Ann. Cas. 1916B, 505, note.

*Frick, J.*, delivered the opinion of the court:

The defendant was charged with and convicted of violating a certain ordinance of Ogden City regulating restaurants or public eating places, and appeals.

The part of the ordinance which is in question here reads as follows:

"It shall be unlawful for any person, firm or corporation to keep, maintain, or operate any such public eating or drinking place containing in the public eating or drinking room or hall thereof any booths or stalls

constructed by means of or by the use of partitions, curtains or screens which shall be higher than 3 feet 6 inches from the surface of the floor of such room or hall provided that on any mezzanine, or higher floor, or platform of such public dining or drinking room or hall, and wholly within such room or hall, inclosed by the walls and ceiling, it shall be unlawful to keep or maintain any such booth or stall of any height, kind or description.

"To improve the morals, peace and good order of the inhabitants of Ogden City it is deemed necessary by the board of commissioners thereof that this ordinance be passed and become effective immediately."

The facts disclosed by the record are very brief. The defendant owns and conducts a public eating place under the name of "Alhambra Café." The room in which the business is conducted is approximately 110 feet in length north and south and about 25 feet wide east and west. In the front part of the room there is an open space of about 25 by 25 feet, on one side of which are four tables with four chairs to each table and on the other side two tables with chairs and a desk in front of the two tables. Immediately back of this open space the defendant maintains what are called "booths," of which there are four along the east wall or side of the room and four along the west side with an alleyway between the booths, 6 feet in width. The walls of these booths are made of thin boards 7 feet high, and the booths are 7 feet square with a doorway 3 feet 6 inches wide leading from the alleyway aforesaid into each booth. These booths, eight in number, therefore, constitute eight private rooms or compartments; each room having a table and four chairs.

The validity of the ordinance prohibiting the maintenance of such booths is assailed upon two grounds: (1) That Ogden City exceeded the power conferred upon it by the statute in adopting the ordinance; and (2) that the ordinance is unreason-

ably oppressive and constitutes an undue interference with a legitimate and lawful business, and is for that reason void. In support of their contention, counsel for defendant have cited the following cases: *Bennett v. Pulaski*, — Tenn. —, 47 L.R.A. 278, 52 S. W. 913; *Champer v. Greencastle*, 138 Ind. 339, 24 L.R.A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; *Long v. Taxing Dist.* 7 Lea, 133, 40 Am. Rep. 55; *Yee Gee v. San Francisco* (D. C.) 235 Fed. 757; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *People ex rel. Huntley Dairy Co. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627. While in some of the foregoing cases it is held that the municipality was without authority to pass the ordinances there in question, yet the holdings are all under statutes different from ours, and the regulations and restrictions there imposed were of quite a different nature. We shall hereinafter more fully consider some of the foregoing cases.

Referring now to our statute, we find that *Utah Comp. Laws 1917*, § 570x38, among other things, expressly confers power upon all the cities of this state to "license, tax and regulate . . . restaurants, hotels, taverns, theaters, opera houses, music halls, boarding houses, eating houses, chop houses, lodging houses," etc. The statute (570x87) further authorizes all cities to "pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety, and preserve the health, and promote the prosperity, improve the morals, peace, and good order, comfort, and convenience of the city and the inhabitants thereof," etc. The statute thus confers ample power upon cities to make all reasonable and proper regulations of the various business en-

terprises mentioned in the statute. Notwithstanding the foregoing provisions, counsel for defendant contend that all that Ogden City is empowered to do by virtue of the foregoing provisions is merely to "require the parties engaged in a business to take out a license and regulate its collection." In our judgment such is not the usual and ordinary meaning given to the term "to regulate" by the courts.

Municipal corporation—power to prohibit booths in restaurant.

A large number of adjudications of the phrase "to regulate" are given in 4 Words and Phrases, 2d series, 234, among which are the following: "To regulate" means to adjust by rule, method, or established mode; to subject to governing principles or laws."

Again: "To regulate" means to prescribe the manner in which a thing licensed may be conducted; a license itself being the permit or authority to conduct and carry on."

Another: "While the word 'regulate' has been given a comprehensive meaning and construed to signify both government and restriction, thereby including in an act all subjects germane to the subject named, it does not so much imply creating a new thing as arranging in proper order and controlling that which already exists."

The foregoing illustrations are quite sufficient to show that, where the power "to regulate" a particular calling or business

—scope of authority.

is conferred on a city, it authorizes such city to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary and wholesome in conducting the business in a proper and orderly manner. To "regulate" therefore implies the right to prescribe rules and regulations for the conduct of the business regulated. The statute, in authorizing the cities of this state to regulate restaurants and eating houses, therefore, conferred the power upon Ogden City to pass reasonable ordinances regu-

lating such enterprises. The contention that Ogden City was without authority to pass an ordinance regulating the business of conducting restaurants or eating houses must therefore fail.

This brings us to the second assignment; namely, is the ordinance in question invalid upon the ground of being oppressive or an unreasonable interference with a legitimate business enterprise? While it is

—reasonableness of authority. true that a business may be regulated, it is equally true that

such regulation must be within the bounds of reason; that is, the regulatory ordinance must be reasonable, and its provisions cannot be oppressive and a mere arbitrary interference with the business or calling which is regulated. A lawful business or calling may not, under the guise of regulation, be unreasonably interfered with even by the exercise of the police power. The question therefore is: Is the ordinance in question, in prohibiting the maintenance of booths as therein set forth, an unreasonable interference with defendant's business? The record is entirely devoid of anything from which we can judge or determine the condition prevailing in Ogden City which may have induced the city authorities to pass the ordinance in question. In that regard counsel have not taken us into their confidence, except the statements made at the oral argument, and

Evidence—  
assumption by  
court—reason  
for passing  
ordinance.

therefore all we judicially know is what is disclosed in the ordinance itself and what counsel have seen fit to tell us. In the absence of facts to the contrary, we must assume that the city authorities were warranted in passing the ordinance. The general rule in that regard is well stated by the annotator in the note to the case of *State ex rel. Dawson v. Atchison*, Ann. Cas. 1916B, 504, where it is said: "It is generally presumed that conditions exist which make ordinances

necessary or proper for the welfare of the community."

A large number of cases from numerous jurisdictions are cited in support of the text to which we shall not specially refer here. The same thought is expressed in another form in *Seattle v. Hurst*, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454, where the following language is adopted from *Horr & Bemis, Municipal Police Ordinances*, § 127: "An ordinance to be void for unreasonableness must be plainly and clearly unreasonable. There must be evidence of weight that it took inception either in a mistake, or in a spirit of fraud or wantonness on the part of the enacting body."

To the same effect are *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642; *Pate v. Jonesboro*, 75 Ark. 276, 112 Am. St. Rep. 55, 87 S. W. 437, 5 Ann. Cas. 381; *State v. Barge*, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 915; and numerous cases cited in those cases. Indeed, the case of *Pate v. Jonesboro*, 75 Ark. 276, 112 Am. St. Rep. 55, 87 N. W. 437, 5 Ann. Cas. 381, cited above, is quite analogous to the case at bar, and in that case the ordinance was sustained.

We therefore are required to presume that the local conditions in Ogden City are such as to justify the city authorities to regulate the conduct of restaurants or eating houses in the manner prescribed in the ordinance. The ordinance certainly is not such that we can as matter of law declare that, upon its face, it is unreasonably oppressive, or that it constitutes an unreasonable and unwarranted interference with the conduct of the restaurant business, upon the one hand, nor, upon the other, that under no circumstances can the prevailing conditions in Ogden City be such as to require the regulation prescribed in the ordinance. Every presumption, as we have pointed out, is in favor of the validity of the ordinance. Unless, therefore, the regulation prescribed in the ordinance is mani-

Municipal  
corporation—  
reasonableness  
of authority—  
power of court.

festly oppressive or necessarily constitutes an unreasonable and unwarranted interference with defendant's business under any possible view that can be taken of the local situation, we must uphold the ordinance. We confess our entire inability to discover anything in the ordinance that is unreasonably oppressive or which constitutes an undue interference with the business of conducting a restaurant. We have a right to assume that the purpose of the ordinance is merely to prevent persons of both sexes who have regard for neither the law nor good morals from meeting at late and unusual hours of the night and entering those booths where they can avoid detection and can indulge their propensities for violating both the law and good morals. It certainly cannot be said that law-abiding persons and all those who frequent restaurants and public eating places only for the purpose of obtaining refreshments desire seclusion from the eyes of others who may also be in the place for the same purpose. We know, as all men know, that the best and largest dining rooms everywhere are open, and that the respectable and law-abiding men and women do not seek closed booths or dark rooms when they go to a public eating place to eat their meals. The fact that an ordinance like the one in question here was deemed necessary to regulate public eating places is no reflection either upon the good morals or the law-abiding propensities of the good people of Ogden. It reflects credit upon the city authorities rather than discredit. Similar ordinances might well be adopted and enforced in any city of the size of Ogden. There is nothing to

the contrary to what we here hold in any of the cases cited by defendant's counsel. The principle announced in the case of *Yee Gee v. San Francisco* (D. C.) 235 Fed. 757, has no application here. In that case the city of San Francisco prohibited all work in laundries between the hours of 6 o'clock P. M. and 7 o'clock the following morning. The ordinance was held invalid by the Federal court upon the ground that it applied to all parts of the city of San Francisco without regard to conditions or surroundings, and that it was in fact an attempt to regulate the hours of labor, and not the business. Anyone with but slight reflection would readily understand that the purpose of the ordinance was merely to prevent small laundries from carrying on their business at hours different from those establishments which employed a large number of hands all of whom would generally be governed by union hours. It therefore is easy to perceive why the court refused to uphold the ordinance. The other cases illustrate interferences not authorized by the statute. There is nothing of the kind in this case. What is sought to be done and what is done by the ordinance in question here is to regulate the conduct of the business and to prevent the concealment of evilly disposed persons under the guise that they are merely "taking their meals." We can discover no reason for holding that the ordinance in question is invalid.

For the reasons stated, the judgment of the District Court is affirmed; respondent to recover costs of printing its brief.

Corfman, Ch. J., and Weber, Gideon, and Thurman, J.J., concur.

## ANNOTATION.

### Validity of statute or ordinance interfering with privacy in restaurants.

An extensive search reveals no decision except that in the reported case (*OGDEN CITY v. LEO*, ante, 960) which deals with the validity of legislation

enacted by a state or a city regulating restaurants, which interferes with privacy therein. In the reported case it appeared that the city of Ogden

passed an ordinance making it unlawful to have any booths or stalls in any public eating place which were higher than 3½ feet from the floor. The defendant, when prosecuted for a violation of this ordinance, assailed it on the ground that it was unreasonably oppressive, and constituted an undue interference with a lawful business. The court held that the ordinance under consideration did not interfere with the restaurant business unduly and was therefore valid, as such ordinance was enacted to prevent persons inclined to violate both law and good morals from gathering in such places.

While the validity of regulations as to the use of screens and the like in saloons is outside the scope of this note, the court in *State v. Barge* (1901) 82 Minn. 256, 53 L.R.A. 428, 84 N. W.

911, applied the same theory which finds expression in the reported case (*OGDEN CITY v. LEO*). In that case the court sustained an ordinance prohibiting booths or stalls in places where intoxicants are sold, saying: "It is a fact, of which we may take judicial notice, that opportunities for men and women, old or young, to lounge, drink, and carouse in secrecy, free from the observation of the police and of all other persons, are demoralizing in the extreme, and directly tend to drunkenness, licentiousness, and the corrupting of unwary youth. The existence of any drinking booth, stall, or other like inclosure, with screens, curtains, or partitions, within the room named in a license for the sale of intoxicating liquors, affords just such opportunities." E. C. B.

## OKANOGAN POWER & IRRIGATION COMPANY, Appt.,

v.

E. C. QUACKENBUSH et al., Respts.  
(Two cases.)

*Washington Supreme Court (Dept. No. 1)—July 24, 1919.*

(— Wash. —, 182 Pac. 618.)

### Tax — purchase by county treasurer — validity.

1. A purchase by a county treasurer of delinquent tax certificates for property within the jurisdiction of his office is void, where the statute makes it a misdemeanor for him to be beneficially interested in any sale which may be made under his supervision.

[See note on this question beginning on page 969.]

### — notice to record owner.

2. A statutory requirement that notice of an intended sale under a delinquent tax certificate shall be given to the record owner refers to the own-

er appearing as such on the records compiled under the Recording Acts, not to the one in possession or appearing on the tax roll.

**APPEAL** by plaintiff from a judgment of the Superior Court for Okanogan County (Neal, J.) in favor of defendants in consolidated actions brought to require the defendant county treasurer to receive and accept an amount due for taxes upon certain property, to satisfy the lien of said taxes, and to set aside the tax deeds and quiet plaintiff's title. *Reversed.*

The facts are stated in the opinion of the court.

Mr. James B. Kinne, for appellant:  
Defendant Quackenbush as county treasurer practised artifice and fraud

to secure title to the property by foreclosure of certificates of delinquency.  
*Coughlin v. Homes*, 53 Wash. 692,

(— Wash. —, 182 Pac. 618.)

102 Pac. 772; Sponable v. Woodhouse, 48 Kan. 173, 29 Pac. 394; Clute v. Barron, 2 Mich. 192; Shipley v. Gaffner, 48 Wash. 169, 93 Pac. 211; Sparks v. Standard Lumber Co. 92 Wash. 584, 159 Pac. 812; Jackson v. Bateman, 96 Wash. 329, 165 Pac. 63; Pyatt v. Hegquist, 45 Wash. 504, 88 Pac. 933; Craver v. Wehr, 98 Wash. 56, 167 Pac. 98; Olson v. Johns, 56 Wash. 12, 104 Pac. 1116; Rust v. Kennedy, 52 Wash. 472, 100 Pac. 998.

No notice of tax sale was given the record owner.

Seattle Nat. Bank v. Ally, 66 Wash. 610, 120 Pac. 94; Bernard v. Benson, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; McDougall v. Murray, 57 Wash. 76, 26 L.R.A. (N.S.) 159, 106 Pac. 490.

Mr. W. C. Gresham, for respondent:

The true rule is that, where the public official or other person having a fiduciary duty to perform has any discretion in the performance of that act, then he could not deal with himself; but, when his act is purely ministerial, the reason for the rule that such a contract is contrary to public policy has failed, and the rule should not exist.

Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633; Walcott v. Hand, 122 Mo. 621; 27 S. W. 331; Pyatt v. Hegquist, 45 Wash. 504, 88 Pac. 933; Sparks v. Standard Lumber Co. 92 Wash. 589, 159 Pac. 812.

The "record owner" in the statute, without question, means the owner as shown by the tax rolls, and in the certificate of delinquency.

Sparks v. Standard Lumber Co. supra.

Tolman, J., delivered the opinion of the court:

Appellant in 1908 acquired title from the state of Washington to a tract of land in Okanogan county, and has ever since been the record owner thereof. Shortly after purchasing, it subdivided and platted the lands as the Brewster orchard tracts, filed the plat of record, and proceeded to establish an irrigation system as an appurtenance thereto. The irrigated tracts were placed on the market, and the particular tracts here involved were sold on contract to different purchasers. Only one of these contracts was placed of record. The contracts all provided,

among other things, that the purchaser should pay all subsequently accruing taxes. In the course of time each of these purchasers defaulted, the several contracts were forfeited, and appellant again entered into possession and proceeded to cultivate the lands. Respondent Quackenbush, who was then the county treasurer of Okanogan county, in December, 1916, procured a considerable sum of money for the purpose of purchasing delinquent tax certificates to be issued by and through his office, made up a list of the taxes which he wished to pay, and his office force, under his direction, issued a considerable number of certificates of delinquency in the name of one B. S. Ladd, a brother-in-law of Quackenbush. But it is an admitted fact in the case that these certificates so issued, including those affecting the tracts of land here involved, were at all times the property of Quackenbush, purchased with his money, wholly under his control, and he was the only person to gain or lose by the transaction. These certificates show the owners or reputed owners of the tracts involved to be the purchasers under the contracts hereinbefore referred to. And it appears that the tax rolls showed such contract holders to be the owners, though it is alleged, and there is considerable evidence in the case to the effect, that Quackenbush actually knew, or well might have known, that appellant was the owner and in possession of each of the tracts. After his term of office expired, Quackenbush delivered these certificates to the prosecuting attorney, with directions to foreclose, and such proceedings were had as to result in a foreclosure and sale thereunder by the county treasurer who succeeded him in office. The regularity of these proceedings is not attacked, except only for the failure to give appellant notice of the sale according to the language of the statute (Rem. Code, § 9260), which requires county treasurers to give notice to the record owner of the pendency of the sale. Appellant was

not a party to the foreclosure, and had no notice or knowledge of the issuance of the certificates or of any of the steps taken to acquire title thereunder, until after the delivery of the treasurer's tax deeds to Quackenbush; but, upon ascertaining the facts, it tendered to the county treasurer and to Quackenbush a sum of money sufficient to pay all taxes, interest, and penalties due, and all costs incurred up to the time of the tender. The tender being refused, appellant brought these actions which were consolidated below, to require the county treasurer to receive and accept the amount due for taxes upon the property, to satisfy the lien of said taxes, and to set aside the tax deeds and quiet its title. From a judgment denying the relief sought this appeal is taken.

May a county treasurer, while in office, and charged with the duties thereof, become the purchaser of certificates of delinquency to be issued by his office? We said in *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772: "Furthermore, we are of the opinion that the judgment may be sustained upon the ground that the sale of the land by the county treasurer to himself or a deputy in his office is against public policy, and therefore invalid."

And the legislature has defined the public policy of this state by including in the Criminal Code the following:

"Every public officer who shall

"(2) Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein . . .

"Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void."

Rem. Code, § 2334.

It being against public policy for a public official to be beneficially interested in any contract, sale, lease, or purchase made through his office, it would seem almost too clear for argument that the acts complained of

Tax-purchase  
by county  
treasurer—  
validity.

here come within the spirit, if not within the actual letter, of the prohibition. By the issuance of certificates of delinquency the county sold its right to proceed against the property to collect the tax, contracted to repay the purchase money, with legal interest, if the certificates should prove to be void because of any irregularity of the taxing officers, and placed in the hands of the purchaser the instrument by which he might proceed in due course to procure title if the tax should not be paid. That the final steps in procuring title were not taken until after Quackenbush's term of office expired does not save the situation. If he must not buy the property at his own sale, he likewise may not initiate the proceedings during his term which will lead up to a purchase by him after his term has expired. We apprehend that it was the purpose of the legislature to forbid any public officer to in any manner deal as an individual with the affairs of his office for the purpose of making a private profit. Such dealing is intolerable, and cannot be permitted directly or indirectly, immediately or remotely, and must be condemned wherever found, no matter what method be pursued.

While our views just stated dispose of the case, yet one other point which has never been passed upon by this court should be decided for the guidance of those charged with the duty or necessity of foreclosing certificates of delinquency. In § 9260, Rem. Code, relating to judgment and order of sale for taxes, is the provision: "Provided, however, that before such sale shall be held, the county treasurer shall notify the record owner of such real estate of the pending sale, or in case of unknown owner shall post a notice of



(— Wash. —, 182 Pac. 618.)

same in some public place at the county courthouse."

Nowhere else in the act are the words "record owner" used. Section 9254, Rem. Code, requires notice of the foreclosure suit to be served upon "the owner of the property described in such certificate." And we have frequently held, that it was sufficient to name as defendant and serve with process the person in whose name the property appears on the tax rolls and who is named in the certificate as owner or reputed owner. See *Sparks v. Standard Lumber Co.* 92 Wash. 584, 159 Pac. 812, and cases there cited. But, notwithstanding the statutory provision that the suit may be maintained against the owner named in the certificate, who is the owner named on the tax rolls, the legislature, by the provision above quoted, has, in express terms, required a notice of sale to be given the record owner. In view of our Recording

Act, there can be no doubt as to what is meant by the term, "record owner," And we think that as the purpose of providing for the issuance and foreclosure of certificates of delinquency is primarily to insure, if possible, the collection of the tax, and not to divest title, except as a last resort, that the legislature used the words, "record owner," advisedly, with the purpose of making more certain the collection of the tax, and reducing, so far as possible, the number of cases in which title would be divested. We can see no reason which will justify us in attempting to give the words, "record owner," any other than their usual and common meaning.

—notice to  
record owner.

The judgment appealed from is reversed, with directions to grant the relief prayed for.

Holcomb, Ch. J., and Main and Mackintosh, JJ., concur.

## ANNOTATION.

### Right of public officer to purchase tax certificates or tax titles.

- I. General rule, 969.
- II. Contrary doctrine, 971.
- III. Under particular statutes, 971.
- IV. Miscellaneous, 972.

This note does not include cases where the officer buys for the public.

#### I. General rule.

It is a general rule that officials having to do with tax sales ought not to buy at such sales.

Thus, an officer making a tax sale may not buy at his own sale. *Cole v. Moore* (1879) 34 Ark. 582; *Haxton v. Harris* (1878) 19 Kan. 511; *Spicer v. Rowland* (1888) 39 Kan. 740, 18 Pac. 908; *Sponable v. Woodhouse* (1892) 48 Kan. 173, 29 Pac. 294; *Payson v. Hall* (1849) 30 Me. 319; *Clute v. Barron* (1851) 2 Mich. 192; *McLeod v. Burkhalter* (1879) 57 Miss. 65; *Chandler v. Moulton* (1860) 33 Vt. 245; *Crahan v. Chittenden* (1909) 82 Vt. 410, 74 Atl. 86; *Mooney v. Smith* (1889) 17 Ont. Rep. 644.

A collector acquires no title by buying at his own tax sale, either directly or indirectly. *Chandler v. Moulton* (1860) 33 Vt. 245. So, when he bids for another person. *Crahan v. Chittenden* (1909) 82 Vt. 410, 74 Atl. 86. Or strikes it off to him in his absence. *Hubbard v. Taylor* (1909) 83 Vt. 120, 138 Am. St. Rep. 1071, 74 Atl. 641.

The collector who makes the sale may not purchase thereat, even as agent for another, and such a sale will not pass the tax title. *Payson v. Hall* (1849) 30 Me. 319, *supra*.

So, a deputy sheriff should not purchase at his principal's tax sale. *Straus v. Head* (1898) 14 Ky. L. Rep. 740, 21 S. W. 537; *Coughlin v. Holmes* (1909) 53 Wash. 692, 102 Pac. 772.

It was held in *Re Cameron* (1868) 14 Grant, Ch. (U. C.) 612, that a county treasurer may not purchase at a tax sale, but should have a lien for the taxes he has paid.

A deputy county treasurer may not

purchase the state bid for lands sold at tax sale. *Wait v. Gardiner* (1900) 123 Mich. 236, 81 N. W. 1098.

The clerk of the county treasurer who conducts a tax sale may not act as the agent for a purchaser, and the tax deed will be set aside. *Hall v. Collins* (1898) 117 Mich. 617, 76 N. W. 72.

In some of the cases, however, it has been held that a deputy to the sheriff who makes the tax sale, having nothing to do with the sale, may properly purchase thereat. *O'Reilly v. Holt* (1877) 2 Woods, 645, Fed. Cas. No. 10,563; *Hare v. Carnall* (1882) 39 Ark. 196.

And it has been held in one case that a deputy tax collector, after a tax sale, before the payment of the bid, may acquire an interest in the purchase. *Mixon v. Clevenger* (1896) 74 Miss. 67, 20 So. 148.

The mayor of a town who has to issue his warrant for a tax sale and join the treasurer in the deed may not buy at the sale. *Greenstreet v. Paris* (1874) 21 Grant. Ch. (U. C.) 229.

The chancery clerk may not purchase at a tax sale where he certifies the assessment roll, takes the acknowledgment of the tax deed, is the redemption officer, "taxes the costs, the taxes due since the sale, and the damages accrued," and is allowed fees in connection with the conveyance, etc. *Barber v. Jackson* (1907) 90 Miss. 621, 44 So. 34.

It is contrary to public policy for the county clerk to buy, when by the statute it was his duty to advertise delinquent lands for sale, to attend the sale and make a record of the lands and lots sold, the sums bid for them, the names of purchasers, etc.; to issue certificates of purchase and certificates of redemption when lands or lots were redeemed, and finally to execute deeds to purchasers on failure of owners to redeem. But in such case he ought to have his payment and interest refunded. *Cole v. Moore* (1879) 34 Ark. 582.

But it was held in *Barr v. Randall* (1886) 35 Kan. 126, 10 Pac. 515, that where the county clerk has nothing to do with the tax sale, except to make a deed, he may buy at the sale, and

that his deed to himself is at most voidable, and will be good after the limitation time for tax deeds.

In *Beckett v. Johnston* (1882) 32 U. C. C. P. 301, it was held that the purchase at tax sale by a township clerk who has duties in regard to taxes is voidable.

And it has been held that a sale is not invalid because a mere employee of the treasurer's office bid in the land at request of a purchaser. *Lorain v. Smith* (1873) 37 Iowa, 67.

The reeve of a township who has nothing to do with the taxes or tax sales is not debarred from purchasing at a tax sale. *Totten v. Truax* (1888) 16 Ont. Rep. 490.

In *Youngs v. Povey* (1901) 127 Mich. 297, 86 N. W. 809, where an intending purchaser from the state, of lands bid in by the state at tax sale, wrote to an employee of the auditor general's office, giving him the descriptions he wanted to purchase, inclosing a draft to the order of the auditor general, and asking the clerk before presenting his application to ascertain if any application for these lands were on file, and the clerk, having no personal interest in the matter, made and filed an application, signing the applicant's name, it was held that there was no violation of the provision making it unlawful for any clerk employed in the office to purchase either directly or indirectly, from the state, any land for sale at said office.

It has been held that the officer buying at his own tax sale may not claim the money paid by him. *Haxton v. Harris* (1878) 19 Kan. 511; *Sponable v. Woodhouse* (1872) 48 Kan. 173, 29 Pac. 394.

It has been held that such sales are absolutely void. *Spicer v. Rowland* (1888) 39 Kan. 740, 18 Pac. 908; *Sponable v. Woodhouse* (Kan.) *supra*. A purchase by a county treasurer at his own tax sale is a nullity, and he is not entitled to his improvements. *Clute v. Barron* (1851) 2 Mich. 192.

But in *Pierce v. Benjamin* (1833) 14 Pick. (Mass.) 356, 25 Am. Dec. 396, the court expressed the opinion that where a tax collector buys personal property at his own sale the sale is

not absolutely void, but the owner may affirm or avoid it.

In *Morton v. Waring* (1857) 18 B. Mon. (Ky.) 72, the court said: "Conceding that a deputy register is not embraced by the [prohibiting] statute, still it would be against the policy of the law to permit him to purchase at sales made by his principal, and although his purchase might not, for that reason alone, be deemed absolutely void, yet, like all purchases made by persons whose positions confer on them advantages which others do not possess, it can only be sustained by its appearing to be, in every respect, fair, free from all suspicion, and made for a full and adequate consideration."

### II. *Contrary doctrine.*

In *Yancey v. Hopkins* (1810) 1 Munf. (Va.) 419, the court expressed the opinion that before the prohibiting statute a deputy sheriff might buy at his own sale for taxes.

The general rule does not apply in Missouri. Thus, where the collector sues to enforce taxes and gets judgment for the state, and issues executions to the sheriff, the collector is not debarred from buying at the execution sale. *Walcott v. Hand* (1894) 122 Mo. 621, 27 S. W. 331; *Turner v. Gregory* (1899) 151 Mo. 100, 52 S. W. 234.

So, the attorney for the collector may purchase. *Walker v. Mills* (1907) 210 Mo. 684, 109 S. W. 44.

The deed is not void because the circuit judge bought the land and presided over the court, where the sheriff's deed was acknowledged. *Culbertson v. Edwards* (1912) 243 Mo. 438, 148 S. W. 112.

In Pennsylvania, a county commissioner may buy at the county treasurer's sale for taxes if he pays more than taxes and costs. *Cuttle v. Brockway* (1854) 24 Pa. 145; *Cuttle v. Brockway* (1858) 32 Pa. 45.

In *Fox v. Cash* (1849) 11 Pa. 207, it was held that the clerk of the county commissioners may purchase at their tax sale.

### III. *Under particular statutes.*

Where a collector of a town attempts to purchase at a tax sale, and the stat-

ute directly forbids it, the deed to him is void. *Ely v. Brown* (1900) 183 Ill. 575, 56 N. E. 181.

If a county treasurer buys as agent for a purchaser, the sale is invalid under the statute making void any sale in which a treasurer shall be directly or indirectly concerned. *Corbin v. Beebe* (1873) 36 Iowa, 336; *Everett v. Beebe* (1873) 37 Iowa, 452, holding also, however, that the purchaser in such case is entitled to have repaid by the owner the money he has paid for taxes, and which the owner would otherwise have had to pay.

A purchase by a deputy treasurer is invalid, but a purchaser in good faith from his grantees will be protected. *Ellis v. Peck* (1876) 45 Iowa, 112. But in *Kirk v. St. Thomas Church* (1886) 70 Iowa, 287, 30 N. W. 569, the wording of the holding is that a purchase by a deputy treasurer, though acting for his minor son, is void. In *Lawrence v. Hornick* (1890) 81 Iowa, 193, 46 N. W. 987, however, it was held that a purchase by a deputy treasurer, acting for his son, was only voidable, and was good after five years from the recording of the deed.

In *Gibbs v. Scales* (1909) 54 Tex. Civ. App. 96, 118 S. W. 188, it was held that, under a statute providing that if there be no bidder for the land at tax sale the county attorney shall buy it in for the state, it is not contrary to public policy for the county attorney to purchase for his own use.

Where the statute provided that "if any officer making sale of property on execution, or his deputy, shall, directly or indirectly, purchase the same, the sale shall be void," a purchase at a sheriff's execution sale for delinquent taxes by a deputy sheriff is voidable, not void, and the title is barred by the Five-Year Statute of Limitations. *Davis v. Howe* (1919) — Tex. —, 213 S. W. 608.

Lands bought by a deputy sheriff at a sheriff's tax sale, and sold by him for value, may be recovered by the owner where the statute provides that such a purchaser "shall, moreover, hold such land or lot in trust for the absolute use and benefit of the person who owned the land at the time of the sale."

Taylor v. Stringer (1844) 1 Gratt. (Va.) 158.

It will be seen that it is held in the reported case (*OKANOGAN POWER & IRRIG. CO. v. QUACKENBUSH*, ante, 966) that the purchase by the county treasurer of delinquent tax certificates is contrary to the spirit, if not the letter, of the prohibition in the statute against a public officer's being beneficially interested in any contract, etc., which may be made by, through, or under his supervision, and making such contract, etc., void.

A deputy to a sheriff, who made the delinquent return and the list of delinquent lands to be returned, is disqualified from buying at the sale of another sheriff, and after such deputy has gone out of office, and such purchase is absolutely void under the statute providing that "no sheriff, deputy sheriff, collector or other officer, who shall return any real estate delinquent for the nonpayment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter, or who shall sell by himself, his deputy or agent, or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purpose. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title of the real estate sold shall remain in the person in whose name

the same was sold." *Shrewsbury v. Horse Creek Coal Land Co.* (1916) 78 W. Va. 182, 88 S. E. 1052.

A deputy county treasurer may purchase tax certificates issued before he became such, although the statute provides that it shall not be lawful for him to purchase directly or indirectly, property sold for taxes at any tax sale, or to purchase any tax certificate or tax deed held by the county, except for or on behalf of the county, and also provides that any tax certificate or tax deed issued in violation of the act is null and void. *Coleman v. Hart* (1875) 37 Wis. 180.

And a treasurer of a county may purchase tax certificates after they have been assigned to another county on a change in territory. *Gilbert v. Dutruit* (1895) 91 Wis. 661, 65 N. W. 511.

#### IV. Miscellaneous.

The wife of the collector is not debarred from purchasing at his tax sale. *Means v. Haley* (1905) 86 Miss. 557, 38 So. 506.

After the lapse of the period of redemption of land sold for taxes to the state, the auditor of public accounts may sell it to a clerk in his office. *Browne v. Carlisle* (1885) 62 Miss. 595.

Where the statute provides that, where the clerk who makes the sale purchases, a commissioner should make the deed, if the clerk purchases through a trustee it is not necessary to have the commissioner make the deed. *Wilder v. Dennis* (1912) 121 C. C. A. 77, 202 Fed. 667. B. B. B.

## STANDARD FIRE INSURANCE COMPANY, Appt.,

v.

## SALLIE SMITHHART.

*Kentucky Court of Appeals — March 25, 1919.*

(183 Ky. 679, 211 S. W. 441.)

### Evidence — communications as to false claim.

1. Communications to his attorney by one who has burned his house to secure the insurance, for the purpose of seeking aid in defrauding the insurer into paying the loss, are admissible against him in an action on the policy.

[See note on this question beginning on page 977.]

— communication between attorneys.

2. Conversations, communications, or agreements between the attorneys representing the different parties to a suit are not admissible in evidence against one of the parties.

Witnesses — attorney — privilege.

3. An attorney at law is a competent witness as to any matters except as to communications made to him in his professional character by his client.

Evidence — privileged communication — statements in presence of other parties.

4. Where one has been the legal adviser at the same time and about the same matter of two persons, the statements made to him by either of them in the presence of the other are not

privileged in a controversy between them.

— advice as to crime.

5. Communications by one contemplating crime or the perpetration of fraud to an attorney for advice as to how to succeed are not privileged.

— communications as to past crime.

6. Communications by a client to an attorney, seeking advice as to liability for a crime already committed, are privileged.

— burning of dwelling.

7. Communications to his attorney by one who has burned his house for the insurance are not admissible in an action to enforce the policy, for the purpose of showing such burning.

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover the amount alleged to be due on four fire insurance policies. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John C. Worsham, for appellant: The provision of the statute that "no attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent," is but a restatement of the common-law rule relative to privileged communication between attorney and client.

Denunzio v. Scholtz, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529; Bannon v. P. Bannon Sewer Pipe Co. 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

To be privileged, communications between the client and attorney must be made in professional confidence and in the legitimate course of the professional employment of the attorney.

40 Cyc. 2373; Greenl. Ev. § 242-a; Gartside v. Outram, 26 L. J. Ch. N. S. 113, 3 Jur. N. S. 39, 5 Week. Rep. 35; Reg. v. Cox, L. R. 14 Q. B. Div. 153, 54 L. J. Mag. Cas. N. S. 41, 5 Am. Crim. Rep. 140; Williams v. Quebrada R. Land & Copper Co. [1895] 2 Ch. 751, 73 L. T. N. S. 397, 44 Week. Rep. 76; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054.

Messrs. McClain & Pentecost for appellee.

Hurt, J., delivered the opinion of the court:

The appellee, Sallie Smithhart,

owned a house in Henderson upon which and its contents she carried four insurance policies in the appellant Standard Fire Insurance Company, which insured her against damages by fire to the house and contents insured. The larger part of the house and its contents were destroyed by fire; and, the appellant company having refused to pay the damages, she instituted this action against the insurance company upon the policies to recover the damages. The trial resulted in a verdict of the jury in her favor, and a judgment of the court in accordance with the verdict. A motion for a new trial was made and denied, and the insurance company appeals.

The only ground upon which a reversal is sought is that an error prejudicial to the substantial rights of the appellant was made by the trial court in excluding from the jury certain evidence offered by the appellant. One of the grounds relied upon by the appellant in the defense of the action was that the burning of the house and goods was not accidental, but was of incendiary origin, and that the appellee procured the house and contents to be burned, with the fraudulent purpose of col-

lecting the amount of the insurance carried upon the house and its contents. This plea was denied by a reply. Upon the trial the appellee stated: That she was not at home at the time the house was burned, but had left her house on the evening before at about 4:30 o'clock, and had gone to Evansville, Indiana, for the purpose of seeing a physician. The house was burned during the following night. She left the house in charge of the caretaker, with directions to close the window shutters and to lock the doors of the house. That some days previous to the time mentioned one Gus Stevens came to the door of her house to ask if she desired any painting to be done. That after her return to her home she engaged the services of an attorney to prepare the proofs of the loss and to collect the insurance, and thereafter the attorney informed her that the company declined to pay the damages upon the ground that she had burned the property. The policies were then returned to her by the attorney, and she thereafter secured other attorneys and instituted the suit. The chief of the fire department of the city testified that he arrived at the place of the fire within a few minutes after the alarm had been given, and the house was then ablaze within, and the shutters to as many as two windows upon one side of the house were fastened by nails driven through the foot of the shutters. The caretaker testified that he closed the shutters between three and four hours before the fire, but did not fasten them with nails. The house was discovered to be on fire about 1 o'clock in the night. The attorney whom appellee had at first employed was called as a witness by the appellant; and his employment by the appellee, and that he had prepared the proofs of the loss, and his services engaged to collect the insurance upon the policies by suit, if necessary, and his submission of the proofs to the company, and its refusal to pay the damages, were prov-

en by the attorney. The appellant then offered to prove by the attorney that he informed the appellee of the refusal of the company and the ground upon which it based its refusal, and that she stated to him that she did not burn the house nor have anything to do with its being burned, but that at a time before it was burned John Puckett suggested to her that, as the business in which she was engaged was dull, it would be a good scheme for her to have the house burned, and that he would attend to the burning of it for her. She said to Puckett that she would not have anything to do with setting it on fire, but he said that if she would let him know of a time when she was going to leave town he would attend to the matter, and for her to call him up; that Puckett said further that he would send Gus Stevens to her house, and that Stevens would come with a paint bucket and ask to be shown the house, and for her to let him see the house, and then telephone to him (Puckett) when she was going to be out of the town, and the house would be burned whilst she was out of the town; and that on the afternoon preceding the night upon which the house was burned, and before she left for Evansville, she telephoned Puckett that she would leave for Evansville that night, and would spend the night in Evansville, and that the house burned during that night. Upon the objection of appellee the court refused to allow the attorney to make the statements above stated. It was then offered to be proven by the attorney that the appellee directed him to deliver the policies sued on, to the attorneys for the company, for the purpose of being canceled, and that in accordance with this direction he did deliver the policies to the attorneys for the company, who promised that no criminal prosecution should be instituted against her, but in a short time the attorneys for the company returned

the policies to the witness, with an explanation that, because of a disagreement between them and the company, they did not represent the company any further, and that witness could collect the policies, if he desired, and that he then returned them to the appellee. The above-proposed statements were also excluded upon the objection of the appellee.

So far as the offered evidence was a statement of conversations or communications or agreements

between the attorneys of the company and the witness, they were

properly excluded upon well-known grounds; but as regards the statements of the appellee made to the attorney, and which were offered to be proven by him, a question is presented which has not heretofore been determined in this jurisdiction. The witness at the time the statements were made to him by appellee was representing her in his professional capacity as an attorney, with reference to her claim under the policies against the insurance company, and the statements made by her directly related to the nature of her claim and her legal rights with reference to same. The common law had a rule which determined the right of an attorney to give evidence touching statements made to him by his client, when such were made to the attorney in his professional character, and the advice of the attorney thereon, and the subject is now governed by the provisions of subsection 4, § 606, Civil Code, which is said to be a declaration of the common law upon that subject. The Code provisions, supra, are as follows: "No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent. . . ."

Touching all matters, an attorney is a competent witness, and is priv-

ileged to testify, either for or against his client, except as to communications made to him in his professional character by his client, and as to such he cannot testify, without the consent of the client, although the relationship has ceased between them. As said in *Carter v. West*, 93 Ky. 211, 19 S. W. 592: "The seal of silence is upon it [such communication] subject to be broken by the consent of the client only."

Witnesses—  
attorney—  
privilege.

Hence the matter for decision here is whether the communications offered to be proven were made to the attorney in his professional character. It is gathered from the textbooks and authorities that there are many communications which a client may make to an attorney, and touching the matter about which the attorney is employed or consulted, which are not made to him in his professional character, and oftentimes for the reason that they are communications which the attorney cannot receive in his professional character, and sometimes as to whether the communication is privileged depends upon the parties to the controversy in which he is called as a witness to testify concerning the communications. As an instance, where one has been the legal adviser at the same time and about the same matter for two persons, the statements made to him by either of them in the presence of the other are not privileged

Evidence—  
privileged  
communication  
—statements in  
presence of  
other parties.

communications in a controversy with each other, though they are privileged in a contest between them and other persons. *Rice v. Rice*, 14 B. Mon. 417; *Smick v. Beswick*, 113 Ky. 439, 68 S. W. 439. The principle upon which this rule is based is that the communications in such a state of case are not given nor received in confidence as to the parties themselves. A communication made by a client to his attorney for the purpose of having it com-

municated to another is not privileged. *List v. List*, 26 Ky. L. Rep. 691, 82 S. W. 446. As an instance of the character of communications which cannot be given to nor received by a lawyer in his professional character are communications made to a lawyer by persons who are contemplating the commission of crimes or the perpetration of

frauds, and who  
—advice as to seek the advice of  
crime. the lawyer as to

how the crimes or frauds contemplated may be committed and how the consequences of them may be avoided. The reason of the principle which holds such communications not to be privileged is that it is not within the professional character of a lawyer to give advice upon such subjects, and that it is no part of the profession of an attorney or counselor at law to be advising persons as to how they may commit crimes or frauds, or how they may escape the consequences of contemplated crimes and frauds. If the crime or fraud has already been committed and finished, a client may advise with an attorney in regard to it, and communicate

with him freely,  
—communications as to and the communi-  
past crime. cations cannot be

divulged as evidence without the consent of the client, because it is a part of the business and duty of those engaged in the practice of the profession of law, when employed and relied upon for that purpose, to give advice to those who have made infractions of the laws; and, to enable the attorney to properly advise and to properly represent the client in court or when prosecutions are threatened, it is conducive to the administration of justice that the client shall be free to communicate to his attorney all the facts within his knowledge, and that he may be assured that a communication made by him shall not be used to his prejudice. While the general rule, which applies to communications made by a client to his attorney in his professional ca-

capacity, and his advice thereon, and to information acquired by an attorney from his client, or touching his client's affairs, concerning matters about which he is employed in his professional capacity, is that he cannot, and will not be permitted to, give evidence touching such matters without the client's consent; but the exception touching communications to an attorney concerning crimes and frauds which the client has in contemplation, and in furtherance of which he makes the communications, is as broad as the rule itself. The exception as stated by 1 Thornton on Attorneys, 214, is: "Where an attorney is consulted for the purpose of obtaining advice as to the perpetration of a fraud, or in aid or furtherance thereof, the communications made to him by one having such purpose in view are not privileged."

In 5 Chamberlayne, Ev. 5280, it is said: "The protection which the law affords to communications between attorney and client has reference to those which are legitimately and properly within the scope of a lawful employment. It does not recognize those which may be made in connection with and as an aid to the accomplishment of a criminal purpose. It is the duty of the attorney in the eyes of the law to act in conformity with the laws in force, and in no way endeavor to violate them, or to aid in their violation."

In 40 Cyc. 2373, the exception is defined as follows: "The rule does not extend to communications respecting proposed infractions of the law, and so there is no privilege as to communications made in contemplation of the future commission of a crime, or perpetration of a fraud, in which, or in avoiding the consequences of which, the client asks the advice or assistance of the attorney. But communications in respect to an alleged crime or fraud, made after the act or transaction is finished, are privileged."

While the decisions of the courts in the various jurisdictions have not been altogether harmonious as



to the soundness of the exception above stated, it is sustained by the weight of modern authority, and is consistent with the purposes of the general rule, which is to aid the dispensing and administration of justice, and not the dispensing of injustice. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Orman v. State*, 24 Tex. App. 495, 6 S. W. 544; *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440; *Hyman v. Grant*, 102 Tex. 50, 112 S. W. 1042; *Taylor v. Evans*, — Tex. Civ. App. —, 29 S. W. 172; *Collins v. Hoffman*, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A, 1; *Dudley v. Beck*, 3 Wis. 274; *Dunn v. Amos*, 14 Wis. 107; *Hamil v. England*, 50 Mo. App. 338; *Stone v. Stitt*, 56 Tex. Civ. App. 465, 121 S. W. 187; *Supplee v. Hall*, 75 Conn. 17, 96 Am. St. Rep. 188, 52 Atl. 407; *Reg. v Cox*, L. R. 14 Q. B. Div. 153, 54 L. J. Mag. Cas. N. S. 41, 5 Am. Crim. Rep. 140.

In the instant case the communications avowed to have been made by the appellee to her attorney tended to prove that she had pro-

—burning of dwelling.

—procured her house to be burned, but it was not permissible

to prove her communications, over her objections, for that purpose in this action; but the fact of having procured the burning of her house

—she was then seeking to defraud the insurance company by pretending that the burning was accidental, or done without her participation, and thus to enable her to recover the insurance by fraud, and that she had employed the services of the attorney to assist her in doing so, and the communications were made to him for his advice and in furtherance of her contemplated fraud—renders it permissible to prove the communications made by her in reference to her connection with the burning of the house by the attorney to whom the communications were made. Such communications were not made to the attorney in his professional capacity, as they were such as he could not receive in such capacity, and therefore were not privileged. Hence the trial court erroneously excluded from the jury so much of the testimony of the attorney as would detail the communications made to him by appellee touching the connection which she had with the burning of the house, but the other statements proposed to be made by the attorney were properly excluded.

—communications as to false claim.

The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

## ANNOTATION.

### Privilege of communication to attorney by client in attempt to establish false claim.

Since the perpetration of a fraud is outside the scope of the professional duty of an attorney, no privilege attaches to a communication between attorney and client with respect to the establishment of a false claim. *People v. Petersen* (1901) 60 App. Div. 118, 69 N. Y. Supp. 941; *Hyman v. Grant* (1908) 102 Tex. 50, 112 S. W. 1042; *Charlton v. Coombes* (1863) 4 Giff. 372, 66 Eng. Reprint, 751, 1 New Reports, 547, 32 L. J. Ch. N. S. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 5 A.L.R.—62.

Week. Rep. 504. And see the reported case (*STANDARD F. INS. CO. v. SMITHHART*, ante, 972).

In *Hyman v. Grant* (1908) 102 Tex. 50, 112 S. W. 1042, wherein title by adverse possession under a deed was claimed, the attorney of the claimant, who was the grantor in the deed, testified that he had no title to the land in question, and that, after consultation with the claimant, who had made improvements on the land, as to the best method of protecting them, he

made the deed in order that a claim of title might be asserted thereunder. The court held that the testimony did not involve the disclosure of any privileged communication, saying: "The making of the deed by Carter to Scott in order that the latter might place it upon record and acquire title by limitation was certainly not the act of an attorney which would be privileged, for, if done in his professional character, it was 'a wrongful act,' aiding Scott to perpetrate a fraud upon the owner of the land by making a pretense of title through a recorded deed when in fact no claim whatever existed."

In *People v. Petersen* (N. Y.) *supra*, the accused were on trial for conspiracy to institute falsely an action for breach of a promise of marriage. The attorney who appeared for the accused in the civil action for breach of promise was called as a witness and produced the original summons and complaint in that action. It was claimed that this evidence was not admissible, being privileged. It was held that no privilege attached. The court said that if this complaint was made for the purpose of carrying into effect the criminal act conspired to be done, the testimony was competent.

While *Charlton v. Coombes* (Eng.) *supra*, upholds the rule that communications by a client to an attorney in the attempt to establish a false claim are not privileged, it confines its application to cases in which the attorney has knowledge of the fraud. In that case it appeared that a widow, by the will of her husband, was entitled to certain dividends and interest, provided that she should not marry without the consent of the executors and trustees. She married without their consent, concealing the fact. She filed a bill alleging the refusal of the trustees to consent to her marriage, and praying that the trust might be administered by the court. She wrote several letters to her attorney, who was ignorant of her marriage, in regard to her claim to the trust fund which was in fact forfeited by her marriage without the trustees' consent. A

decree was made whereby the rents and profits were to be paid to her. In an action to recover back the amount thereof, her attorney was asked to testify as to communications made to him. He refused to testify on the ground that she was his client at the time and such communications were privileged. It was held that the attorney was not compelled to testify and properly refused to do so. Since the bill failed to connect the attorney with any fraud, and since he was employed in the ordinary way, the communications between him and his client came within the rule of privilege. The court went on to say: "There appears to be no case in which it has been expressly decided whether the death of the client in any way affects or modifies the rule. . . . There can be no doubt that, if a solicitor is a co-conspirator with a defendant in the cause, in concocting a fraud in respect of which the suit seeks relief, privilege does not cover such a case; because . . . the court cannot permit it to be said that the contriving of a fraud forms part of the professional business of an attorney or solicitor."

The rule laid down in the case last cited has been applied in two cases holding that advice given by an attorney as to a transfer of a right of action in order to avoid legal objections to its enforcement was not so far fraudulent as to be divested of privilege. *Higbee v. Dresser* (1870) 103 Mass. 523; *Dewey v. Komar* (1906) 21 S. D. 117, 110 N. W. 90.

In *Dewey v. Komar* (S. D.) *supra*, the plaintiff, as assignee of an account and indorsee of notes, brought action against the debtor and maker of the notes. It appeared that the assignor of the account and the payee of the notes were foreign corporations. The attorney for the plaintiff was called as a witness and asked whether he did not advise the corporations to assign these claims in order that action might be brought in the assignee's name, thus evading the

laws of the state relating to foreign corporations. It was held that the testimony was inadmissible.

In *Higbee v. Dresser* (Mass.) *supra*, an action on a note, it was sought to prove that an attorney for the original creditor advised him to procure a note and have it assigned to a bona fide purchaser. It did not appear that the original debt was in fact fraudu-

lent or illegal. The court said: "If the case disclosed anything having a tendency to show that the witness was acting for himself as a party to the transaction, or that he was consulted in aid of any intended fraud, or that his advice was asked for any dishonest purpose, the matter would have raised a more serious question."

M. J. Q.

LEO L. D'UTASSY, Appt.,

v.

WILLIAM M. BARRETT, President of Adams Express Company,  
Respt.

*New York Court of Appeals — December 28, 1916.*

(219 N. Y. 420, 114 N. E. 786.)

**Carrier — theft by employees — extent of liability.**

1. A shipper who undervalues the property shipped in order to secure a lower rate under the schedules filed in accordance with the Interstate Commerce Act cannot hold the carrier liable for the full value of the property when it is stolen by the carrier's employees.

[See note on this question beginning on page 986.]

—agreement for limited liability — validity.

2. Agreements limiting a carrier's liability are upheld where the loss is due to ordinary negligence or to the wrongful act of another.

[See 4 R. C. L. 770; 5 R. C. L. 15.]

—affirmative wrongdoing.

3. A carrier cannot contract for limi-

tation of liability for loss due to its affirmative wrongdoing.

—common-law liability.

4. The liability of a carrier of goods at common law was that of insurer, and proper care and diligence were unavailing to avoid such liability.

[See 4 R. C. L. 696.]

**APPEAL** by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part III., for New York County (Lehman, J.) overruling plaintiff's demurrer to the affirmative defenses in the amended answer to the amended complaint, in an action brought to recover the value of five shipments of goods alleged to have been unlawfully converted by defendant's employees.  
*Affirmed.*

The facts, so far as material, are stated in the opinion of the court.

The questions certified were as follows:

"1. Is the affirmative defense set forth in the paragraphs of the amended answer designated III., IV., V., VI., and VII. sufficient in law, upon the face thereof, to constitute a partial defense to the first

cause of action set forth in the amended complaint herein?

"2. Is the affirmative defense set forth in the paragraphs of the amended answer designated X. and XI. sufficient in law, upon the face thereof, to constitute a partial defense to the second cause of action

set forth in the amended complaint herein?

"3. Is the affirmative defense set forth in the paragraphs of the amended answer designated XIV. and XV. sufficient in law, upon the face thereof, to constitute a partial defense to the third cause of action set forth in the amended complaint herein?

"4. Is the affirmative defense set forth in the paragraphs of the amended answer designated XVIII. and XIX. sufficient in law, upon the face thereof, to constitute a partial defense to the fourth cause of action set forth in the amended complaint herein?

"5. Is the affirmative defense set forth in the paragraphs of the amended answer designated XXII. and XXIII. sufficient in law, upon the face thereof, to constitute a partial defense to the fifth cause of action set forth in the amended complaint herein?

**Mr. Arthur W. Clement, with Messrs. Tipple & Plitt, for appellant:**

The affirmative act of conversion of the shipments by the Express Company deprives the Express Company of the benefit of the limitation of its liability to the \$50 specified in its express receipt.

*Wheeler v. Oceanic Steam Nav. Co.* 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Rosenthal v. Weir*, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65; *Fein v. Weir*, 199 N. Y. 540, 92 N. E. 1084; *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525; *Maghee v. Camden & A. B. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *McKahan v. American Exp. Co.* 209 Mass. 270, 35 L.R.A. (N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Boyle v. Bush Terminal R. Co.* 210 N. Y. 389, 104 N. E. 933; *Adams Exp. Co. v. Berry & W. Co.* 35 App. D. C. 208, 31 L.R.A. (N.S.) 309; *Sleat v. Fagg*, 5 Barn. & Ald. 342, 106 Eng. Reprint, 1216, 24 Revised Rep. 407; *Wyld v. Pickford*, 8 Mees. & W. 443, 151 Eng. Reprint, 1113; *Thorley v. Orchis S. S. Co.* [1907] 1 K. B. 660,

2 B. R. C. 565, 76 L. J. K. B. N. S. 595, 96 L. T. N. S. 488, 23 Times L. R. 338, 12 Com. Cas. 251, 7 Ann. Cas. 281; *Angell, Carr.* 5th ed. p. 11; *Story, Bailm.* 9th ed. p. 33; *Hutchinson, Carr.* 8d ed. p. 455.

The Interstate Commerce Act does not require that the true valuation of a shipment shall be declared.

*George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 507, 57 L. ed. 314, 320, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

The Interstate Commerce Act does not prevent the plaintiff from recovering the full value of the shipments.

*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277.

Messrs. William D. Guthrie and Edward V. Conwell, for respondent:

The admission by the demurrer of a fraudulent misrepresentation and concealment of the true value of the package shipped estops the plaintiff from claiming a larger value.

*Boyle v. Bush Terminal R. Co.* 210 N. Y. 392, 104 N. E. 933; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 339-341, 28 L. ed. 717, 720, 721, 5 Sup. Ct. Rep. 151; *Hohl v. Norddeutscher Lloyd*, 99 C. C. A. 166, 175 Fed. 544; *Donlon Bros. v. Southern P. Co.* 151 Cal. 763, 11 L.R.A. (N.S.) 811, 91 Pac. 603, 12 Ann. Cas. 1118; *Greenwald v. Barrett*, 199 N. Y. 177, 35 L.R.A. (N.S.) 971, 92 N. E. 218; *Rosenthal v. Weir*, 170 N. Y. 154, 57 L.R.A. 527, 63 N. E. 65; *Gibbon v. Paynton*, 4 Burr. 2300, 98 Eng. Reprint, 199; *People v. Schmidt*, 216 N. Y. 341, L.R.A. 1916D, 519, 110 N. E. 945, Ann. Cas. 1916A, 978; *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Logan v. Whitley*, 129 App. Div. 670, 114 N. Y. Supp. 255; *Murray v. Interurban Street R. Co.* 118 App. Div. 37, 102 N. Y. Supp. 1026; *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 197, 60 L. ed. 948, 952, 36 Sup. Ct. Rep. 541.

Under the Federal Interstate Commerce Act, the plaintiff cannot recover more than the agreed value.

*United Lead Co. v. Lehigh Valley R. Co.* 156 App. Div. 525, 141 N. Y. Supp. 310; *Adams Exp. Co. v. Croninger*, 226

U. S. 491, 511, 57 L. ed. 314, 322, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 649, 652, 57 L. ed. 683, 687, 688, 33 Sup. Ct. Rep. 391; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 180, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Barstow v. New York, N. H. & H. R. Co. 158 App. Div. 665, 143 N. Y. Supp. 983; Bostwick v. Baltimore & O. R. Co. 45 N. Y. 712; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Pound, J., delivered the opinion of the court:

The complaint alleges that the defendant received certain packages from plaintiff's assignors for interstate shipment, and agreed to carry the same to the consignees thereof, but that said "Adams Express Company, its agents, servants, and employees," stole said packages and their contents, and have unlawfully disposed of said property and have converted the same to their own use, to plaintiff's damage upwards of \$2,000. The answer sets up as a partial defense that it was agreed between the shipper and defendant that the value of each shipment was not more than \$50, and that the defendant should not be liable for more than \$50 thereon; that the shipper concealed the true value of the property, that charges were fixed and filed with the Interstate Commerce Commission as required by the Interstate Commerce Act of Congress of February 4, 1887, and the acts amendatory thereof, including the Carmack Amendment; that a higher charge would have been made if the true value had been given; that greater care would also have been taken to prevent the loss or theft of the property, "as well through the acts or omissions of the agents or employees of said Express Company as through the acts or omissions of other persons."

To this affirmative partial de-

fense the plaintiff demurs on the ground of the legal insufficiency thereof. The effect of the pleadings is that the defendant admits that "its agents, servants, and employees" stole, unlawfully disposed of, and converted the packages to their own use, and alleges that the value was stipulated as well in case the property was so stolen or converted by the employees of the defendant as in case the loss or theft was due to the acts of third parties, and, therefore, claims that if the evidence discloses that the property was so stolen and converted by an agent, servant, or employee of the defendant, the liability of the defendant should be limited to \$50 on each shipment. Proof of actual conversion by the defendant itself would, under this partial defense, establish full liability, for it is not pleaded that the value is agreed upon as against such an act. As the defendant may act only through agents whose acts in the scope of their employment are attributed to it, the question narrowly presented is whether the agreed valuation applies to an action for the conversion of the goods by an employee for his own benefit, and amounts to a partial defense.

Agreements of limited liability are upheld where the loss is due to ordinary negligence or to the

Carrier—  
agreement for  
limited liability  
—validity.

wrongful act of another (Boyle v. Bush Terminal R. Co. 210 N. Y. 389, 392, 104 N. E. 933; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593); but the law remains that the carrier may not claim a limitation of liability to a certain amount for its affirmative wrongdoing (Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442), when the plaintiff makes proof thereof (Wamsley v. Atlas S. S. Co. 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896). This distinction between a limitation of liability for conver-

—affirmative  
wrongdoing.

sion and for negligence is clearly shown in the cases.

The distinction must be borne in mind between a limitation of liability and an agreed valuation in case of liability. When it is urged that the limitation of value should not be applied to any case of theft by the carrier's employees, for the reason that the company is liable for such acts as if the company had been the thief (*Adams Exp. Co. v. Berry & W. Co.* 35 App. D. C. 208, 31 L.R.A. (N.S.) 309), the argument loses sight of this distinction. When the agent acts within the scope of his employment in taking possession of the shipment, "in legal effect it was the same as if the defendant, personified, had taken it" (*Vann, J., in Hasbrouck v. New York Central & H. R. R. Co.* 202 N. Y. 363, 373, 35 L.R.A. (N.S.) 537, 95 N. E. 808, Ann. Cas. 1912D, 1150), but the liability may exist and the valuation of the shipment in case of liability may be agreed upon when the rates for transportation are based on the valuation of the goods intrusted to the carrier.

The reason for the rule sustaining the declared and agreed valuation is to prevent fraudulent practices by shippers in obtaining a lower rate by undervaluation. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *George N. Pierce Co. v. Wells F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351. While the rule should not be extended to permit a carrier to realize a profit by converting valuable shipments, such conversions are so unusual as to be almost negligible. It

—theft by  
employees—  
extent of  
liability.

would be unjust and contrary to the policy of the law to permit the agreed valuation to be overthrown for the purpose of enabling the shipper to obtain a recovery in excess thereof in a suit for loss or damage, on any theory of trover or conversion, for loss of goods by wrongful deliveries or acts of employees for their own benefit, based not on the wrongful

misconduct of the carrier as such, but on the act of the employee. *Rosenthal v. Weir*, 170 N. Y. 148, 154, 57 L.R.A. 527, 63 N. E. 65. The liability of carriers of goods at common law was that of insurers, and proper care and diligence were —common-law liability. insufficient to avoid

such liability. The duty was to carry the goods and deliver them to the consignee. A breach of that duty imposed liability. The innocent mistakes of the servant in delivering the goods, no less than his wilful misconduct in breach of the trust reposed in him, constituted a conversion by the carrier. *Price v. Oswego & S. R. Co.* 50 N. Y. 213, 10 Am. Rep. 475. But the contract in suit does not evade the liability; it merely fixes the valuation of the goods when liability is established. In an action for damages against the carrier, the shipper is bound by the terms of the contract, and it is of the highest importance that competent parties be held to the terms of their valid contracts. "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common-law principles accepted and enforced in Federal courts." *Southern Exp. Co. v. Byers*, 240 U. S. 612, 614, 60 L. ed. 825, 827, L.R.A. 1917A, 197, 36 Sup. Ct. Rep. 410; *New York C. & H. R. Co. v. Beaham*, 242 U. S. 148, 151, 61 L. ed. 210, 216, 37 Sup. Ct. Rep. 43. It has been held in cases involving negligence or the acts of third parties that where alternate rates fairly based upon valuation are offered, liability may be limited by special contract (*Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555); that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from neg-

ligence (Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 593, 60 L. ed. 453, 457, 36 Sup. Ct. Rep. 177); that having obtained a rate based on the declared value the shipper is concluded, and there is no room for parol evidence to show otherwise (Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 670, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397); that so long as the tariff based on value remained operative it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties (Great Northern R. Co. v. O'Connor, 232 U. S. 508, 515, 58 L. ed. 703, 706, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 180, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556); that the question is not one of form, but of actuality (Southern R. Co. v. Prescott, 240 U. S. 632, 639, 60 L. ed. 836, 839, 36 Sup. Ct. Rep. 469), and that the effect of the stipulation cannot be escaped by the mere form of the action, the scope and effect of which is an action for damages against the carrier. Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 197, 60 L. ed. 948,

952, 36 Sup. Ct. Rep. 541. The contention of appellant that the agreed value does not conclude the shipper as against the acts of employees outside the scope of their employment cannot be sustained, without ignoring the terms of the contract, disregarding the intent of the parties and of the acts of Congress regulating interstate transportation, and holding the carrier to a different responsibility than that which it assumed.

The order should be affirmed, with costs, and the questions should be answered in the affirmative.

Willard Bartlett, Ch. J., Chase, Collin, Cuddeback, Hogan, and Cardozo, JJ., concur.

#### NOTE.

The question decided in the affirmative in (D'UTASSY v. BARRETT (reported herewith) ante, 979, as to whether a stipulation limiting the amount of a carrier's liability is applicable where goods are stolen by its employee, is the subject of the annotation following FESSLER v. DETROIT TAXICAB & TRANSFER Co. post, 986.

### ISABELL FESSLER

v.

DETROIT TAXICAB & TRANSFER COMPANY, Plff. in Err.

*Michigan Supreme Court—April 3, 1919.*

(— Mich. —, 171 N. W. 360.)

**Carrier — transfer company — loss of baggage — extent of liability.**

The placing by a baggage transfer company of a notice on the back of its claim checks that it will not be liable for loss of baggage in excess of a specified amount does not relieve it from liability for the full value of baggage stolen by its agent.

[See note on this question beginning on page 986.]

**ERROR** to the Circuit Court for Wayne County (Des Voignes, J.) to review a judgment in favor of plaintiff in an action brought to recover the value of a trunk and its contents, stolen by defendant's agent. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. A. J. Groesbeck for plaintiff in error.

Mr. Charles P. O'Neil for defendant in error.

Moore, J., delivered the opinion of the court:

This suit is brought to recover the value of a trunk and its contents. The trunk was at the railroad depot, having arrived there from California. The sister of appellee engaged the agent of the defendant to deliver it at the house. There was given by the defendant to the sister a check reading as follows:

Claim Check. Detroit Taxicab & Transfer Co. Telephone, M5353.  
Address, 674 Lakeview Ave.

Baggage checked from residence to destination by presenting railroad ticket Branch Office, 13 Lafayette Blvd. See that the exact amount as paid is punched out from this ticket.

Read carefully conditions on the back. The amount paid was \$1. Number, 65,641.

On back: "This company will not be responsible for loss or injury to baggage covered by this check to an amount exceeding \$100, or for merchandise, money, or jewelry carried by it, unless specifically agreed in writing."

Neither the plaintiff nor her sister read the check at the time it was delivered, nor were its contents made known to either of them. The trunk was given by the defendant to its driver, McLeod, to deliver at plaintiff's home. McLeod stole the trunk, and it was never received by plaintiff. The plaintiff claimed the trunk and contents, including a watch and some jewelry, were worth \$665.67, and sued to recover that amount.

The defendant, at the close of the testimony offered by the plaintiff, asked that a verdict be directed against it for \$100, claiming that was the limit of its liability. This motion was denied. The verdict was for the plaintiff for \$665.67. The defendant then moved to enter

judgment notwithstanding the verdict for \$100. This was refused, and judgment was entered for the full amount.

We quote from the brief of appellant:

"(1) The main question involved in this case is the validity of the limitation of defendant's liability under the facts in the case.

"(2) The other questions involved relate to the admission of evidence, the rejection of evidence, the remarks of the court, and the charge of the court on the question of the damages of the plaintiff."

It is the claim of the defendant that it might limit its liability, and that it did so by the giving of the claim check, and that the limitation was fair and reasonable, and that when the plaintiff, through her sister, accepted the check, she assented to the limitation and is bound by it, citing *Smith v. American Exp. Co.* 108 Mich. 572, 66 N. W. 479, and the cases cited therein. Counsel quote in their brief nearly the whole of that opinion, but omit quoting the first part of it, which justifies headnotes reading as follows:

"The receipt or bill of lading issued by a common carrier to a consignor, and received by him without objection, and without any insistence upon the common-law liability of the carrier, is a contract between the parties, and fixes their liabilities and rights."

"Such contract is not to be construed as in any way limiting the carrier's liability for loss or damage due to the neglect or default of its employees."

The court saying: "The rule is established by the overwhelming weight of authority."

There is a serious question as to whether the claim check is a bill of lading, within the definition in *McMillan v. Michigan & N. I. R. Co.* 16 Mich. at page 113, 93 Am. Dec. 208, where it is said:

"It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part



of the contract for transportation and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

"A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed to their destination, and there delivered to the parties therein designated. Abbott, Shipping, 322. It constitutes the contract between the parties in respect to the transportation, and is the measure of their rights and liabilities, unless where fraud or mistake can be shown. Redf. Railways, 307-309, and notes; Angell, Carr. § 223. It has acquired from usage a negotiable character, and the carrier may be estopped, as against the indorsee for value, from showing mistakes in giving it. Redf. Railways, 307."

It will be noticed that the claim check does not describe any goods, does not mention the name of the consignor, nor the consignee, nor the place of destination, and it would hardly be claimed that it is negotiable.

Much reliance is placed by counsel for the appellant upon the case of D'Utassy v. Barrett, 171 App. Div. 772, 157 N. Y. Supp. 916, and 219 N. Y. 420, ante, 979, 114 N. E. 786. In that case there was a bill of lading which stated: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof, . . . the shipper agrees that the company shall not be liable in any event for more than \$50," etc.

Clearly a very different case than the one before us.

A case more like the one we are considering is Adams Exp. Co. v. Berry & W. Co. 35 App. D. C. 208, 31 L.R.A. (N.S.) 309. In that case it is said:

"It is evident that the only way in which a carrier may be relieved from its common-law obligation to pay the full value of goods lost through its negligence is by means

of a special contract with the shipper, as above noted. It is also clear, according to the ordinary rules of construction, that such relief is only to the extent named in that contract. New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624. Is it possible for the carrier to extend this doctrine of contractual

limitation of liability to cover cases where the goods are converted or embezzled by it? We think not. So great would be the opportunity for fraud that public policy will not suffer a practice so manifestly calculated to invite it. That the shipper, in a particular instance, might be willing to make such a concession does not alter the rule; it is not within the power of the individual to barter away the right to protection inherent in the general public. In discussing this question, the court, in the case of The New England (D. C.) 110 Fed. 415, 10 Am. Neg. Rep. 388, said: 'It should be added, further, that it is doubtful if any limitation which seeks to protect a company, not from the negligence, but from the theft or conversion, of its servants, is consonant with public policy.' Story, in his work on Bailments, 8th ed. § 32, says: 'In respect to cases of loss by fraud, there is a salutary principle, belonging both to our law and the civil law. It is that the bailee can never protect himself against responsibility for losses occasioned by his own fraud; nay, not even by a contract with the bailor that he shall not be responsible for such losses, for the law will not tolerate such indecency and immorality that a man shall contract to be safely dishonest.' See also Alabama G. S. R. Co. v. Little, 71 Ala. 615; Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Zouch v. Chesapeake & O. R. Co. 36 W. Va. 524, 17 L.R.A. 116, 15 S. E. 185; American Exp. Co. v. Sands, 55 Pa. 140; Ronan v. Midland R. Co. Ir. L. R.

Carrier—transfer company—loss of baggage—extent of liability.

14 C. L. 157; Schouler, Bailm. & Carr. § 20.

"Would it be possible for a carrier, after receiving for transportation goods worth \$1,000, to embezzle them, and then plead as a limitation of its liability the fact that the shipper had not stated their value to be more than \$50? In other words, can a carrier engaged in business of a public nature be permitted to justify a conversion of goods intrusted to it, on the ground that its liability is fixed by con-

tract? Such would be the absurd result were appellant's contention carried to its logical conclusion."

See also 4 R. C. L. § 251, and the many cases cited in the note.

The facts disclosed by this record do not limit the liability of the defendant to \$100. Having reached this conclusion, it is unnecessary to discuss the other questions presented by counsel, though they have not been overlooked.

Judgment is affirmed, with costs to the plaintiff.

### ANNOTATION.

**Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee.**

- I. In general, 986.
- II. Grounds for holdings, 986.
- III. Unsigned contracts, 989.

#### *I. In general.*

This note does not include cases like *The Saratoga* (1884) 20 Fed. 869, in which the goods were stolen by someone not at the time in the employ of the carrier, such cases necessarily turning upon the question of negligence or degree of care required to prevent theft. And cases like *Clarke-Lawrence Co. v. Chesapeake & O. R. Co.* (1908) 63 W. Va. 423, 61 S. E. 364, in which the decision is based upon the holding that there was a conversion by the carrier itself, there being no theft by an employee for his own benefit, are likewise excluded.

It has been held that a clause in a special contract, limiting the carrier's liability to a fixed amount in case of loss or injury to the goods, does not apply where the goods are embezzled by an employee of the carrier. *The New England* (1901) 110 Fed. 415, 10 Am. Neg. Rep. 388; *Adams Exp. Co. v. Berry & W. Co.* (1910) 35 App. D. C. 208, 31 L.R.A. (N.S.) 309; *Southern Exp. Co. v. Gutman* (1885) 6 Ky. L. Rep. 654 (abstract) modifying (1885) 6 Ky. L. Rep. 587 (abstract); *Gillespie v. Platt* (1896) 19 Misc. 43, 42 N. Y. Supp. 876 (see discussion of this case, *infra*).

Contra: *D'UTASSY v. BARRETT* (re-

ported herewith) ante, 979, aff'g (1916) 171 App. Div. 772, 157 N. Y. Supp. 916. See discussion, *infra*, III.

#### *II. Grounds for holdings.*

The two cases (*Adams Exp. Co. v. Berry & W. Co.* (1910) 35 App. D. C. 208, 31 L.R.A. (N.S.) 309, and *D'UTASSY v. BARRETT* (reported herewith) ante, 979, affirming (1916) 171 App. Div. 772, 157 N. Y. Supp. 916, cited by the court in *FESSLER v. DETROIT TAXICAB & TRANSFER Co.* (reported herewith) ante, 983, are practically alike on the facts, but, as already indicated, are opposed in the conclusions reached. The contract relied upon to limit the recovery in the *Berry & W. Case* reads as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding \$50, unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein," etc., no value being declared; and it was held that the limitation did not apply so that a recovery for the full value of the goods was had, upon the jury's finding that the goods were embezzled by an employee of the carrier for his own

use. It appeared that the receipt that contained this clause was taken from a blank receipt book kept upon the desk of plaintiff's shipping room and that he had previously shipped goods in the same way. The decision is based upon the theory that the act of the carrier's agent, in embezzling the goods for his own use, was in effect the act of the carrier, or at least amounted to a conversion by the carrier. See quotation from *FESSLER v. DETROIT TAXICAB & TRANSFER CO.*

The contract in the *D'UTASSY CASE*, which was also an express company's receipt, reads as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding \$50 for any shipment of 100 pounds or less, and not exceeding 50 cents per pound for any shipment in excess of 100 pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars (\$50) on any shipment of 100 pounds or less, and for not exceeding 50 cents per pound on a shipment weighing more than 100 pounds, and said property is valued at, and the liability of the company is hereby limited to, the values above stated, unless a greater value is declared at the time of shipment, and charge for value paid or agreed to be paid therefor," nothing being said as to the shipper's having read the receipt. It was held that the limitation does apply, and the amount of the recovery was limited by the terms of the contract. The appellate division in deciding the case said: "A number of New York and other cases are cited by appellant in support of this proposition, but practically all of them involve a conversion in the course of the carrier's effort to perform the contract of carriage, such as a deviation from the agreed route, an unwarranted delay, a misdelivery, etc., in which case it is quite proper to say that the conversion is by the carrier itself, and that for such conversion the carrier should be liable in tort independently

of the contract. But the instant case presents a totally different question, since the conversion of the goods was by an employee for his own benefit. His acts in furtherance of this purpose were not company acts, but the acts of a stranger. But for not preventing the theft the company, through its agents, including the thief, was negligent. It was a part of the contract of carriage to prevent thefts by anyone, including their own employees. The failure to do this constituted a breach of contract for which the company is liable, but to which, however, the limitation of liability contained in that contract applies." And, in affirming the decision the court of appeals said: "The distinction must be borne in mind between a limitation of liability and an agreed valuation in case of liability. When it is urged that the limitation of value should not be applied to any case of theft by the carrier's employees, for the reason that the company is liable for such acts as if the company had been the thief (*Adams Exp. Co. v. Berry & W. Co.* (1910) 35 App. D. C. 208, 31 L.R.A.(N.S.) 309), the argument loses sight of this distinction. When the agent acts within the scope of his employment in taking possession of the shipment, 'in legal effect it was the same as if the defendant, personified, had taken it' (*Vann, J., in Hasbrouck v. New York C. & H. R. R. Co.* (1911) 202 N. Y. 373, 35 L.R.A.(N.S.) 537, 95 N. E. 808, Ann. Cas. 1912D, 1150), but the liability may exist, and the valuation of the shipment in case of liability may be agreed upon, when the rates for transportation are based on the valuation of the goods intrusted to the carrier. The reason for the rule sustaining the declared and agreed valuation is to prevent fraudulent practices by shippers in obtaining a lower rate by undervaluation (*Kansas City Southern R. Co. v. Carl* (1913) 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *George N. Pierce Co. v. Wells, F. & Co.* (1915) 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351). While the rule should not be extended to permit a carrier to

realize a profit by converting valuable shipments, such conversions are so unusual as to be almost negligible. It would be unjust and contrary to the policy of the law to permit the agreed valuation to be overthrown for the purpose of enabling the shipper to obtain a recovery in excess thereof, in a suit for loss or damage, on any theory of trover or conversion for loss of goods by wrongful deliveries or acts of employees for their benefit, based not on the wrongful misconduct of the carrier as such, but on the act of the employee."

*Gillespie v. Platt* (1896) 19 Misc. 43, 42 N. Y. Supp. 876, *supra*, holding that the limitation in the contract does not apply where the goods must have been stolen by the carrier's employee, is based upon the carrier's affirmative wrongful act in making up a receipt in such manner that its delivery employee could obtain the signature of the consignee to the receipt by fraud, without delivery of the package, which he did, and made it appear that he had delivered the package to the consignee when he had not done so. It will be seen, therefore, that this decision, while opposed in result to the *D'UTASSY CASE* (reported herewith) *ante*, 979, is not necessarily so on principle. In that case there was no negligence of the carrier except what might be imputed to it for employing an untrustworthy servant, while in the *Gillespie Case* the negligence was so gross that the court held it to be a positive wrongful act.

The *New England* (1901) 110 Fed. 415, 10 Am. Neg. Rep. 388, was decided upon the unreasonableness of the limitation, after a finding that the goods had been stolen or embezzled by the carrier's employees, the court holding that a limitation to \$50 in value for a passenger with a first-class steamer ticket across the Atlantic is an unreasonably low amount. But the court added that "it is doubtful if any limitation which seeks to protect a company not from the negligence, but from the theft or conversion, of its servants, is consonant with public policy." And it might be

observed here that the court did not favor the distinction that was afterwards so tersely stated by the New York court in the *D'UTASSY CASE*. It said: "To make a case turn on the presence or absence of the formal words, 'at which the baggage is hereby valued,' is to sacrifice substance to form." This had reference to the distinction later drawn by the New York court between "a limitation of liability and an agreed valuation in case of liability." See quotation from the *D'UTASSY CASE*.

In *Windmiller v. Northern P. R. Co.* (1909) 52 Wash. 613, 101 Pac. 225, part of the goods were taken from the box, and the theft was not discovered until the box had reached its destination over a connecting carrier's line; it was held that plaintiff could not recover above the limit specified in the contract, upon a speculative theory that the goods were stolen by the employees of the connecting carrier. So the case cannot be classed as one in which the goods were stolen by an employee.

In *Bradley v. Waterhouse* (1823) 3 Car. & P. (Eng.) 318, *Moody & M.* 154, a parcel containing 200 sovereigns, inclosed in 6 pounds of tea, was sent by coach and paid for as of ordinary value, both the sender and the consignee being aware of a notice of the proprietors, limiting their liability to £5 unless the value was declared and carriage paid for accordingly. The parcel was stolen on the way by one of the coach porters employed by the coach proprietors. The question submitted was: "Has this been a case of gross negligence on the part of the defendants, or has the loss been brought on by the plaintiff's own conduct in sending valuable articles under such slight disguise?" The verdict was for the defendants, but it will be observed that the question was one of avoiding liability altogether, and not merely the application of the limitation fixed by the contract or public notice. Another case of this kind is *Fein v. Weir* (1908) 129 App. Div. 299, 114 N. Y. Supp. 426, affirmed in (1910) 199 N. Y. 540, 93 N. E. 1084, where the carrier was held lia-

ble for the whole value of the goods stolen by an employee, notwithstanding a clause limiting its liability, on the theory that the agent who received the goods and signed a false name to the receipt was acting within the scope of his authority, but the question of limiting the liability was eliminated from the case by the admissions or concessions made in the brief of the carrier. These two cases are not within the scope of the note, which is limited to the question of limiting the liability, but they are cited here to show the distinction.

### III. *Unsigned contracts.*

In view of the fact that the court in (*FESSLER v. DETROIT TAXICAB & TRANSFER CO.* (reported herewith) ante, 983), seems to lay emphasis upon the facts, that the "check does not describe any goods, does not mention the name of the consignor, nor the consignee, nor the place of destination," that it was not signed, and that it was not negotiable, neither the *D'UTASSY CASE* (reported herewith) ante, 979, nor *Adams Exp. Co. v. Berry & W. Co.* (1910) 35 App. D. C. 208, 31 L.R.A.(N.S.) 309, supra, shed much light upon the question before the court, although it cites both and says that the latter is the more like the case before it. As already stated, supra, the two cases are alike in every essential fact, the court in the *D'UTASSY CASE* citing the other, but refusing to follow it. But a clear distinction is raised between bills of lading, express receipts, and other forms used by carriers of freight and express, on the one hand, and the carriers of baggage on passenger tickets, checks of transfer companies, etc., on the other. Since there is not much, if any, authority upon this phase of the question, *FESSLER v. DETROIT TAXICAB & TRANSFER CO.* (reported herewith) ante, 983, should stand as a valuable precedent as to the nonapplicability of a clause contained in an unsigned contract, limiting the amount of the carrier's liability, when the property is stolen by the employees of the carrier.

In *Mobile & O. R. Co. v. Hopkins* (1868) 41 Ala. 486, 94 Am. Dec. 607,

where the baggage of a passenger traveling upon a free ticket had been stolen by the employees of the carrier, it was held that the limitation in amount of recovery expressly stipulated for upon the ticket or free pass did not apply. It was contended that the fact that no consideration was paid for the ticket made a difference in the matter of limitation of liability, but the court said: "The relation of common carrier and passenger certainly subsisted between the parties, notwithstanding the contract; but whether the effect of a gratuitous transportation, in such case, is to exempt the carrier from that liability imposed by the common law, by which he becomes an insurer, viz., such as arises from those conclusive presumptions of negligence which are raised by the law in the absence of nonfeasance or misfeasance and wrong, we need not determine, as no such question is presented by the record. We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for ever since the decision of the leading case of *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 92 Eng. Reprint, 107, 5 Eng. Rul. Cas. 247, 1 Am. Neg. Cas. 948, it has been regarded as sound law that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' And we hold, further, that in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence, or wilful default, or tort, of himself or his servants, than he can when he receives a reward for the service to be performed; both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent or safely dishonest."

J. W. M.

MILLEN H. McLENDON, Admr., etc., of Annie C. McLendon, Deceased,  
Respt.,

v.

CITY OF COLUMBIA, Appt.

*South Carolina Supreme Court — May 3, 1915.*

(101 S. C. 48, 85 S. E. 234.)

**Statute — construction — meaningless reference.**

1. A section of a statute attempting to refer to and adopt relevant sections of other statutes, but which by mistake refers to irrelevant sections, which makes the reference meaningless, may be read without such reference.

[See note on this question beginning on page 996.]

**— construction — particular words.**

2. In the construction of statutes the court must look to the plain purpose of the whole statute, rather than the strict verbal construction of particular words in it.

[See 25 R. C. L. 1013.]

**Damages — death — punitive.**

3. A statute making applicable to procedure to recover damages for death resulting from a defective highway the provisions of Lord Campbell's Act, which permits the allowance of punitive damages, amends the act permitting the recovery so as to allow such damages, although they were not provided for in the act creating the cause of action.

[See 25 R. C. L. 907, 908.]

**Statute — enforcement of expurgated statute.**

4. If, by eliminating from a section of a statute giving a right of action for death reference to sections of a statute which are erroneously alleged to prescribe the procedure, the statute will permit enforcement of the right

in the manner now provided by the Code, and appropriate methods are provided in the Code, such procedure may be enforced.

**Evidence — parol — reason for mistake in statute.**

5. Parol evidence to show how a mistaken reference in a statute occurred is incompetent upon the question of construction of the statute.

[See 10 R. C. L. 1028.]

**— printed volume of statutes.**

6. The printed volume of the statutes of the state is competent evidence of what the law is on a given subject.

[See 10 R. C. L. 1110.]

**Death — survival of right of action — construction of statute.**

7. An amendment of a statute relating to actions for trespass on real estate, which provides for survival of such rights of action and includes "any and all injuries to the person," permits an action by the administrator for suffering before death of one killed by another's negligence.

APPEAL by defendant from orders of the Common Pleas Circuit Court for Richland County (Ramage, Special Judge) overruling a demurrer to the complaint and an objection to the jurisdiction, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

The demurrer and order made thereon, and the grounds of objection and the order thereon, mentioned in the opinion, are as follows:

The demurrer was as follows:

Upon the ground that it appears upon the face of the complaint that

it does not state facts sufficient to constitute a cause of action.

1. Because it appears upon the face of the complaint that the action is brought by the administrator of the deceased against a municipal corporation to recover damages re-

sulting from the death for the benefit of the husband of the deceased, whereas it is respectfully submitted that no such action is allowed under the statute laws of the state of South Carolina, nor can such an action be maintained against a municipality under the common law, as applied in the courts of this state.

2. Because it appears upon the face of the complaint that the action is one to enforce a cause of action against a municipal corporation for the benefit of a certain beneficiary, for damages resulting from the death of plaintiff's intestate, whereas it is respectfully submitted that there is no such action given by the statute laws of the state of South Carolina, nor by the common law as applied in the courts of this state.

3. Because it appears upon the face of the complaint that the cause of action sought to be enforced is against a municipal corporation, and it further appears upon the face of said complaint that the death of plaintiff's intestate was immediate, and whereas it is respectfully submitted that the only cause of action permitted in this state against a municipal corporation for the death of a person injured is a survival action, and it clearly appears upon the face of the complaint that the action here sought to be enforced is not a survival action, but is a new action for the benefit of the husband of the deceased.

4. Because it appears upon the face of the complaint that the cause of action sought to be enforced is not a survival action, and, even if so construed, it cannot be maintained, because it appears upon the face of the complaint that the death of plaintiff's intestate was immediate; therefore plaintiff's intestate, while living, had no cause of action, and none could or did survive.

Upon hearing the demurrer, the judge filed the following order:

"The defendant demurred to the complaint in the above-entitled cause on the ground that it did not

state facts sufficient to constitute a cause of action in the particulars set forth in the notice of demurrer on file.

"After hearing C. S. Monteith, Esq., in support of the demurrer, and the attorneys for plaintiff, contra, I have reached the conclusion that the grounds are not well founded. I am of the opinion that § 1974 of the Code of 1912, vol. 1, in connection with § 3053 of said Code, embraces an action of the kind alleged in the complaint. The terms of § 1974 are comprehensive, and, I think, embrace an action for immediate death as well as one in which the injured person may die after the lapse of an interval. This section expressly provides that remedy shall be pursued in the manner described in the Lord Campbell's Act, all of the terms of which are made applicable to such a case. It was expressly admitted by counsel for defendant in argument before me that references to §§ 1475 and 2282, and chapter XCIII. vol. 1, appearing in § 1974 of the Code, were clerical errors, and the section in question should be construed as if referring to §§ 1972 and 3053, and chapter XCII.

"It is, therefore, ordered that the demurrer be, and the same hereby is, overruled."

The case was called for trial on October 20, 1914, the plaintiff announced ready for trial, and defendant stated that notice of appeal from order overruling demurrer had been given, and objected to going to trial, and defendant also interposed an objection to the jurisdiction of the court to try the case upon grounds which were as follows:

"The defendant objects to the jurisdiction of the court to try this case and moves to dismiss the same upon the ground that the court has no jurisdiction of the subject-matter, for the reason that Code of Laws of 1912, vol. 1, § 1974, provides for the survival of causes of action arising under §§ 1475 and 2282 of the Code of 1912, vol. 1,

and neither of said sections provides for any cause of action against a municipality, or gives any rights against same whatsoever, nor does chapter 93 of the Code of 1912 give personal representative of a deceased person any right of action whatever."

The circuit judge thereupon made the following order:

"Upon the call of this case for trial on Tuesday, October 20, 1914, the defendant interposed an objection to the jurisdiction of the subject-matter, for the reason that the Code of Laws of 1912, vol. 1, § 1974, provides for the survival of causes of action arising under §§ 1475 and 2282 of the Code of 1912, vol. 1, and neither of said sections provides for any cause of action against a municipality or gives any rights against same whatsoever, nor does chap. XCIII. of the Code of 1912 give the personal representative of a deceased person any right of action whatever.

"After hearing argument for and against the motion, I decided to and did overrule the same."

Messrs. C. S. Monteith and W. H. Cobb for appellant.

Messrs. Edward L. Craig and Melton & Belser, for respondent:

The court had jurisdiction of the subject-matter of the action,—the right of the plaintiff to recover damages of the defendant.

17 Am. & Eng. Enc. Law, 2d ed. 1041.

While it has been held that the action conferred by Lord Campbell's Act is not strictly a "survival" action, but in a certain sense a new action given to the administrator for the beneficiaries prescribed by the act, yet generally, and commonly speaking, such action has always been regarded as in some sort surviving or continuing to the administrator; for the same is subject to be defeated by the act or release of the injured person.

Reed v. Northeastern R. Co. 37 S. C. 42, 16 S. E. 289; Watson v. Southern R. Co. 66 S. C. 47, 44 S. E. 375.

Gage, J., delivered the opinion of the court:

The appeal is from two orders of the circuit court.

The administration of justice

would have been promoted had the appellant abided a final judgment on the merits; for then all the issues now made, and others which may be hereafter made, could be settled by one appeal, and no party have suffered.

The plaintiff sues the city of Columbia for the instant death of his wife, under his overturned automobile, upon a defective highway of the city.

To a complaint which alleged the wrong the defendant demurred. The demurrer will be reported, as will the order made thereon.

The cause proceeded immediately to trial, but thereto the defendant "objected to the jurisdiction of the court upon the ground that the court had no jurisdiction of the subject-matter." The grounds of objection and the order made thereon and denying the motion will also be reported.

There was a mistrial, and the appeal here, as above stated, is from the two orders made by the court.

History: The plaintiff, in company with his wife, was driving his automobile along Main street in the city of Columbia towards the south; at or near the intersection of Main and Whaley streets a small stream crosses Main street obliquely, and over the stream there was flung a narrow cement bridge; the plaintiff had just crossed over the bridge, and his machine went into a side ditch on the right, turned turtle upon and immediately killed the wife. Therefore, the plaintiff sued as the administrator of his wife's estate.

The right to sue for the alleged wrong is referable to many statutes of the state, and a decision of the cause requires a detailed, and it may be a fatiguing, consideration of the statutes and the decisions about them.

By the Act of 1892 (21 Stat. at L. 91, Code of Laws 1912, vol. 1, § 3053), a city was made liable for injuries to persons which resulted from a defect in a bridge or a street.



By the Act of 1903 (24 Stat. at L. 67, Civil Code of Laws 1912, § 1974) if death resulted from such an injury, then the action was made to survive to the personal representative of the person so killed.

By the Statute of 1903, the action was to be enforced as by the provisions of Lord Campbell's Act.

By the Act of 1892 and its Amendment of 1895 (21 Stat. at L. 18, 24 Stat. at L. 945, Civ. Code 1912, § 3963), a cause of action for an injury to the person of the deceased, in this case Annie C. McLendon, survived to the personal representative of such person, in this case the plaintiff, her husband.

This is the statute law, and all of it by which the rights and remedies of the plaintiff are prescribed.

The defendant has made two exceptions, one about the order overruling the demurrer, and that he has subdivided into four parts; and one about the order overruling the plea to jurisdiction of the subject-matter.

Thereby the appellant makes only two questions; he contends: (1) That § 1974, vol. 1, of the Code of Laws of 1912, is the sole warrant for the action, and its words do not sustain the action. (2) That § 3963, vol. 1, of the Code of Laws 1912, governs the case; and by it the plaintiff has only that cause of action which Annie C. McLendon would have had, had she lingered and not died immediately, which the appellant calls a survival action, and on it the plaintiff has not sued.

The confusion in the case arises out of the enactment of amendments to three capital statutes; so that the whole collected body of the law thereabout is not so in harmony as it would have been had it been embraced at the outstart in one act.

The three capital enactments are: (1) Lord Campbell's Act, 1859 (12 Stat. at L. 825, Civ. Code 1912, § 3955); (2) the act to allow remedies to and against the representatives of deceased persons for injuries to land, 1892 (21 Stat. at L. 18, Civ. Code 1912, § 3962); (3)

the act to make municipal corporations liable to persons who receive bodily hurt on its streets through defects therein, 1892 (21 Stat. at L. 91, Civ. Code 1912, § 3053).

Into each of these statutes, unrelated at the start, amendments have been thrust, in different years and for different purposes, so that each is now somewhat related to the other, and the relation is apparently hostile.

The third of these statutes, enacted in 1892, is that which created the primary right in the citizen and the corresponding wrong of the municipality, and we shall hereinafter refer to it as the Act of Primary Right.

By it the citizen might ride on smooth highways unhurt, and by it, for defective highways, the consequence of municipal negligence, which cause hurt to the citizen, the municipality is made liable.

The statute, however, gave a right of action only to a person who received bodily injury; it did not give a right of action to anybody in the event the person so injured died; and unless some other statute supplied that right it did not exist, for the wrong was esteemed to die with the person.

At that time (1892), and at the time of the transaction here (in 1913), Lord Campbell's Act was of force. The language of that act is sufficiently comprehensive to permit the plaintiff to maintain this new action.

The statute (Civ. Code 1912, § 3053) which gives the primary right to the plaintiff is not the same as that which was construed in *All v. Barnwell County*, 29 S. C. 161, 7 S. E. 58.

By Lord Campbell's Act (Civ. Code 1912, § 3955), and by the Act of Primary Right, the right of action is made to depend on negligence; not so with the act construed at 29 S. C. 161, 7 S. E. 58.

But if Lord Campbell's Act (Civ. Code 1912, § 3955) did not comprehend this case, the Act of 1903 (24

Stat. at L. 67, Civ. Code 1912, § 1974) did so expressly.

That statute was an amendment of the act of primary right. That statute was passed to change the rule announced in *All v. Barnwell*. It had not then, nor since, been held that Lord Campbell's Act did not embrace a case arising under the Act of Primary Right.

But the appellant stoutly contends that Lord Campbell's Act cannot govern the case, though the general assembly has so ordained by the Act of 1903. The argument is (1) that Lord Campbell's Act creates a new action in him who sues for the death (Civ. Code 1912, § 3955, and *Re Mayo*, 60 S. C. 401, 54 L.R.A. 660, 38 S. E. 634), while the act here which gives the primary right only provides that the right of action,—(a) for the injury and (b) for the death,—shall survive to the personal representative; and (2) that Lord Campbell's Act permits the jury to award punitive damages, while the act which gives the primary right here limits the recovery to actual damages.

It is true the Act of Primary Right declares that the right of action shall "survive," but the whole statute, especially that part which makes applicable Lord Campbell's Act, makes it plain that for the death of the person certain other persons might sue and recover damages sustained by them.

In the instant case, there could literally be no *survival of action*, for the woman instantly killed had no action. We must look to the plain

Statute—con-  
struction—  
particular  
words.

purposes of the  
whole statute rather  
than to strict  
verbal construction

of particular words of it. The action here sued on is a new action, and the plaintiff has so esteemed it; he has sought to "enforce" his primary right by the procedure laid down in Lord Campbell's Act, which is applicable to such actions.

And that brings us to the issue stated just above as (2).

It is true Lord Campbell's Act al-

lows punitive damages. That was foreign matter thrust in 1901 into the Act of 1859, and to change the rule announced in 1898 in *Garrick v. Florida*, C. & P. R. Co. 53 S. C. 449, 69 Am. St. Rep. 874, 31 S. E. 334.

And inasmuch as the allowance of punitive damages was one of the "provisions" of Lord Campbell's Act in 1903, when it was made "applicable" to the Act of Primary Right, it is plain that such "provision" about punitive damages alters and amends the Act of Primary Right wherein only actual damages were allowable.

Damages—  
death—  
punitive.

In the case at bar, however, there is no demand for punitive damages; it is not alleged that the act of the municipality was wilful.

But the appellant yet contends that the Statute of 1903, that which amended the Act of Primary Right and makes "applicable" to the case Lord Campbell's Act, is not now a part of the statute law of the state, and that because it is not written in totidem verbis in the Codification of 1912, at § 1974.

That is the contention stated as (1) in the outstart of this opinion, when reference was made to the exceptions.

It is true that § 1974 of the Code of 1912 does not contain all the words of the Act of Amendment of 1903. The Act of Amendment did not recite and repeat the Primary Act or Lord Campbell's Act; it invokes those statutes by reference to them as numbered parts of the Codification of 1902, and the numbered parts are pertinent.

But the Codification of 1912, when it invokes the same two statutes—Lord Campbell's Act and the Primary Act—by section and chapter of that Code itself, refers to sections and chapters which contain matter foreign to the subject.

The appellant's contention is that the section must mean that which it declares, and, if that meaning is not true, then its true meaning cannot be supplied aliunde.

But so far as the section and chapter therein referred to are concerned, to wit, §§ 1475 and 2280, and chap. XCIII., the reference means nothing, and the section may, therefore, be read without the reference. Plainly, the insertion of the numerals 1475 and 2280 and the character XCIII., is a bull.

Statute—construction—meaningless reference.

There is no need to inquire how it happened. The sense would be the same had blank spaces been put in the place of the numerals and character. It will not be contended on any hand that the general assembly intended to make the references which appear in the section. If, therefore, § 1974 (Code of 1912) be read with the foreign matter eliminated, it will stand thus: "Whenever the death of any person shall be caused by any injury through a defect in or failure to repair a highway, causeway, public way, street, or bridge, under such circumstances and conditions as would have entitled the party to recover damages if death had not ensued, then in every such case the right of action for such injury and death shall survive to and may be enforced by the personal representative of such person in the same manner as is now provided by this Code."

The Code of 1912 provides at § 3053 and chap. XCII. a congruous right and remedy for the death of such person by such instrumentality.

We think, therefore, that the plaintiff has a plain right of action without any reference to how the blunder in § 1974 occurred.

—enforcement of expurgated statute.

The parol testimony offered to show how it did occur was irrelevant, as well as incompetent.

Evidence—parol—reason for mistakes in statute.

The best evidence before us of what is the statute law on the subject is the printed volume; there is none other evidence

—printed volume of statutes.

at hand, and it contains all the law necessary to sustain the action. Finally, the appellant cites yet another statute to sustain his contention that the cause of action set up in the complaint is not a new action, but an old action, made to survive her in whom it first inhered. That is the Act of 1905 (24 Stat. at L. 945), embodied in the Code of 1912 at § 3963. That statute is but an amendment thrust into the Act of 1892 (21 Stat. at L. 18).

The Act of 1892 had reference only to trespassers upon real estate, and it provided that wrongs thereon should survive to or against the owner or the trespasser as the case might be.

The Amendment of 1905 included "any and all injuries to the person."

The statute, as amended, is discussed in *Bennett v. Spartanburg R. Gas & Electric Co.* 97 S. C. 28, 81 S. E. 189, and thereunder, if the deceased here had suffered before her death, the personal representative might have sued by a survival action therefor, and then sued by a new action for her death.

Death—survival of right of action—construction of statute.

Thus we have considered and decided all the real issues made, not by name, but in essence, and our conclusion is that the orders of the Circuit Court be affirmed; it is so ordered.

## ANNOTATION.

**Effect of mistake in reference in statute to another statute, constitution, public document, record, or the like.****I. General rule, 996.****II. Illustrations of rule:**

- a. Error in reference to title, chapter, or section number, 997.
- b. Error in reference to date, 1003.
- c. Misrecital of title, 1007.

**I. General rule.**

In interpretation of a statute, it should be construed with reference to its general scope and the intent of the legislature in enacting it, and in order to ascertain what was the purpose the court must give effect to all of its clauses and provisions. Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act, and effectuate its purpose. The use of inapt, inaccurate, or improper terms or phrases will not invalidate the statute, provided the real meaning of the legislature can be gathered from the context or from the general purpose and tenor of the enactment. Clerical errors or misprisions, which, if not corrected, would render the statute unmeaning or incapable of reasonable construction, or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable. Nor will mere inadvertences or omissions have that effect, provided they can be supplied by reference to the context or to other statutes, and the true reading of the statute made obvious, and its real meaning apparent. *Fortune v. Buncombe County* (1905) 140 N. C. 322, 52 S. E. 950. And if the object, purpose, and intention of the legislature in the enactment of the particular statute can be fairly ascertained and arrived at, then it is the duty of the court to overlook and disregard all apparent inaccuracies and mistakes in the mere verbiage or phraseology of the statute, and, if possible, to give force and effect to the evident reason, spirit, and intention of the law. *Clare v. State* (1879) 68 Ind. 25.

**II.—continued.**

- d. Error in ignoring amendment to act referred to, 1009.
- e. Reference to ordinance, resolution, or municipal charter, 1010.
- f. Miscellaneous, 1011.

**III. Exceptions to rule, 1011.**

These principles apply in case of a mistake in a reference in a statute to another statute, constitution, public document, record, or the like, and ordinarily, where the real intent of the legislature is manifest, but would be defeated by a literal adherence to the terms of a mistaken reference, the mistaken reference will be regarded as surplusage, or will be read as corrected, and the legislative intent given effect.

**United States.**—*Wilson v. Spaulding* (1884) 19 Fed. 304; *Northern P. Exp. Co. v. Metschan* (1898) 32 C. C. A. 530, 61 U. S. App. 161, 90 Fed. 80.

**Alabama.**—*Harper v. State* (1895) 109 Ala. 28, 19 So. 857.

**Arkansas.**—*Hughes v. Kelly* (1910) 95 Ark. 327, 129 S. W. 784.

**California.**—*People v. King* (1865) 28 Cal. 265; *Re Campbell* (1904) 143 Cal. 623, 77 Pac. 674; *People v. Bradford* (1905) 1 Cal. App. 41, 81 Pac. 712.

**Colorado.**—*Murray v. Hobson* (1887) 10 Colo. 66, 13 Pac. 921.

**Florida.**—*Saunders v. Pensacola* (1888) 24 Fla. 226, 4 So. 801.

**Georgia.**—*Dowda v. State* (1884) 74 Ga. 12; *Maysville v. Smith* (1909) 132 Ga. 316, 64 S. E. 131; *White v. Forsyth* (1912) 138 Ga. 753, 76 S. E. 58.

**Illinois.**—*School Directors v. School Directors* (1874) 73 Ill. 249; *Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386; *People ex rel. Sangamon County v. Haire* (1907) 231 Ill. 153, 83 N. E. 133; *People v. Penman* (1915) 271 Ill. 82, 110 N. E. 894.

**Indiana.**—*Clare v. State* (1879) 68 Ind. 17; *Ray v. Jeffersonville* (1882) 90 Ind. 567; *Citizens Street R. Co. v. Haugh* (1895) 142 Ind. 254, 41 N. E. 533.

**Kansas.**—*Baker v. Agricultural*

Land Co. (1900) 62 Kan. 79, 61 Pac. 79; Coney v. Topeka (1915) 96 Kan. 46, 149 Pac. 689; Tatlow v. Bacon (1917) 101 Kan. 26, — A.L.R. —, 165 Pac. 835.

Kentucky.—Re Barker (1909) 182 Ky. 220, 116 S. W. 686, 1176; Com. v. Casteel (1888) 4 Ky. L. Rep. 623.

Maine.—Blake v. Brackett (1859) 47 Me. 28; Gray v. Cumberland County (1891) 83 Me. 429, 22 Atl. 376; Lowell v. Washington County R. Co. (1897) 90 Me. 80, 37 Atl. 869.

Michigan.—People v. Howard (1888) 73 Mich. 10, 40 N. W. 789; Stow v. Grand Rapids (1890) 79 Mich. 595, 44 N. W. 1047.

Minnesota.—Winona v. Whipple (1877) 24 Minn. 61.

Montana.—Lane v. Missoula County (1887) 6 Mont. 473, 13 Pac. 136; Caruthers v. Madison County (1887) 6 Mont. 482, 13 Pac. 140; Equitable Life Assur. Soc. v. Hart (1918) — Mont. —, 173 Pac. 1062.

Nebraska.—State ex rel. Burnham v. Babcock (1888) 23 Neb. 128, 36 N. W. 348; Fenton v. Yule (1889) 27 Neb. 758, 43 N. W. 1140; Baird v. Todd (1889) 27 Neb. 782, 43 N. W. 1143; State ex rel. Powers v. Partridge (1890) 29 Neb. 158, 45 N. W. 290; Richards v. State (1902) 65 Neb. 808, 91 N. W. 878.

Nevada.—Worthington v. District Ct. (1914) 37 Nev. 212, L.R.A.1916A, 696, 142 Pac. 230, Ann. Cas. 1916E, 1097.

New Jersey.—American Surety Co. v. Great White Spirit Co. (1899) 58 N. J. Eq. 526, 43 Atl. 579.

New York.—Watervliet Turnp. Co. v. M'Kean (1844) 6 Hill, 616; People ex rel. Furman v. Clute (1872) 50 N. Y. 451, 10 Am. Rep. 508; McKee Land & Improv. Co. v. Swikehard (1898) 23 Misc. 21, 51 N. Y. Supp. 399, affirmed in (1901) 63 App. Div. 553, 71 N. Y. Supp. 1141, which was affirmed in (1903) 173 N. Y. 630, 66 N. E. 1112; Lowman v. Billington (1909) 65 Misc. 111, 119 N. Y. Supp. 825; People ex rel. Fitch v. Lord (1896) 9 App. Div. 458, 75 N. Y. S. R. 760, 41 N. Y. Supp. 343.

North Carolina.—State v. Woolard (1896) 119 N. C. 779, 25 S. E. 719; Fortune v. Buncombe County (1905)

140 N. C. 322, 52 S. E. 950; Murphy v. Webb (1911) 156 N. C. 402, 72 S. E. 460.

Oregon.—State v. Robinson (1897) 32 Or. 43, 48 Pac. 357.

Pennsylvania.—Com. use of Allegheny City v. Marshall (1871) 69 Pa. 332; Re Clearfield County License Bonds (1891) 10 Pa. Co. Ct. 593; Martin v. Luzerne County (1904) 13 Pa. Dist. R. 801.

South Carolina.—McLendon v. Columbia (1915) 101 S. C. 48, 85 S. E. 234.

Texas.—Chambers v. State (1860) 25 Tex. 307; State v. McCracken (1875) 42 Tex. 383; Ex parte Segars (1894) 32 Tex. Crim. Rep. 553, 25 S. W. 26.

Utah.—People v. Hill (1884) 3 Utah 334, 3 Pac. 75.

Washington.—State ex rel. Wolfe v. Parmenter (1908) 50 Wash. 164, 19 L.R.A.(N.S.) 707, 96 Pac. 1047.

West Virginia.—State v. Cross (1898) 44 W. Va. 315, 29 S. E. 527.

Wisconsin.—Madison, W. & M. Pl.-Road Co. v. Reynolds (1854) 3 Wis. 287; Penberthy v. Lee (1881) 51 Wis. 261, 8 N. W. 116.

Wyoming.—Hollibaugh v. Hehn (1904) 13 Wyo. 269, 79 Pac. 1044.

England.—Re Boothroyd (1846) 15 Mees. & W. 1, 153 Eng. Reprint, 736, 15 L. J. Exch. N. S. 170; Rex v. Vasey [1905] 2 K. B. 748, 75 L. J. K. B. N. S. 19, 69 J. P. 455, 22 Times L. R. 1, 54 Week. Rep. 218, 93 L. T. N. S. 671, 21 Cox C. C. 49.

## II. Illustrations of rule.

### a. Error in reference to title, chapter, or section number.

The rule generally obtains that a mistaken reference to a title, chapter, or section number of a statute in another statute will be disregarded, and the reference will be read as if made to the proper title, chapter, or section number, if enough appears in the statute to indicate properly the legislative intent.

United States.—Wilson v. Spaulding (1884) 19 Fed. 304.

California.—People v. King (1865) 28 Cal. 265; People v. Bradford (1905) 1 Cal. App. 41, 81 Pac. 712.

**Illinois.**—*Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386; *People ex rel. Sangamon County v. Haire* (1907) 231 Ill. 153, 83 N. E. 133.

**Indiana.**—*Clare v. State* (1879) 68 Ind. 17.

**Kansas.**—*Coney v. Topeka* (1915) 96 Kan. 46, 149 Pac. 689; *Tatlow v. Bacon* (1917) 101 Kan. 26, — A.L.R. —, 165 Pac. 835.

**Kentucky.**—*Re Barker* (1909) 182 Ky. 220, 116 S. W. 686, 1176.

**Maine.** — *Lowell v. Washington County R. Co.* (1897) 90 Me. 80, 37 Atl. 869.

**Nebraska.**—*State ex rel. Burnham v. Babcock* (1888) 23 Neb. 128, 36 N. W. 348; *Richards v. State* (1902) 65 Neb. 808, 91 N. W. 878.

**Nevada.**—*Worthington v. District Ct.* (1914) 37 Nev. 212, L.R.A.1916A, 696, 142 Pac. 230, Ann. Cas. 1916E, 1097.

**New York.**—*Watervliet Turnp. Co. v. M'Kean* (1844) 6 Hill, 616; *People ex rel. Fitch v. Lord* (1896) 9 App. Div. 458, 75 N. Y. S. R. 760, 41 N. Y. Supp. 343; *McKee Land & Improv. Co. v. Swikehard* (1898) 23 Misc. 21, 51 N. Y. Supp. 399, affirmed in (1901) 63 App. Div. 553, 71 N. Y. S. 1141, which was affirmed in (1903) 173 N. Y. 630, 66 N. W. 1112; *Lowman v. Billington* (1909) 65 Misc. 111, 119 N. Y. Supp. 825.

**Pennsylvania.**—*Martin v. Luzerne County* (1904) 13 Pa. Dist. R. 801.

**Texas.**—*Ex parte Segars* (1894) 32 Tex. Crim. Rep. 553, 25 S. W. 26.

**Utah.**—*People v. Hill* (1884) 3 Utah, 334, 3 Pac. 75.

**West Virginia.** — *State v. Cross* (1898) 44 W. Va. 315, 29 S. E. 527.

Thus, in *State ex rel. Burnham v. Babcock* (1888) 23 Neb. 128, 36 N. W. 348, it was held that the fact that an amendatory act, in referring to the particular section of the amended act to which it was applicable, designated it as a division, would not affect its validity. In *State v. Cross* (W. Va.) *supra*, it was held that a mistake in an amendatory act, in enumerating the section of the Code to be amended, would be disregarded, and the act construed to amend the section intended

to be amended, where the intent of the legislature was clear.

In *Watervliet Turnp. Co. v. M'Kean* (1844) 6 Hill (N. Y.) 616, there was involved an act chartering a turnpike company, which made it subject "to all the regulations, restrictions, and liabilities imposed by title first, chapter eight, of the revised statutes." An amendatory act exempted the company "from the restriction contained in the thirty-sixth section of the third article of the sixteenth chapter of the revised statutes, relating to turnpike." Chapter 8 related to duties of the executive officers of the state, and chapter 16 related to highways, bridges, and ferries. That part of the Revised Statutes relating to turnpike corporations was found in the 18th chapter, under title one. There was a 36th section in title one. It was held that both the original act and the amendatory act referred to chapter 18.

In *Lowell v. Washington County R. Co.* (1897) 90 Me. 80, 37 Atl. 869, a statute extending time for the location and construction of a certain railroad, "incorporated under chapter fifty-four of the Private Acts of Eighteen Hundred and Ninety-three," was held to apply to the specified railroad, although it was incorporated under chapter 454 of the Private Acts of 1893, chapter 454 being the only act of incorporation of the railroad during that year, and chapter 54 being an act in regard to larceny.

In *People ex rel. Fitch v. Lord* (1896) 9 App. Div. 458, 75 N. Y. S. R. 760, 41 N. Y. Supp. 343, there was involved an act (Laws 1894, chap. 567) providing for ascertaining and paying damages to lands and buildings suffered by changes of grade authorized by chapter 329 of the Laws of 1892, and by certain other acts. Chapter 329 of the Laws of 1892 was an enactment entirely foreign to the subject referred to by the Act of 1894, but chapter 339 did relate to that subject. It was held that the enumeration in the Act of 1894 of a particular law passed in 1892 would be disregarded, and the section wherein that law was inaccurately specified would be treated simply as though it referred to changes of

grade made pursuant to authority conferred by the legislature at its session in 1892.

In *Martin v. Luzerne County* (1904) 13 Pa. Dist. R. 801, the court passed on the 15th section of the Act of June 27, 1895, by which it was provided as follows: "And the report required by the 7th section of this act shall have the same effect as the report of the auditors under said Act of April 15, 1834, P. L. 537." There was no requirement for a report in the 7th section, but there was one in the 6th section, and it specified the only report in the act which, from its make-up, could be held to have "the same effect as the report of the auditors under said Act of April 15, 1834." It was held that there was a mere clerical mistake, which the courts had power to correct, and that the words, "7th section," would be read "6th section."

In *People v. Hill* (1884) 3 Utah, 334, 3 Pac. 75, the court in construing § 192 of the Criminal Practice Act, which, in pointing out what objections appearing on the face of an indictment may be taken advantage of by way of demurrer, specified as one of the grounds in subdivision two, "that it does not substantially conform to the requirements of §§ 150 and 152," held that the reference to § 152 should be read as though it were to § 151, the reference to § 152 manifestly being a mistake, since, when considering its subject-matter and that of § 151, the legislative intent could only find expression in the latter section.

In *Worthington v. District Ct.* (1914) 37 Nev. 212, L.R.A.1916A, 696, 142 Pac. 230, Ann. Cas. 1916E, 1097, there was involved an act entitled, "An Act to Amend an Act Entitled, 'An Act to Amend an Act Entitled, 'An Act Relating to Marriage and Divorce,'" Approved November 28, 1861,' as Approved February 15, 1875," which provided that "§ 22 of said act is amended so as to read as follows." The language used in the act was substantially the same as that used in § 22 of the Act of November 28, 1861, and § 1 of the Act of February 15, 1875. It was held that the intention of the legislature was

clear, and that the designation of the amended section as 22 instead of 1 was a mere clerical mistake, to be disregarded.

In *Richards v. State* (1902) 65 Neb. 808, 91 N. W. 878, an act entitled, "A Bill for an Act for the Protection of Girls under the Age of Fifteen Years, and to Amend § 12 of Chapter 4 of the Criminal Code of the Compiled Statutes of Nebraska, and to Repeal Said Original Section," and which, by its first section, amended the section designated in the title, was held not to be invalid because the repealing clause declared that "said original § 11 herein amended shall be, and the same is hereby, repealed." The court said: "The intention of the legislature, which is to be ascertained from a view and consideration of the whole law, is in our judgment clear and certain. It is beyond question that the second section of the act was intended to repeal the law which it was the declared purpose of the first section to amend. In providing for the repeal of the amended section, in obedience to the mandate of the Constitution, the legislature made a verbal error, which produces no ill effect because it does not tend in the slightest degree to render doubtful or obscure the legislative purpose and intent. You may reject the numeral term as a mere redundancy, and no shadow of ambiguity will remain."

In *Re Barker* (1909) 132 Ky. 220, 116 S. W. 686, 1176, the title of the act in question recited that it was an act to amend subsection 11 of § 2380 of Carroll's Kentucky Statutes. In the body of the act subsection 2 was said to be amended, but the amendment was pertinent to subsection 11, and not to subsection 2. It was held that the intent of the legislature to amend subsection 11 would be given effect.

In *Wilson v. Spaulding* (1884) 19 Fed. 304, the act in question, which was entitled, "An Act to Correct an Error in § 2504 of the Revised Statutes of the United States," in its body referred to "Schedule M of § 25 of the Revised Statutes." The subject-matter of the act was the rate of customs duties to be levied on certain kinds

of imported goods, and § 2504 of the Revised Statutes had reference to duties on imported goods, and contained a series of schedules identified by letters, among which was "schedule M." Section 25 related to a matter entirely foreign to that treated by the amendatory act. It was held that by reading the title of the act together with the body there could be no question but that the act referred to schedule M of § 2504, and operated to amend it.

In *Clare v. State* (1879) 68 Ind. 17, the court construed an act which purported to amend § 74 of an act entitled, "An Act to Divide the State into Circuits for Judicial Purposes," approved March 6, 1873, and which provided that the counties of Steuben and De Kalb should constitute the fortieth judicial circuit. Section 74 of the amended act had been repealed, but by § 36 of that act it was provided that the counties of Steuben, De Kalb, and two others should constitute the thirty-fifth circuit. It was held that it was the intention of the legislature to amend § 36, and the court would construe the act to carry out that intent, and that the mistaken reference to § 74 would not vitiate the act.

In *Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386, followed in *People ex rel. Sangamon County v. Haire* (1907) 231 Ill. 153, 83 N. E. 133, it appeared that the Farm Drainage Act of 1885 was amended in 1895 by adding § 15a. The next amendment was made June 10, 1897, and purported to amend § 89a of the Farm Drainage Act as amended by the amendment of 1895. There was no § 89a in the Farm Drainage Act, but § 15a of the amendment of 1895 was numbered paragraph 89a in Hurd's Statutes, and it was plainly the section which the legislature intended to amend in 1897. By an Act of May 10, 1901, § 89a was repealed. It was held that the Act of June 10, 1897, must be construed as an amendment of § 15a of the amendment of 1895, and that the Act of 1901 had the effect of repealing that section.

In *People v. Bradford* (1905) 1 Cal. App. 41, 81 Pac. 712, it was contended

that § 288 of the Penal Code, which provided that "any person who shall wilfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part II. of this Code," etc., was unintelligible, in that part II. of the Code referred to related solely to criminal procedure, and in no way described acts constituting other crimes. It appeared that the statement of the acts constituting other crimes was to be found in part I. Answering the contention, it was said: "It is evident that either by legislative oversight or by clerical misprision the characters 'II.' were inserted for the character 'I.' in such section, and that § 288 should be so construed."

In *People v. King* (1865) 28 Cal. 265, there was involved a statute which read as follows: "No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court; or upon a plea of guilty; or upon judgment against him upon a demurrer to the indictment in the case mentioned in section two hundred and ninety-three." The reference to § 293 did not express the legislative intent, but that intent found expression in § 296, the latter section referring to a case of conviction, and the former to a case of acquittal. It was held that the act would be construed as referring to § 296, otherwise the statute would lead to an absurdity.

In *Ex parte Segars* (1894) 32 Tex. Crim. Rep. 553, 25 S. W. 26, the act construed by the court was one relating to local option, and purported to be an amendment of the Revised Statutes, title 63. It added two articles numbered 3239b and 3239c, which, however, were stated in the caption and first section of the act to be part of title 63. It was held that there was no question as to the intention of the legislature, and if the mistake as to the two articles could be held to be material, it could not affect the rest of the statute.

In *Coney v. Topeka* (1915) 96 Kan. 46, 149 Pac. 689, it appeared that an amendatory act to the statute, relating to the commission form of government



for cities, provided for an election to abandon that form of government, and declared that the sufficiency of an initiatory petition for calling the election, the order for an election and conduct thereof, together with the declaring of the result, should be determined "generally as provided by § 3 of this act, in so far as the provisions thereof are applicable." Section 3 related to oaths of office, salaries of the mayor and commissioners, and the time to be devoted to their duties. Section 5 covered recall elections in detail. It was held that the intention of the legislature to refer to § 5 was clear, and would be given effect. The rule laid down by the court is quoted in *Tatlow v. Bacon* (1917) 101 Kan. 26, — A.L.R. —, 165 Pac. 835.

In *McKee Land & Improv. Co. v. Swikehard* (1898) 23 Misc. 21, 51 N. Y. Supp. 399, affirmed in (1901) 63 App. Div. 553, 71 N. Y. Supp. 1141, which was affirmed in (1903) 173 N. Y. 630, 66 N. E. 1112, it was held that a statute called the Liquor Tax Law, which purported to repeal chapter 744, Laws of 1895, did not have the effect of repealing the act designated, which was an act relating to the construction of a sewer, there being a chapter 774, Laws of 1895, which related to excise, and which it was probably the intention of the legislature to repeal.

In *Lowman v. Billington* (1909) 65 Misc. 111, 119 N. Y. Supp. 825, the decision turned on the question whether § 2 of chapter 309 of the Laws of 1883 was repealed by chapter 548 of the Laws of 1896. Chapter 309 of the Laws of 1883 originally consisted of four sections, the fourth of which was distinctly repealed in 1892. The Act of 1896 was a repealing act, and a great many statutes were repealed by it. The repealed statutes were arranged in columns according to their year, chapter, and section, and when certain sections of an act were repealed, those sections were distinctly specified, and when an entire act was repealed the word "all" was used. In reference to the Act of 1883, §§ "1-3" were stated as being repealed. The same legislature, in another repealing act, repealed §§ "1, 2, 3, 4, 5, 6," of a

certain act, and §§ "312-327, inclusive," of another act. It was held that the intent of the legislature was to repeal only §§ 1 and 3 of chapter 309 of the Laws of 1883, leaving § 2 unrepealed. But since the decision of this case it has been provided by statute (21 McKinney's Consol. Laws, General Construction Law, § 96) that, "when two numbers in a schedule of repeals of the consolidated laws are connected by a hyphen, both such numbers are included, as well as all intermediate numbers."

It sometimes happens that a reference in a statute to another statute is rendered correct, or the legislative intent is made clear, by the elimination of a part of the reference. In such a case the erroneous part is entirely disregarded. *People v. Penman* (1915) 271 Ill. 82, 110 N. E. 894; *State v. Robinson* (1897) 32 Or. 43, 48 Pac. 357; *McLendon v. Columbia* (1915) 101 S. C. 48, 85 S. E. 234. Thus, in *People v. Penman* (1915) 271 Ill. 82, 110 N. E. 894, there was involved a statute whose title was as follows: "An Act to Amend § 7 of Chapter 37 of an Act Fixing the Terms of Holding Court in the Several Judicial Circuits . . . Approved June 11, 1897." The enacting clause declared "that § 7 of chapter 37, fixing the terms of holding court in the several judicial circuits . . . approved June 11, 1897, be amended to read as follows." There was no chapter 37 in the amended act, and the omission of the words "of chapter 37" left a correct reference to the act intended to be amended. It was held that those words must be regarded as surplusage. The court said: "The rule for the guidance of courts in such a case is to ascertain the intention of the legislature, and not its mistakes either as to law or facts. The only question is, Has the legislature expressed its purpose intelligently? If it has, the act is valid and must be upheld. *Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386."

In *State v. Robinson* (1897) 32 Or. 43, 48 Pac. 357, the act under consideration was entitled, "An Act Entitled, An Act to Amend § 1733 of Chapter XI. of Title XI. of the Crimi-

nal Code of Oregon, as Compiled and Annotated by William Lair Hill." There was no chapter XI. of title XI. in the Criminal Code. It was held that there was a mere mistake in the engrossment of the bill, which was immaterial, as all reference to the chapter and title could be disregarded as surplusage and a good and sufficient title still remain.

*McLendon v. Columbus* (1915) 101 S. C. 48, 85 S. E. 234, the court construed § 1974 of the Code of 1912 which, in applying the right of action for death by wrongful act or default to cases where death was caused by defects in streets, referred to §§ 1475 and 2280 and chapter XCIII. of the Code. The sections and the chapter referred to were entirely foreign to the subject. It was held that the section should be read as if the erroneous references were eliminated, and that the rights and remedies arising out of death by wrongful act or default as governed by the proper sections of the Code would be applicable.

The rule seems to obtain that, where a reference in a statute to another statute can be made complete by supplying additional words or figures, that will be done in order to effectuate the legislative intent where that is clearly shown. *Baker v. Agricultural Land Co.* (1900) 62 Kan. 79, 61 Pac. 79; *Gray v. Cumberland County* (1891) 83 Me. 429, 22 Atl. 376; *Stow v. Grand Rapids* (1890) 79 Mich. 595, 44 N. W. 1047; *Fortune v. Buncombe County* (1905) 140 N. C. 322, 52 S. E. 950. Thus, in the case last cited, it appeared that a statute (Acts 1905, chap. 703), prescribing the duties of an auditor, among other things, provided that he was to perform "all the duties required by § 74 of the Public Laws of 1905 to be performed by the register of deeds, and to prepare for publication the annual statements required by law." It was contended that an insuperable obstacle in the way of enforcing the statute was that there was no reference to any particular chapter of the Acts of 1905. Chapter 590 of the Acts of 1905, commonly known as the Machinery Act, had a section numbered 74 which prescribed

the duties of the registers of deeds with reference to computing the taxes and preparing the tax tests of the county, and that was the only chapter of the acts that contained as many as seventy-four sections, and was the only one referring to such duties. Chapter 590 was ratified two days later than chapter 703. It was held that the intention of the legislature was clear and would be effectuated. The court said: "'A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing.' *Black, Interpretation of Laws*, § 58. Under this rule, we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning, but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. *Black, supra*, § 38. But ours is not so much an erroneous, as an inaccurate, description, and the question is whether its words are adequate to express with sufficient certainty the intention of the legislature. . . . We have no doubt as to the intention, and conclude that the mere designation of the section was sufficient, under the circumstances, for us to identify with certainty the chapter and section to which the reference was made."

In *Gray v. Cumberland County* (1891) 83 Me. 429, 22 Atl. 376, the statute construed was one amending an act relating to the location of highways, and provided that a party interested should have the same right to appeal "as is provided by §§ 49 to 51,

inclusive." The court held that the language of the amendment, construed in connection with the provisions of the sections named, together with the antecedent and subsequent legislation touching the same subject-matter, and the difficulties sought to be remedied, showed the intention of the legislature to give the right to appeal as provided in §§ 48 to 51 inclusive.

In *Baker v. Agricultural Land Co.* (1900) 62 Kan. 79, 61 Pac. 79, the title of the act under consideration recited that it was amendatory of §§ 72 and 73 "of chapter 80 of the General Statutes of 1868." Section 1 of the act began as follows: "That § 72 of the General Statutes of 1868 be . . . amended," etc. Section 2 of the act began as follows: "That § 73 of the General Statutes of 1868 be . . . amended," etc. Section 9 of the act provided: "Original §§ 72 and 73 of chapter 80 of the General Statutes of 1868 . . . are hereby repealed." It was held that the omission of the words, "chapter 80," in §§ 1 and 2 was unobjectionable.

In *Stow v. Grand Rapids* (1890) 79 Mich. 595, 44 N. W. 1047, an act entitled, "An Act to Amend Section Four of Act No. 282," was held unobjectionable because the words "title one" should have been inserted in the title, there being ten titles in the act, each of which had a section 4, but the subject-matter of the amendatory act relating to § 4 of title 1.

#### *b. Error in reference to date.*

It may be stated as a general rule that a mistake in a reference in a statute as to the date of another statute referred to will be disregarded where the intent of the legislature otherwise plainly appears.

**Alabama.**—*Harper v. State* (1895) 109 Ala. 28, 19 So. 857.

**Florida.**—*Saunders v. Pensacola* (1888) 24 Fla. 226, 4 So. 801.

**Georgia.**—*Maysville v. Smith* (1909) 132 Ga. 316, 64 S. E. 131. See also the dictum in *Alberson v. Hamilton* (1888) 82 Ga. 30, 8 S. E. 869.

**Illinois.**—*School Directors v. School Directors* (1874) 73 Ill. 249, cited in *Melrose Park v. Dunnebecke* (1904)

210 Ill. 422, 71 N. E. 431; *Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386; *People ex rel. Sangamon County v. Haire* (1907) 231 Ill. 153, 83 N. E. 133.

**Indiana.**—*Citizens' Street R. Co. v. Haugh* (1895) 142 Ind. 254, 41 N. E. 533. See also the dictum in *Pooch v. Lafayette Bldg. Asso.* (1879) 71 Ind. 357.

**Kentucky.**—*Com. v. Casteel* (1883) 4 Ky. L. Rep. 623.

**Maine.**—*Blake v. Brackett* (1859) 47 Me. 28.

**Michigan.**—*Stow v. Grand Rapids* (1890) 79 Mich. 595, 44 N. W. 1047.

**New Jersey.**—*American Surety v. Great White Spirit Co.* (1899) 58 N. J. Eq. 526, 43 Atl. 579.

**North Carolina.**—*State v. Woolard* (1896) 119 N. C. 779, 25 S. E. 719.

**Pennsylvania.**—*Re Clearfield County License Bonds* (1892) 10 Pa. Co. Ct. 593. See also *Bradbury v. Wagenhorst* (1867) 54 Pa. 180, where the question was raised but not decided.

**Texas.**—*State v. McCracken* (1875) 42 Tex. 383.

**Wisconsin.**—*Madison, W. & M. Pl.-Road Co. v. Reynolds* (1854) 3 Wis. 287; *Penberthy v. Lee* (1881) 51 Wis. 261, 8 N. W. 116.

**England.**—*Re Boothroyd* (1846) 15 Mees. & W. 1, 153 Eng. Reprint, 736, 15 L. J. Exch. N. S. 170.

Thus, in *American Surety Co. v. Great White Spirit Co.* (1899) 58 N. J. Eq. 526, 43 Atl. 579, it was held that an error in the title of a supplementary act as to the date of approval of the act supplemented was immaterial, and would be disregarded as surplusage where the title of the supplemented act was otherwise accurately described.

In *Madison, W. & M. Pl.-Road Co. v. Reynolds* (1854) 3 Wis. 287, a mistake in an amendatory act as to the date of approval of the act amended was held to be immaterial, where the subject-matter of the latter act was referred to.

In *Com. v. Casteel* (1883) 4 Ky. L. Rep. 623, it was held by an abstract opinion that the fact that an amendatory act referred to the act amended by the wrong date did not invalidate

the amendment, where enough remained to identify the original act.

In *Citizens' Street R. Co. v. Haugh* (1895) 142 Ind. 254, 41 N. E. 533, it was held that a misrecital of the date of the approval of an amended act in the title of the amending act was immaterial where the title of the amended act was set out in the title of the amendatory act, and the body of that act set forth and published at full length the sections of the amended act affected by it.

In *Patton v. People* (1907) 229 Ill. 512, 82 N. E. 386, which was followed in *People ex rel. Sangamon County v. Haire* (1907) 231 Ill. 153, 83 N. E. 133, it was held that an error in the title of an amending act in referring to the date of approval of the amended act was immaterial, where the enacting clause gave the correct date, and showed clearly what act was amended.

In *Penberthy v. Lee* (1881) 51 Wis. 261, 8 N. W. 116, it was held that an amendatory act was not made ineffective by the fact that it purported to amend "chapter 101 of 1869" instead of "chapter 101 of 1868," where the subject-matter of the amendatory act showed clearly the legislative intent.

In *State v. Woolard* (1896) 119 N. C. 779, 25 S. E. 719, it was held that an error in a supplementary act in referring to the date of approval of the supplemented act as being February 14, instead of February 11, did not affect the validity of the act, where it was clear beyond cavil what prior act was referred to.

In *Saunders v. Pensacola* (1888) 24 Fla. 226, 4 So. 801, it appeared that the title of an amendatory act was as follows: "An Act to Amend an Act Entitled an Act to Provide for the Incorporation of Cities and Towns and to Establish a Uniform System of Municipal Government in the State, Approved February 4th, 1869, and the Acts Amendatory Thereof." The second section of the act commenced as follows: "That § 29 of said act, approved February 4th, 1869, as aforesaid, as amended by the act approved March 8th, 1877, be and the same is hereby amended to read as follows." Section 29 of the Act of 1869 was

amended by an act approved March 2, 1877, instead of March 8. There was an act approved March 8, 1877, amending the general Municipal Incorporation Act of 1869, but it did not in any way affect § 29 of that act. It was held that the error was to be regarded as only a clerical mistake.

In *Stow v. Grand Rapids* (1890) 79 Mich. 595, 44 N. W. 1047, the title of the act construed by the court was as follows: "An Act to Amend Section Four of Act No. 282 of the Local Acts of 1877, entitled, 'An Act to Revise the Charter of the City of Grand Rapids, Being Amendatory of an Act Entitled, 'An Act to Incorporate the City of Grand Rapids,' Approved April 2, 1850,' Approved March 29, 1877, as Amended by the Several Acts Amendatory Thereof.'" It appeared from the journals of the legislature that the title of the bill as introduced, and as it passed both houses and was engrossed and sent to the governor, referred to Act No. 282 of the Local Acts of 1887, instead of 1877, and it was urged that the act was void because it has a different title from the one agreed to by the legislature. There was no Act No. 282 of the Local Acts of 1887, and Act No. 282 of the public acts for that year had no reference to the city of Grand Rapids; but Act 282 of the Local Acts of 1877 was an act to revise the charter of Grand Rapids. It was held that the figure "1887" in the title was simply a clerical error, corrected by the reading of the whole title, and that the making of it "1877" was in harmony with the rest of the title, and a correction which the law would have made in default of any other action.

In the case of *Re Boothroyd* (1846) 15 Mees. & W. 1, 153 Eng. Reprint, 736, 15 L. J. Exch. N. S. 170, the statute construed purported to repeal the statute of 13 Geo. III. and recited its title. It appeared, however, that there was no statute of 13 Geo. III. with that title, but there was one of 17 Geo. III. It was held that as the title of the repealed statute was set out; and there being no statute of 13 Geo. III. which could be affected by the repealing act,

it should be read as referring to the statute of 17 Geo. III.

In *Blake v. Brackett* (1859) 47 Me. 28, there was involved an act approved March 13, 1856, which provided, among other things, as follows: "Section 46, of chapter 148, of the Revised Statutes, and chapter 88, of the Public Laws of eighteen hundred and forty-five, are hereby repealed." There was no act in the Public Laws of 1845 which was numbered chapter 88, and no statute of that year dealing with the subject-matter of the repealing statute. Chapter 88 of the Laws of 1844 dealt with that subject-matter, however, and it was an amendment of § 46 of chapter 148 of the Revised Statutes. The court found it unnecessary to decide the question whether a naked repeal of an act, described only by the year of its enactment and the chapter of the volume could be applied to an act of a former year, but it was held that the repealing statute operated on § 46 of the chapter 148 of the Revised Statutes as it was amended by chapter 88 of the Public Laws of 1844, and that the erroneous reference to the amendatory statute was immaterial.

In *Re Clearfield County License Bonds* (1892) 10 Pa. Co. Ct. 593, it was held that a recital in the title of an amendatory act of the date of approval of the amended act as being the "24th day of May, A. D. 1887," instead of the "13th day of May, A. D. 1887," which was the date of approval of the act which it was the manifest intention of the legislature to amend, was a merely clerical error, which would be corrected by the courts.

In *State v. McCracken* (1875) 42 Tex. 388, there was involved an act entitled, "An Act to Amend an Act Entitled 'An Act to Adopt and Establish a Penal Code for the State of Texas,' Approved August 26, A. D. 1871." There was only one Penal Code and that was approved August 26, 1856. It was contended that the act was void for want of compliance with a constitutional provision requiring that every statute should embrace but one object, which should be expressed in the title. It was held that the ob-

jection could not be sustained, as no one could have been misled by the misrecital as to the date of approval of the amended act. The court said: "One of the leading objects of this provision, as shown by all of the authorities, is to prevent surprise, misapprehension, or deception upon the legislature, and upon the public, by the insertion in the act of something that would not be indicated by the title of the act. That was one of the principal evils that led to its adoption. *Tadlock v. Eccles* (1858) 20 Tex. 782, 73 Am. Dec. 213. Now can this mistake of inserting 1871 for 1856, as being the year when the Penal Code designed to be amended was approved, take anyone by surprise, or in any way mislead anyone as to the object or application of the amendment? We think not. Texas never had but one 'Penal Code,' in the sense conveyed in this title, and that was approved on the 26th of August, 1856; and it has been amended continually ever since its adoption, by referring to it in the titles of the amendatory acts as the Penal Code, not meaning thereby, generally, a body of criminal laws in force in the state, but specially the Penal Code that was adopted as one act of the legislature, and which was approved on the 26th of August, 1856. There was no such act establishing a Penal Code in 1871. The leading object, as expressed in this title, was the amendment of the Penal Code, there being but one such, according to the understanding of all persons who understood anything about it, and the date assigned to it, of '1871,' would rarely be noticed at all, and, when noticed, would be known to be a mistake or misprint; and therefore no one could be misled by it to his prejudice."

In *Maysville v. Smith* (1909) 132 Ga. 316, 64 S. E. 131, the court construed the act incorporating the town of Maysville, which was approved September 30, 1879, and provided that its corporate limits should extend "¼ of 1 mile in every direction from the Northeastern Railroad depot." This act was amended by an act approved October 13, 1885, so as to reduce the municipal territory from a circle having a radius

of  $\frac{1}{2}$  of a mile to one with a radius of  $\frac{1}{2}$  of a mile. In 1905, an act was passed with the following title: "An Act to Amend an Act to Incorporate the Town of Maysville, in the Counties of Jackson and Banks, so as to Extend the Incorporate Limits of Said Town One Fourth of One Mile in Every Direction Beyond the Present Corporate Limits of Said Town of Maysville, Ga." The first section of the act purported to amend "an act incorporating the town of Maysville, in the counties of Jackson and Banks, approved September 30, 1879," by striking certain words in certain lines and inserting other words, and ended as follows: "So that said section, when so amended, shall prescribe the present incorporate limits of said town of Maysville, Ga., as extending three fourths of one mile in every direction from the center of the old Northeastern depot site." The words referred to as to be stricken from certain lines were not in those lines of the Act of 1879, but in the Act of 1885. The court held: "The misdescription of the Act of 1879 did not affect the real purpose of the amending act, as expressed in its title and body, and did not render it inoperative, since the means of identifying the thing intended to be accomplished and described are clear, certain, and convincing."

In *School Directors v. School Directors* (1874) 73 Ill. 249, there was involved an act approved in 1865, which provided that § 1 of "an act to establish and maintain a system of free schools," approved February 22, 1861, "be and the same is hereby amended," etc. The Act of 1861 was entitled, "An Act to Amend the School Law," and referred to an act of the title referred to in the Act of 1865 as approved February 16, 1857. The Act of 1857 was the one to which reference was intended to be made in the Act of 1865, it containing the sections referred to in the Act of 1865. It was held that the mistaken reference was immaterial and could be rejected as surplusage, the statute possessing all the requisites of a valid statute, and containing clear requirements capable of being

carried into effect in connection with the general school law.

In *Harper v. State* (1895) 109 Ala. 28, 19 So. 857, the act under consideration was entitled, "To Amend an Act for the Trial of Misdemeanors in Shelby County, Approved February 12th, 1891." The first section was, "that an act entitled, 'An Act to Regulate the Trial of Misdemeanors in Shelby County, Approved February 21st, 1898,' be amended so as to read as follows," etc. The correct date of the amended act was as stated in the title of the amending act. It was held that the error should be regarded as self-corrective, or treated as surplusage, and that the date appearing in the section quoted should be read, February 12, 1891.

In *Poock v. Lafayette Bldg. Asso.* (1879) 71 Ind. 357, it was contended that an act was void, "because it misrecites the date of the approval of the act which it proposes to amend, the recital being, 'Approved March 11, 1873,' whereas it should read '1875.'" The court said, in disposing of this claim, that there was no mistake as to what act was intended to be amended, as the whole title was correctly set out, and that they should hardly deem it justifiable to annul an act on so narrow a ground, but declared that they need decide nothing in this respect.

In *Alberson v. Hamilton* (1888) 82 Ga. 30, 8 S. E. 869, referring to the fact that an act amending an amended act recited the date of the original act as "March 20th, 1873," instead of "February 20th, 1873," the court called it an obvious mistake, and said that no point was made because of the erroneous description. The act was held valid on other grounds.

In *Bradbury v. Wagenhorst* (1867) 54 Pa. 180, the effect of a misrecital of the date of an act was not passed on, but the court called attention to the error and recommended the passage of a curative statute, saying: "In the Act of 1851, which we have been considering, there is a misrecital of the general Mechanics' Lien Law, which should be corrected by the legislature. It is referred to as 'the Act

of 17th March, 1836.' It was intended, doubtless, to refer to the Act of 16th June, 1836, and supplements. The Act of 1806, on the subject of mechanics' liens, was passed the 17th of March, and it is probable that the framer of the Statute of 1851 blended the date of the Act of 1806 with the year in which it was supplied, viz., 1836, and this made a misrecital of both. To save trouble, it should be corrected, and perhaps proceedings under it cured."

*c. Misrecital of title.*

It is generally held that a misrecital in a statute, of the title of another statute to which a reference is made, is immaterial where the intent of the legislature is obvious. *Northern P. Exp. Co. v. Metschan* (1898) 32 C. C. A. 530, 61 U. S. App. 161, 90 Fed. 80; *Hughes v. Kelley* (1910) 95 Ark. 327, 129 S. W. 784; *Re Campbell* (1904) 143 Cal. 623, 77 Pac. 674; *Murray v. Hobson* (1887) 10 Colo. 66, 18 Pac. 921; *Dowda v. State* (1884) 74 Ga. 12; *White v. Forsyth* (1912) 138 Ga. 753, 76 S. E. 58; *Ray v. Jeffersonville* (1882) 90 Ind. 567; *People v. Howard* (1888) 73 Mich. 10, 40 N. W. 789; *People ex rel. Furman v. Clute* (1872) 50 N. Y. 451, 10 Am. Rep. 508; *Murphy v. C. A. Webb & Co.* (1911) 156 N. C. 402, 72 S. E. 460; *Hollibaugh v. Hehn* (1904) 13 Wyo. 269, 79 Pac. 1044.

In *Hollibaugh v. Hehn* (Wyo.) *supra*, there was involved a statute purporting to amend "section 3299 of the Revised Statutes of Wyoming." What was known as the Revised Statutes of Wyoming was the Revision of 1887, but the section designated did not relate to the subject-matter of the amendatory act. Section 3299 of the "Revised Statutes of Wyoming 1899" treated of the subject-matter of the amendatory act, and the title of the latter act, in addition to designating by number the section to be amended, referred to the subject-matter of the act. It was held that the intention of the legislature to amend § 3299 of the "Revised Statutes of Wyoming 1899" was clear, and that the omission of the year "1899" was a mere error in reference, which would not invalidate the act. The court said: "If

. . . the legislative intent is subject to no uncertainty, the act should not be held invalid, even though the reference in the title and in the body of the act to the section to be amended is to be regarded as erroneous. . . . There is . . . not the slightest chance for doubt of the intention of the legislature. It is absolutely clear and certain that it was intended to amend and re-enact § 3299 of the Revised Statutes of Wyoming 1899. The explanatory part of the title as to subject and the act itself furnish unequivocal evidence of that intention. If, therefore, the omission of the year '1899' in describing the revision referred to is to be considered as an error in reference, the legislative intent is so clear and manifest that the court would not be justified in holding the act invalid on that ground. In view of the qualifying words in the title, followed by a re-enactment of the section at length, it might be reasonably held, we think, that the title referred to the Revision of 1899 rather than the Revision of 1887."

In *Hughes v. Kelley* (1901) 95 Ark. 327, 129 S. W. 784, the court construed an amending act which designated the act amended as "§ 980 of the Revised Statutes." There was no § 980 in the "Revised Statutes," but there was a section of that number in "Mansfield's Digest," which had reference to the same subject-matter as the amending act. The title of the latter act was, "An Act to Amend § 980 of Mansfield's Digest." It was held that this, with the subject-matter of the amending act, showed plainly that the legislature meant to amend § 980 of Mansfield's Digest, the designation being an obvious clerical misprision.

In *Northern P. Exp. Co. v. Metschan* (1898) 32 C. C. A. 530, 61 U. S. App. 161, 90 Fed. 80, the statute under consideration was an amendatory act, which, in reciting the title of the act amended, omitted the words, "banking" and "exchange," probably to make the title read as it was intended to stand after the act was amended. The title of the amended act was: "An Act to Regulate and Tax Foreign Insurance, Banking, Express and Ex-

change Corporations or Associations Doing Business in This State." It was held that the reference to the amended act was not such an error as was calculated to mislead anyone as to the purpose of the amendment, and would not invalidate it.

In *Re Campbell* (1904) 143 Cal. 623, 77 Pac. 674, an act was attacked as invalid because the body of the act did not conform to its title. Its title was as follows: "An Act to Amend an Act Entitled, 'An Act to Amend an Act Entitled, 'An Act to Establish a Tax on Collateral Inheritances, Bequests and Devises, to Provide for Its Collection, and to Direct the Disposition of its Proceeds,' Approved March 23, 1898,' Approved March 9, 1897." The introductory portion of the act was as follows: "Section one of an act entitled, 'An Act to Establish a Tax on Collateral Inheritances, Bequests and Devises, to Provide for Its Collection, and to Direct the Disposition of Its Proceeds, Approved March 23, 1898,' approved March 9, 1897, is hereby amended so as to read as follows." The title of the amending Act of 1897 was correctly quoted in the act attacked as invalid. Adopting the rule that if the act could be given a construction which was reasonable and in favor of its validity the court would do so, the court held that the error in the body of the act was merely clerical, and would be disregarded.

In *Dowda v. State* (1884) 74 Ga. 12, the fact that an act amending another in referring to the amended act stated correctly the number of the section to be amended, but by inadvertence or accident referred to it as the law of kidnapping instead of the law of inveigling children, was held insufficient to render the act invalid.

In *People v. Howard* (1888) 73 Mich. 10, 40 N. W. 789, it was contended that an act was invalid in that it violated a provision of the Constitution, declaring that no law shall embrace more than one object, which shall be expressed in its title. The statute defined the offense of having in one's possession burglar's tools, and its title read as follows: "An Act to Amend Chapter 154 of the Revised

Statutes of 1846, Being Chapter 180 of the Compiled Laws, Entitled, 'Of Offenses against the Lives and Property of Individuals.'" Chapter 154 of the Revised Statutes and chapter 181 of the Compiled Laws related to crimes and offenses, such as arson, larceny, fraud, and the like, and were headed by the compiler, "Of Offenses against Property." The act had been passed twenty years before. It was held that the act was valid.

In *White v. Forsyth* (1912) 138 Ga. 753, 76 S. E. 58, in its official headnote, the court said: "The title of the act of December 18, 1902 (Acts 1902, p. 427), was, 'An Act to Consolidate and to Codify the Various Acts Incorporating the City of Forsyth, in the County of Monroe, and the Various Acts Amendatory Thereof; to Enlarge by Providing Additional Powers and Authority Therein; to More Specifically Define and Fix the Duties of the Various Officers of Said City and Their Compensation, and for Other Purposes.' In this act frequent references were made in general terms to the limits of the city, recognizing that they had previously been established, but there was no express declaration of what such limits were, either fixing or changing them. By the Act of August 19, 1907 (Acts 1907, p. 649), . . . the limits were so extended as to include a territory having a radius of 1 mile from the courthouse. The Act of August 14, 1909 (Acts 1909, p. 897), was entitled, 'An Act to Amend an Act Approved December 18, 1902, Being an Act to Codify the Various Acts Incorporating the City of Forsyth, and an Act Amendatory Thereof, Approved August 19, 1907, and for Other Purposes.' By the third section of that act the third section of the Act of 1907 was stricken, and a provision inserted in lieu thereof. Held, that neither the Act of 1909 as a whole, nor the third section thereof, was invalid as being in conflict with article 3, § 7, paragraph 8, of the Constitution, which declares that 'no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof.'



. . . The Act of 1909, in so far as it amended the Act of 1907, was not invalid on the ground that its title described it as an act to amend the Act of December 18, 1902, being an act to codify the various acts incorporating the city of Forsyth, 'and an act amendatory thereof, approved August 19, 1907, and for other purposes.' The words, 'amendatory thereof,' in connection with the date of the approval of the Act of 1907, did not constitute such a misdescription of that act as to render the Act of 1909 ineffectual to amend it."

In *Murray v. Hobson* (1887) 10 Colo. 66, 13 Pac. 921, there was involved an act of Congress of March 2, 1867, entitled, "An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Domain," which required that the local legislatures should prescribe rules and regulations for carrying it into effect. There had been a similar act passed by Congress on May 23, 1844, and the territorial legislature passed an act on March 11, 1864, providing the necessary rules for carrying it into effect. The Act of May 23, 1844, was repealed July 1, 1864. The territorial legislature on January 10, 1868, repealed the Legislation Act of March 11, 1864, and on the same day passed an act similar in form and substance to the one repealed, which contained the following clause: "When the [proper authorities] . . . shall have entered at the proper land office the land, . . . settled and occupied . . . pursuant to and by virtue of the provisions of the act of Congress, entitled, 'An Act for the Relief of Citizens of Towns upon Lands of the United States, under Certain Circumstances,' passed May 23, A. D. 1844, and any amendments that may be made thereto." It was held that it was the intention of the legislature to provide rules for carrying the act of Congress of March 2, 1867, into effect, and the reference to the Act of May 23, A. D. 1844, was a mere misdescription or false description which did not affect the validity of the act.

In *People ex rel. Furman v. Clute* (1872) 50 N. Y. 451, 10 Am. Rep. 503, 5 A.L.R.—64.

the court construed an act (Laws 1853, chap. 80, p. 115) reading as follows: "§ 1. Section twenty-two of chapter twenty of title one of the first part of the Revised Statutes, fourth edition, is hereby amended so as to read as follows: § 22. No supervisor of any town . . . shall be elected or appointed to hold the office of superintendent of the poor . . . in any county. . . ." The act purported to be amended was a part of chapter 352 of the Laws of 1829, and was not on the revision of the statute law made a part of the Revised Statutes, but it was found in the 4th edition of the Revised Statutes at the place named. The 4th edition of the Revised Statutes was not the work of the legislature, but was a compilation of private persons. It was held that the Act of 1853 was effective to amend the Act of 1829.

In *Murphy v. C. A. Webb & Co.* (1911) 156 N. C. 402, 72 S. E. 460, it was held that an act providing for the repeal of § 17 of chapter 239 of the Public Laws of 1889 operated to repeal § 17 of chapter 239 of the Private Laws of 1889, the named section in the Private Laws dealing with the same subject-matter as the repealing statute, while the same section of the Public Laws treated of a matter entirely foreign to that subject-matter.

In *Ray v. Jeffersonville* (1882) 90 Ind. 567, it was held that the use of the word "execute," instead of the word "exercise," in the recital of the title of the amended act in the title of the amending act, did not cause any uncertainty or doubt as to the act to be amended, the title of the amending act being as follows: "An Act to Amend Sections Eight and Sixty-nine of an Act Entitled, 'An Act to Repeal All General Laws Now in Force for the Incorporation of Cities, . . . Prescribing Their Powers and Rights, and the Manner in Which They Shall Execute the Same.'"

*d. Error in ignoring amendment to act referred to.*

In *Lane v. Missoula County* (1887) 6 Mont. 473, 13 Pac. 136, the court construed an act entitled, "An Act to Amend an Act to Regulate the Fees

of Sheriffs for Board of Prisoners, Approved February 10, 1881." The act of February 10, 1881, was entitled, "An Act to Regulate the Fees of Sheriffs for the Board of Prisoners," and provided for the repeal of all those portions of §§ 585 and 748 of the fifth division of the Revised Statutes, relating to fees allowed sheriffs for the board of prisoners, and that a clause relating to that subject was to be added to § 585 of the fifth division of the Revised Statutes. The only provision in the Revised Statutes relative to the fees of sheriffs for the board of prisoners was in ¶ 2, § 585, of the fifth division. It was held that the intention of the legislature was clear, and any mistake it may have made by undertaking to amend the Act of 1881 by reference to its title instead of expressing its intent to amend § 585 of the fifth division of the Revised Statutes did not vitiate the act. Followed in *Carruthers v. Madison County* (1887) 6 Mont. 482, 13 Pac. 140.

In *Ex parte Segars* (1894) 32 Tex. Crim. Rep. 553, 25 S. W. 26, the act construed by the court related to local option, and purported to be an amendment of the Revised Statutes, title 63. Title 63 of the Revised Statutes had been amended by the Act of April 1, 1887. It was held that while the act construed should have stated in its caption and first section that it was an act to amend title 63 of the Revised Statutes as amended by the Act of April 1, 1887, its failure to do so did not invalidate it, as it was the intention of the legislature to amend title 63 of the Revised Statutes as amended by the Act of 1887, which intention was further shown by the fact that the act in question referred to a section which was added by the Act of 1887.

In *Fenton v. Yule* (1889) 27 Neb. 758, 43 N. W. 1140, there was involved an act approved February 26, 1889, and entitled, "An Act to Amend the Second Division of § 25 of Chapter 18 of the Compiled Statutes of Nebraska of 1887." That part of chapter 18 of the Compiled Statutes of 1887 embracing § 25 was passed by the legislature on March 30, 1887, and on March

31, 1887, an act was passed, amending the act of March 30, 1887, which was not carried in the compilation of 1887 other than as a footnote. It was contended that the Act of February 26, 1889, sought to amend a repealed and superseded section. It was held that while there was some confusion in the application of the last amendatory act to the provisions sought to be amended, it sufficiently furnished the means for its identification. *Fenton v. Yule* (Neb.) *supra*, was followed in *Baird v. Todd* (1889) 27 Neb. 782, 43 N. W. 1143; *State ex rel. Powers v. Partridge* (1890) 29 Neb. 158, 45 N. W. 290.

*e. Reference to ordinance, resolution, or municipal charter.*

In *Com. use of Allegheny City v. Marshall* (1871) 69 Pa. 332, it appeared that a city council on April 12, 1866, passed a resolution authorizing a contract for the grading of a street, and on July 13, 1866, the contract was entered into. The resolution subsequently was declared invalid, because it was not published and recorded as required by the city's charter. The assembly, to cure this omission, passed an act which in its preamble recited the resolution as having been passed on July 13, 1866, and also stated that the resolution had been declared void in a named decision. It was held that, considering the remainder of the preamble together with the enacting clause, the intention of the legislature to validate the resolution of April 12, 1866, was perfectly plain.

In *Winona v. Whipple* (1877) 24 Minn. 61, an act construed by the court provided "that § 2 of chapter 1 of said amended charter [of the city of Winona] be amended so that the proviso at the end of the first subdivision shall read as follows: "It appeared that § 2 of chapter one of the charter contained no subdivisions or provisos and the proposed amendment was in no way germane to that section. Section 2 of chapter 4 of the charter contained subdivisions, and a proviso at the end of the first subdivision to which alone the proposed amendment was entirely appropriate. It was held that, to carry out the man-

ifest intention of the legislature, the act was to be read by substituting "chapter 4" for "chapter 1."

As to a mistaken reference in a statute to an ordinance which was held to invalidate the statute, because the court could not ascertain from the statute itself what ordinance was meant, see III., *infra*.

*f. Miscellaneous.*

In *Chambers v. State* (1860) 25 Tex. 307, there was involved a statute which repealed a number of sections of the Penal Code, designating them by number, and also the "provisions to art. 411." There was but one provision in the article except that contained in a proviso, and an important and beneficial result in the execution of the law relating to gaming might have been anticipated from the repeal of the proviso, and none whatever from the repeal of the entire body of the article. It was held that the intention of the legislature to repeal the proviso was clear, the words "provisions to art. 411," being used by mistake for the words "proviso to art. 411."

In *Equitable Life Assur. Soc. v. Hart* (1918) — Mont. —, 173 Pac. 1062, it was held that, where the only mistake in the title of an act was in a misplaced quotation mark in a reference to the statutes to be repealed by the act, the act was not invalid because of a defective title.

In *Rex v. Vasey* [1905] 2 K. B. (Eng.) 748, it appeared that the "Malicious Injuries to Property Act of 1861," by § 32, provided as follows: "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein,"

should be guilty of a misdemeanor. An amendment of the act provided as follows: "The provisions of the 32d section of the 'Malicious Injuries to Property Act,' so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words, 'or in any salmon river' were inserted in the said section in lieu of the words 'private rights of fishery' after the words 'noxious material in any such pond or water.'" It was held that the intention of the legislature to prevent the destruction of fish in salmon rivers, by putting lime or other noxious substances into the water, was plain, and would not be defeated by too liberal an adhesion to its precise language.

In *State ex rel. Wolfe v. Parmenter* (1908) 50 Wash. 164, 19 L.R.A. (N.S.) 707, 96 Pac. 1047, it was contended that an act was invalid because of its insufficiency of title. The title of the act in question was as follows: "An Act Amending an Act Entitled, 'An Act to Amend § 3 of Chapter 83 of the Laws of 1897 Relating to Revenue and Taxation.'" It appeared that chapter 83, p. 221, of the Laws of 1897, to which reference was made by the title, treated of monuments and notices of mining claims. The body of the act clearly and succinctly treated alone of the subject of revenue and taxation. It was held that the erroneous reference in the act to the Laws of 1897 would be regarded as mere surplusage, the statute, regarded as an independent one, having the effect of amending any previously existing statute on the subject, and of repealing by implication any previously existing provisions in conflict with it.

*III. Exceptions to rule.*

In a number of cases an error in the title of an amendatory act in designating the act to be amended has been held to be fatal, in view of a constitutional requirement that the subject of an act shall be expressed in its title.

In *Mankin v. Pennsylvania Co.* (1903) 160 Ind. 447, 67 N. E. 229, the act claimed to be invalid was entitled as follows: "An Act to Amend § 359

of an Act Concerning Trial by Jury, in Force Since September 19, 1881, the Same Being § 525 of the Revised Statutes of 1881." It appeared that § 359 (525) was part of an act entitled, "An Act Concerning Proceedings in Civil Cases." The constitutional requirement that no act should be amended by mere reference to its title had been construed by prior decisions to require the title of the amended act to be set out in the title to the amendatory act. It was held that the act purporting to amend § 359 (525) was invalid. The court said: "It will be observed that the amendatory Act of 1891 (Acts 1891, p. 376, chap. 160) does not refer to the title of the act to be amended by setting it out, as required by said § 21 of article 4 of the Constitution, but refers to the act to be amended as 'An Act Concerning Trial by Jury,' which is not the title of the act in which said § 359 (525) supra, may be found. When the act or section to be amended is identified in the manner required by the Constitution, and it is not certain what act or section was amended, the court will resort to means other than the title to determine what act or section was amended. But, if the act or section is not identified in the manner required by the Constitution, the court will not resort to such other means of identification, although the act intended would thereby be ascertained beyond question."

In *State v. Knoll* (1904) 69 Kan. 767, 77 Pac. 580, it was held that an error in the title of an act in reciting the number of the section of a statute which the act, among other things, purported to repeal, prevented the repeal from becoming operative, although the section was correctly numbered in the body of the statute. It was held, however, that the act was broad enough to operate as a repeal by implication.

In *Com. v. Schulte* (1904) 26 Pa. Super. Ct. 95, affirming (1903) 13 Pa. Dist. R. 294, there was an indictment for violating the Mining Laws as to the employment of minors. The law alleged to be violated was the Act of May 13, 1903, § 2, P. L. 359, and was

entitled: "Act to Amend Art. IX. § 1, of an Act Entitled, 'An Act to Provide for the Health and Safety of Persons Employed' in and about the Anthracite Coal Mines of Pennsylvania and for the Protection and Preservation of Property Connected Therewith, approved June 2, 1891, P. L. 176; Also to Amend § 17 of an Act Entitled: 'An Act Relating to Bituminous Coal Mines and Providing for the Lives, Health, Safety and Welfare of Persons Employed Therein,' Approved June 30, 1885, P. L. 205." The body of the Act of 1903, by the second section, provided that the first section of article nine of the Act of 1885 should be amended, but the words quoted for amendment were apparently from the first section of the Act of June 2, 1891, P. L. 176, and were not found in any section of the Act of 1885. The Act of June 30, 1885, was repealed by the Act of May 15, 1893, P. L. 52. It was held that the title of the Act of 1903 did not indicate the purpose of the act, thus violating the constitutional requirement that no bill should be passed containing more than one subject, which should be expressed in the title, and that the indictment was therefore properly quashed.

In *State v. Mitchell* (1895) 17 Mont. 67, 42 Pac. 100, there was involved an amendatory act relating to gaming, which was entitled as follows: "An Act to Amend Chapter IX. of the Penal Code of the State of Montana." Previously chapter IX. of the Penal Code which was entitled, "Gaming," had been stricken by the legislature, and its provisions had been added to chapter VIII. At the time of the passage of the amendatory act, there were three chapters IX. under different parts, titles, and subdivisions, but all dealing with matters entirely foreign to it. It was held that the act was invalid, as violating the constitutional provision requiring the subject of an act to be expressed in its title.

In *Sanders v. Cambria County* (1895) 4 Pa. Dist. R. 241, an act, the constitutionality of which was questioned, was entitled, "An Act to Amend the Provisions of the First Section of an Act, Approved May 13, 1887, En-

titled, 'An Act for the Destruction of Wolves and Wildcats.'" The Act of May 13, 1887, was "An Act to Repeal an Act for the Destruction of Wolves, Wildcats, Foxes, Minks, Hawks, Weasels and Owls in This Commonwealth, Approved June 23, 1885, So Far as Relates to Foxes, Minks, Hawks, Weasels and Owls." The purpose of the amendatory act was to restore the premium for killing foxes and minks. It was held that it was invalid, as not expressing its subject in its title.

In *Hearn v. Louttit* (1908) 42 Or. 572, 72 Pac. 132, it appeared that an act was entitled, "An Act to Amend § 711 of the Codes and General Laws of Oregon." There was no authorized publication known as "The Codes and General Laws of Oregon." But there was a work, the title of which, as shown by the inscription on the cover, was "Hill's Annotated Laws of Oregon," and, by the title page, as "The Codes and General Laws of Oregon, Compiled and Annotated by William Lair Hill;" and § 711 of that publication related to the same subject-matter as that in the amendatory act. It was held that the title of the amendatory act was not sufficiently definite to comply with a constitutional provision, requiring the subject of an act to be expressed in its title.

In *State v. Looker* (1894) 54 Kan. 227, 38 Pac. 288, it was held that an error in the title of an amendatory act, both in designating the chapter number of the act purported to be amended and in reciting its title, was sufficient to invalidate the act.

In *Maysville v. Smith* (1909) 132 Ga. 316, 64 S. E. 131, the act under

consideration read as follows: "An act approved September 30, 1885, entitled, An Act to Amend the Charter of the Town of Maysville, in Jackson and Banks Counties, Be and the Same Is Hereby Amended by Striking All of § 1 of Said Act." There was no act of that date amending the charter of the town. It was held that because of that error the act amended was insufficiently identified, there being left merely a reference to the title of the act amended, which was insufficient to operate as an amendment, because of a constitutional inhibition.

In *Murphy v. Eney* (1893) 77 Md. 80, 25 Atl. 993, the first section of the act under consideration provided as follows: "The legislative district lines of the second and third legislative districts of Baltimore city, . . . as now described and defined by an ordinance of the mayor and city council of Baltimore, No. 36, approved April the 6th, 1882, . . . are hereby amended and changed so as to read as follows." The second section of the act contained the purported amendment, but there was no provision in the ordinance mentioned in § 1 for which § 2 could be substituted. It was suggested in the argument that the ordinance to which reference should have been made in § 1 "was one with a different number, approved on a different day and relating to a different subject-matter. The court held that as it was unable to ascertain from anything in the act itself to what ordinance the legislature had reference, the act was so uncertain as to be invalid. R. J. B.

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C———, Appt.,  
v.  
C———, Respt.

*Wisconsin Supreme Court — October 6, 1914.*

(158 Wis. 301, 148 N. W. 865.)

**Marriage — annulment — concealment of venereal disease.**

1. Concealment of venereal disease by one party to a marriage contract, which subsequently affects the innocent party, is such fraud as will

justify the annulment of the marriage if it is not ratified after the fraud is discovered.

[See note on this question beginning on page 1016.]

**Appealing — conflicting evidence.**

2. A finding of conflicting evidence will not be disturbed on appeal if there is evidence to support it.

[See 2 R. C. L. 204.]

**Marriage — concealment of fraudulent marriage.**

3. An ignorant and slow-minded

man does not confirm a marriage induced by fraud of the wife in marrying when afflicted with a venereal disease, by permitting her to remain in the house for eighteen months, if he discontinued all sexual relations with her as soon as he discovered the fraud.

[See 9 R. C. L. 296.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Columbia County (Fowler, J.) in favor of defendant on his counterclaim in an action for a divorce. *Affirmed.*

Statement by Vinje, J.:

Action for divorce. Plaintiff, aged thirty-three, and defendant, aged thirty-seven, intermarried July 11, 1911, and lived in the same household ostensibly as man and wife till about December 20, 1912, when they separated. In March, 1913, plaintiff began a suit for divorce against her husband, alleging cruel and inhuman treatment, and charging him with being afflicted with gonorrhea at the time of the marriage and transmitting the disease to her. The defendant denied the allegations and in a counterclaim made the same charges against the plaintiff. The court, as facts, found that the allegations of the complaint were not true; that at the time of her marriage plaintiff to her knowledge, but not to the knowledge of the defendant, was afflicted with gonorrhea, and in the three or four acts of intercourse that at any time ever took place between them, and which occurred shortly after they were married, she infected him therewith; that thereafter, and until she left, she continued to live in the same house with him, ostensibly as his wife, but he did not occupy the same room with her, nor have sexual intercourse with her; "that during the said time he frequently suggested to her that they separate, and endeavored to procure a separation; that the defendant at no time, after learning of his infection as aforesaid, intended ever to resume full marital relations with the plain-

tiff, and ever thereafter expected a separation; that the defendant is extremely diffident and sensitive to ridicule, unsophisticated, ignorant, and slow-minded, and, because thereof and his expectation of separation as aforesaid, did not promptly sever entirely his relations with the plaintiff, but permitted her to live in the same house with him as aforesaid until she voluntarily left," that a permanent cure of her disease is improbable; that defendant is the owner of a farm and personal property worth \$3,300; and that plaintiff has no property, but is able to maintain herself as a cook or servant in hotels. As conclusions of law, the court found that the defendant, by continuing to live with his wife in the same household, did not condone plaintiff's fraud or cruel treatment; that he was entitled to an annulment of the marriage on the ground of fraud, and, if not, he was entitled to a divorce on the ground of cruel treatment. From a judgment of annulment of the marriage the plaintiff appealed.

Messrs. Grady, Farnsworth, & Kenney for appellant.

Messrs. E. E. Brossard, and Burke & Lueck, for respondent:

If the plaintiff had the disease when she was married, and did not inform the defendant, she perpetrated a fraud on him, which furnishes ground for annulment of the marriage.

Smith v. Smith, 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933; Vondal v. Vondal, 175 Mass. 383, 78 Am. St. Rep. 502, 56 N. E.

586; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923.

A right of action for annulment of a marriage accrues immediately upon knowledge or discovery of the invalidating fact or circumstance, and, unless sooner barred by some statute of limitation, continues until the marriage is dissolved by death of one of the parties.

26 Cyc. 909; *McNair v. McNair*, 68 Misc. 570, 125 N. Y. Supp. 191.

The doctrine of condonation does not apply to actions for annulment.

14 Cyc. 556, 637; 8 Cyc. 559.

The plaintiff's fault is one that cannot be condoned or waived.

*Muir v. Muir*, 133 Ky. 125, 4 L.R.A. (N.S.) 909, 92 S. W. 314; *Hooe v. Hooe*, 122 Ky. 590, 5 L.R.A. (N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214.

Costs should be awarded against the plaintiff upon the ground that her appeal is without merit. No costs should be imposed upon the defendant.

*Phillips v. Phillips*, 27 Wis. 252; *Krause v. Krause*, 23 Wis. 354; *Friend v. Friend*, 65 Wis. 412, 27 N. W. 34; *Coad v. Coad*, 40 Wis. 392.

*Vinje, J.*, delivered the opinion of the court:

Plaintiff challenges every material fact found by the trial court as not sustained by the evidence, and especially the finding that the plaintiff was affected with gonorrhea at the time of her marriage, and knowingly infected the defendant therewith. The evidence presents a sharp conflict as to which spouse was first affected, but the finding made is supported by the defendant's testimony, and some fairly persuasive, though not conclusive, corroborating testimony of a physician, to the effect that, upon examination of plaintiff before marriage, he found a condition that usually indicates gonorrhea, but not necessarily so, and also a condition that usually, but not necessarily, evidences loss of virginity. The ques-

tion of the veracity of the parties was peculiarly one for the trial judge, and he believed the defendant. From a careful perusal of the evidence we cannot say that he erred in so doing. The same result is reached as to the other facts found. We cannot say that they are not supported by the evidence.

The question arises whether or not the defendant was entitled to an annulment of the marriage upon the facts found. Our statutes, § 2351, subd. 4, provide that a marriage may be annulled for "fraud, force, or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party." The first inquiry arising under the provisions of the statute and the facts is whether the infection of the defendant, as found, constitutes fraud within the meaning of the statute. In *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739, it was held that the concealment by a woman of her previous want of chastity was not such a fraud as would entitle the husband to an annulment of the marriage. That decision is founded upon sound public policy and should not be questioned. But quite a different situation is presented when there is not only a want of chastity, but the presence of a loathsome venereal disease that seriously and bodily affects the innocent spouse. In such cases annulment has been granted where there has been no confirmation of the marriage relation after the discovery of the fraud. *Smith v. Smith*, 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *Crane v. Crane*, 62 N. J. Eq. 21, 49 Atl. 734; *Anonymous*, 21 Misc. 765, 49 N. Y. Supp. 331. But where there has been a confirmation of the marriage, annulment will be

Appeal—con-  
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Marriage—  
annulment—  
concealment of  
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denied. *Vondal v. Vondal*, 175 Mass. 383, 78 Am. St. Rep. 502, 56 N. E. 596. Considerations of morality and health alike dictate that neither spouse should be compelled to submit to the indignity and menace presented by such an infection. The fact that through the fraud and concealment of the guilty party the other has, without his knowledge and consent, already been infected, aggravates rather than palliates the fraud, and cannot of itself be considered a confirmation of the marriage. The facts found in this case justified the conclusion of the trial court that plaintiff was guilty of such fraud as, in the absence of confirmation of the marriage, entitled the defendant to an annulment thereof.

A second question arising upon the facts found is whether the defendant by his conduct confirmed the marriage. The trial court found he did not, and after a careful consideration of all the evidence we cannot say the finding is erroneous. It is undisputed that after the first three or four days subsequent to the marriage, and as soon as defendant discovered his infec-

tion, no sexual intercourse took place between them. He frequently, after that, told her they must separate, and that he would not resume the full marital relation. His permitting her to remain in the same household for the length of time she did, under the circumstances disclosed by the evidence, and in view of the ignorance and slow-mindedness of the defendant, cannot be held a confirmation of the marriage. He dis-  
—concealment of fraudulent marriage.  
 affirmed an essential part of the marriage relation as soon as he discovered the fraud, and continuously and consistently persisted therein. The court also found that a permanent cure of her disease was improbable, and it has been held that, where the menace from a disease is a continuing one, there can be no condonation. *Hooe v. Hooe*, 122 Ky. 590, 5 L.R.A. (N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *Williams v. Williams*, 77 Ill. App. 229; *Wilson v. Wilson*, 16 R. I. 122, 13 Atl. 102.

Judgment affirmed.

## ANNOTATION.

### Venereal disease as ground for divorce or annulment of marriage.

- I. Venereal disease as cruelty:
  - a. In general, 1016.
  - b. Knowledge or wilfulness, 1018.
- II. Venereal disease as ground for separation, 1020.
- III. Venereal disease as evidence of adultery, 1020.

#### I. Venereal disease as cruelty.

##### a. In general.

It is well settled that if a spouse, knowing that he or she is afflicted with a venereal disease, continues to maintain sexual relations with the other spouse, and communicates the disease to the other, it is such cruelty as will warrant the granting of a divorce.

*Iowa*.—*Holmes v. Holmes* (1919) — *Iowa*, —, — A.L.R. —, 170 N. W. 793.

*Louisiana*.—*Carbajal v. Fernandez* (1912) 130 La. 812, 58 So. 581.

IV. Venereal disease as impotence or physical defect, 1021.

V. Concealment of venereal disease as fraud, 1022.

VI. Evidence of existence or communication of venereal disease, 1024.

VII. Condonation, 1027.

*Michigan*.—*Holthoefer v. Holthoefer* (1882) 47 Mich. 260, 11 N. W. 150.

*Missouri*. — *Darling v. Darling* (1914) 181 Mo. App. 211, 167 S. W. 1166.

*New Jersey*.—*Cook v. Cook* (1880) 32 N. J. Eq. 475. And see dictum in *Rogers v. Rogers* (1913) 81 N. J. Eq. 479, 46 L.R.A. (N.S.) 711, 86 Atl. 935, wherein it was said that there was no evidence of the existence of the disease.

*New York*.—Anonymous (1886) 17 Abb. N. C. 231. And see the dictum



in *Abramowitz v. Abramowitz* (1913) 140 N. Y. Supp. 275.

**Oregon.**—*Rebart v. Rebart* (1891) — Or. —, 25 Pac. 775; *Wagner v. Wagner* (1916) 80 Or. 256, 156 Pac. 1037.

**Pennsylvania.**—*McMahan v. McMahan* (1898) 186 Pa. 485, 41 L.R.A. 802, 40 Atl. 795; *Kulp v. Kulp* (1906) 34 Pa. Co. Ct. 338; *Simon v. Simon* (1907) 34 Pa. Super. Ct. 182.

**England.**—*Popkin v. Popkin* (1794) 1 Hagg. Eccl. Rep. 765, note; *Collett v. Collett* (1838) 1 Curt. Eccl. Rep. 679; *Brown v. Brown* (1846) L. R. 1 Prob. & Div. 46, 35 L. J. Prob. N. S. 13, 11 Jur. N. S. 1027, 13 L. T. N. S. 645, 14 Week. Rep. 149; *Boardman v. Boardman* (1866) L. R. 1 Prob. & Div. 233, 14 Week. Rep. 1024; *Morphett v. Morphett* (1869) L. R. 1 Prob. & Div. 702, 38 L. J. Prob. N. S. 23, 19 L. T. N. S. 801, 17 Week. Rep. 471.

**Scotland.**—*Strain v. Strain* (1885) 13 Sc. Sess. Cas. 4th series 132, 23 Scot. L. R. 90.

In *McMahan v. McMahan* (1898) 186 Pa. 485, 41 L.R.A. 802, 40 Atl. 795, it appeared that a husband, being afflicted with syphilis, communicated the disease to his wife before marriage. It appeared that cohabitation aggravated her condition. In affirming the granting of a divorce, the court said: "We do not see how it is possible to imagine more direct and palpable case of cruelty to a wife by a husband than this. It comes within not only the spirit, but the very letter, of our statute, which allows divorce 'when any husband shall have by cruel and barbarous treatment endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family.' That the libellant in this case was kept in a constant state of suffering from malignant venereal disease was proved without contradiction. It was equally well established that so long as cohabitation continued the disease would continue, and that this condition was always dangerous, especially during pregnan-

cy, and in the case of childbirth might prove fatal."

In a few cases it has been held that the fact that one spouse has venereal disease constitutes cruelty to the other, though it is not communicated. *Leach v. Leach* (1887) — Me. —, 8 Atl. 349; *Canfield v. Canfield* (1876) 34 Mich. 519; *Hanna v. Hanna* (1893) 3 Tex. Civ. App. 51, 21 S. W. 720.

In *Leach v. Leach* (Me.) supra, it was held that if a man has a loathsome disease when he marries, and conceals the fact from his wife, and the knowledge of the fact, when she discovers it, causes her mental pain and suffering sufficient to endanger her life or health, it constitutes "cruel and abusive treatment."

In *Canfield v. Canfield* (1876) 34 Mich. 519, it was held in a syllabus decision that "the contracting by the defendant of a venereal disease" warrants a divorce on the ground of extreme cruelty.

In *Hanna v. Hanna* (Tex.) supra, it was said: "A man may, as a result of his own debauchery, become so diseased as that living and cohabiting with him will probably destroy the health of his wife; and we are not prepared to say that such fact would not, of itself, entitle a pure and innocent woman to a divorce, in the absence of specific proof that he had communicated to her a loathsome disease."

But in *Ciocci v. Ciocci* (1853) 1 Spinks, Eccl. & Adm. (Eng.) 121, it was held that the marriage of a man who knew himself to have a venereal disease was not legal cruelty, in the absence of the communication thereof to the wife.

The communication of a venereal disease has been referred to, in connection with other facts, as conjunctively constituting cruelty. Thus, in *Venzke v. Venzke* (1892) 94 Cal. 225, 29 Pac. 499, it appeared that a husband communicated a venereal disease to his wife. It also appeared that he abused her verbally, and accused her of unchastity. The grant of a divorce for "extreme cruelty" was sustained.

In *Morehouse v. Morehouse* (1898)

70 Conn. 420, 39 Atl. 516, the court stated the facts and its conclusion as follows: "Knowing that she was affected with a heart trouble and that his conduct would aggravate it, he frequently appeared before her in an intoxicated condition, humiliated her by his vulgar and profane language, and abused her with vile and unfounded charges. On many occasions his conduct made her ill, a result which he knew would follow such treatment. While affected with an infectious disease which he knew could be communicated to his wife by intercourse, he solicited intercourse (she being ignorant of his condition) and communicated to her the disease, from the effect of which she suffered for months. Afterwards, while still having this disease, he solicited intercourse with her, and, on her refusal, insisted, and attempted to accomplish his purpose with actual violence. As a result of the defendant's treatment of her, the plaintiff was made seriously and dangerously ill. This is intolerable cruelty."

In *Wilson v. Wilson* (1888) 16 R. I. 122, 13 Atl. 102, the court stated the facts and its conclusion as follows: "The evidence shows that during the intervening period she suffered from him, in a greater or less degree, four different kinds of cruel treatment, to wit: vulgar, profane, and abusive language, often used to or concerning her in her presence when she was in very feeble health; blows and other physical injuries inflicted on her; the communication to her of a vile disease; and the forcing her, by threats and importunities, to surrender to or for him her money, her jewels, and her household furniture; so that, making all due allowance for exaggeration and misconception, we are entirely satisfied that she is entitled to a divorce unless she has lost her right to it by condonation."

*b. Knowledge or wilfulness.*

In order for the communication of a venereal disease to constitute legal cruelty the diseased spouse must have known of his condition so as to impart an element of wilfulness to the communication thereof. Anonymous

(1886) 17 Abb. N. C. (N. Y.) 231, holding that the evidence, which is not set out, was insufficient to establish knowledge. And see the cases cited throughout this subdivision.

The question of scienter is one of fact. *Hanna v. Hanna* (1893) 3 Tex. Civ. App. 51, 21 S. W. 720.

In *Cook v. Cook* (1880) 32 N. J. Eq. 475, it was held that where a man has had the venereal disease twice, and consorted with a lewd woman shortly before his marriage, the appearance of symptoms indicating the existence of disease is sufficient to impose on him the duty of abstaining from intercourse with his wife until he is assured by competent medical authority that there is no danger of infection.

In *Carbajal v. Fernandez* (1912) 130 La. 812, 58 So. 581, it was held that the fact that the husband for six months before the marriage had been treated for syphilis and gonorrhea was sufficient to show that he had knowledge of his diseased condition, "or, which is the same thing, should, under the circumstances, have had it."

In *Long v. Long* (1822) 9 N. C. (2 Hawks.) 189, the statute under consideration allowed a divorce where the husband "abandons his family, or turns his wife out of doors, or by cruel and barbarous treatment endangers her life, or offers such indignities to her person as to render her condition intolerable, or life burdensome." It appeared that the husband contracted a venereal disease and communicated it to his wife. Refusing a divorce, the court said: "A divorce must still be withheld, the injury received by the petitioner not having been communicated under such circumstances as constitute any one of the causes provided for in the act. It is not meant to extenuate the adulterous act by which the defendant became infected, or to lessen the reprobation which it justly merits; that has lost no part of its original turpitude, and in the view of moral justice the defendant should bear the full weight of all its consequences. But we must estimate the character of the offense according to a positive law, and not attach legal effects to an act

of one description, which the law has connected with another. The evidence shows that the defendant was not impelled by any settled purpose of mischief, or moved by that brutal disposition which shows itself in repeated acts destructive of the happiness of the married state; that he was unconscious of his situation at the time; and, when he afterwards discovered its calamitous effect on the petitioner, he expressed his sorrow in the tones of unfeigned remorse."

In *Holmes v. Holmes* (1919) — Iowa, —, — A.L.R. —, 170 N. W. 793, it is held that proof that a man had, before his marriage, frequented houses of prostitution, that he at one time had gonorrhea, and that before his marriage he was circumcised in an effort to "clean up," shows sufficient knowledge by him of a possibly diseased condition to charge him with reckless disregard of the health of his wife in copulating with her.

In England it was held, in one case, that there must be some affirmative proof of knowledge by the afflicted person of the existence and nature of the disease. *Morphett v. Morphett* (1869) L. R. 1 Prob. & Div. (Eng.) 702, wherein it was said with respect to the effect of the disease itself to charge the afflicted person with notice: "If knowledge is charged and the proof of it is drawn from the fact that the disease existed, it is material to know whether the disease existed in such a form as to carry with it a knowledge of its existence and an appreciation of its nature and incidents. In many, if not most, cases of venereal disease, the general nature of the malady is hardly doubtful. I allude to those cases in which the organs of generation are palpably affected. But when the disease exhibits itself in other parts of the body only, as was proved to be the case with secondary syphilis, and the symptoms are those of eruption, sore throat, and the like,—easily disregarded with innocence, or as easily referred, with innocence, to other causes,—the case becomes widely different. Now, it is just here that the evidence of fact wholly fails.

There is an absolute dearth of proof that the petitioner was diseased at all, and, consequently, of all circumstances tending to show its character or appearances." In *N. v. N.* (1862) 9 Jur. N. S. (Eng.) 1203, 3 Swabey & T. 234, 9 L. T. N. S. 265, some affirmative proof of wilfulness was apparently deemed to be necessary, the court saying that, assuming the proof of the communication of the disease, there must be wilfulness, "as to which the court has nothing to guide it but mere conjecture." In *Boardman v. Boardman* (1866) L. R. 1 Prob. & Div. (Eng.) 233, the judge ordinary charged the jury as follows: "If the husband knew that he was in such a state of health that the having connection with his wife would be a reckless act, I think the communication of the disease would amount to cruelty. I think that mere indiscretion, if it went no further than that, would not be sufficient; but if you think that, looking at the state of his health and of his knowledge of his health, he recklessly had communication with her, and thereby communicated the disease, that, in my opinion, is cruelty." On the other hand, in *Brown v. Brown* (1846) L. R. 1 Prob. & Div. (Eng.) 46, the court said: "Prima facie, it is fit to conclude that the husband's state of health would be within his own knowledge, though he may rebut this by his own oath (when admissible as a witness), or by such other proof as may be within his reach." In the recent case of *Browning v. Browning*, L. R. [1911] P. (Eng.) 161, 80 L. J. Prob. N. S. 74, 104 L. T. N. S. 750, 55 Sol. Jo. 462, the court followed *Brown v. Brown* (Eng.) supra, and disapproved *Morphett v. Morphett* (Eng.) supra. It was held in that case that proof that a spouse is afflicted with a venereal disease casts on him the burden of showing that he was ignorant thereof. In *Strain v. Strain* (1885) 13 Sc. Sess. Cas. 4th series, 132, 23 Scot. L. R. 90, the existence of venereal sores on the body of the husband was said to be sufficient to apprise him of the danger of infecting the wife.

### II. Venereal disease as ground for separation.

It has been held that the fact that a husband has a venereal disease justifies the wife in refusing to cohabit with him during its continuation. *Williams v. Williams* (1898) 77 Ill. App. 229, wherein the court said: "When she became fully aware of his condition, when she was advised by a reputable physician, as it appears she was, that the disease was contagious, that it had existed ten years prior to the trial, that she was liable to contract the disease by impregnation, when she found that her child by her husband had constitutional syphilis, when her physician testified he could not tell whether it could be cured or not, she was justified in refusing to cohabit with him."

In *Butler v. Butler*, L. R. [1917] P. (Eng.) 244, 86 L. J. Prob. N. S. 135, 117 L. T. N. S. 542, 33 Times L. R. 494, 61 Sol. Jo. 631, it was held that the innocent contracting of a venereal disease by a woman before her marriage, and the communication thereof to her husband after marriage, did not justify him in separating from her.

### III. Venereal disease as evidence of adultery.

The fact that one spouse is found to have a venereal disease at a time long enough after the marriage to exclude the inference that it was contracted prior thereto is sufficient to make out a prima facie case of adultery against that spouse. *Clark v. Clark* (1867) 7 Robt. (N. Y.) 276; *Johnson v. Johnson* (1835) 14 Wend. (N. Y.) 637; *Laycock v. Laycock* (1908) 52 Or. 610, 98 Pac. 487; *Baker v. Baker* (1900) 195 Pa. 407, 46 Atl. 96; *Kulp v. Kulp* (1906) 84 Pa. Co. Ct. 338; *Popkin v. Popkin* (1794) 1 Hagg. Eccl. Rep. (Eng.) 765, note. And see *North v. North* (1809) 5 Mass. 320, wherein it was held that cohabitation, with knowledge of a venereal disease, condoned adultery, and *Rogers v. Rogers* (1877) 122 Mass. 423, wherein it appeared that after discovery by the wife of the venereal disease the husband confessed the adultery. See also *Chesnutt v. Chesnutt*

(1854) 1 Spinks, Eccl. & Adm. (Eng.) 196, a case involving the communication of the itch, wherein Dr. Lushington said, by way of dictum: "The communication of the venereal disease is another and a very different question; the communication of such disease, in almost every possible case, imports adultery."

"Where the husband, long after marriage, communicates a venereal disease to his wife, that fact is prima facie evidence of adultery having been committed, although when, where, or with whom is not proved. The innocent party, upon proving that fact, may rest his or her case, and, if the proof be not rebutted, is entitled to a divorce, except in those cases where it is essential to the jurisdiction of the court that the adultery should have been committed within this state." *Clark v. Clark* (N. Y.) supra.

In *Johnson v. Johnson* (1835) 14 Wend. (N. Y.) 637, it was said that "the fact of the defendant having the venereal disease so long after matrimony is prima facie evidence of adultery."

In *Laycock v. Laycock* (1908) 52 Or. 610, 98 Pac. 487, it was said: "It is admitted by him that he had a venereal disease, as is alleged in the complaint. He gives no explanation as to how he contracted it, except that it was communicated to him by the plaintiff, which the evidence shows to be wholly unfounded, or that he received it by coming in contact with infected clothing, and the like,—a highly improbable explanation in view of the other facts in the case. It is shown by the testimony, and in fact admitted by defendant, that about the time he contracted the disease he visited houses of prostitution in Pendleton, and that he was not an infrequent visitor to such houses in Pendleton, Ontario, and other points on the railroad whenever he went out on the road in business. It is certainly much more reasonable, under these circumstances, to conclude that he contracted the disease in the manner such diseases are usually contracted, than to accept his explanation."

In *Baker v. Baker* (1900) 195 Pa.

407, 46 Atl. 96, it was said: "If he had such a disease as that during the continuance of the marital relation, it must be regarded, in the absence of explanatory proof, as evidence of the fact of illicit connection with other women than his wife, there being no proof in the case that she was affected by that disease."

Where adultery is made out by the proof that a spouse has contracted a venereal disease since the marriage, it is not necessary, in an action for a divorce, to prove when, where, or with whom the adulterous intercourse was had. *Clark v. Clark* (1867) 7 Robt. (N. Y.) 276. See also *Mackenzie v. Mackenzie* (1916) 114 L. T. N. S. (Eng.) 564, 85 L. J. Prob. N. S. 151, 32 Times L. R. 318, wherein a husband, on proof that the wife had infected him with a venereal disease, was allowed to proceed without naming a corespondent.

In *Ferguson v. Ferguson* (1849) 3 Sandf. (N. Y.) 307, it was held that the fact that a man had the venereal disease eighteen months after marriage was not sufficient to make a *prima facie* case of adultery. The court said: "But even admitting the correctness of the inference, from such a state of facts, that the defendant had the venereal disease, still that alone does not prove adultery. The plaintiff, therefore, calls upon us to draw this further inference that the disease was contracted by means of illicit intercourse after marriage. It was an essential part of the plaintiff's case to show that the discharge could not have existed except from recent infection, and could not have been the result of immoralities before marriage. It is remarkable, however, that on this point, so essential to their success, the plaintiff's counsel did not ask a single question. All the evidence on this part of the case was elicited by the defendant's counsel, and it is entirely at variance with the inference sought by the plaintiff. Dr. Wood states that the disease may break out after marriage, without any improper intercourse—that cold and other causes may reproduce an old stricture; and Dr. Parker says that

the disease may give no trouble for years, and then break out again. Here, then, on the supposition that the appearances indicated the existence of the disease charged by the plaintiff, we find those appearances equally capable of two interpretations, so far as the time of its contraction is concerned—one entirely consistent with the innocence of the defendant, and the other involving a violation of the most solemn obligations. It is impossible for any man to say that the circumstance of the disease being found within eighteen months after marriage leads, 'by fair inference, to the necessary conclusion' that it was contracted since, and not prior to, the marriage."

In *Mounts v. Mounts* (1862) 15 N. J. Eq. 162, 82 Am. Dec. 276, the fact that six months after marriage the husband was found to have a venereal disease was held to be insufficient, standing alone, to warrant an inference of adultery as against his denial. The court adverted to the fact that the wife had been previously married, and that there was no clear showing that she was free from disease.

In *Mack v. Handy* (1887) 39 La. Ann. 491, 2 So. 181, it was held that the possession by the husband of mixtures which were taken by druggists and physicians to be a remedy in use for some venereal disease was held to be circumstantial proof of adultery, but not sufficient to make out a case against him.

The fact that one spouse is found to be afflicted with a venereal disease is not sufficient to show that the disease was communicated by the other spouse, and thereby raise an inference of adultery against the latter. See *infra*, VI.

#### IV. Venereal disease as impotence or physical defect.

It has been held that the fact that the woman was, at the time of her marriage, afflicted with chronic syphilis, is ground for annulment of the marriage, under a statute permitting annulment where either party is "physically incapable of entering into the marriage state." *Ryder v. Ryder*

(1892) 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029, wherein the court said: "In the case at bar the petitionee's organs of generation, at the time of marriage, were in an incurably diseased condition, which, while it did not physically render her incapable of copulation or of bringing into life a child a mass of syphilitic sores, as good as dead when born, yet did render copulation and procreation on the part of the petitioner impracticable, because the act endangered both his health and life. The facts found bring the case within the reason and essence, if not the exact language, of the rule."

In Kentucky, by the express terms of a statute, the existence in either spouse, at the time of the marriage, of a "loathsome disease," is ground for a divorce. It has been held that gonorrhea is such a disease. *Boughner v. Boughner* (1897) 19 Ky. L. Rep. 504, 41 S. W. 26. See also *Young v. Young* (1891) 12 Ky. L. Rep. 886, 15 S. W. 780. The fact that the husband believed at the time of the marriage that he was well does not prevent a divorce on this ground. *Hooe v. Hooe* (1906) 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214.

#### *V. Concealment of venereal disease as fraud.*

If a person entering into a marriage conceals the fact that he or she is afflicted with a deep-seated and chronic venereal disease, it is ordinarily deemed to be such a fraud as will warrant the annulment of the marriage. *Crane v. Crane* (1901) 62 N. J. Eq. 21, 49 Atl. 734; *Svenson v. Svenson* (1904) 178 N. Y. 54, 70 N. E. 120; *Meyer v. Meyer* (1875) 49 How. Pr. (N. Y.) 311; *Anonymous* (1897) 21 Misc. 765, 49 N. Y. Supp. 331; *Anonymous* (1901) 34 Misc. 109, 69 N. Y. Supp. 547; *Ryder v. Ryder* (1892) 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *C—— v. C——* (reported herewith) ante, 1013.

In *Anonymous* (1901) 34 Misc. 109, 69 N. Y. Supp. 547, in ordering a physical examination of the defendant, the court said: "Where a person, to his knowledge afflicted with a most grievous venereal disease, contagious

in a very high degree, and which, even under the most favorable circumstances, requires years before it yields to treatment, and may even then for a long time still lurk in the system, a source of hidden danger, marries an innocent girl, under representations that his health is sound, threatens her with infection, and their offspring with hereditary disease, a case is presented for state interference and judicial annulment."

In *Meyer v. Meyer* (1875) 49 How. Pr. (N. Y.) 311, a referee reported in favor of the annulment of a marriage on proof that a woman had been for years afflicted with vaginal and uterine leucorrhea, and had married without disclosing her condition.

In *Crane v. Crane* (N. J.) supra, it was held that where a man had been treated for syphilis under such circumstances that he must have known the nature of the disease, and in response to a direct charge of having the disease stated to the woman he was about to marry that he was free therefrom, there was such fraud as to warrant a decree of annulment.

In *Anonymous* (1897) 21 Misc. 765, 49 N. Y. Supp. 331, it appeared that a man told the woman whom he was about to marry that he was in good health. He had a chronic and contagious venereal disease, and communicated the same to her. It was held that the marriage should be annulled. The court said: "Although the disease fraudulently concealed in the case at bar was of a less virulent character, and one that, perhaps, would be more correctly described as local, rather than as constitutional, the principle seems to be the same; and this decision would be binding upon me even if it were in conflict with my own views. The issues are, consequently, decided in favor of the plaintiff, and a report herewith submitted recommending the annulment of the marriage."

In *Ryder v. Ryder* (1892) 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029, a marriage was annulled for the fraud of the woman in concealing from her prospective husband the fact that she was afflicted with syphilis, the court saying: "If it were found that she

was fully aware of her condition, she would have been guilty of a fraudulent concealment in not disclosing it to the petitioner. It would be an essential fact, entirely within her knowledge, not within his, nor open to his observation nor to his inquiry upon any reasonable principles which do, or should, prevail in conducting the negotiations which lead up to entering into the contract of marriage. It would be both indelicate and offensive to enter upon such inquiries. In such a case, if she did not care to disclose her condition she should have declined his advances."

In *Svenson v. Svenson* (1904) 178 N. Y. 54, 70 N. E. 120, it was held that concealment of a venereal disease existing at the time of the marriage was ground for annulment, it appearing that the marriage had not been consummated; and the fact that at the time the defendant had practically recovered was held not to be ground for denying relief. The court said: "What a practical recovery from such a disease may import, where it has existed for more than two years, with the danger of its return and ultimate transmission, it is difficult if not impossible to determine. But it is certain, at least, that at the time of the marriage the defendant was incapable of meeting the obligations and performing the functions of the marital relation, and was morally and physically unfit to become or continue to be the husband of a pure and innocent girl. When he concealed that condition from her and still induced her to marry him in ignorance thereof, he was guilty of a base and unmitigated fraud as to a matter essential to the relation into which they contracted to enter. Obviously the principle that refuses relief in cases of ordinary ill health after the marriage contract has been actually consummated has no application to a case like this, where there has been no consummation, and the disease is one involving disgrace in its contraction and presence, contagion in marital association, and includes danger of transmission and heredity that even science cannot fathom or certainly

define. The suppression of the presence of a disease including such dire and disastrous possibilities, directly affecting the marital relation, constitutes a fraud which clearly entitled the innocent party to a decree annulling the marriage contract, particularly when it has not been consummated."

In *Jordan v. Missouri & K. Teleph. Co.* (1909) 136 Mo. App. 192, 116 S. W. 432, it was held that the fact that a man entered into a marriage, concealing the fact that he was afflicted with a venereal disease, rendered the marriage voidable, but not void, and that a second marriage by the wife before entry of a final decree of nullity was void.

In several instances annulment has been granted of marriages which had been consummated, without reference to that fact. *Meyer v. Meyer* (1875) 49 How. Pr. (N. Y.) 311; Anonymous (1897) 21 Misc. 765, 49 N. Y. Supp. 331; *Ryder v. Ryder* (1892) 66 Vt. 158, 49 Am. St. Rep. 833, 28 Atl. 1029. In a few cases, however, the question has been raised, what constitutes such a confirmation of a marriage as to prevent an annulment for fraud in concealing the existence of a venereal disease. The Massachusetts rule seems to be that an annulment cannot be had if the marriage was consummated. Thus, in *Smith v. Smith* (1898) 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 983, it was held that the concealment by a man of the fact that, at the time of the marriage, he was constitutionally afflicted with syphilis, was such a fraud as to warrant the annulment of a marriage which had not been consummated.

But in *Vondal v. Vondal* (1900) 175 Mass. 383, 78 Am. St. Rep. 502, 56 N. E. 586, it was held that similar facts did not justify the annulment of a consummated marriage. It is to be noted, however, that in *Smith v. Smith* (Mass.) supra, it appeared that the disease was incurable, while in *Vondal v. Vondal* (Mass.) supra, the court adverted to the fact that it did not appear that the disease was not susceptible of cure. In *Svenson*

v. Svenson (1904) 178 N. Y. 54, 70 N. E. 120, the fact that the marriage had not been consummated was held to permit an annulment, though the defendant had practically recovered at the time of the trial. The court said: "It is evident that, the marriage not having been consummated, the usual considerations of public policy which apply to a case where the relation has, by consummation of the marriage, ripened into a public status, do not exist here. There was between these parties little more than a contract to marry, and we are aware of no principle of public policy which would be subverted by annulling this marriage, or which requires us to compel the plaintiff to consummate the marriage and give herself up as a sacrifice to the possibilities involved in such a course." In the reported case (C— v. C—, ante, 1013) the court laid down what would appear to be the true rule, that consummation of the marriage in ignorance of the fraud will not prevent an annulment, but continuation of cohabitation after knowledge thereof will. In that case it was said: "A second question arising upon the facts found is whether the defendant, by his conduct, confirmed the marriage. The trial court found he did not, and after a careful consideration of all the evidence we cannot say the finding is erroneous. It is undisputed that after the first three or four days subsequent to the marriage, and as soon as defendant discovered his infection, no sexual intercourse took place between them. He frequently after that told her they must separate, and that he would not resume the full marital relation. His permitting her to remain in the same household for the length of time she did, under the circumstances disclosed by the evidence, and in view of the ignorance and slow-mindedness of the defendant, cannot be held a confirmation of the marriage. He disaffirmed an essential part of the marriage relation as soon as he discovered the fraud, and continuously and consistently persisted therein."

In Koehler v. Koehler (1919) — Ark. —, 209 S. W. 283, the court said

that there was a conflict upon the question whether concealment by the wife of the fact that she is afflicted with a venereal disease is ground for annulment of the marriage; but that it was not necessary to decide the point, for the reason that the husband waived the right by continuing to live with her for more than a year after learning that she was being treated for syphilis.

#### VI. Evidence of existence or communication of venereal disease.

The mere fact that one spouse is found to have a venereal disease raises no presumption that it was communicated to him or her by the other spouse. *Holmes v. Holmes* (1919) — Iowa, —, — A.L.R. —, 170 N. W. 793; *Holthoefer v. Holthoefer* (1882) 47 Mich. 260, 11 N. W. 150; *Homburger v. Homburger* (1873) 46 How. Pr. (N. Y.) 346; *Moore v. Moore* (1912) 135 N. Y. Supp. 425; *Collett v. Collett* (1838) 1 Curt. Eccl. Rep. (Eng.) 678; *Morphett v. Morphett* (1869) L. R. 1 Prob. & Div. (Eng.) 702, 38 L. J. Prob. N. S. 23, 19 L. T. N. S. 801, 17 Week. Rep. 471.

This rule is based on the ground stated in *Collett v. Collett* (1838) 1 Curt. Eccl. Rep. (Eng.) 678, *supra*, that the existence of such disease in the wife "is consistent (1) with the adultery of the husband; (2) with her own adultery; and (3) with accidental communication of it."

Thus, in *Holthoefer v. Holthoefer* (1882) 47 Mich. 260, 11 N. W. 150, it was held that the mere fact that a wife was found to be afflicted with a venereal disease was not sufficient to warrant a finding that it was communicated to her by her husband, the court saying: "If it were impossible that a virtuous wife should contract such a disease otherwise than from the husband, perhaps the fact already stated should, under the circumstances, be sufficient proof of his guilt. But it is conceded that the wife may innocently acquire the disease in other ways, and the wife's case may, therefore, require to be supported by negative evidence that she has not in any manner been exposed."

Proof that a spouse became infected



with a venereal disease and that the other spouse previously had that disease is, however, sufficient to raise an inference of communication of the disease. Thus, in *Carbajal v. Fernandez* (1912) 130 La. 812, 58 So. 581, proof that the husband was afflicted with venereal disease before the marriage, and that the wife, after the marriage, showed symptoms of the same disease, was held to be sufficient to warrant a finding that he communicated the disease to her.

In *Darling v. Darling* (1914) 181 Mo. App. 211, 167 S. W. 1166, it appeared that the wife became afflicted with gonorrhea. In a divorce suit against the husband by a former wife he was charged with having gonorrhea, and did not deny it. He had an operation for a swelling in the groin. The physicians "testified that they discovered no signs of gonorrhea or syphilis, though they admitted that his condition indicated tuberculosis, gonorrhea, or syphilis." Affirming the grant of a divorce, the court said: "It is agreed that plaintiff was afflicted with the disease, and we think the suggestion that she must have caught it from some innocent source, not connected with defendant, is not reasonable."

The sufficiency of the proof of the existence of a venereal disease, whether it is shown to raise a presumption of adultery, or as a step in the proof of its communication to the other spouse, is, of course, a question of fact, and each case must be determined on its own circumstances. See the cases following.

Testimony by a wife to admissions of the husband that he had a venereal disease has been held not to be of itself sufficient. *Donohue v. Donohue* (1917) 180 App. Div. 561, 167 N. Y. Supp. 715.

In *Simon v. Simon* (1907) 34 Pa. Super. Ct. 182, a charge of cruelty in communicating a venereal disease to a wife was held not to be sustained by her uncorroborated testimony, which was said to be "based rather upon suspicion and inference than upon fact."

In *Glenn v. Glenn* (1901) 87 Mo. 5 A.L.R.—65.

App. 377, an action for a divorce for cruelty in communicating gonorrhea to a wife, three physicians testified that she did not have the disease. A bacteriologist testified from a microscopic test that she did. A finding that she did not have the disease was sustained.

In *Ferguson v. Ferguson* (1846) 1 Barb. Ch. (N. Y.) 604, it was held that stains on the linen of the husband were insufficient to warrant a finding of the existence of a venereal disease. The court said: "Nor was there a particle of evidence to justify a suspicion of an improper intercourse with any person, except the suspicion arising from the stains upon the defendant's linen. Even if it were conclusively proved that these stains proceeded from the part of the defendant's person which their situation upon his body linen seemed to indicate, it would not be sufficient of itself, uncorroborated by other circumstances, to authorize the jury to presume that they had been produced by an adulterous intercourse. Doctor Male is of the opinion that an honest and virtuous female, affected by the fluor albus, or leucorrhea, may communicate a disease to her husband that will produce a gonorrheal discharge resembling in appearance that of syphilitic origin. Indeed, if medical writers are right in supposing that the gonorrhea impura itself is produced by the inflammation of the cellular tissue of the mucous membrane of the vagina, or of the urethra, causing a discharge of purulent matter therefrom, it is evident that strictures and other irritations of the urethra may produce a purulent discharge, resembling the disease which arises from impure and guilty intercourse." On a second trial of the same case, after a transfer thereof to the superior court it was again held that the proof of the existence of venereal disease was insufficient, the evidence adduced on that trial not being stated. (1849) 3 Sandf. (N. Y.) 307.

In *James v. James* (1890) 29 Neb. 533, 45 N. W. 777, wherein it was sought to prove adultery of a husband, evidence that he was treated for a dis-

ease of the sexual organs, the nature of which was not shown, and that an inexperienced physician testified to finding germs of gonorrhea on a shirt taken from the husband's house, but not shown to have been worn by him, was held to be insufficient.

In *Mack v. Handy* (1887) 39 La. Ann. 491, 2 So. 181, it was held that the possession by a husband of medicine which was taken by druggists and physicians to be a remedy for venereal disease was not sufficient to make out a case against him, the court saying: "There is a possibility that it may have been prepared and in use for a different purpose or disease." The court in that case also referred to the fact that the wife was not infected, and that the children of the marriage were healthy, as tending to negative the existence of venereal disease in the husband.

In *Boughner v. Boughner* (1897) 19 Ky. L. Rep. 504, 41 S. W. 26, a physician testified that the husband was afflicted with gonorrhea. On behalf of the husband several physicians testified without a microscopic examination it is impossible to distinguish with certainty between gonorrhea and urethritis, a disease which might be contracted from the wife if her health was poor or her vaginal secretions acrid. The court reversed a finding that the husband had gonorrhea.

In *N. v. N.* (1862) 9 Jur. N. S. (Eng.) 1203, the evidence was held to be insufficient to establish the existence and communication of a venereal disease, the court stating the proof and its conclusion thereon as follows: "A medical man who was consulted about a week after the separation deposed that he then examined the petitioner and found her laboring under gonorrhea in a virulent form, and that she must have had it some time; that she was suffering much pain, and that such pain was generally experienced in ten or twelve days after the disease showed itself. The petitioner, when examined as a witness, deposed that she never had sexual intercourse with anyone but her husband; she did not state when she first had any of the symptoms ob-

served by the medical man, nor was the existence of such symptoms assigned as a reason for refusing further cohabitation with her husband. The only corroborative evidence given by the petitioner was that she had seen him use a syringe with powdered alum and water, or water alone. The laundress employed to wash for the family deposed that in May or the beginning of June she observed marks on the linen of the respondent, which might be supposed to indicate that he was suffering from gonorrhea in a virulent stage, and that she soon afterwards noticed similar marks on the linen of the petitioner. Now they did not separate until September, nor was any assertion made that connubial intercourse did not continually take place between them until that time, which is utterly inconsistent with the supposition that both were, during that period, viz., from June to September, affected by disease. The respondent was never subjected to medical examination, and he positively denied the existence of such disease. It was not made the subject of complaint during the long interview with Mr. Parker, and when Mr. Kingsford attended her before the separation nothing was said that intimated to him the existence of any such cause for her illness. Upon this evidence I cannot feel satisfied that the disease ever existed, and, therefore, I cannot find the respondent guilty of this act of cruelty."

In *Auld v. Auld* (1891) 16 N. Y. Supp. 803, the husband admitted that he had blood poisoning. A physician testified that this might arise from other causes than venereal disease, and that, after an examination of the husband, "he was unwilling to swear" that he had ever been so afflicted. It was held that the proof of disease was insufficient.

In *Wilson v. Wilson* (1911) 97 Ark. 643, 134 S. W. 963, it was charged that a wife had gonorrhea. The husband testified to admissions by her, and there was evidence of the taking of medicine by her. As against this showing, physicians testified that they found no trace of the disease, and it

appeared that the husband continued to cohabit with her after the alleged admissions. It was held that a finding that she did not have the disease was sustained by the evidence.

The refusal of a physician to testify as to whether a patient had a venereal disease raises no presumption against the patient. *Ibid.*

But in *Young v. Young* (1891) 12 Ky. L. Rep. 886, 15 S. W. 780, a finding of the existence of a venereal disease was sustained on proof that the husband's physician gave him medicines ordinarily used for such a disease, and declined to answer as to whether he was so afflicted on the ground that "to answer the question in the affirmative" would be unethical.

#### VII. *Condonation.*

Continuation of cohabitation by a spouse with knowledge that he or she has been infected with a venereal disease by the other is such a condonation as will prevent a divorce for cruelty in communicating the disease. *Auld v. Auld* (1891) 16 N. Y. Supp. 803; *Rehart v. Rehart* (1891) — Or. —, 25 Pac. 775; *N. v. N.* (1862) 9 Jur. N. S. (Eng.) 1203, 3 Swabey & T. 234, 9 L. T. N. S. 265.

In *Koehler v. Koehler* (1919) — Ark. —, 209 S. W. 283, it was held that the husband had waived the fraud of the wife in concealing the fact that she was suffering from a venereal disease at the time of the marriage by continuing to live with her for a year after learning the fact.

Continuing to cohabit with the husband after knowledge that he has a venereal disease does not condone adultery, where the husband tells the wife that it was innocently acquired and she believes the statement. *Andros v. Andros* (1905) 1 Cal. App. 309, 82 Pac. 90; *Wilkins v. Wilkins* (1904) — N. J. Eq. —, 58 Atl. 821; *Laycock v. Laycock* (1908) 52 Or. 610, 98 Pac. 487.

In *Wilson v. Wilson* (1888) 16 R. I. 122, 13 Atl. 102, it was held that no condonation resulted from continued cohabitation, the court saying: "Her husband had syphilis, but nevertheless continued to cohabit with her, the

consequence being that she had a syphilitic sore throat. He told her the name of the trouble, but, to exculpate himself, ascribed it to a false cause, namely, drinking from a cup which had been used by a person infected, and did not restrain himself. It is difficult to imagine a worse or more insidious form of cruelty. The petitioner testifies that she did not know the nature of the disease, notwithstanding he had named it, and though there were things which might have opened her eyes, we are inclined to believe that it was not until the physicians, summoned at our request, had given their testimony that she fully realized to what a shameful and dangerous disorder he had exposed her. It is not to be supposed that a lady bred up in family seclusion has the same understanding of such matters as the average man. The respondent evidently did not think the petitioner had it. 'In a case of this kind,' it has been said, 'the court ought to see its way very clearly to the fact of condonation before it comes to that conclusion.' *Ellis v. Ellis & Smith* (1865) 4 Swabey & T. (Eng.) 157, 34 L. J. Prob. N. S. 100, 11 Jur. N. S. 610, 13 L. T. N. S. 211, 13 Week. Rep. 964. When the defense is condonation, it is for the respondent to prove it; and of course, if the petitioner did not know what the offense was, she cannot be held to have condoned it; and we may add that it is easier to believe that she did not know, because it is so difficult to believe that if she had known she either would or could have condoned it."

In *Williams v. Williams* (1898) 77 Ill. App. 229, it was held as a matter of fact that there was no condonation, it appearing that the continued cohabitation after knowledge of the existence of the disease was under duress.

In *Muir v. Muir* (1909) 133 Ky. 125, 4 L.R.A.(N.S.) 909, 92 S. W. 814, in holding that continued cohabitation did not condone the offense, the court said: "Appellant contends that the offense of his disease was condoned by appellee's voluntarily cohabiting with him after she had knowledge of

his condition. The statute allows cohabitation to operate as a condonement of lewdness or adultery. § 2120. But the offense is aggravated, it seems to us, for a diseased spouse to inoculate the other with a dreadful venereal ailment, possibly curable, possibly not, and then claim a condonement because further cohabitation was indulged after that fact."

*Muir v. Muir* (Ky.) *supra*, was followed in *Hooe v. Hooe* (1906) 122 Ky. 590, 5 L.R.A. (N.S.) 729, 92 S. W. 317, 18 Ann. Cas. 214.

Though the communication of a venereal disease to the wife has been

condoned so as not to be of itself ground for a divorce, it may be considered as a part of the marital history in passing on an action for a divorce for subsequent acts of a different nature. *Abbott v. Abbott* (1918) — Mich. —, 168 N. W. 950.

In the reported case *C—— v. C——*, ante, 1013) an action for annulment of marriage, it was held that where the disease is incurable the wrong is a continuing one, and there can be no condonation. See, to the same effect, *Ryder v. Ryder* (1893) 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029. W. A. S.

## NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.,

v.

HARRIET P. BIRCHETT.

*United States Circuit Court of Appeals, Fourth Circuit — July 15, 1918.*

(252 Fed. 512.)

### Evidence — *res ipsa loquitur* — fall of passenger.

Negligence of a railroad company is not established, under the doctrine *res ipsa loquitur*, by the fall of a passenger from a chair in which she is seated in the dressing room of a sleeping car, and her statement that she train gave a terrific lurch, if the fact of the lurch is contradicted by other evidence in the case.

[See note on the question beginning on page 1034.]

ERROR to the District Court of the United States for the Western District of Virginia (McDowell, District Judge) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion of the court.

Argued before Knapp and Woods, Circuit Judges, and Smith, District Judge.

Messrs. F. Markoe Rivinus, F. S. Kirkpatrick, William Hodges Mann, Theodore W. Reath, and Joseph I. Doran, for plaintiff in error:

Plaintiff's fall created no presumption of negligence on the part of the railway.

*Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; *Roanoke R. & Electric Co. v. Sterrett*, 108 Va. 533, 19 L.R.A. (N.S.) 316, 128 Am. St. Rep. 971, 62 S. E. 385; *Thomas v. Philadel-*

*phia & R. R. Co.* 148 Pa. 180, 15 L.R.A. 416, 23 Atl. 989, 10 Am. Neg. Cas. 173; *Herstine v. Lehigh Valley R. Co.* 151 Pa. 244, 25 Atl. 104; *Nelson v. Lehigh Valley R. Co.* 25 App. Div. 535, 50 N. Y. Supp. 63, 4 Am. Neg. Rep. 523, 165 N. Y. 635, 59 N. E. 1127; *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978; *Irvine v. Delaware, L. & W. R. Co.* 106 C. C. A. 600, 184 Fed. 664; *Chesapeake & O. R. Co. v. Needham*, L.R.A. 1918A, 1169, 156 C. C. A. 574, 244 Fed. 146.

Words of characterization cannot substitute evidence of negligence. There is no evidence of negligence,

and the binding instruction requested by the railway company should have been given.

Weaver v. Pennsylvania R. Co. 256 Pa. 597, 100 Atl. 989; Norfolk & W. R. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445; Springs v. Virginia R. & Power Co. 117 Va. 826, 86 S. E. 65; Foley v. Boston & M. R. Co. 193 Mass. 332, 7 L.R.A. (N.S.) 1076, 79 N. E. 765; Hogg v. Kansas City, S. & G. R. Co. 139 La. 972, 72 So. 705; 4 Elliott, Railroads, p. 552, § 1630a.

Messrs. Harrison & Long for defendant in error.

**Knapp**, Circuit Judge, delivered the opinion of the court:

Defendant in error, plaintiff below, recovered judgment, entered upon the verdict of a jury, for injuries received by her while a passenger in a sleeping car on one of the railway company's trains. The accident occurred on the morning of January 12, 1916, just after the train west bound had left the station of East Radford, Virginia, and plaintiff's account of what happened is this: "I got up early, and went to the dressing room, and made my toilet, and had completed it, and was seated in the chair, just putting a few finishing touches to my waist or something, when this terrific lurch came. I never knew what it was, but that just threw me across the room. In catching myself, I suppose I threw this arm (indicating the left) back, and it broke it. It was just as though cars were coming together. That is the way I felt about it; a great lurch. . . . Q. You say, when this lurch came, this violent lurch that you have described, that it threw the cars together? A. Yes, sir; it seemed so to me. I went with a crash. It was that kind of a lurch; just as if some one would take a football and kick it,—I went with just as much force across the car. It all occurred very suddenly. I was taking due precaution, and I was seated in the chair, firmly seated there. It was a chair that is placed in the ladies' dressing room for the use of ladies. As I remember, the chair was turned over. I remember seeing

the chair out of its natural position. I was suffering, and had fainted, and don't remember what position the chair was in, except that it was over. . . . I had completed my toilet before the accident happened, except for a few finishing touches, to place a ribbon or a piece of lace or something while I was sitting in the chair. I cannot state now how I was sitting in the chair, except that I was sitting there firmly. I know that is a fact, because I am cautious, very cautious. I am a good traveler, and have traveled a good deal, and this is my first serious accident. . . . I have never had an attack of vertigo in my life. I am as steady as can be. I could not explain how the accident occurred, or how I was thrown out of the chair,—only a certain thing threw me out of my chair. . . . My height is 5 feet 2½ inches, and my weight 145 pounds. As to my strength, it is very good, very good."

The only negligence charged in the declaration or asserted at the trial was the unskilful and careless handling of the train, which is alleged to have caused the plaintiff's injury. It is not questioned that the roadbed and appurtenances were in good condition at the time and place, that the train equipment, including engine and cars with their various appliances, was also in good condition, and that the engineer and conductor in charge were rated among the best in the company's service. The sleeper in which plaintiff was riding was of recent construction, described as "one of the best class of cars the Pullman Company makes." There was no "accident," in the sense that anything broke or gave way or got out of order. The train went on, after plaintiff was hurt, the same as before, and no one else on board seems to have suspected that anything in the least unusual had happened, until she summoned the porter by ringing the dressing room bell. In short, there is not the slightest corroboration by tes-

timony of circumstance of her statement of a "terrific" or "violent" lurch of the car, indicating improper handling of the train. On the contrary, we think it was proved as conclusively as the nature of such a case admits that nothing of the kind occurred. The engineer, who first heard of the accident at the next stopping place, an hour or so later, testified that the train was operated in the customary manner; that he could tell in the engine "if there was a run up or a run out;" that is, as he explained, the "slack" running up or running out; and that when informed of plaintiff's injury he could not recall that anything of the kind had happened that morning. The dining car steward, who learned of the occurrence within a few minutes, when he was going through the sleepers to announce breakfast, says that none of the china or glassware was broken or disturbed, as would be the result of a violent jerk or lurch. The train conductor, the two brakemen, the Pullman conductor, and the Pullman porter, all of whom knew of the accident almost immediately, testified that no unusual lurching or jolting of the car had been observed. To the same effect was the testimony of five passengers, four of whom were in the same sleeper with plaintiff and heard of her injury shortly after it happened. Not only do these witnesses say that nothing at all uncommon had been noticed, but their detailed statements of what they were doing at or about the time—for example, two of them had been shaving—tend strongly to show that any violent or unusual lurching of the car would have attracted their attention. In a word, so far as negative testimony could disprove what the plaintiff says was the cause of her accident, and it is not perceived that the case made by her could be otherwise met, the fact was established beyond reasonable doubt that she had the misfortune to be injured, not by an extraordinary or exceptional

lurching from which negligent handling of the train might be inferred, but rather and solely by one or another of those swaying or tilting movements, however described, that the most skilful operation cannot avoid.

Moreover, according to the testimony of several witnesses, the plaintiff did not at the time claim that her injury was caused by any violent or unusual lurch of the car. The porter, whom she summoned to the dressing room, quotes her as saying: "I have hurt my arm, porter." The train conductor says: "I asked her how she fell, how she got hurt, and her remark was she didn't know; that she was in the ladies' dressing room sitting in a chair, and the next she knew she was in her berth; that she didn't know how she came to be hurt or to fall at all."

One of the brakemen states that he heard the conductor ask her how she got hurt, and gives substantially the same version of her reply. The company's surgeon, who in response to a telegram boarded the train at its next stop in order to attend her, testified that he wrote down at the time her answers to certain questions, and produced his memorandum, which showed the following reply to the inquiry as to how the accident occurred: "I had been to the toilet and was sitting in the chair. As the train was getting under headway from the last stop, I was thrown from the chair against the radiator and injured my left arm."

He further testified that "she did not complain to me of any rough handling, or excessive speed, or improper service on the part of the railway company."

In this connection it may be noted that the plaintiff's case, so far as the accident is concerned, rests wholly on her own testimony; her only other witness being a physician, who described the condition of her arm at the time of the trial. On cross-examination she was asked if she did not make to the

surgeon the statement just quoted, and said in reply that she did not remember, but that she would not contradict him. In answer to other questions of like import, she repeatedly declared that she could not recollect, but did virtually deny having told the conductor that she knew nothing from the time she was sitting in the chair until she found herself in her berth. But after the defendant's witnesses had given the testimony above set forth, as to her statements directly after the accident, she made no attempt in rebuttal to controvert anything they said. And the significance of all this is that it amounts to a full admission that at the time her injury was received she did not attribute it, by anything then said or suggested to those with whom she talked, to a violent and unusual lurching of the car, or to any improper operation of the train from which negligence could be inferred.

The intimation that the train was running at excessive speed around a certain curve, and that the accident may have been caused by a severe lurch at that point, deserves perhaps a word of comment. It appears that the distance from the station at East Radford to the station at New River is 2.3 miles. Something less than a mile east of New River station is New River bridge, at the eastern approach to which there is quite a sharp curve. Elsewhere between East Radford and New River the track is straight, or curves but slightly. From the first-named station to the other the schedule time of this train was five minutes; but on the morning in question it made the run to New River, where it did not stop, in four minutes, which the engineer says was not unusual. The average speed was about 34½ miles an hour, and expert testimony shows that even the bridge curve could be passed at that speed without the least danger, while on the straight track a speed of 60 miles an hour or more would be perfectly safe. With the amplest allowance

for time consumed and distance covered in getting under headway, it is therefore evident that the train could run this 2.3 miles in four minutes, as it often did, without improper speed at any point, and there is nothing to indicate that the fact was otherwise. Besides, the proof is convincing that the accident occurred before the bridge curve was reached. One of the brakemen says that he was on the rear platform, as his duty required, until the train passed through the East Radford yard, about half or three-quarters of a mile west of East Radford station; that he then started forward, and had gone through one sleeper when he met the conductor and was told of the occurrence. He is positive that this was before the train got to the bridge, and his testimony to that effect is in no wise discredited. Indeed, it is confirmed by the plaintiff herself, who specifically states that she would not deny having told the surgeon that the accident happened "as the train was getting under headway from the last stop." It is sufficient to say that there is absolutely no basis for an inference that her injury was occasioned by excessive speed.

The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. If it can be said that her testimony, unsupported by a single circumstance, raises a presumption of negligence, that presumption was overcome by evidence so convincing as to leave no room for reasonable doubt that the accident was not caused by any such extraordinary lurch as she describes. The doctrine of *res ipsa*

Evidence—  
*res ipsa loquitur*  
—fall of  
passenger.

loquitur, upon which plaintiff really relies, has but limited application to a case of this kind. The injury for which she sues did not result from collision or derailment, or from the improper character or unsafe condition of any part of the train equipment. It must have been occasioned, as seems to us clearly established, by one or more of those car movements or motions, by whatever name called, which necessarily attend the most careful operation of fast passenger trains. In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. *Hershtine v. Lehigh Valley R. Co.* 151 Pa. 244, 25 Atl. 104; *Weinschenk v. New York, N. H. & H. R. Co.* 190 Mass. 250, 76 N. E. 662; *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978; *Nelson v. Lehigh Valley R. Co.* 25 App. Div. 535, 50 N. Y. Supp. 63, 4 Am. Neg. Rep. 523. In the last-named case it was said: "But it does not follow as a logical consequence that, because a passenger is shaken or disturbed in his seat by the movement or lurching of a car running upon a curved road, the imputation of negligence must necessarily arise. That a passenger may, in a greater or less degree, be shaken or jostled, under such circumstances, is a matter of common knowledge and experience. As an ordinary incident to railroad travel, it is a consequence of the operation of counteracting forces, and is to be expected to occur. The courts must take notice of that which is a matter of common knowledge or experience, and when the evidence fails to disclose the lack of the required measure of care, as judged by the light of such knowledge, in view of the attendant circumstances, it ought not to be left to the conjecture of a jury. The plaintiff must give some proof from which there may be a logical inference of negligence, and the mere happening of the accident is not sufficient for the jury."

In *Norfolk & W. R. Co. v. Rhodes*, 109 Va. 176, 183, 63 S. E. 448, a case of the same class as the one at bar, though the facts stated seem decidedly more favorable to the injured passenger, the supreme court of appeals of Virginia says: "In this case there is no direct proof of negligence, nor can negligence be reasonably presumed from the facts and circumstances disclosed by the record. It is a matter of common knowledge, as well as shown by the record, that trains or cars, in passing rapidly over curves in the road, lurch, rock, or swing, and that this is unavoidable. Railroad tracks cannot always be straight. The movement of trains is rapid, and the inevitable result is that the natural laws of motion cause the car to rock or swing or lurch as it passes over curves. This cannot be prevented and is one of the risks which a passenger assumes. . . . It is true that the plaintiff and one of his witnesses express the opinion that the rocking or lurching when the plaintiff was injured was unusual and extraordinary, but they testify to no facts which show that it was unusual or extraordinary. *Foley v. Boston & M. R. Co.* 193 Mass. 332, 7 L.R.A. (N.S.) 1076, 79 N. E. 765. The mere fact that the plaintiff, who did not have hold of anything, was thrown or fell in the way he described, does not show that the movement of the train was unusual. No one was to blame for the injury so far as the record shows. It was simply one of those unfortunate accidents which sometimes happen, for which the law holds no one responsible."

An able and discriminating review of the subject will be found in *Irvine v. Delaware, L. & W. R. Co.* 106 C. C. A. 600, 184 Fed. 664, in the course of which the third circuit court of appeals has this to say upon the question here considered: "But, according to the contention of the plaintiff in error, a passenger who by reason of weakness or momentary vertigo, or by reason of the ordinary and regular movement



of the train, should fall in the aisle of the car and suffer hurt or damage, would be permitted, in an action against the carrier company, to rest upon a presumption of negligence, as arising from the mere fact that he was injured or hurt, and to throw upon the defendant the burden of negating negligence on its part. Such a proposition is as unsupported by authority as it is by reason. The counsel for the plaintiff in error has founded his argument upon what we have said was a misconception of the true meaning of the doctrine established by the decisions to which he has referred. This misconception has apparently arisen from considering certain language in the reported opinions of the cases, apart from the facts and circumstances with reference to which the opinions were announced."

The opinion of Judge Gray then proceeds to analyze a number of cases, among them *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877, 7 Am. Neg. Cas. 325, relied upon by plaintiff, and *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, 7 Am. Neg. Cas. 297, therein cited, and shows that they belong to a different class. The former, for example, was a case where in the operation of shifting or "drilling," when the train was within about 100 yards of the station and running slowly, one car was bumped into another with such force that the plaintiff, standing at the moment, was thrown against the arm of a seat and injured. These facts being admitted, the court held in effect that it was properly left to the jury to say whether the specific act which caused the injury was negligently performed; that is to say, if

the cars were bumped together with unnecessary and avoidable force, the negligence of the company might be inferred. In *Stokes v. Saltonstall* the passenger was injured by the upsetting of a stagecoach on an open road in daylight, which of itself would be enough to raise a presumption that the driver was negligent. The distinction between such cases and the instant case, with reference to any presumption arising from the mere fact of injury to a passenger, is so clearly and convincingly pointed out by the learned judge, in the opinion quoted from above, that nothing need be added to what is there said. Of *Chesapeake & O. R. Co. v. Needham*, L.R.A.1918A, 1169, 156 C. C. A. 574, 244 Fed. 146, recently decided by us, it suffices to say that on the record in this court the question here discussed was not presented, and our reversal of the judgment was solely on the ground that a refused instruction should have been granted.

The plaintiff has cited no authority, and we have found none, which sustains her contention. The fact that she fell, under circumstances not seriously in dispute, does not make out a *prima facie* case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred. As was said in *Norfolk & W. R. Co. v. Rhodes*, *supra*: "It was simply one of those unfortunate accidents which sometimes happen, for which the law holds no one responsible."

In our opinion a verdict should have been directed for the defendant, as was done in the almost identical case of *Ozanne v. Illinois C. R. Co.* (C. C.) 151 Fed. 900.

Reversed.

## ANNOTATION.

**Presumption of negligence from throwing passenger from seat.**

- I. Scope and introduction, 1034.
- II. Negligence not inferred, 1034.
- III. Negligence presumed:
  - a. Accident regarded as unusual, 1036.
  - b. Accident unusual and instrumentality controlled by carrier, 1038.
  - c. Instrumentality controlled by carrier, 1040.
  - d. Mere happening of accident, 1041.

*I. Scope and introduction.*

This annotation is confined to a treatment of those cases wherein the fact that a passenger was thrown from his seat was an element which entered into the decision. This limitation, of course, excludes cases where, by virtue of the nature of a collision or wreck, the passenger was necessarily thrown from his seat as, for instance, where the coach or car was turned over or demolished, and in which it was not contended that the mere fact that the passenger was thrown from his seat strengthened his case.

In examining the following annotation it should be remembered that, strictly speaking, it is incorrect to say, as has often been broadly asserted, that the negligence of a common carrier is to be presumed from the mere fact that an injury has happened to a passenger, since such a presumption, if any, arises from consideration of the cause of the injury or from other circumstances attending it, and not from the fact of the injury itself, unless it was such as could not well have happened without the carrier having been negligent, and that to create a presumption of negligence as against a carrier, the injury must be traced to the carrier, i. e., it must be shown to have proceeded from something under its control or from some danger which, in the fulfilment of its obligation of extraordinary care, it was its duty to anticipate and provide against. In other words, a presumption of negligence arises against a carrier for injuries to a passenger sustained while

being transported by it only when the accident proceeds from something within the control of the carrier, such as a defective roadbed or rolling stock, or from the wrongful management and operation thereof, and not from inevitable accident, an act of God, or of a stranger or the passenger himself, or in fact anything against which no human prudence or foresight could provide.

From this it follows that the present question is whether or not the fact that something occurred which was sufficiently violent to throw a passenger from his seat is sufficient to establish a case of prima facie negligence upon the part of the carrier.

*II. Negligence not inferred.*

Taking up the questions just outlined, a number of cases have held that where the injury for which damages are sought did not result from collision or derailment or from the improper character or unsafe condition of any part of the train equipment, but must have been occasioned by car or train movements, the mere fact that a passenger fell or was thrown from his seat does not raise a presumption of negligence against the company, at least where such movements were merely such as were necessarily attendant upon the careful and ordinary operation of the carrier's car or train.

Thus, in the reported case (*NORFOLK & W. R. Co. v. BIRCHETT*, ante, 1028) it was held that negligence of a railroad company was not established under the doctrine *res ipsa loquitur* by the fall of a passenger from a chair in which she was seated in the dressing room of a sleeping car, and her statement that the car gave a "terrific" or "violent" lurch, all the other evidence showing beyond a reasonable doubt that there was no such lurch or in fact any car movements other than those which necessarily attend the careful operation of a fast passenger train.

And in *Hoffman v. Third Ave. R. Co.*

(1899) 45 App. Div. 586, 61 N. Y. Supp. 590, it was held that the mere fact that a cable car, while moving through a crowded street at a rate no faster than a man could walk, for an unexplained reason stopped with such violence as to throw a passenger from her seat and onto the floor, was insufficient to raise an inference of negligence against the carrier.

And in *Wilder v. Metropolitan Street R. Co.* (1896) 10 App. Div. 364, 41 N. Y. Supp. 931, affirmed without opinion in (1900) 161 N. Y. 665, 57 N. E. 1128, where a passenger on a cable car was thrown from her seat to the floor as the car rounded a curve, it was held that the mere happening of the accident and the absence of any explanation did not raise a presumption of negligence. The court in the course of its argument spoke as follows: "The fact that such an accident did not ordinarily happen at the place in question does not justify the assumption or presumption that the plaintiff's injury was chargeable to the want of care of the defendant, nor need it be deemed attributable to the negligence of the plaintiff. The accident may have arisen from causes not dependent upon the negligence of the defendant. The circuitous movement of the car on the curve at the rate of the cable was necessarily a sort of a whirl of it, which may have required some care on the part of the passengers to steady themselves in the places occupied by them, with, however, no apparent danger to those within the car. The plaintiff at the moment of the accident may have been so unguarded in her position as to cause her to lose her balance, and thus be thrown from her seat by the motion of the car as it was proceeding around the curve. That this condition was applicable to her alone at the time is indicated by the fact that none of the other persons in the car were in like manner affected or disturbed in their seats. It is therefore clear that no presumption of negligence of the defendant arose from the occurrence of the accident which resulted in the plaintiff's alleged injury."

And again in *Nelson v. Lehigh Val-*

*ley R. Co.* (1898) 25 App. Div. 535, 50 N. Y. Supp. 63, 4 Am. Neg. Rep. 523, it was held that the mere fact that an unfastened chair in defendant's dining car tipped over, allowing plaintiff, a passenger, to fall on the floor while its train was rounding a curve at high speed, was not sufficient to establish a prima facie case of negligence, it appearing that while the car did give somewhat of a lurch, no one else fell, and that the train was traveling at a normal speed at the point in question. It was said that as no such accident had ever happened before from similar operation of its trains, the defendant was not bound to anticipate one. In other words, the happening of the accident during the normal operation of the train did not raise a presumption of negligence.

So, in *Frohriep v. Lake Shore & M. S. R. Co.* (1902) 131 Mich. 459, 91 N. W. 748, where a passenger on a freight train rolled or was thrown from a narrow seat or bunk on which he was sleeping in the caboose, to his injury, while the cars were being coupled, it was held that there was no inference of negligence upon the part of the carrier, there being nothing to show that the management of the train was unusual.

And in *Hawk v. Chicago, B. & Q. R. Co.* (1908) 130 Mo. App. 658, 108 S. W. 1119, in holding that the mere fact that an elderly passenger riding in the caboose of a freight train was thrown by a sudden stopping thereof from his seat to the floor of the car did not ipso facto raise a presumption of negligence, the court said: "It is a matter of common knowledge that in starting and stopping such unwieldy trains, sudden jolts and jars of varying degrees of violence are ordinary incidents even where such trains are handled with the greatest care. As such occurrences cannot be avoided in the exercise of due care, the rule is well settled that passengers assume the risk of injury by them as one of the perils of travel by that mode of conveyance. The fact that a sudden and violent jolt or jar accompanies the stopping of a freight train ipso facto will not raise a presumption of

negligence. A passenger injured thereby, to be entitled to recover from the carrier, must go further: He must adduce facts from which an inference of negligence fairly arises. . . . We do not find any evidence in the record before us from which it may be said with reason that the jolt which accompanied the stopping of the train was extraordinarily violent. Plaintiff depicts it as a 'terrible shock,' 'a severe shock, sufficient to knock the breath out of me,' but these expressions of a nonexpert witness amount to nothing more than mere conclusions and possess no probative value. . . . The facts that no one else on the car was overthrown, and that nothing in the car was disturbed, strongly support the testimony of all of the witnesses except plaintiff, that the stop was not extraordinary. The burden was on plaintiff to show by evidence the fact that the stopping of the car was so sudden and unusual that it bespoke the existence of negligence on the part of the engineer. His own witness, the traveling salesman, admitted that in riding on freight trains he had often encountered jolts of equal violence, and we think his testimony is quite convincing of the fact that the jolt in the present instance was one of the ordinary incidents in the operation of a long train, and should not be attributed to the negligence of the trainmen. We cannot agree with plaintiff that the fact that he was seated at the time of the injury is sufficient to raise a presumption of negligence. Doubtless the attitude he assumed in turning his face toward the door contributed somewhat to rendering his position on the seat insecure. But however this may be, the undisputed physical facts demonstrate beyond peradventure that he was unseated, not by a jolt of extraordinary violence, but by one likely to be encountered in travel by freight train."

In the Pennsylvania case of *Herstine v. Lehigh Valley R. Co.* (1892) 151 Pa. 244, 25 Atl. 104, the court seems to have gone as far as any, it having been held that there was no presumption of negligence on the part of a carrier raised by the fact that a

coupling was made with such force as to throw the plaintiff and his wife forward from their seats and against the seat in front of them to his injury. This was upon the theory that where an accident befalls a passenger, no presumption of negligence upon the part of a carrier is raised unless the passenger was injured in or because of an accident to the train or other means of transportation, the rule of presumptive negligence being declared inapplicable to cases where the only injury was to a passenger himself. In this connection the court said: "The reason of the rule in such cases is that a contract to carry is, within the understanding of both parties, a contract to carry safely; and a breach of this contract by reason of the failure or insufficiency of any of the means provided for the carrier puts the carrier upon the defensive. The construction of its roads, cars, and boats, and their management and care, are subjects peculiarly within the knowledge of the carrier, and with which the passenger has no means of becoming familiar. When an accident occurs therefore, the presumption is that it is due to the want of care in construction, repair, or management, and the burden of showing its own freedom from fault is on the carrier. But an accident to a passenger while about the premises of the carrier raises no such presumption, . . . nor does an accident befalling a passenger while on board a train and in the course of his journey, unless it is connected in some way with the means of transportation."

And see *Tuley v. Chicago, B. & Q. R. Co.* (1890) 41 Mo. App. 432.

### *III. Negligence presumed.*

#### *a. Accident regarded as unusual.*

It seems that the rules adopted and applied in the preceding subdivision should be limited in their application to those cases wherein the facts and circumstances, aside from the actual happening of the accident, do not show an unusual movement of the train or car or an uncommon accident. In fact the decided weight of authority is to the effect that a showing that the ac-

cident resulted from an unusual movement of the car or train is sufficient, if unexplained, to raise a presumption of negligence upon the part of the carrier.

Thus, in *Rust v. Springfield Street R. Co.* (1914) 217 Mass. 116, 104 N. E. 367, the court, while admitting that no presumption of negligence arises against a carrier from injury to a street car passenger occasioned by an ordinary movement or jerk of the car, yet held that negligence in the operation of a car would be presumed where it appeared that a passenger, while seated in the end of a cross seat of an open car with her feet firmly on the floor and with one hand holding onto the back of the seat in front of her, was suddenly thrown partially upon the running board, that she grabbed the stanchion, but while in this position the car was suddenly started forward and she was thrown out on the street nearly to the curb about 15 feet away.

And in *Chicago Union Traction Co. v. Mommsen* (1903) 107 Ill. App. 353, the court applied the rule that whenever an accident to a passenger is of that kind which, according to common experience, does not usually occur except from some fault of the carrier or from some defect of its carriage or appliance or condition of its road, a prima facie case of negligence is made, holding that a showing that a bolt from an unknown source had dropped into defendant's cable slot and caught, stopping its car with sufficient suddenness to throw plaintiff, a passenger, forward against the seat in front of her and upon the floor, established a prima facie case of negligence, and cast upon defendant the duty of showing that the accident occurred through no omission of duty resting upon it under its obligation to exercise the highest degree of care compatible with the practical operation of its road.

So, in *Fitch v. Mason City & C. L. Traction Co.* (1904) 124 Iowa, 665, 100 N. W. 618, upon similar reasoning, it was held that where a passenger, while free from contributory negligence, was thrown from his seat and out the open door of the electric car

in which he was riding, while the car was going down hill and around a 10 per cent curve at high speed, a presumption of negligence arose, because the accident would not have happened under ordinary circumstances had the defendant exercised the required care and foresight.

And in *Maier v. Metropolitan Street R. Co.* (1913) 176 Mo. App. 29, 162 S. W. 1041, where a passenger on a street car was thrown from her seat by an unusual starting up or jerk of the car, in holding that a prima facie case of negligence was established, it was said that "the evidence that deceased was a passenger, and that a jerk of such character occurred whereby she was thrown from her seat, is evidence that the car was negligently managed in some particular. And in such case that is sufficient. It is not required of plaintiff to point out the special act of the motorman causing such jerk."

And again, in *Tilton v. Philadelphia Rapid Transit Co.* (1911) 231 Pa. 63, 79 Atl. 877, it was held that evidence to the effect that a passenger, while seated in a street car, was thrown forward against the seat in front of him by the sudden and violent stopping of the car, showed such an unusual manner of stopping a car as to justify an inference of negligence in the management thereof and to call for an explanation by the carrier. The court said: "Under ordinary circumstances, with the car under proper control, when it is brought to a stop by the motorman, it is not done so abruptly as to injure a passenger by throwing him forward against the seat in front of him. Yet that was what occurred in this case, if the testimony of the plaintiff is to be credited. Such an unusual manner of stopping the car called for explanation by the defendant. If the sudden and violent stop was made necessary by something which occurred outside the car, and which was beyond the control of the motorman, and in his judgment made it needful to stop abruptly, rather than incur the risk of otherwise causing more serious injury, that fact should have been made to appear. But, in the

absence of any explanation, the occurrence, as described in the testimony of the plaintiff, was sufficient to justify an inference of negligence in the management of the car. It matters not whether there was an actual collision with a wagon; the point of the inquiry would be as to the conduct of the motorman, and whether or not he was justified in stopping his car in what under ordinary circumstances would have been a negligent manner, and with needless violence."

So, in *Webber v. Old Colony Street R. Co.* (1912) 210 Mass. 432, 97 N. E. 74, where there was a jolt sufficient to raise the end of a street car and lift a passenger some inches from her seat and cause her to fall back with "a hard thump," to her injury, it was held that such an unexplained occurrence raised a presumption of negligence on the part of the carrier, since it could not be regarded as an ordinary incident of travel.

And see the cases set out in the next following subdivision.

*b. Accident unusual and instrumentality controlled by carrier.*

In a number of cases the courts have laid stress not only upon the fact that the accident was unusual, but that it resulted from the operation of instrumentalities wholly within the control of the carrier.

Thus, in *St. Louis & S. F. R. Co. v. Fitts* (1914) 40 Okla. 685, L.R.A. 1916C, 348, 140 Pac. 144, in holding that where a passenger train gave a lurch or jolt of sufficient violence to throw a child, and to almost throw two adult passengers from their seats, a presumption of negligence on the part of the carrier arose, and cast upon it the onus of rebutting the same, the court applied the general rule that where the thing which causes the accident is exclusively controlled or managed by the carrier, and the accident is such as in the ordinary course of events does not happen if those who have the control or management use proper care, it affords reasonable evidence, in the absence of explanation by the carrier, that the accident arose from want of care. In discussing the unusualness of the ac-

cident, Kane, J., speaking for the court, said: "We venture to say that a railway company, of which it could truthfully be said that a jerk of sufficient violence to throw a child five years old out of her seat, where she was quietly sitting, and 'liked to have jerked' two adults out of their seats, and 'liked to have jerked the head off' one of them, was an ordinary occurrence, would not enjoy the patronage of the traveling public to any great extent. We therefore conclude that evidence tending to show the occurrence of a lurch or a jerk of a passenger train of sufficient violence to throw from the seat whereon she was quietly sitting as a passenger a child five years old, painfully injuring her, and to almost throw from their seats two adult passengers, justifies an inference of some breach of the duty owed to the injured person by the carrier, and casts the onus upon it of relieving itself of responsibility by showing that the injury was the result of an accident which the exercise of due skill, foresight, and diligence could not have prevented." And the *Fitts Case* was quoted at length and followed in *Ramsey v. McKay* (1915) 44 Okla. 774, 146 Pac. 210, wherein it was held that the fact that a freight train on which plaintiff was riding as a passenger was stopped so suddenly as to throw him from his seat against the side of the car and into a pile on the floor with the conductor, brakeman, and another passenger, together with an admission by the conductor made at the time of the accident that the engineer had made the stop on purpose and that it was the second time that he had done it on that day, sufficiently established a *prima facie* case of negligence on the part of the carrier.

And in *O'Callaghan v. Dellwood Park Co.* (1909) 242 Ill. 336, 26 L.R.A. (N.S.) 1054, 184 Am. St. Rep. 331, 89 N. E. 1005, 17 Ann. Cas. 407, the court again applied the rule that if an injury to a passenger is caused by apparatus wholly under the control of a carrier, and furnished and managed by it, and the accident is of such a character that it would not ordinarily

occur if due care was used, a presumption of negligence arises from the nature of the accident and the attending circumstances, but not from the mere fact of the accident itself, holding that the fact that a passenger on a scenic railway was injured by being thrown from the seat of a car by the sudden slowing or stopping thereof after having slid down a greasy incline was sufficient to raise a presumption of negligence against the carrier. It was said that the injury was caused by apparatus wholly under the control of the defendant, a common carrier, and that the accident was of such a character that it would not ordinarily occur if due care had been used in the management of the railway.

So, in *Mitchell v. Chicago & A. R. Co.* (1908) 132 Mo. App. 143, 112 S. W. 291, in holding that where, in coupling a freight train, the portions were driven together with such force as to hurl passengers in the caboose from their seats, and one of them through the door to the ground, and to overturn the water tank and shake the lamps from their positions, breaking the globes, the facts were sufficient to show an unusual and extraordinary jar attributable to the operation of instrumentalities within the control of the defendant, and to raise a presumption of negligence upon the part of the carrier, the court said: "The facts in proof in the case now under advisement extend quite beyond the usual and ordinary jerks incident to the operation of a freight train however, for to say otherwise would be to declare that it was a usual and ordinary occurrence in the coupling of trains to produce such a collision as hurls passengers from their seats through the doors of the car onto the ground, overturns water kegs, jars papers from the conductor's desk, pigeonholes, and the lamps from their positions. And too, that it is a usual and ordinary occurrence for freight trains to make their coupling in such a manner as to inflict injury upon passengers seated in the cars, sufficient to produce headache, lame backs and the loss of sleep for two successive nights. Common knowledge in that behalf points such

to be more than the result of an ordinary and usual jerk of a freight train operated without negligence. We are fully persuaded that although there was no proof of a specific negligent act on the part of those operating the train, the facts above related are amply sufficient to authorize a legitimate inference of negligence on the part of the engineer and those engaged in the coupling, constituting substantial evidence in support of the verdict. . . . As to the proposition presented with respect to the doctrine of *res ipsa loquitur*, . . . the sound rule on the subject, declared in an early case and often approved by the courts, is: 'Where the thing is shown to be under the management of defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.' "

Again, in *Redmon v. Metropolitan Street R. Co.* (1904) 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26, where a passenger on a cable car, as the result of a sudden and abrupt stopping of the car, was thrown with great violence from his seat against the stove and side of the car and onto the floor, it was held that since the injury arose from apparatus wholly and entirely under the control of the defendant and furnished and operated by it, the facts so shown made out a *prima facie* case of negligence against the carrier. It was also expressly recognized in this case that an accident such as the one in controversy, in the ordinary course of things, would not have happened if the carrier had used proper care in the management and care of its road and equipment.

And in *Rosenthal v. New York, N. H. & H. R. Co.* (1914) 88 Conn. 65, 51 L.R.A.(N.S.) 775, 89 Atl. 888, the court applied the rule that a passenger, to raise a presumption of negligence in the operation of a passenger train, must go farther than to characterize the jerk or jolt which threw him forward in his seat and caused a suit case

to fall upon him from one of the racks provided for luggage as "awful" or "strong" or "big," and must show by evidence of what took place as a physical fact that the train was operated negligently, and held that the fact that the train was stopped so suddenly as to throw the passengers forward in their seats and dislodge a suit case from an overhead baggage rack, was sufficient, in the absence of any explanation from the company, to raise a presumption of negligence in the operation of the train. In reaching this conclusion Beach, J., among other things, said: "In this case the witnesses not only characterized the stop as sudden and violent, but they testified to the physical effect on themselves, as throwing them forward in their seats, and to the simultaneous fall of the suit case, which, according to the testimony, had been securely stowed in the rack before the train started. We think that the jury might reasonably have found that the stop was unusually sudden and caused the suit case to fall from a position from which it would not probably have been dislodged by the ordinary motion of the train. The starting and stopping of trains is a matter peculiarly within the control of the employees of the railroad, and the safety of passengers may be endangered by careless or unskilful handling of the powerful apparatus employed for these purposes. A passenger cannot be expected to know the cause of an abrupt stop resulting in injury, and it is not asking too much of the defendant railroad that it should be put upon its explanation by evidence showing that the stop was uncommonly abrupt and that it produced a physical consequence in itself unusual, from which the plaintiff's injury resulted."

*c. Instrumentality controlled by carrier.*

Without reference to the unusual character of the accident, it has been held that a presumption of negligence arises because of the fact that the negligence charged and which resulted in the throwing of the passenger from his seat related to an instrumentality

wholly within the control of the carrier.

Thus, in *Smith v. Chicago City R. Co.* (1911) 165 Ill. App. 190, upon the theory that where the negligence charged relates to an instrumentality wholly within the control of the defendant, the doctrine of *res ipsa loquitur* is applicable and a presumption of negligence arises, it was held that a presumption of negligence upon the part of a carrier arose from injury to a passenger on a trailer attached to a cable car, caused by a violent jolt, throwing him violently against the woodwork at the back of the seat in which he was sitting and then forward and onto the floor of the car.

And, of course, a very strong case for the raising of a presumption of negligence is made where it is shown that the throwing of the passenger from his seat resulted from a collision or a defect in the roadway or carrying vehicle or in the machinery or apparatus used to run the same. Since such things are under the control of the carrier, the law presumes that it was negligent when a passenger is injured as a result of an accident to the rolling stock itself. For instance, in *Clow v. Pittsburgh Traction Co.* (1893) 158 Pa. 410, 27 Atl. 1004, where a cable car, stopped by reason of a defect in the roadway or machinery with sufficient force to throw plaintiff, a passenger, from his seat, it was held that the law would presume the company negligent. And in *Southern R. Co. v. Dawson* (1900) 98 Va. 577, 36 S. E. 996, 8 Am. Neg. Rep. 359, where a freight train parted from some unknown and unexplained cause and then again came together with such force as to derail several cars and to throw plaintiff, a passenger, from his seat in the caboose with great violence and to his injury, it was held that the presumption was that the accident was the result of the negligence of the company so as to throw upon it the burden of showing that there had been no negligence, and that the injury had been caused by inevitable casualty or by some cause which human care and foresight could not prevent. In *North Chicago Street R. Co. v. Schwartz*



(1899) 82 Ill. App. 493, where defendant deliberately ran its cable car into an obstruction on its track in an attempt to pass over the same, with such force as resulted in a lurch or jolt sufficient to throw plaintiff, a passenger, from her seat to the floor of the car, it was held that a prima facie case of negligence was established. This was upon the theory that the evidence showed that the obstruction was under the defendant's control.

*d. Mere happening of accident.*

In a few cases in which a passenger was injured by falling or being thrown from his seat, the courts have broadly ruled that the mere happening of the accident is sufficient to establish a prima facie case of negligence against the carrier, but it will be noted in practically all of these cases that the facts were such as to permit the result to be characterized as unusual and out of the ordinary, so as to place upon the defendant the duty of explaining the cause of the accident.

In *Hobson v. St. Louis, S. & P. R. Co.* (1913) 180 Ill. App. 84, proceeding upon the broad theory that proof that one was a passenger and that an accident happened resulting in injury is sufficient to establish a prima facie case of negligence, it was held that a presumption of negligence arose against a carrier, where a passenger on its electric train was injured by being thrown, as a result of the sudden stopping of the car, so violently against the seat in front of her as to cause it to turn over. Here the facts were clearly sufficient to at least permit the stop and the result to be characterized as unusual and out of the ordinary.

And following a similar rule it was held in *Vandalia R. Co. v. Darby* (1915) 60 Ind. App. 294, 108 N. E. 778, that a presumption of negligence upon the part of a carrier arose when a passenger on a freight train was injured by a sudden and violent stopping of the train by application of the brakes which threw her from her seat forward 15 or 20 feet across the caboose and against the side of the car and on the floor. Here, too, it would seem that the stop must have been an unusual one. So, in *Missouri, K. & T. R. Co. v. Stone* (1910) 58 Tex. Civ. App. 480, 125 S. W. 587, it was held that proof that a railroad coach while standing in a yard and known to be occupied by passengers was so violently moved by the carrier as to cause some of such passengers to be thrown against the arms of the chairs occupied by them, and others to be thrown to the floor, was sufficient to establish a prima facie case of negligence and impose upon the carrier the burden of showing circumstances that would exonerate it from blame. Again the movement of the car seems to have been an unusually violent one.

Likewise, in *Baltimore & P. R. Co. v. Swann* (1895) 81 Md. 400, 31 L.R.A. 313, 32 Atl. 175, applying the rule that injury to a passenger on a train is prima facie evidence of the carrier's negligence, it was held that the fact that a passenger was jostled and thrown from her seat against the side of the car to her serious injury raised a presumption of negligence as against the carrier.

G. J. C.

BUELL STARK, Plff. in Err.,

v.

ED HAMILTON.

*Georgia Supreme Court—July 16, 1919.*

(— Ga. —, 99 S. E. 861.)

**Injunction — against association with girl.**

1. Where a man has debauched a minor girl and induced her to abandon

Headnotes by ATKINSON, J.

5 A.L.R.—66.

her parental abode and live with him in a state of adultery and fornication, and persists in a continuance of such conduct, equity will afford a remedy by injunction, and to that end, in a suit by the father, will enjoin the man from associating and communicating with the girl, either by writing, telephoning, or telegraphing, personally or through the aid or agency of any other person.

[See note on this question beginning on page 1044.]

—right to.

2. Under the pleadings and the evidence in this case, the judge did not

err in granting a temporary injunction.

[See 14 R. C. L. 365, 370.]

**ERROR** to the Superior Court for Whitfield County (Tarver, J.) to review a decree in favor of plaintiff in a suit to enjoin defendant from associating or communicating in any way with plaintiff's daughter. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. Reuben R. Arnold and Archibald H. Davis, for plaintiff in error:

The court will not enjoin a person from committing a crime, nor will injunction be granted, where the injurious acts have already taken place.

O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Paulk v. Sycamore, 104 Ga. 26, 41 L.R.A. 772, 69 Am. St. Rep. 128, 30 S. E. 417.

Injunction issues only for the protection of a property right.

Singer Mfg. Co. v. Domestic Sewing Mach. Co. 49 Ga. 70; Georgia R. & Bkg. Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256; Shellman v. Saxon, 134 Ga. 29, 27 L.R.A. (N.S.) 452, 67 S. E. 438; Jonesboro v. Central of Georgia R. Co. 134 Ga. 190, 67 S. E. 716; Starnes v. Atlanta, 139 Ga. 531, 77 S. E. 381; Schooler v. Schooler, 74 Ga. 345; Price v. Price, 90 Ga. 244, 15 S. E. 774; Lyon v. Lyon, 102 Ga. 453, 42 L.R.A. 194, 66 Am. St. Rep. 189, 31 S. E. 34; Hall v. Hall, 141 Ga. 361, 80 S. E. 992.

Messrs. C. D. McCutchen and F. K. McCutchen also for plaintiff in error.

Messrs. Harris & Harris, F. W. Cope-land, and George Glenn, for defendant in error:

Injunction lies at the instance of plaintiff.

Lyon v. Lyon, 102 Ga. 453, 42 L.R.A. 194, 66 Am. St. Rep. 189, 31 S. E. 34.

Atkinson, J., delivered the opinion of the court:

The controlling question in this case is, Where a man has debauched a minor girl and induced her to abandon her parental abode and live with him in a state of adultery and fornication, and persists in a continuance of such conduct, will

equity afford the father of the girl a remedy by injunction, and to that end enjoin the man from associating with the girl and from communicating with her in any way, either by writing, telephoning, telegraphing, or through the aid and agency of any other person? The following excerpts from the Civil Code have the force and effect of statutes:

Sec. 5490. "Equity, by a writ of injunction, may restrain proceedings in another or the same court, or a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience, and for which no adequate remedy is provided at law."

Sec. 4538. "Equity will not take cognizance of a plain legal right, where an adequate and complete remedy is provided by law; but a mere privilege to a party to sue at law, or the existence of a common-law remedy not as complete or effectual as the equitable relief, shall not deprive equity of jurisdiction."

Sec. 4519. "Equity jurisdiction is established and allowed for the protection and relief of parties, where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong, or relieving for injuries done."

Sec. 3020. "Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child."

Sec. 3025. "Parents and children may mutually protect each other, and justify the defense of the person or reputation of each other."

In *Clark on Equity*, § 241, it is said: "When the act of the defendant has consisted of interfering with domestic relations, equitable relief has rarely been given unless a property right was involved."

See also *Bispham*, Eq. 738.

In *Lyon v. Lyon*, 102 Ga. 453, 42 L.R.A. 194, 66 Am. St. Rep. 189, 31 S. E. 34, it was held: "An injunction will, in a meritorious case, lie at the instance of a wife, who is suing her husband for a divorce on the grounds of cruel treatment and habitual intoxication, to restrain him not only from interfering with her property, but also from going into her dwelling house and eating and sleeping therein over her protest and against her consent."

In the course of the opinion it was said: "While courts of equity are reluctant to interpose in controversies growing out of merely personal or domestic relations, and will ordinarily leave the parties to pursue the remedies open to them in the courts of common law, still when 'property rights or questions concerning property arise between husband and wife, parent and child, [or] guardian and ward,' jurisdiction will be taken, in a proper case, in order that full and adequate relief may be granted to the injured party."

In *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 919, 14 L.R.A.(N.S.) 304, 67 Atl. 100, it was said: "If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief."

The above case involved the in-

fringement of both personal rights and property rights; but, inasmuch as it involved personal and property rights, the court put the grant of injunction upon "technical" property rights.

In an article on injuries to personality, in 29 *Harvard L. Rev.* 668, there is an elaborate discussion and able review of cases on the subject. Among the cases cited is *Ex parte Warfield*, 40 Tex. Crim. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933. In that case it was held that injunction at the instance of a husband (plaintiff) would issue against the defendant, who was alleged to have partially alienated the affections of plaintiff's wife, to restrain him from visiting or associating with her, going to or near her at a certain house, or interfering with plaintiff's attempts to communicate with her. In the course of the opinion, it was said: "Now, recurring to the subject-matter of this litigation, as set forth in plaintiff's petition, we think there can be no question that appellant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. 'He is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie.' See 2 *Lawson, Rights, Rem. & Pr.* § 714. 'It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family.' *Id.* § 715; *Schouler, Dom. Rel.* § 41; *Bennett v. Smith*, 31 Barb. 439; *Barnes v. Allen*, 20 Barb. 663. A husband, from time immemorial,

has an interest in the services of his wife, springing from the marital relation. In this state, suits for personal injuries to her must be maintained by the husband, predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife, and it was averred that on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plaintiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff; and it would seem that, if the court had the power to maintain this suit for damages on account of a partial alienation of the affections of his said wife, he would have the right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affections and the utter destruction of the marital agreement."

The case under consideration differs on its facts from any case heretofore decided by this court and from any of the cases cited from other states. It in a sense involves

both personal and property rights. The father has the right, under the statutes of this state, to protect his minor child, to be protected by her, and to have her reside in his home and with his family and to enjoy the comfort of her association and the advantage of her services. It is his moral and legal duty to support her in sickness and in health. Reformation of a wayward daughter is always possible, and her father has the legal and moral right to make the effort to save her, and in some measure lessen the reproach to his name and to the reputation of his family. It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family, or palliate the humiliation of the father for the continual debauching of his daughter. —right to.

**Injunction—  
against associa-  
tion with girl.**

Under the pleadings and the evidence the interlocutory injunction was properly granted.

Judgment affirmed.

All the Justices concur.

## ANNOTATION.

### **Injunction to prevent one person from associating with another.**

It is not intended to include cases of orders restraining the marrying of infants or providing for their custody or preventing interference with them in certain cases by a parent, nor cases of interference by husbands with wives from whom they are separated.

It will be seen that it is held in the reported case (*STARK v. HAMILTON*, ante, 1041) that a father may obtain an injunction restraining a man from associating with his minor daughter, whom he has debauched.

*Ex parte Warfield* (1899) 40 Tex. Crim. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933, which is sufficiently discussed in the reported case (*STARK v. HAMILTON*) seems to be the only case upon the interesting question whether one spouse may enjoin a third person from associating with the other spouse. It is true that there is in such case the remedy at law for alienation of affections; but it will hardly be contended that that is an adequate remedy.

In *Butler v. Freeman* (1756) 1 Amb. 301, 27 Eng. Reprint, 204, there was a petition by the plaintiff's father setting forth that the plaintiff was entitled to a considerable estate, that a bill had been brought in his name for directions concerning it, and a decree made for that purpose; that the plaintiff, at the age of eighteen years, had been seduced away from a clergyman's house, where he was placed for education, by one Medwin and Mary Dolben, his sister-in-law, and that they all went to Antwerp, where "it is pretended that the plaintiff and Mary were married. It appeared that a suit was pending to annul the marriage. Medwin and Mary were committed. It was later ordered that Medwin be discharged upon paying the costs of the contempt, but he is not to resort to, or keep company with, or have any intercourse or correspondence with, the plaintiff, the infant, till further order."

Reference may be here made to *Aymar v. Roff* (1817) 3 Johns. Ch. (N. Y.) 49, where the defendant had married a girl twelve years old, she joining in as a frolic, and not understanding the matter, and at once leaving the defendant; and it was ordered that the defendant refrain from holding any conversation or from having

any intercourse or correspondence with the girl.

It may be noted that in *Hodecker v. Stricker* (1896) 39 N. Y. Supp. 515, the court sustained a demurrer to a complaint of the plaintiff which, as stated by the court, "alleges that she is the lawful wife of Frederick Hodecker; that the defendant, with knowledge of this, resides with him, in relations immoral and meretricious, and assumes to bear the surname of Hodecker, and that such appropriation of the plaintiff's name of Hodecker, by thus falsely personating her, is calculated to prejudice the plaintiff's standing in the community, as well as to scandalize and injure her in name and fame, as the lawful wife of the said Frederick Hodecker; and that 'by reason of the premises the plaintiff has been scandalized, slandered, defamed, humiliated, defrauded, libeled, and otherwise injured among the community, and greatly distressed in mind, to her damage of \$10,000.' She therefore demands judgment for injunctive relief and for damages." The court stated that the charge was not that the defendant sought to personate the plaintiff, and that she failed to aver that her cohabitation with her husband was discontinued for any cause attributable to the defendant.

B. B. B.

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ISAAC E. EMERSON, Trading as the Emersonian Apartments, et al.,  
Appts.,

v.

RACHEL TAYLOR.

*Maryland Court of Appeals—June 20, 1918.*

(— Md. —, 104 Atl. 538.)

**Husband and wife — injury to husband — action by wife.**

A married woman is not entitled to damages for loss of consortium for negligent injuries inflicted upon her husband.

[See note on this question beginning on page 1049.]

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APPEAL by defendants from a judgment of the Baltimore City Court overruling a demurrer to the declaration in an action brought to recover damages for plaintiff's loss of consortium, from injuries to her husband, alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Aubrey Pearre, Jr., for appellants:

The Married Women's Act of Maryland does not create any new right of action in a wife, but does give to her the right to bring suit only on such rights of action as existed in her favor at common law; therefore she cannot bring suit in a case such as this is, for loss of consortium, where a husband is injured through the negligence of another.

*Kosciolek v. Portland R. Light & P. Co.* 81 Or. 517, 160 Pac. 132; *Stout v. Kansas City Terminal Co.* 172 Mo. App. 118, 157 S. W. 1019; *Gambino v. Manufacturers Coal & Coke Co.* 175 Mo. App. 658, 158 S. W. 77; 1 *Cooley, Torts*, 3d ed. p. 474; *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459; *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Brown v. Kistelman*, 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 631; *Patelski v. Snyder*, 179 Ill. App. 24; *Smith v. Nicholas Bldg. Co.* 93 Ohio St. 101, L.R.A.1916E, 700, 112 N. E. 204, Ann. Cas. 1918D, 206.

Messrs. Augustus C. Binswanger and Louis Samuels, for appellee:

A wife may sue for loss of consortium growing out of negligence to her husband.

*Wolf v. Frank*, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Flandermeyer v. Cooper*, 85 Ohio St. 327, 40 L.R.A.(N.S.) 363, 98 N. E. 102, Ann. Cas. 1913A, 983; *Gerner v. Gerner*, 185 Pa. 233, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Warren v. Warren*, 89 Mich. 123, 14 L.R.A. 545, 50 N. E. 842; *Winsmore v. Greenbank* (1745) Willes, 577, 125 Eng. Reprint, 1330; *Harlan, Dom. Rel.* 1909, p. 74 (VII), ¶ 4 et seq.; *Guevin v. Manchester Street R. Co.* 78 N. H. 289, L.R.A.1917C, 410, 99 Atl. 298, 16 N. C. C. A. 518; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, 3 Am. Neg. Cas. 655; *Standen v. Pennsylvania R. Co.* 214 Pa. 189, 63 Atl. 467, 6 Ann. Cas. 408; *Moberg v. Scott*, 38 S. D. 422, L.R.A.1917D, 732, 161 N. W. 998; *Blaechinska v. Howard Mission & Home*, 130 N. Y. 499, 15 L.R.A. 215, 29 N. E. 755; *Zingrebe v. Union R. Co.* 56 App. Div. 567, 67 N. Y. Supp. 554;

*Garrison v. Sun Printing & Pub. Asso.* 207 N. Y. 1, 45 L.R.A.(N.S.) 766, 100 N. E. 430, Ann. Cas. 1914C, 288; *Rott v. Goehring*, 33 N. D. 413, L.R.A.1916E, 1086, 157 N. W. 296, Ann. Cas. 1918A, 643.

**Stockbridge, J.**, delivered the opinion of the court:

This suit is an action by a married woman to recover damages for the loss of consortium, resulting from an injury to the husband occasioned by the negligence, as alleged, of the defendants. No other element of damage to the plaintiff is claimed. She suffered no physical injury.

The husband, a hod carrier by occupation, was employed as one of the hands in the building of an apartment house under construction by the appellants. An elevator which ran from the sixth to the first floor became beyond control, as the result of which the plaintiff's husband was thrown down, suffered severe contusions, the breaking of his right leg, and was confined to a hospital for a period of four months. For the injury suffered, if due to the negligence of the defendants, he had a right of action. Whether he did, as matter of fact, present any claim for these injuries, and, if so, what was the ultimate disposition of it, does not appear from the record, but any claim of this character for the injury suffered was a claim of his, and not of his wife. The sole basis for her claim rests in the loss of consortium consequent upon the injury.

A demurrer was filed to the declaration, which was overruled. The defendants declined to plead, a judgment by default for lack of a plea was entered against them, and an inquisition found in favor of the wife, upon which a judgment for \$50 was entered. Such is the case presented in this court by the record. The appeal, therefore, calls in question only the ruling of the Baltimore city court upon the demurrer to the declaration, and this presents but a single question of law.

It was well settled at common

law that for personal injuries to a husband no right of action arose in favor of the wife; but with the advance of the law in the direction of according greater rights to married women, and more nearly placing her upon a footing of equality with her husband, and especially since the adoption in many of the states of this country of the so-called "Married Women's Act," the claim is made that a change has taken place in the right of a married woman to sue and recover separately from her husband for damages which she may suffer. The case has been presented with much fullness of research into the adjudications, and large numbers of the cases were referred to in the argument and cited upon the briefs. The present accepted rule of law will be found accurately and concisely stated in 13 R. C. L. 1443, where many of the cases are referred to. It is sometimes said that there is great conflict of opinion in the conclusions reached in the various cases.

A close examination of the adjudications discloses that these group themselves under several distinct heads; the differences of opinion arising, as was held in the case of *Wolf v. Frank*, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132, from the source from which the married woman acquires the right, rather than whether the right existed at all. In the case just mentioned the suit was brought by a married woman to recover damages for the alienation of the affections of her husband, and this court held that the law cannot make redress in such cases otherwise than to the married woman solely, apart from all others, and especially her husband. In such cases the injury to the woman is direct, and hence of legal necessity the damages must be to her solely, and therefore the suit can be maintained in her own name.

In some of the cases of this description, the basis upon which the recovery is allowed is that an injury of this character involves the legal idea of malice, even if there be no

actual malice; that the husband cannot be said to have been damaged, or have recovery therefor, and that, therefore, a suit by a married woman alone, in cases of alienation of affections, enticement, or seduction of the husband, are held to give the wife the right of action. This right of action, sustained in *Wolf v. Frank*, supra, is said in some of the cases to have been a right existing at common law, as well as under married women's statutes; but, however this may be, in this class of cases it is a rule which has been adopted quite generally, of which the following cases are examples: *Bassett v. Bassett*, 20 Ill. App. 543; *Tucker v. Tucker*, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 27 L.R.A. 120, 47 Am. St. Rep. 759, 61 N. W. 577; *Gerner v. Gerner*, 185 Pa. 233, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Jaynes v. Jaynes*, 39 Hun, 40; *Logan v. Logan*, 77 Ind. 558, contra; *Duffies v. Duffies*, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Jacobson v. Siddal*, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108, crim. conv.; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Warren v. Warren*, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658; *Work v. Campbell*, 164 Cal. 343, 43 L.R.A.(N.S.) 581, 128 Pac. 943; *Rott v. Goehring*, 33 N. D. 413, L.R.A. 1916E, 1086, 157 N. W. 294, Ann. Cas. 1918A, 643; *Wolf v. Frank*, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132. Analogy to this class of cases was attempted to be drawn from certain cases of slander or libel; but these cases are all cases where the suit was by the husband for loss of the consortium of the

wife, and of these the case of *Garrison v. Sun Printing & Pub. Co.* 207 N. Y. 1, 45 L.R.A.(N.S.) 766, 100 N. E. 430, Ann. Cas. 1914C, 288, is a good example. A right may exist in the husband, which, notwithstanding the statute, is without a correlative right in the wife.

There is another class of cases upon which reliance has been placed by the appellee, namely, where in the suit of a married woman against a third party for loss of the consortium of her husband the cause of the damage was the sale to the husband of liquor or noxious drugs. In some of these cases, the sales, as testified to, were in direct violation of state statutes; in others, the right to maintain such an action has been based upon special laws, generally described as civil damage acts; and in still a third class of cases, it has been held that sale of such liquors or drugs, particularly when made after due notice and caution to the dealer, involves an element of malice, for which no right of action subsists in the husband; that the damage to the wife is direct, not indirect, and as such a recovery by her in an independent suit can be maintained. See *Flandermeyer v. Cooper*, 85 Ohio St. 327, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983; *Moberg v. Scott*, 38 S. D. 422, L.R.A. 1917D, 732, 161 N. W. 998. In many of the cases cited in the argument the suits were actions brought by the husband for the loss of the consortium of the wife, and from these it has been argued that since the adoption of the Married Women's Act there was the establishment of a complete parity of right upon the part of both husband and wife. The suits in which the Married Women's Act has been considered, as affecting the right of action, are, in part, *Southern R. Co. v. Crowder*, 135 Ala. 417, 33 So. 335; *Clark v. Hill*, 69 Mo. App. 541; *Blair v. Seitner Dry Goods Co.* 184 Mich. 304, L.R.A. 1915D, 524, 151 N. W. 724, Ann. Cas. 1916C, 882; *Marri v. Stamford Street R. Co.* 84 Conn. 9, 33 L.R.A.(N.S.) 1042, 78 Atl. 582, Ann. Cas.

1912B, 1120; *Guevin v. Manchester Street R. Co.* 78 N. H. 289, L.R.A. 1917C, 410, 99 Atl. 298.

The most satisfactory discussion of this phase of the case will be found in *Kosciolek v. Portland R. Light & P. Co.* 81 Or. 517, 160 Pac. 132. The line of demarcation is there clearly drawn between cases such as find their origin in alienation of affection and those which result from an act of negligence of a third party. The rule with regard to these latter is clearly stated in the section in 13 R. C. L. already referred to, and is expressed by Mr. Cooley in the first volume of his work on Torts, 3d ed. p. 474, as follows: "A wife cannot recover damages on account of personal injury to her husband, whereby she sustains loss of support and of consortium, and is compelled to care for him while sick."

Husband and wife—injury to husband—action by wife.

See also *Stewart, Husband & Wife*, § 429.

The statements of these authors are fully borne out by the following adjudicated cases: *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459; *Feneff v. New York C. & H. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389; *Whitcomb v. New York, N. H. & H. R. Co.* 215 Mass. 440, 102 N. E. 663; *Gearing v. Berkson*, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785; *Blaechinska v. Howard Mission & Home*, 130 N. Y. 497, 15 L.R.A.215, 29 N. E. 755, reversing 56 Hun, 322, 9 N. Y. Supp. 679; *Stout v. Kansas City Terminal R. Co.* 172 Mo. App. 113, 157 S. W. 1019; *Gambino v. Manufacturers Coal & Coke Co.* 175 Mo. App. 653, 158 S. W. 77; *Patelski v. Snyder*, 179 Ill. App. 24; *Smith v. Nicholas Bldg. Co.* 93 Ohio St. 101, L.R.A.1916E, 700, 12 N. E. 204, Ann. Cas. 1918D, 206; *Brown v. Kistelman*, 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 631. To quote at length from the opinions in the va-



rious adjudicated cases would protract this opinion to an unreasonable length, nor has it seemed worth while even to refer to the class of cases where actions have been brought in the joint names of husband and wife, or to suits for damages in cases where an assault has been committed upon the woman, and she has brought an independent suit for the injury sustained. Cases

of these several characters are without bearing or influence upon the question now under consideration.

It will be apparent from what has been said that the court below was in error in its ruling upon the demurrer, and the judgment appealed from must therefore be reversed without a new trial.

Judgment reversed, with costs to the appellants.

## ANNOTATION.

### Wife's right of action for loss of consortium.

#### In general.

The term "consortium" is ordinarily used in the sense of companionship or society; the wife's right of consortium has, however, been used in the sense of her right of support from the husband. This right of consortium may be interfered with in various ways. One way is by the alienation of the husband's affections. Actions for alienation of affections, however, are in a distinct class, and the principles governing them cannot be fully developed in a note limited to loss of consortium. Such actions have, therefore, been generally excluded from the present discussion.

The right of consortium may be interfered with by a sale of drugs or intoxicants to the husband. The wife's right of action for such a sale is frequently governed by statutes commonly known as civil damage acts. The right of recovery under such a statute is not discussed herein.

At common law a wife had no cause of action for loss of consortium of the husband. *Kosciolek v. Portland R. Light & P. Co.* (1916) 81 Or. 517, 160 Pac. 132 (dictum as to injury—action was one for loss of consortium through death). The reason for this has been stated to be that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. *Feneff v. New York C. & H. R. R. Co.* (1909) 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436. In *Monroe v. Ma-*

*ples* (1792) 1 Root (Conn.) 422, an action for malicious prosecution, it was held that the husband and wife cannot join in an action for an injury done to the husband as well as the wife, but for that the husband must have an action by himself.

In *Lynch v. Knight* (1861) 9 H. L. Cas. 577, 11 Eng. Reprint, 854, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382, an action by the wife for slanderous words spoken of her to her husband, which resulted in a separation and loss of conjugal society, an opinion was expressed by Lord Campbell that such a loss may be one which the law may recognize. This decision, however, turned upon another point.

Under the Married Women's Acts, or where the disabilities of married women as they existed at common law have been otherwise removed, the wife has a right of action for loss of consortium in certain cases. The most common illustration of cases in which the wife's right of action for loss of consortium is sustained is an action for alienation of the husband's affections. Acts resulting in alienation of affections are regarded as direct attacks upon the wife's rights. Closely akin to actions for alienation of affections are those actions based upon wilful acts directed against the husband. Thus, a right of action has been held to exist in favor of the wife for loss of her husband's support, comfort, and society, against one who by threats of violence drove the husband insane. *Clark v. Hill* (1897) 69 Mo. App. 541. While this case is

distinguished from the case of a negligent injury to the husband, the theory of it is disapproved in *Gambino v. Manufacturers Coal & Coke Co.* (1913) 175 Mo. App. 653, 158 S. W. 77, and *Reynolds*, presiding judge, was of the opinion that the *Clark Case* should be expressly overruled so far as it intimates that a negligent action can be maintained. A wife has been held entitled to damages for her loss of consortium against one who, with knowledge that a husband, by the constant and continued use of morphine, has become so weak in his body and mind that he is unable to resist his craving for the drug, and who, after the repeated protests of the wife, continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum. *Flandermeyer v. Cooper* (1912) 85 Ohio St. 329, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983. In *Moberg v. Scott* (1917) 38 S. D. 422, L.R.A.1917D, 732, 161 N. W. 998, a wife was held entitled to recover damages for loss of consortium and support through the unlawful sale of opium to her husband. It has been held in a jurisdiction in which, by virtue of a code, a wife may maintain an action for damages suffered by her by reason of the abduction or enticement from her of her husband, that a wife may maintain an action for deceit in making false representations to her about her husband, which cause her to treat him cruelly, and thereby drive him from her, where her treatment would be justified if the representations were true. *Work v. Campbell* (1913) 164 Cal. 343, 43 L.R.A.(N.S.) 581, 128 Pac. 943.

It has been held, however, that a wife cannot, either at common law or under the Married Women's Act giving her a right to hold separate property and sue alone, recover damages for loss of companionship and support, from persons who have successfully conspired to induce her husband to commit an offense for which he was imprisoned, where they intended to injure him, and not her. *Neiberg v.*

*Cohen* (1914) 88 Vt. 281, L.R.A.1915C, 483, 92 Atl. 214, Ann. Cas. 1916C, 476. It is stated to be "true that the loss she suffered resulted from an intentional and malicious act. But the malicious purpose and act of the defendant were directed against the husband, and not against the wife."

**Right to recover for loss of consortium through negligent injury to the husband.**

The right to recover for loss of consortium, which a wife has in certain circumstances where the common-law disabilities have been removed, does not extend to a case in which this right has been indirectly interfered with by a negligent injury to the husband; a wife is held to have no cause of action for such injuries. *EMERSON v. TAYLOR* (reported herewith) ante, 1045; *Brown v. Kistleman* (1912) 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 637; *Feneff v. New York C. & H. R. R. Co.* (1909) 208 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Bernhardt v. Perry* (1919) — Mo. —, 208 S. W. 462; *Stout v. Kansas City Terminal R. Co.* (1918) 172 Mo. App. 118, 157 S. W. 1019; *Gambino v. Manufacturers Coal & Coke Co.* (1918) 175 Mo. App. 653, 158 S. W. 77; *Goldman v. Cohen* (1900) 30 Misc. 336, 63 N. Y. Supp. 459; *Smith v. Nicholas Bldg. Co.* (1915) 93 Ohio St. 101, L.R.A.1916E, 700, 112 N. E. 204, Ann. Cas. 1918D, 206; *Kosciolek v. Portland R. Light & P. Co.* (1916) 81 Or. 517, 160 Pac. 132 (dictum as to injury—action was one for loss of consortium from death of husband).

An act empowering a married woman to sue and be sued, without joining her husband, to the same extent as if she were unmarried, does not, according to the court in *Patelski v. Snyder* (1913) 179 Ill. App. 24, "proffer to vest in her or create for her any pecuniary claim which she did not before have."

Consequential damages for loss of consortium arising from the sickness of the husband from eating unfit food sold by the defendant cannot be recovered by the wife. *Gearing v. Berk-*

son (1916) 223 Mass. 257, L.R.A. 1916D, 1006, 111 N. E. 785.

In *Feneff v. New York C. & H. R. R. Co.* (1909) 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436, it is stated that "where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render service of any kind is paid for in full to the person injured. Ordinarily, the relation between him and others whereby they will be detrimentally affected by impairment of physical or mental ability makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. . . . The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injuries. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential." In the declaration of the wife in *Feneff v. New York C. & H. R. R. Co.* (Mass.) *supra*, there was the averment that by reason of the husband's disability the wife had endured great suffering and anxiety, and had been obliged to assume heavy and arduous duties she did not have to assume before the injury, and that she had lost the comforts, society, aid, and assistance of her husband. In her bill of exceptions she alleged that the action was one for loss of consortium.

It has been stated that "damages for the loss of consortium are recoverable for wrongs which directly tend to entirely deprive the husband or wife of the consortium of the other, as, for instance, if one be enticed, seduced, or forced away from the other,

but never for impairment of consortium resulting from the mere act of negligence in which the injury is the indirect consequence of the act, wholly bereft of intentional wrong; and that, too, where the party through whom the damages are claimed has received (as in the case at bar), or is entitled to receive, full compensation in his own name." *Stout v. Kansas City Terminal R. Co.* (1913) 172 Mo. App. 113, 157 S. W. 1019.

This right of consortium has not uniformly been defined. The rule denying recovery has been applied where the action is based upon the loss of companionship, comfort, and society of the husband. *Brown v. Kistleman* (1912) 177 Ind. 692, 40 L.R.A. (N.S.) 236, 98 N. E. 631. In *Stout v. Kansas City Terminal R. Co.* (Mo.) *supra*, the action was brought to recover damages for the loss of the "consortium, comfort, and society," of the plaintiff's husband. The court, in discussing the meaning of the word "consortium," says that this word covers the plaintiff's case, for the additional phrase, "comfort and society," added by the pleader, are but forms of that word, that is, they are in part, at least, the meaning of the word.

The rule denying recovery has also been applied where the action of the wife was based upon the loss of companionship, comfort, society, and protection of the husband. *Brown v. Kistleman* (Ind.) *supra*. In some such cases the element of support of the wife seems to be regarded as within the meaning of consortium. In *Gambino v. Manufacturers Coal & Coke Co.* (1913) 175 Mo. App. 653, 158 S. W. 77, the court states that "the sole question for consideration relates to the right of recovery in the plaintiff wife as for consortium; that is, for the loss of the society, companionship, and also the aid and support of her husband during the time he was so incapacitated." In *Smith v. Nicholas Bldg. Co.* (1915) 93 Ohio St. 101, L.R.A. 1916E, 700, 112 N. E. 204, Ann. Cas. 1918D, 206, an action by the wife which is treated as one for loss of consortium, the plaintiff averred that

by reason of the injuries complained of her husband had become nervous, irritable, morose, fretful, excitable, and ill-tempered, that she was deprived of his society, companionship, conjugal affections, fellowship, and assistance. In *Patelski v. Snyder* (1913) 179 Ill. App. 24, recovery was predicated upon the allegations that the husband was kept and detained away from his home and the plaintiff, whereby the plaintiff was deprived of the comforts, society, and assistance of the husband, and of the means of support and maintenance which he had been accustomed to provide and give her.

The recovery has also been denied where the action is based upon the loss of support and maintenance resulting from a decreased earning capacity, but this is not usually spoken of as a right of consortium. *Brown v. Kistleman* (Ind.) *supra*. The husband, in a proper action, is entitled to full compensation for such loss. *Ibid*.

No cause of action arises in a wife for negligence resulting in depriving

her husband of his salary for a certain period. *Glenn v. Western U. Teleg. Co.* (1907) 1 Ga. App. 821, 58 S. E. 83.

In *Goldman v. Cohen* (1900) 30 Misc. 336, 63 N. Y. Supp. 459, where an action was brought by a wife for an injury to her husband resulting from the negligence of the defendant in the management of a horse, the loss of the wife for which recovery was sought is stated to be that which usually occurs to a wife from the illness of a husband in the deprivation of support and consortium, and the need of her personal care for him during his sickness.

A wife cannot recover what has been lost to her husband in wages and which otherwise would have gone to her support, nor for labor and care in nursing him while recovering for the injury, nor for medicine, nor can she recover for distress, anxiety, and pain in nursing and caring for him. *Welch v. Morrison* (1887) 9 Ohio Dec. Reprint, 852. W. A. E.

### HIRAM G. BEACH, Appt.,

v.

### JAMES HAYNER et al.

*Michigan Supreme Court—July 17, 1919.*

(207 Mich. 93, 173 N. W. 487.)

#### **Fish — in private lake — ownership.**

1. The title to the fish in a lake the title to which is in private owners is in the public or is common to all riparian owners until they are taken and reduced to actual possession.

[See note on this question beginning on page 1056.]

**Injunction — against trespass — necessity of ejectment.**

2. Injunction will not lie to prevent trespass upon real estate until title has been established in ejectment.

[See 14 R. C. L. 450-452.]

**Water — right to use surface of private lake.**

3. Each of several riparian owners

on an inland lake whose titles include the land covered by water may, together with their lessees and licensees, use the entire surface of the lake for boating and fishing so far as they do not interfere with the reasonable use of the water by other riparian owners, and they are not limited to the portion within their respective side lines.

**APPEAL** by plaintiff from a decree of the Circuit Court for Livingston County, in Chancery (Collins, J.), dismissing a bill filed to enjoin defend-

ants from entering upon lands claimed to be owned by plaintiff and trespassing thereon contrary to his orders. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Louis E. Howlett, for appellant:  
Conceding that plaintiff is the owner of the lands in question, he is entitled to the exclusive control of the same and entitled to have the defendants enjoined from trespassing thereon.

*Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, 5 Mor. Min. Rep. 67; *Seager v. McCabe*, 92 Mich. 194, 16 L.R.A. 247, 52 N. W. 299; 32 Cyc. 655; *Murphy v. Bolger*, 60 Vt. 723, 1 L.R.A. 309, 15 Atl. 365; *Hoag v. Place* (Mansfield v. Place) 93 Mich. 450, 18 L.R.A. 39, 53 N. W. 617; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *Hall v. Alford*, 114 Mich. 165, 38 L.R.A. 205, 72 N. W. 137; *Janesville v. Carpenter*, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Giddings v. Rogalewski*, 192 Mich. 319, 158 N. W. 951; *Winans v. Willetts*, 197 Mich. 512, 163 N. W. 993; 19 Cyc. 990, 991; *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *Albright v. Cortright*, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; *Smoulter v. Boyd*, 209 Pa. 146, 66 L.R.A. 829, 103 Am. St. Rep. 1000, 58 Atl. 144.

Defendants have no rights on the lake, and should be restrained from trespassing upon plaintiff's property.

*Lembeck v. Nye*, 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686.

Mr. Francis J. Shields, for appellees:

Ejectment not having been brought, plaintiff cannot now maintain his claim in this chancery suit as to any rights in the 25-acre parcel.

*Beach v. Rice*, 186 Mich. 95, 152 N. W. 916.

Plaintiff can have no exclusive right to the fish in the waters of Silver lake or the boating or transportation privileges there, even in the waters that lie above the land which he claims to own, for the reason that fish are *feræ naturæ*, and so far as any right of property in them can exist, it is in the public or in common to all until they are taken and reduced to actual possession.

*Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *People v. Horling*, 137 Mich. 406, 100 N. W. 691; *Menzies v. Macdonald*, 36 Eng. L. & Eq. Rep. 20; *West Roxbury v. Stoddard*, 7 Allen, 158; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845.

Kuhn, J., delivered the opinion of the court:

This bill was filed to enjoin the defendants from entering upon waters covering lands claimed to be owned by plaintiff, located in the township of Hamburg, Livingston county, Michigan, and trespassing thereon contrary to his orders and request.

Silver lake is an inland lake without visible outlet or inlet, covering about 100 acres of land. It is surrounded by hard banks on all shores except at the southwest. It is the claim of the plaintiff that he owns all of the land covered by the waters of the lake, except two small parcels at the northwesterly corner thereof and three or four small parcels at the southerly and southwesterly corner of the lake. Being located in the center of the section, the lines of the various subdivisions of land at these points extend into the water, so that at the northwesterly corner of the lake 4 or 5 acres of the land of the Root estate is covered by water. Mr. M. R. Bennett, who owns the adjoining farm, has 3 or 4 acres covered by water. In the southwest part of the lake the Napier farm covers 3 or 4 acres, and the Featherly farm, now owned by Rosier, covers about 6 acres, on the south end the Hankins farm about half an acre, and the Rice farm about 2½ acres, making a total of approximately 20 acres. In the center of the lake the plaintiff owns all the land between the two shores. During the last ten or twelve years cottages have been built upon the lands above referred to, and have been rented to various occupants. At the time of the filing of the bill of complaint the defendants were tenants of the owners of these cottages, and were occupying the same and spending the summer, or a portion of the same, at these cottages. When the defendants were not occupying the cottages, they sublet them to various people. The defendants, to-

gether with their families, guests, subtenants, and patrons, to whom they rented their boats, were claiming the right to travel at will over the lake, wherever they desired. The circuit judge dismissed the bill, alleging his reasons as follows: "The court, however, is of the opinion that where there are several riparian proprietors of an inland lake, that all such proprietors and their lessees may use the surface of the whole lake for boating, fishing, and fowling purposes, if access is gained to the lake from their own or leased land; and that no one riparian proprietor can exclude another riparian proprietor from the exercise of these rights; and that neither can one riparian proprietor exclude the lessees of another riparian proprietor from the exercise of these rights."

Some claim is made with reference to the plaintiff's title to a 25-acre parcel, the controversy with reference to which was before this court before, and is reported in the case of *Beach v. Rice*, 186 Mich. 95, 152 N. W. 916. We there held that the title to this 25 acres should be determined in an action of ejectment, and that the question of plaintiff's title to the land

**Injunction—  
against trespass  
—necessity of  
ejectment.**

should not be determined in the chancery suit. The trial judge, relying upon this decision, again held in this case, and we think correctly, that the plaintiff cannot maintain this action in the chancery side of the court, as he has not by ejectment proceedings established his ownership and possession of said lands, and properly dismissed the bill as to the 25 acres.

The real question in controversy seems to be, as stated by counsel for plaintiff and appellant in his brief, as follows: "The important legal question involved in the case is whether or not, where more than one person owns the bed of an inland pond with neither outlet nor inlet, can one owner exclusively use and control his property against the trespass of the public who claim to have a license from the other own-

ers of land in the lake, to go thereon?"

This exact situation has not been before this court. The case of *Giddings v. Rogalewski*, 192 Mich. 319, 158 N. W. 951, involved a small, unmeandered, shallow, and disconnected sheet of water wholly upon the premises of a private owner, and which could only be reached by invading private premises. It was held that such a lake is not navigable, and that every unauthorized intrusion upon the private premises of another is a trespass, and the owner was protected in his exclusive rights to the use of this water. But it was distinctly said in that opinion: "The right of the people to fish in navigable or meandered waters where fish are propagated, planted, or spread, and to which they have lawful access by land or water, even though such waters may superimpose the subaqueous lands of a private owner, is not decided nor involved here."

In the recent case of *Winans v. Willetts*, 197 Mich. 512, 163 N. W. 993, which is relied upon by the appellant as sustaining the principle of his contentions, Mr. Justice Ostrander, in writing the majority opinion, said: "As I understand the record, however, plaintiff has not shown himself to be owner, or lessee in possession, of all of the land covered by the waters of the lake. In such case, of course, defendants might prove a license to fish in the lake, and it would then be a question for decision whether, possessing such a license, the licensee could fish in any part of the lake. No such question is presented upon this record."

We do not understand that it is the claim of counsel for the plaintiff that they have any property rights in the fish in the lake, which are *feræ naturæ*, and so far as any right of property in them can exist, it is in the public or in common to all until they are taken and reduced to actual possession, but it is his contention that licensees of riparian owners have no right to en-

**Fish—in private  
lake—owner-  
ship.**

ter upon the waters covering the lands of the plaintiff for the purpose of fishing or boating. In the case of *West Roxbury v. Stoddard*, 7 Allen, 158, the following general rule was announced by the court: "Fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed."

In this state, in the case of *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, it was held that a man had the exclusive right of fowling upon his own land, whether it is upland or land covered by water, but a distinction seems to be made in the majority opinion of the court between fowling and fishing. In the dissenting opinion of Mr. Justice Campbell the following was said: "It is the law of this state that the riparian owner on any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights, connected with the same waters. In rivers the theoretical line of ownership is in the middle thread or line of the stream, unless changed by islands or some other cause of deflection. If the stream is crooked, the curves must be adjusted so as to save all the rights of the different owners. But lakes have no thread, and, while there is usually no difficulty in fixing equitable bounds near the shore, it cannot be done, by any mathematical process, over any considerable extent of the lake; and if—which does not often happen—there is any occasion for making partition of the surface, it can only be reached by some measure of proportion requiring judicial or similar ascertain-

ment, and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, the enjoyment is almost universally held to be in common. This was held by the House of Lords in *Menzies v. Macdonald*, 36 Eng. L. & Eq. Rep. 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses."

This reasoning seems to be appealing. To hold with the plaintiff and appellant in this case would cause the establishment of a rule very difficult in its application. All riparian owners and their licensees would have a clear right to enter upon certain portions of the surface of the lake, and it certainly would be very difficult to establish definite lines of demarcation along the property lines of the various owners. As the question of fowling upon the waters is not presented by the bill and is not an issue here, it will be unnecessary to determine that question, but we are of the opinion that the judge was right in holding that, where there are sev-

Water—right to use surface of private lake.

eral riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners.

Some contention is made that the defendants Meyers and Dupper did not occupy land adjoining the lake, and therefore cannot claim to be riparian owners, and for that reason entitled to privileges upon the lake. The record discloses that they both testified that they had received permission from riparian owners, and therefore were licensees of such

owners, and under the ruling of the trial court, with which we agree, they therefore could not be said to be trespassers.

We conclude, therefore, that the decree of the court below dismissing the plaintiff's bill should be affirmed, with costs.

## ANNOTATION.

### Rights of boating and fishing on inland lakes.

- I. Introductory, 1056.
- II. General rule, 1056.
- III. Large lakes and ponds, 1058.
- IV. Miscellaneous, 1060.

#### I. Introductory.

In Great Britain the public has no right of fishing in nontidal lakes, as the title to such lakes is in the riparian owners. 2 Farnham, Waters, 1427; Bristow v. Cormican (1878) L. R. 3 App. Cas. (Eng.) 641; Mackenzie v. Bankes (1878) L. R. 3 App. Cas. (Eng.) 1324; Pery v. Thornton (1889) Ir. L. R. 23 Eq. 402; Johnston v. O'Neill [1911] A. C. (Eng.) 552, 81 L. J. P. C. N. S. 17, 105 L. T. N. S. 587, 27 Times L. R. 545, 55 Sol. Jo. 686 (as stating the rule).

The Supreme Court of Canada has expressed the opinion that "according to the common law of England, which applies in all the provinces constituting the Dominion except the province of Quebec, riparian proprietors undoubtedly have an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown." *Re Provincial Fisheries* (1896) 26 Can. S. C. 517.

See, as to Quebec, *Tetreault v. Lewis* (1900) Rap. Jud. Quebec 19 C. S. 257, *infra*, II.

In the United States the title to the beds of the Great Lakes is in the public, which has the right of fishing therein. 2 Farnham, Waters, 1427. Lake Champlain also is not subject to riparian ownership. *Champlain & St. L. R. Co. v. Valentine* (1853) 19 Barb. (N. Y.) 484; *Austin v. Rutland R. Co.* (1872) 45 Vt. 215.

As to other lakes and ponds, the question in general depends on ownership of the beds. Whether the bed is public or private depends upon the law of the particular state.

There are a number of cases as to the ownership of the beds of lakes in various states, but very few cases upon the right of fishing in inland lakes.

#### II. General rule.

It is a general rule that the owners of the bed of an inland lake or pond have the exclusive right of fishery therein. *Beckman v. Kreamer* (1867) 43 Ill. 447, 92 Am. Dec. 146; *Cobb v. Davenport* (1867) 32 N. J. L. 369; *Albright v. Cortright* (1900) 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; *Tripp v. Richter* (1913) 158 App. Div. 136, 142 N. Y. Supp. 563; *Lembeck v. Nye* (1890) 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; *Bass Lake Co. v. Hollenbeck* (1896) 11 Ohio C. C. 508, 5 Ohio C. D. 242.

Also the exclusive right of boating therein. *Bass Lake Co. v. Hollenbeck* (Ohio) *supra*.

In *Marsh v. Colby* (1878) 39 Mich. 626, 33 Am. Rep. 439, where it was held that by public usage there is no trespass in taking fish from a small lake nearly surrounded by another's land, unless the landowner has given notice that it will not be allowed, the court said: "The small lake or pond on which the alleged trespass was committed was almost entirely inclosed within the lines of plaintiff's farm. Whatever question might arise respecting the right to exclusive fisheries in larger bodies of water, the right of the landowner to the exclusive control of small bodies thus situated would seem clear."

The ownership of land along the shore of another's pond gives no right to fish therein. *Baylor v. Decker* (1890) 133 Pa. 168, 19 Atl. 351.

A person having no license to fish from an owner or part owner of a private pond is a trespasser, whether he



enters from a highway or elsewhere. *Winans v. Willetts* (1917) 197 Mich. 512, 163 N. W. 993.

A non-navigable inland lake is the subject of private ownership; and where it is so owned, neither the public, nor an owner of adjacent lands whose title extends only to the margin thereof, has a right to boat upon, or take fish from, its waters. *Lembeck v. Nye* (1890) 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686.

The owner of nearly all the bed of a pond may bring trespass against a stranger for rowing, bathing, and fishing thereon and therein. *Tripp v. Richter* (1913) 158 App. Div. 136, 142 N. Y. Supp. 563, *supra*.

In *Albright v. Sussex County Lake & Park Commission* (1904) 71 N. J. L. 303, 69 L.R.A. 768, 108 Am. St. Rep. 749, 57 Atl. 398, 2 Ann. Cas. 48, reversing (1902) 68 N. J. L. 523, 53 Atl. 612, it was held that the private owner's right of fishery in an inland lake could not be separated from the ownership of the lake and taken for the public under the law of eminent domain, as the supply of fish was too small to benefit more than a few persons, and the purpose was sport, and not utility.

But the right to take fish in any water which is not navigable, although it belongs *prima facie* to the owner of the soil, follows the ownership of the water if that is separated from the ownership of the soil. *Turner v. Hebron* (1891) 61 Conn. 175, 14 L.R.A. 386, 22 Atl. 951.

The aforesaid general rule applies also in the case of artificial ponds. *Waters v. Lilley* (1826) 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Wyandanch Club v. Davis* (1898) 33 App. Div. 698, 53 N. Y. Supp. 993.

Thus, the owner of an unnavigable stream, who dams it, flooding his land, may maintain trespass against one who fishes in the pond so formed. *Waters v. Lilley* (Mass.) *supra*.

As between the owner of the bed of a mill pond and the owner of the land adjacent to the pond, the former owns the right of fishing and boating. *Wyandanch Club v. Davis* (N. Y.) *supra*.

If the public by means of a dam

floods the land of an individual, he may nevertheless have trespass against those who shoot or fish over his land. *Beatty v. Davis* (1891) 20 Ont. Rep. 373.

And the mere fact that a right of navigation arises in the public by the raising of water over private property by the improvement of an adjoining river does not carry with it the right to hunt and fish upon the property, as the owner of land covered by water has the exclusive right to hunt and fish over it. *Schulte v. Warren* (1907) 218 Ill. 108, 13 L.R.A. (N.S.) 745, 75 N. E. 783.

In the United States one cannot claim the right to fish in another's lake through the long-continued usage of the public. *Cobb v. Davenport* (1867) 32 N. J. L. 369; *Albright v. Cortright* (1900) 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; *Lembeck v. Nye* (1890) 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; *Bass Lake Co. v. Hollenbeck* (1896) 11 Ohio C. C. 508, 5 Ohio C. D. 242.

It has been held that the unorganized public cannot acquire the right of fishing in a pond either by grant or by prescription. *Turner v. Hebron* (1891) 61 Conn. 175, 14 L.R.A. 386, 22 Atl. 951.

Fishing in another's pond without objection will lead to no presumptive right. *Gibbs v. Sweet* (1902) 20 Pa. Super. Ct. 275.

But the exclusive right to fish in a pond may be gained by the owner of the land surrounding it, who also owns the water and excludes all others from fishing therein without his permission during the whole period of the Statute of Limitations, although from time immemorial all members of the unorganized public had fished therein as a matter of right, and a part of the soil under the pond belongs to a town and the title to another part has been lost or abandoned. *Turner v. Hebron* (Conn.) *supra*.

But in order that one owner of land under a pond should obtain without transfer the ownership of the other land under it, he must have hostile and exclusive occupancy for the statutory

period. *Providence Forge Fishing & Hunting Club v. Miller Mfg. Co.* (1915) 117 Va. 129, 83 S. E. 1047.

A part proprietor may boat and fish in the whole lake. *Menzies v. Macdonald* (1856) 36 Eng. L. & Eq. Rep. 20, 2 Macq. H. L. Cas. 463; *BEACH v. HAYNER* (reported herewith) ante, 1052.

In *Hardin v. Jordan* (1890) 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, the court said, referring to Lord Selborne's opinion in the Scotch case of *Mackenzie v. Bankes* (1878) L. R. 3 App. Cas. (Eng.) 1324: "As to the rights of boating, fishing, and fowling, Lord Selborne added, 'these are to be enjoyed over the whole water space by all the riparian proprietors in common, subject (if need be) to judicial regulation.'"

In *Smoulter v. Boyd* (1901) 10 Kulp (Pa.) 199, it was held that the owner of a part of the bed of the lake may not fence it off so that the other owners may not boat over his portion, the court not deciding as to fishing.

But on the contrary it was held in *Smoulter v. Boyd* (1904) 209 Pa. 146, 66 L.R.A. 829, 103 Am. St. Rep. 1000, 58 N. W. 144, that a part owner of a small lake may fence off his portion.

And in *Tetreault v. Lewis* (1900) Rap. Jud. Quebec 19 C. S. 257, it was held that the riparian owners of a non-navigable water or pond, the bed of which was granted by the Crown to them or their predecessors before Confederation, have the exclusive right of fishing therein, and that in such case the fishing rights of the whole pond do not belong to all in common, but the rights of each are limited to the water covering the portion of the bed to which each is entitled by his deed.

It was held in *Hill v. Bishop* (1892) 17 N. Y. Supp. 297, that one who owns the bed of a pond up to low-water mark only has not the exclusive right to fish therein under a statute allowing an owner having such right to lay out a private park, etc.

So where one owns only a part of the bed of a pond, it is not a "private" pond under a statute. *Reynolds v. Com.* (1880) 93 Pa. 458.

### III. Large lakes and ponds.

As heretofore stated, the Great Lakes (and Lake Champlain) are not the subject of riparian ownership. As to other lakes of considerable size, the question depends upon the law of the particular state. While there are a number of cases as to the ownership of lakes in various states, there are very few cases as to the right to fish therein.

In Wisconsin, where a lake has been meandered by the United States government surveyors, the bed is in the state, and the right to fish therein is in the public. *Ne-pee-nauk Club v. Wilson* (1897) 96 Wis. 290, 71 N. W. 661; *Atty. Gen. ex rel. Askew v. Smith* (1901) 109 Wis. 532, 85 N. W. 512.

In *Fuller v. Shedd* (1896) 161 Ill. 462, 33 L.R.A. 146, 52 Am. St. Rep. 380, 44 N. E. 286, a case of a navigable lake, the court said, referring to the Illinois rule that a conveyance of land bounded along or upon a natural lake or pond extends only to the water's edge: "If we depart from the reasonable rule we have established, the small non-navigable lakes would become the private waters of riparian owners, pertinent to their lands, with exclusive rights thereon as to boating, fishing, and the like, from which the body of the people would be excluded,—a principle inconsistent with, and not suited to, the condition of our people, or called for as a rule of law."

But in *Wilton v. Van Hessen* (1911) 249 Ill. 182, 94 N. E. 134, it was held that where a lake is not navigable and has never been meandered by the United States government surveyors, a conveyance by that government of the land as if no lake existed there will carry the title to the bed of the lake.

In Tennessee an inland lake large enough to be a "navigable stream" is not the subject of private ownership as to fisheries. *State ex rel. Cates v. West Tennessee Land Co.* (1913) 127 Tenn. 575, 158 S. W. 746, Ann. Cas. 1914B, 1043 (overruling the test of navigability in *Webster v. Harris* (1902) 111 Tenn. 692, 59 L.R.A. 324, 69 S. W. 782). But if lands of an owner are submerged by such lake, he has the exclusive right of fishing over such lands.

In Maine and Massachusetts there is a peculiar situation in regard to so-called "Great ponds," and there is a somewhat similar situation in New Hampshire.

The Massachusetts Bay Colonial Ordinance of 1641, as amended in 1649, has been accepted in Maine as part of its common law; it declares the right of free fishing and fowling for all in and upon any great pond lying in common and containing more than 10 acres in extent, with the incidental right "to pass and repass on foot through any man's property for that end so they trespass not upon any man's corn or meadow." *Barrows v. McDermott* (1882) 73 Me. 441; *Conant v. Jordan* (1910) 107 Me. 227, 31 L.R.A. (N.S.) 434, 77 Atl. 938.

In *West Roxbury v. Stoddard* (1863) 7 Allen (Mass.) 158, the court said as to "Great ponds" containing more than 10 acres: "Fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed."

The lessee of a tract of land and ice house on a great pond who has cleared off the ice in front of the ice house cannot have an action in tort against an inhabitant who cuts holes in the cleared ice for fishing purposes. *Rowell v. Doyle* (1881) 131 Mass. 474.

It was provided by the Massachusetts Statute of 1869, chap. 884, § 7, that "the riparian proprietors of any pond, the superficial area of which is not more than 20 acres, and the proprietors of any pond or parts of a pond created by artificial flowage, shall have exclusive control of the fisheries therein existing, but this shall not abridge any rights heretofore granted to fish for herring or alewives in ponds of the above dimensions which are connected with salt water, nor affect

any previous laws restricting fishing for any period of time."

By the Statute of 1869, chap. 384, § 9, it was enacted that "the commissioners, or any two of them, may, in the name of the commonwealth, lease any great pond exceeding 20 acres in area, for the purpose of cultivating useful fishes, for such periods of time and on such terms and conditions as shall seem to said commissioners most for the public good; and the lessee of such pond may occupy a portion, not exceeding one tenth part thereof, with inclosures and appliances for the cultivation of useful fishes; but this shall not affect any public rights in such pond, other than the right of fisheries; and the appliances and inclosures used by the lessee shall be so placed as not to debar ingress to or egress from such pond at proper places;" and that "whoever fishes in that portion of a pond, stream, or other water in which fishes are lawfully artificially cultivated or maintained, without the permission of the proprietors," shall be subject to a penalty. Under this statute, one fishing in any part of the pond is subject to the penalty. *Com. v. Vincent* (1871) 108 Mass. 441; *Com. v. Weatherhead* (1872) 110 Mass. 175.

The Statute of 1869 was also enforced in *Com. v. Tiffany* (1876) 119 Mass. 300. So also a similar later statute in *Com. v. Eliot* (1888) 146 Mass. 5, 15 N. E. 81.

An artificial pond is within the statute providing that "whoever without the permission of the proprietors fishes in that portion of a pond, stream, or other water in which fishes are lawfully cultivated or maintained, shall forfeit not less than \$1 nor more than \$20 for the first offense, and not less than \$5 nor more than \$50 for any subsequent offense." *Com. v. Skatt* (1894) 162 Mass. 219, 38 N. E. 499.

In New Hampshire large ponds are public waters, and their beds belong to the public, and the private ownership of the surrounding land does not make criminal the exercise of the public right to fish therein. *State v. Welch* (1889) 66 N. H. 178, 28 Atl. 21 (pond of 300 to 500 acres). Nor will the court enjoin a person from fishing in

such pond. *Percy Summer Club v. Welch* (1889) 66 N. H. 180, 28 Atl. 22; *Percy Summer Club v. Astle* (1908) 90 C. C. A. 527, 163 Fed. 1, rehearing denied in (1908) 92 C. C. A. 667, 166 Fed. 1020 (140 acres). In the last-cited case (90 C. C. A. 527) the court said: "From the beginning, the New Hampshire court has tended to hold free the fishery in all considerable lakes and ponds, basing its action partly upon the analogy of the Massachusetts ordinances, and partly upon an appreciation of local usage."

"In the absence of a legislative grant, the state's title in great ponds in this state extends to the high-water line." *State v. Great Falls Mfg. Co.* (1912) 76 N. H. 373, 83 Atl. 126.

In *Chase v. Baker* (1879) 59 N. H. 347, it was held that an action for debt for a statutory penalty for catching fish in a pond wholly in the control of a riparian owner, and used for breeding, could not be maintained by one who was not owner or lessee of all the land under or around and adjoining the pond.

#### IV. Miscellaneous.

Boatable waters within the meaning of Const. chap. 2, § 40, giving the right to fish in all boatable and other waters (not private property), are waters that are of common passage as highways for business or pleasure, and do not include all waters which may be boatable in fact. *New England Trout*

& *Salmon Club v. Mather* (1896) 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323.

"The owner of water in a stream or pond not navigable, or of all the privileges therein, has the exclusive right of fishing in the same, though the land lying under the water may belong to another. Accordingly, a conveyance of land lying upon the natural bank of an unnavigable stream, upon which is located a mill standing on other land of the grantor and across which is a dam causing a pond, a portion of which covers a part of the land conveyed, does not pass to the grantee any right to fish in such pond at any point below the then existing high-water mark thereof, when by the terms of the conveyance an exception is made in the grantor's favor as to 'all water privileges up to high-water mark, and all other privileges in going to his mill.'" *Lee v. Mallard* (1902) 116 Ga. 18, 42 S. E. 372.

The passage quoted in the reported case (*BEACH v. HAYNER*, ante, 1052) from *Giddings v. Rogalewski* (1916) 192 Mich. 319, 158 N. W. 951, refers to a Michigan statute as to the right of the public to fish in navigable or meandered waters.

*Sterling v. Jackson* (1888) 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, is sufficiently referred to in the reported case (*BEACH v. HAYNER*).

The question of the right of a private owner as interfered with by general game statutes is not included in this note. B. B. B.

FRED STEGMANN et al., Appts.,

v.

HENRY L. WEEKE, Commissioner of Weights and Measures of City of St. Louis, Resp't.

*Missouri Supreme Court (Div. No. 2) — July 5, 1919.*

(— Mo. —, 214 S. W. 137.)

**Municipal corporation — ordinance fixing shape of measures — reasonableness.**

1. An ordinance of a city containing hundreds of thousands of consumers, which fixes, without penalty, the shape and size of containers in which certain produce can be marketed, is not unreasonable.

[See note on this question beginning on page 1068.]

**Weights — power to regulate — delegation to municipalities.**

2. The legislature may delegate to municipal corporations the right to regulate weights and measures.

**Constitutional law — right of contract — fixing shape of measures.**

3. Fixing the shape and cubic contents of bushel and half-bushel measures, and forbidding the sale of certain produce in containers of different size or capacity, does not unconstitutionally impair the right of contract.

**Courts — power — reasonableness of ordinance.**

4. The courts may determine whether a municipal ordinance is reasonable or unreasonable.

[See 19 R. C. L. 805.]

**Injunction — against hypothetical act.**

5. Injunction will not lie to enjoin prosecution by a city for the use of

measures which complainant does not intend to use.

[See 14 R. C. L. 441.]

**Municipal corporation — ordinance — construction.**

6. The court in construing an ordinance must take its evident meaning as it reads, although counsel for both parties may have misunderstood its meaning, or may have inadvertently construed it differently.

[See 19 R. C. L. 811; 25 R. C. L. 961.]

**Weights — standard measure — absence of deception.**

7. Farmers and truck gardeners may be required to use a standard-sized container for marketing their produce, although they sell to commission merchants who would not be deceived as to short measures, if the containers are liable to be passed on to consumers who might be so deceived.

**APPEAL** by plaintiffs from a judgment of the Circuit Court of St. Louis (Taylor, J.) in favor of defendant in an action brought to enjoin the enforcement of an amended ordinance, regulating the sale of certain produce. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edward W. Foristel, Taylor R. Young, and T. T. Hinde for appellants.

Messrs. Charles H. Daues and H. A. Hamilton, for respondent:

The ordinance in question, having for its purpose the protection of the inhabitants of the city of St. Louis against false weights and measures, is a valid exercise of the police power of said city, and is not obnoxious to any provision of the state or Federal Constitutions.

*Sylvester Coal Co. v. St. Louis*, 180 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; *State ex rel. Barker v. Merchants' Exch.* 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871; *Chicago v. Schmidinger*, 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

The city of St. Louis, being authorized to establish and regulate weights and measures, may prescribe the form and dimensions of the container in which articles of consumption are marketed in said city.

*Turner v. State*, 55 Md. 240; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

An ordinance passed in the exercise of legal authority will not be declared void on the ground of unreasonableness, unless no difference of opinion can exist upon the question, and a clear case must be made to authorize a court to interfere on that ground.

*St. Louis v. Weber*, 44 Mo. 547; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 21 S. W. 1094; *Chillicothe v. Brown*, 38 Mo. App. 609; *Kansas City v. Sutton*, 52 Mo. App. 398; *Monett v. Campbell*, — Mo. App. —, 204 S. W. 32.

**White, C.**, filed the following opinion:

This is a companion case to No. 21,151 of the same title, — Mo. —, 214 S. W. 134. Many facts pertinent here are fully set out in the opinion in that case, and it may be read in connection with this case. However, for convenience, it is proper briefly to restate some of them. That was a suit brought by plaintiffs, as farmers and truck gardeners, to restrain the commissioner of weights and measures of the city of St. Louis from enforcing a certain ordinance, No. 29,795. In that case the circuit court, on a preliminary hearing for the purpose of de-

termining whether a temporary restraining order should be issued, dismissed the bill without a final hearing on the merits of the case.

The ordinance complained of, enacted August 9, 1917, provided for a bushel box, and boxes holding fractions of a bushel, in which produce, fruits, and vegetables should be marketed, of a cubical content in excess of the statutory bushel as provided by § 11,961, Rev. Stat. 1909, and by the Federal statute. The plaintiffs were using as a bushel box one containing less cubical contents than the statutory bushel. After that case was heard, and before its determination, the city of St. Louis amended the ordinance so as to make it accord with the statute of Missouri and the Federal statute. When that was done and the former case dismissed, the plaintiffs brought this suit to enjoin the enforcement of the ordinance as amended. In their petition in this case they set out the original ordinance enacted August 9, 1917, in full, and the amendment to the same made in April, 1918.

They allege that they are farmers and gardeners, and market their produce either to commission merchants, retail grocers, or hucksters; that their produce is packed in wooden boxes, or crates, before being loaded, and in loading the boxes are packed in tiers and so arranged that the bottom tier is protected from upper tiers; that in capacity said boxes or crates range from  $\frac{3}{4}$  of a bushel, standard measure as defined by statute, to a bushel, and are used by all truck gardeners in the vicinity where plaintiffs grow their produce; that they have been used for twenty-five years in that manner, and are peculiarly suited to the economical and safe delivery of produce; that the plaintiffs and other truck gardeners and farmers have on hand, complete to be used, 1,875,000 of such boxes, which cost them in the neighborhood of \$350,000; that their delivery trucks are especially designed to conform to the size of said boxes and crates; that the

produce which they sell is neither bought nor sold by the bushel, but, by special agreement between the sellers and purchasers, it is sold by the box or crate, and the purchasers from plaintiffs are not in any manner misled or deceived as to the capacity of the boxes in which the produce is sold; that they deliver their boxes full to the purchaser and receive in return, in each case, empty boxes of the same size and character from the purchaser.

Upon the filing of this petition and a bond in the sum of \$1,000, duly approved, a temporary restraining order was issued and served upon the defendant Weeke, who was ordered to show cause on a certain day why the injunction should not issue. Thereupon the defendant filed his return in the nature of an answer to the allegations of the petition. Afterwards, the parties filed a stipulation as to certain facts, wherein they agreed that the case might be submitted "for final adjudication upon the petition and the said return of the respondents, to be taken and construed as an answer thereto, and the reply of the plaintiffs filed on that date together with certain stipulations of facts." The court thereupon heard the case upon its merits, found the issues in favor of the defendant, and dismissed the bill, and from that judgment the plaintiffs appealed to this court.

Ordinance No. 29,795, in its original form, provided, among other things, the duties of the commissioner of weights and measures to test the accuracy of weights and measures and to seize in the name of the city "all false weights, measures, and scales, and to make arrests of persons violating the ordinance by using false weights and measures and scales." It provided for inspection of all weights and measures examined, and penalties for persons having weights and measures in their possession, for refusing to allow them to be tested and examined, and for using weights and measures that are not tested, that the commissioner should mark "Condemned"

weights, measures, standards, etc., that did not conform to the standard in this state, and that it should be a misdemeanor to use a weight or measure containing a less quantity than represented.

Section 22 of that ordinance fixed the dimensions for standard boxes to hold bushels, half bushels, and other fractional parts of a bushel, making the cubical contents of such boxes greater than the statutory requirements. Section 23 of the ordinance provided for a fee of 10 cents each for inspection of such boxes, that they should be inspected once a year, and that it should be a misdemeanor for anyone to use boxes of other dimensions for the purpose of selling fruits or vegetables. Those were the sections struck at in the other suit.

By the amendment of April, 1918, §§ 22 and 23 of the ordinance were made to read as follows:

"Sec. 22. Standard bushel box and fractional part thereof established. —There is hereby established a standard bushel box, the dimensions of which shall be as follows: Length, twenty-two inches; depth, eight and one-half inches; width, eleven and one-half inches; which bushel box shall contain twenty-one hundred and fifty and five-tenths cubic inches. There is hereby established a standard half-bushel box, the dimensions of which shall be as follows: Length, twenty-two inches; depth four and one-quarter inches; width eleven and one-half inches; which half-bushel box shall contain one thousand and seventy-five and two-tenths cubic inches. All boxes or containers in which fruits and vegetables are sold or offered for sale shall be of the foregoing dimensions and standards, unless otherwise provided by ordinance.

"Sec. 23. Penalty.—Any person, firm or corporation who shall sell or offer for sale in the city of St. Louis any fruits or vegetables except fresh berries, cherries, currants or other small fruits in any box or receptacle that is of a capacity different from

that hereinbefore provided, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than five hundred dollars."

It will be seen by this amendment, § 22 is in agreement with the statute as to the cubical contents of a bushel. The answer restates much of the same matter contained in the petition, including the ordinance, and sets out at length Judge Taylor's opinion delivered in the previous case.

The stipulation which supplements the pleadings is to the effect that the defendant commissioner of weights and measures intends to arrest and prosecute plaintiffs and others using boxes in violation of the ordinance, as long as they fail to use boxes of the exact dimensions and contents provided in the amended ordinance, regardless of how said boxes are marked or whether said boxes contain more than the quantity marked on the box or not; that the defendant Weeke has not destroyed any boxes belonging to any of the plaintiffs since the 23d day of April, 1918; "that all persons who now sell direct to the consumer of products sold by the plaintiffs are required to sell and do sell by weight, and not by measure." The further fact was stipulated for what it is worth that the number of farmers and truck gardeners, naming them,—forty-five or fifty,—use boxes which correspond to the requirements of amended §§ 22 and 23 of the ordinance.

The amended ordinance at which this proceeding is aimed does not contain the oppressive feature of inspection fee for each box contained in the original ordinance, and there is no threat of the commissioner of weights and measures to destroy without a hearing the boxes or other property of plaintiffs.

I. Appellant asserts that §§ 22 and 23 of the ordinance are unconstitutional and in conflict with article 1, § 10, of the United States Constitution, and with article 2, § 15, of the Constitution of Missouri, in that

the ordinance prohibiting a person from selling his produce in any form or manner or in any quantity which he sees fit and which his purchasers desire, so long as his method is fair and characterized by honest dealing with his purchaser, impairs the right to make contracts.

As a police regulation for the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities,

**Weights—power to regulate—delegation to municipalities.**

it is recognized by the courts that the legislative authority has the right to regulate weights and measures and delegate that authority to municipal corporations, so that the latter, in so far as they exercise police powers, may regulate weights and measures. The question here is whether this regulation is such as to invade the constitutional right to make contracts. This court has considered the question in construing the statutes providing for official weighers of coal and grain. A leading case is *State ex rel. Barker v. Merchants' Exch.* 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871. In that case the court had under consideration the constitutionality of a statute which forbade any person, corporation, or association other than the duly authorized and appointed state weigher to issue any weight certificate or to issue or sign any ticket purporting to be the weight of any car, wagon, sack, or other package of grain, weighed at any warehouse in the state. The court held that the purpose of the act was to protect from fraud the people who sold and bought grain, and banks which loaned money on warehouse receipts. This language is used (269 Mo. loc. cit. 358): "The whole purport of the act is for such official supervision in the principal grain markets as will protect not only the buyers, but the sellers, of grain. In other words, it establishes a disinterested agency between the buyer and seller both as to weights and grades of the grain. If a wheat grower of Missouri ships a car of

wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators), but he has the protection of the disinterested agency established by the state, an agency duly bonded for faithful performance of duty."

The effect of that statute, then, was to make the certificate of the weigher an official guaranty that the commodity which it represented was correctly represented, without further investigation on the part of the purchaser or of the seller. It would not only save time and expense in negotiations of that kind, but was a power for protection against fraud and imposition in connection with such sales. The case quotes from an earlier case, *Sylvester Coal Co. v. St. Louis*, 130 Mo. 327, 51 Am. St. Rep. 566, 32 S. W. 649, where a municipal ordinance similar in import was under consideration, and it was held binding and valid under the charter authority of the city of St. Louis, wherein it had authority to license, tax, and regulate retailers, and "establish the standard of weights and measures to be used in the city of St. Louis." It is pointed out in those cases that a purchaser or a seller may weigh his grain for his own satisfaction, but that the official weight only can be allowed in buying and selling.

In the case of *House v. Mayes*, 227 Mo. 636, 127 S. W. 305, this court had under consideration a statute which provided that no agent or broker selling grain, etc., should have authority, under claim of right to do so by reason of any custom or rule of any board of trade, to sell such commodities except on the basis of the actual weight thereof, and any contract for such sale in violation of the act should be null and void. The board of trade of Kansas City had a rule which permitted the purchaser of grain to deduct 100 pounds from a carload of such grain because of dirt and foreign substances which were presumed to be in it, and which were swept out after it was unloaded; it being common



experience that about that amount of dirt, on the average, was in each carload. One R. J. House was prosecuted for making such deduction, in accordance with the rules of the board of trade and in violation of the statute. It was held that the statute was valid and constitutional as a matter of police protection, and not in violation of the Constitution, which prohibits any act impairing the obligation of contracts.

An ordinance of the city of Chicago, fixing the standard size of loaves of bread and prohibiting the sale of loaves of any other size, was held to be constitutional by the supreme court of Illinois. *Chicago v. Schmidinger*, 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614. The case was taken to the Supreme Court of the United States, where it was affirmed under the title *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284. That court, in the opinion rendered, thus comments upon the claim that the effect of the ordinance was to impair the right to contract (226 U. S. loc. cit. 589): "This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

The law of Maryland which provided that it should be unlawful to carry out of the state any hogshead of tobacco raised in that state except such as had been inspected,

marked, and passed according to the provisions of the act regulating the inspecting and marketing of tobacco was held to be constitutional by the supreme court. *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

The supreme court of Massachusetts held constitutional an act which provided that the sale of oats and meal must be by the bushel, and providing that an action could not be maintained for the price of such commodity when sold by the bag. *Eaton v. Kegan*, 114 Mass. 433.

The ordinance under consideration here fixes the cubical contents of bushel and half-bushel boxes, and provides a penalty for using boxes of a different capacity. The effect of the ordinance is that certain commodities could not be sold except in containers containing a bushel or a half bushel. The prohibition of the use of boxes of other capacity is sufficient guaranty that boxes of other capacity would not be used, and furnished the same protection to the purchaser that the final weighing certificates would furnish in case of the sale of hay and coal, as considered by the court in the *Merchants' Exch. Case*, and the *Sylvester Coal Co. Case*, *supra*. The reason for the validity of the statute and the ordinance in those cases applies with equal force to the ordinance here. It is not unconstitutional as impairing the obligation of contracts.

Constitutional law—right of contract—fixing shape of measures.

II. But it is claimed the ordinance is an unreasonable regulation in its operation, in that it not only prohibits the use of containers of any other capacity than that provided, but prescribes the exact dimensions, the length and depth of the boxes, and forbids the use of containers of equal capacity of any other shape; that is, a box may be a perfect cube and contain a bushel or a half bushel. Of course, this court may determine whether an ordinance is reasonable or unreasonable.

Courts—power—reasonableness of ordinance.

able (*Union Cemetery Asso. v. Kansas City*, 252 Mo. loc. cit. 500, 161 S. W. 261), and in considering the matter may settle it by inspection of the ordinance on its face, or may find it unreasonable by a state of facts which affects its operation (*St. Louis v. St. Louis Theatre Co.* 202 Mo. 690, loc. cit. 699, 100 S. W. 627). It might be unreasonable in one place and perfectly reasonable in another. It might be unreasonable in a mere village, whereas in a large city, with its great volume of business of the character affected, it would be a reasonable regulation. Here there are several thousand farmers engaged in raising and selling produce. There are hundreds of thousands of consumers in the city of St. Louis, many of whom, doubtless the majority, at some time or other purchase these very commodities. The evident purpose of the ordinance in providing containers of uniform shapes and sizes was so that a purchaser easily could tell the exact quantity of the commodity he was buying, the presumption being that the box containing the commodity which he purchased had passed the final test as to capacity, and he need not trouble himself in relation to that matter or inquire further. Likewise it may be said that certain definite shapes and dimensions would greatly facilitate inspection, lessen the expense of supervision for the city, and conduce in no way to hamper or hinder the course of trade.

It might be said further that the plaintiffs here could not complain that the definite dimensions of the boxes were provided because they were using, or claimed the right to use, boxes of uniform dimensions and capacity. The evidence shows they nearly all used exactly the same kind of boxes as did all other persons pursuing like business. It seems from the facts stated in the record that it was to their advantage to use exactly the same kind of containers as to shape and dimensions. However, it is sufficient

answer to this point to say that no penalty is fixed for the violation of that part of the ordinance prescribing the dimensions of the box; the plaintiffs could not be prosecuted for misdemeanors unless they used boxes of different capacity. In that respect the ordinance is no more unreasonable than the Chicago ordinance fixing the size of loaves of bread, or the statutes and ordinances considered in the Missouri cases cited above.

**Municipal corporation—ordinance fixing shape of measures—reasonableness.**

III. Plaintiffs, however, assert that the ordinance will be interpreted and enforced oppressively and illegally. Persons might use boxes having different length, width, and depth from those mentioned in § 22. If they possessed the cubical contents of the boxes there provided for, they would not be guilty of a misdemeanor under the provisions of § 23. Yet, according to the stipulation, the defendant expects to prosecute plaintiffs for using boxes unless they are of the exact dimensions provided in the ordinance.

In this connection it appears that the only boxes which the plaintiffs use, and have no right to use, are those which do not have the contents provided for in § 22. There is nothing to show that they expect to use boxes of the right capacity and of a different shape, but only expect to use the boxes they have been using, which are of an insufficient capacity; therefore, they are liable to incur the penalties of the ordinance in all they propose to do. This court cannot conjecture that they will use some boxes which they do not expect to use, or that they will be arrested and prosecuted for doing something which they do not intend to do. They cannot have an injunction to restrain the city from pursuing some unexpected and unthreatened prosecution.

**Injunction—against hypothetical act.**

IV. It is stipulated, as noted above, that the consumer who purchases the goods from their imme-

diate vendors, goods which plaintiffs sell, are required to purchase by weight, and not by measure. It is not stated whether this requirement is by ordinance or by contract. Section 28 of the ordinance provides that certain products enumerated, which are presumed to include some of the products sold by plaintiffs, shall be sold by weight, excepting, however, "commodities in original packages," and then provides that "the term 'original package,' as herein used, shall be taken to mean packages in which the commodities have been packed before shipping by the grower, producer, or original packer thereof, and the contents of which have not been disturbed or diminished except for the purpose of ripening it or of replacing spoiled goods."

This provision of § 28 evidently would exclude plaintiffs and those pursuing a like business from obligation to sell by weight, or persons handling their produce in original packages from selling by weight, and therefore the ordinance is in direct conflict with this stipulation as to its purport. This section of the ordinance must be construed in connection with the other sections. It certainly was not the intention in the passage of the ordinance to make any provisions which are absolutely nugatory. There would be no purpose or use in providing for dimensions of measures to contain a bushel and half bushel, unless the products were sold by the bushel or half bushel; and the exclusion of the original packers and of property which comes in original packages from the requirement to sell by weight is the only reasonable construction of the provision in § 28 in connection with the rest of the ordinance. We must attempt to take

Municipal  
corporation—  
ordinance—  
construction.

the evident meaning of the ordinance as it reads, even though counsel for both parties may have misunderstood its meaning, or may have inadvertently construed it differently.

It is also noted that throughout

the ordinance the inspection and the penalties fixed apply to false standards, false weights and measures. The evidence here does not show that the boxes which the plaintiffs were using were measures or standards of measures; they were simply the containers in which they sold their products. The boxes are not used like a half-bushel measure to measure out the quantity of the product; they are only used to contain the products sold. Nevertheless, §§ 22 and 23, leaving out of consideration the balance of the ordinance, fix the size and shape of box and name the penalty for using those of different capacity. Those sections are valid and effective as to that purpose, regardless of the rest of the ordinance.

While it is admitted that plaintiffs sold only to commission merchants and retail dealers, who were not at all deceived as to the contents of the boxes and who did not buy by the bushel, nevertheless the commodities in the original packages under the ordinance could be passed on to the ultimate consumer. It was entirely within the discretion of the city government to provide against imposition which they thought might occur in such sales to consumers. Their discretion and judgment in providing against possible fraud in the matter, whether sound or otherwise, is not for this court to determine. It is sufficient that the governing body deems the restrictions necessary for the protection of citizens and consumers. It has lawful authority to make the regulations, and this court will not interfere.

Weights—  
standard meas-  
ure—absence of  
deception.

The judgment is affirmed.

Railey, C., not sitting.

Mozley, C., concurs.

Per Curiam:

The foregoing opinion by White, C., has been adopted as the opinion of the court.

Williams, P. J., and Walker, J., concur.

**Faris, J., concurring:**

I concur for the reason only that there is no penalty attached for the failure to use a container of the prescribed dimensions, thus leaving so much of the ordinance as prescribes the dimensions of such containers neither mandatory nor punishable, but advisory only.

I do not agree that the city of St. Louis has the authority, under the guise of a police regulation, to require the use of containers of fixed and arbitrary dimensions. I concede the authority in the city to pass an ordinance requiring such containers to be of a certain capacity so as to guard against fraud and cheating, and even to require such containers to be rectangular in

shape, so as to minimize time and labor in ascertaining the conformity of such containers to the capacity required by the ordinance. But I do not think it lies in the power of the city to say by its ordinance that such containers must be of required length, width, and depth. Neither do I think that one using containers of an impeccable capacity, so far as complying with the requirement as to capacity is concerned, could be punished in any wise for using a longer or a shorter, a wider or a narrower, a deeper or shallower container than the arbitrary standard prescribed by ordinance.

Upon the view that the ordinance means what I have said above that it ought to mean, I concur.

## ANNOTATION.

### Validity of statute or ordinance as to "containers."

I. Introductory, 1068.

II. General rule, 1068.

III. Application of rule, 1069.

#### *I. Introductory.*

This note is confined to a consideration of the validity of statutes or ordinances which, to prevent false weights and measures, require uniformity to a standard container. It does not purport to collect those cases which deal with the validity of pure food laws, inspection and sealing laws, enactments as to oleomargarin, statutes to regulate the size of loaves of bread, the requirement of public scales or the regulation of arbitrary deductions in weight. The validity in general of statutes or ordinances requiring commodities to be sold in a specified quantity or weight will be treated in the annotation to *Allion v. Toledo*, 6 A.L.R. —. It is of comparatively recent date that legislation has been enacted regulating the size of measures or other containers, the necessity for such regulation being aptly stated as follows in *Freadrich v. State* (1911) 89 Neb. 343, 34 L.R.A. (N.S.) 650, 131 N. W. 618. "Where the necessities of life are sold to a large extent in package form, it is al-

most as necessary that the public should be protected against imposition by scripping the contents of a package, as it is that it should be protected against adulterated goods, or deception in quality by means of coloring."

#### *II. General rule.*

The reported case holds that legislation may be enacted requiring containers to be of a certain capacity or dimensions, and that such provisions are constitutional. Although there are but few decisions along this line, it appears to be their uniform holding that such statutes are valid.

**United States.**—*Williams v. Walsh* (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 187, affirming (1908) 79 Kan. 212, 98 Pac. 777.

**Illinois.**—*Chicago v. Bowman Dairy Co.* (1908) 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 918, 14 Ann. Cas. 700.

**Kansas.**—*State v. Belle Springs Creamery Co.* (1910) 83 Kan. 389, L.R.A.1915D, 515, 111 Pac. 474.

**Nebraska.**—*Freadrich v. State* (1911) 89 Neb. 343, 34 L.R.A. (N.S.) 650, 131 N. W. 618.

**North Dakota.**—*State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E,

380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

New York.—*People v. Armour & Co.* (1916) 176 App. Div. 161, 162 N. Y. Supp. 621.

Ohio.—*Re Staube* (1914) 91 Ohio St. 135, L.R.A.1916E, 377, 110 N. E. 250.

Tennessee.—*State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248.

Washington.—*Seattle v. Goldsmith* (1913) 73 Wash. 54, 131 Pac. 456.

### *III. Application of rule.*

A statute making it unlawful to sell black powder in any manner, except in unsealed packages containing 12½ pounds, has been held to be constitutional. *Williams v. Walsh* (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137, affirming (1908) 79 Kan. 212, 98 Pac. 777, wherein the court said: "The usual police regulations concerning fire limits, regulations for the storage of gunpowder and for the sale of poisons, and laws concerning oleomargarin and intoxicating liquors, and a multitude of other enactments, are of this nature. The laws of Congress relative to meat inspection and the Pure Food Laws are recent illustrations of legislation of this character. All these rest upon the police power, which cannot be abridged by private contract, and in the exercise of which mere private inconvenience must yield to public welfare."

A city ordinance requiring all bottles or glass jars in which milk or cream is offered for sale to have indicated thereon their capacity is a valid exercise of the police power, and is constitutional. *Chicago v. Bowman Dairy Co.* (1908) 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700.

A legislative enactment providing that a print or package of butter shall contain 16 ounces avoirdupois, the net weight, if less than this, to be placed on the label, has been upheld as constitutional, being a valid police regulation. *State v. Belle Springs Creamery Co.* (1910) 83 Kan. 389, L.R.A. 1915D, 515, 111 Pac. 474, wherein the

court said that "such regulations of weights and measures have stood upon the statute books of this state practically during the entire existence of the state, and likewise in other states of the Union."

In *Freadrich v. State* (1911) 89 Neb. 343, 34 L.R.A.(N.S.) 650, 131 N. W. 618, it was held that a statute requiring certain foods sold in packages, and not put up by the retailer, to bear a printed label showing the net weight or measure of the contents, was valid.

A North Dakota statute to the same effect as the Nebraska statute just referred to has been upheld as constitutional. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, wherein the court stated the reason for the enactment of such statutes as follows: "During the last dozen years there has been a decided tendency of manufacturers to pack foods in cans and packages. Improved machinery and improved sanitary conditions have enabled foods to be packed cheaply and safely, therefore conditions have been changing year by year and legislation necessarily must change to meet them. The object of all Net Weight and Measure Laws is to prevent the opportunity for fraud."

See also *People v. Armour & Co.* (1916) 176 App. Div. 161, 162 N. Y. Supp. 621, wherein the court declared to be within the power of the legislature a statute which required the marking on the container of "the net quantity of the contents of each container, or a statement that the specified weight includes the container." The defendants sold by weight bacon weighing 5½ pounds in a container weighing 6 ounces, but with no statement on the container as to weight. The court said: "The intention of § 17 is to provide a record on the wrapper that shall be the only means of establishing the weight of the container, to the end that the vendor may not be heard to say that the purchaser was informed in some other way, or that he waived information."

In *Re Steube* (1914) 91 Ohio St. 135, L.R.A.1916E, 377, 110 N. E. 250, a statute requiring certain commodities to be sold by avoirdupois weight or numerical count was declared unconstitutional, but articles in sealed packages were expressly excepted by the statute.

In *State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248, it was held that the legislature may provide that corn meal shall not be offered for sale except in packages containing a certain number of bushels or fractions thereof, and such a statute offends neither the state nor Federal Constitution. The court said: "We see nothing in this statute which deprives a citizen of the liberty to contract, or of his property. It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities

of the article, and that the quality and quantity . . . shall be printed and marked thereon."

A city ordinance making it unlawful to sell any commodity in the original container unless the true net weight or measure of the commodity shall be printed on the container is constitutional. *Seattle v. Goldsmith* (1913) 73 Wash. 54, 131 Pac. 456, wherein the court said: "Whatever may be the necessary course to adopt to enable the container to correctly indicate the weight of the commodity it contains, it is not unreasonable to place that burden upon the one who puts that article before the public as a sale commodity, and compel him, if he wishes to retain his trade, to so pack his commodities that the consumer may know the true quantity of the thing he buys, and thus protect himself in paying the value of the thing he buys." E. C. B.

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T. W. MCKINNEY

v.

WESLEY STREET, Appt.

*North Carolina Supreme Court — May 13, 1914.*

(165 N. C. 515, 81 S. E. 757.)

**Judgment — relation to first day of term — effect on conveyance.**

The fiction by which judgments are considered as rendered on the first day of the term does not operate to affect the title of a bona fide purchaser of property from the judgment debtor before the judgment was in fact rendered.

[See note on this question beginning on page 1072.]

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APPEAL by defendant from a judgment of the Superior Court for Mitchell County (Cline, J.) in plaintiff's favor in an action brought to recover possession of a certain tract of land. *Reversed.*

The facts are stated in the opinion of the court.

Mr. S. J. Ervin for appellant.

Messrs. Black & Wilson for appellee.

Brown, J., delivered the opinion of the court:

Mollie Ledford, who owned the land in controversy, conveyed it to the defendant by deed registered July 24, 1912. Judgment was ren-

dered in the superior court of Mitchell county on the 25th day of July, 1912, in favor of one Scinda Street and against the said Mollie Ledford and others, in an action therein pending, for \$321.95, the same being for the conversion of personal property, and on this judgment

an execution issued against the said Mollie Ledford on December 12, 1912, and under this execution the land in controversy was sold as the property of the said Mollie Ledford on the 7th day of April, 1913, and purchased by the plaintiff, to whom the sheriff executed a deed of conveyance, and who thereupon instituted this action to recover the land. The term of court at which said judgment was rendered began on the 22d day of July, and the plaintiff contended that the said judgment should "be held and deemed to have been rendered and docketed on the first day of said term," and by relation to said day to constitute a lien upon the land prior to the rendition of the judgment and the registration of the deed under which the defendant claimed.

The so-called doctrine of relation was originated in rules of court, and enacted afterwards into statute, in order to place all parties obtaining judgments against a common debtor at same term upon an equality. In discussing the rule and the ground upon which it was adopted, this court said, in *Norwood v. Thorp*, 64 N. C. 685: "This was nothing new, but simply an affirmance of an ancient principle of the common law, adopted in furtherance of justice, to give fair play, to prevent an indecent rush to get a judgment docketed first, and to cut off all chance for favoritism on the part of the clerk,"—and, we may add, to prevent the rights of the parties from depending upon the chance as to which plaintiff should first get the ear of the court. *Ibid.*; *Johnson v. Sedberry*, 65 N. C. 4; *Bates v. Hinsdale*, 65 N. C. 423. Rules of this court have been adopted antedating the statute in order to secure equality among judgments obtained at the same term. Rules 1 and 2 (65 N. C. 705); Rule 9 (63 N. C. 668). This doctrine is not permitted at this day to destroy the rights of third persons, and, like other fictions of the law, is administered in the interest of equity and justice. Some courts who have applied this rule of rela-

tion to the prejudice of third persons have reversed their decisions.

This court overruled its own decision made in 1838, when it adopted rule 9 in these words: "The only difficulty in the adoption of this rule was the case of *Farley v. Lea*, 20 N. C. 307 (4 Dev. & B. L. 169), 32 Am. Dec. 680, for the idea of allowing a judgment in a case, which in fact was not tried below until after the commencement of a term of this court, to relate back and take effect from the first day of the term, was out of the question. We are relieved from the difficulty by *Whitaker v. Wisbey*, 12 C. B. 48, 138 Eng. Reprint, 818, decided in 1852, in which all the cases on the subject were fully reviewed, and the conclusion is 'that a mere form or fiction of law, introduced for the sake of justice, shall not work a wrong contrary to the real truth and substance of the thing.' (We consider *Farley v. Lea* (decided in 1838) overruled by the authority and reasoning of this case." In the case of *Clifton v. Wynne*, 81 N. C. 160, this court again discussed the injustice of the doctrine and declined to follow it, saying: "The action of the court is referred to its commencement to avoid unseemly controversy for priority or advantage among suitors whose cases were acted on at different periods of the session. But a fiction adopted for convenience and to promote the ends of justice will not be allowed to defeat the substantial rights of others, nor to obstruct the clear expression of the legislative will. 'The court will not endure,' says Lord Mansfield in *Johnson v. Smith*, 2 Burr. 950, 963, 97 Eng. Reprint, 647, 'that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing.' . . . The principle to be extracted from *Whitaker v. Wisbey* is that rights and interests intermediately acquired are not displaced by the fiction, and that the one on which the court in fact rendered its judgment may be inquired into in decid-

ing upon the preferences among contesting claimants."

In Broom's Legal Maxims, the case of Whitaker v. Wisbey is cited, and it is there said: "It has indeed been affirmed, as a broad general principle, that 'the truth is always to prevail against fiction,' and hence, although for some purposes the whole assizes are to be considered as one legal day, 'the court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days, or even of a fraction of a day.' Evidence may, therefore, be adduced to show that an assignment of his goods by a felon, bona fide made for a good consideration after the commission day of the assizes, was in truth made before the day on which he was tried and convicted, and on proof of such fact the property will be held to have passed by the assignment." Broom's Legal Maxims, 7th Am. ed. p. 128, \*129.

The general, if not the universal, rule at this day, is that the doctrine of relation invoked by the plaintiff here does not apply to strangers and will not be applied to the injury or prejudice of innocent third persons. "A judgment will not be considered to relate to the first day of the term for the purpose of giving it priority over a conveyance to a purchaser for value and without notice." 12 Am. & Eng. Enc. Law, 115. "As against intervening purchasers, it may be regarded as settled that the

Judgment—  
relation to first  
day of term—  
effect on con-  
veyance.

lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance." Black, Judgm. § 442.

Mr. Freeman says: "At common law all judgments were by legal fiction supposed to be entered on the first day of the term at which they were recovered. But it was a maxim of the same law that 'a legal fiction is always consistent with equity.' Therefore, whenever the purposes of justice required it, the true time of entering judgment might be averred and proved. . . . However the fiction of law by which judgments are considered as being rendered on the first day of the term may affect one judgment lien in a contest with other liens of the same nature, it seems to be generally conceded that it cannot prejudice the interests of bona fide purchasers. Whenever a purchaser before the signing of judgment, without notice, and without being guilty of any fraud, acquires an interest in real estate, that interest cannot be charged with the lien of any judgment subsequently entered against his grantor, though such judgment might, as between itself and other judgments, rank as though entered at the beginning of the term and at some time prior to its actual rendition." Freeman, Judgm. § 369.

We are of the opinion that his Honor erred, and that upon the facts agreed judgment should be entered for the defendant. It is so ordered.

Reversed.

## ANNOTATION.

### Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment.

#### I. General rule, 1072.

#### II. Qualifications of rule:

- a. Protection of bona fide purchaser, 1078.
- b. Miscellaneous, 1079.

#### I. General rule.

It was a fiction of the common law that the entire term of court be considered as one day, and that all judgments rendered during a term be treat-



ed as of the first day of the term. This rule was never generally adopted in the United States, but has been confined in its application to comparatively few states. See 15 R. C. L. p. 613.

The rule as adopted is that a judgment relates back to the first day of the term so as to take priority over conveyances made after the beginning of the term, but prior to the time when the judgment was actually rendered. It is now, for the most part, a matter of statute. For that reason the cases herein are valuable only as showing the application of the rule at common law, and as presenting the construction and application of the statutes in force when the decisions were handed down.

**United States.**—*Bank of Cleveland v. Sturges* (1840) 2 McLean, 341, Fed. Cas. No. 861, s. c. on subsequent appeal (1842) 3 McLean, 140, Fed. Cas. No. 13,571; *Clements v. Berry* (1850) 11 How. 398, 13 L. ed. 745; *Kellerman v. Aultman* (1887) 30 Fed. 888.

**Arkansas.**—*Keatts v. Fowler* (1861) 22 Ark. 483.

**Kansas.**—*Kingsley v. Bagby* (1895) 2 Kan. App. 23, 41 Pac. 991.

**Nebraska.**—*Norfolk State Bank v. Murphy* (1894) 40 Neb. 735, 38 L.R.A. 243, 59 N. W. 706; *Ocobock v. Baker* (1897) 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582; *Hayden v. Huff* (1900) 60 Neb. 625, 83 N. W. 920; *Doe v. Startzer* (1901) 62 Neb. 718, 87 N. W. 535.

**North Carolina.**—*Farley v. Lea* (1838) 20 N. C. 307 (4 Dev. & B. L. 169), 32 Am. Dec. 680; *Finley v. Smith* (1842) 24 N. C. (2 Ired. L.) 225. See the reported case (*MCKINNEY v. STREET*, ante, 1070).

**Ohio.**—*Urbana Bank v. Baldwin* (1827) 3 Ohio, 65; *Riddle v. Bryan* (1831) 5 Ohio, 49; *Jackson v. Luce* (1846) 14 Ohio, 514; *Davis v. Messenger* (1867) 17 Ohio St. 231; *Hemminway v. Davis* (1873) 24 Ohio St. 150.

**Virginia.**—*Mutual Assur. Soc. v. Stanard* (1815) 4 Munf. 539; *Skipwith v. Cunningham* (1837) 8 Leigh, 271, 31 Am. Dec. 642; *Hockman v. Hockman* (1896) 93 Va. 455, 57 Am. St. Rep. 816, 25 S. E. 534; *New South Bldg. & 6 A.L.R.—68*

*L. Asso. v. Reed* (1898) 96 Va. 345, 70 Am. St. Rep. 858, 31 S. E. 514.

**West Virginia.**—*Smith v. Parkersburg Co-op. Asso.* (1900) 48 W. Va. 232, 37 S. E. 645.

In *Bank of Cleveland v. Sturges* (1840) 2 McLean, 341, Fed. Cas. No. 861, it appeared that a judgment was entered against a firm on the 2d of July, and execution issued against certain real estate of the firm. A bank sought an injunction to stay the execution, asserting a lien on the real estate by virtue of a mortgage executed on the 28th day of June and filed on the 2d day of July. The court held that by the provisions of the Ohio statute (3 Chase's Stat. 1709) the judgment created a lien on all the lands of the debtor within the territorial jurisdiction of the court, which lien attached from the first day of the term at which judgment was rendered, and since the first day of the term was July 1, the judgment lien had priority. The injunction to stay execution was refused. On a rehearing between the same parties in (1842) 3 McLean, 140, Fed. Cas. No. 13,571, a similar holding was made.

In *Clements v. Berry* (1850) 11 How. (U. S.) 398, 13 L. ed. 745, it appeared that judgment was entered by default on the 8th day of the month, but the clerical record was not completed until the 10th. On the same day, shortly before court opened, the debtor recorded a deed conveying his property to another to act as trustee thereof for certain creditors. The court held that the judgment related back to the first day of the term and took priority over the conveyance as a lien on the debtor's property. The court said: "It is the uniform practice of the Federal and state courts of Tennessee to test executions as on the first day of the term."

In *Kellerman v. Aultman* (1887) 30 Fed. 888, it appeared that on January 17, 1883, the owner of land conveyed it to the plaintiff's grantor. On February 4, 1883, during the January term of the court, a judgment was rendered against the transferrer in a suit commenced in November, 1882. The action was brought to restrain a sale of

the land by virtue of an execution under the judgment. It was provided by statute (Neb. Code Civ. Proc. § 477) as follows: "The lands and tenements of the debtor within the county where the judgment is rendered shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered; but judgments by confession and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered." Since the action in which the judgment in question was rendered was commenced before the January term, the court held that "the plain import of the language of this section carried the judgment lien back to the first of the term, and to a date before the conveyance," and that the judgment lien took priority over the conveyance.

In *Keatts v. Fowler* (1861) 22 Ark. 483, it appeared that after the first day of the term in which a decree was rendered, but prior to the actual rendition of the decree, the debtor conveyed his lands. The plaintiff claimed under the decree as a paramount lien on the lands conveyed. The court held that under the territorial act then in force, the judgment became a lien on the lands of the judgment debtor from the first return day of the term in which the judgment might be entered, and that the lien was superior to the title of a purchaser after the first day of the term, but prior to actual rendition of the decree.

In *Kingsley v. Bagby* (1895) 2 Kan. App. 23, 41 Pac. 991, the question of priority of liens arose between a judgment creditor and a mortgagee. It appeared that the judgment was rendered on March 28, 1888, during the regular January term, which convened on January 3d, 1888, and that the mortgage had been executed on the 22d day of February, 1888. The Kansas statute (Gen. Stat. 1889, § 4515) provided as follows: "Judgments of courts of record of this state . . . shall be liens on the real estate of the debtor within the county in which the judgment is rendered from the first day of the term at which the judgment

is rendered." The court held that the judgment would relate back to the first day of the term and take priority over the mortgage debt as a lien.

But it has been held that despite the statutory right of a judgment creditor to have a judgment rendered during the term become a lien as of the first day of the term, still he cannot extinguish a lien then existing on the property because of a conveyance made during the term. *Bowling v. Garrett* (1892) 49 Kan. 504, 33 Am. St. Rep. 377, 31 Pac. 135, wherein it appeared that a debtor conveyed certain property to another who held a mechanics' lien thereon, and who agreed, as part of the consideration for the transfer, to satisfy certain mortgages on the property. The conveyance was made after the commencement of a term of court in which judgment was rendered, but prior to its actual rendition. The court held that the judgment creditor would have a lien on such property, but must, on a sale under execution, make the sale subject to the liens already existing against the property.

In *Nebraska*, it has been provided by statute (Code Civ. Proc. § 477) that judgments rendered in actions commenced prior to the term, except judgments by confession, become liens on the real estate of the debtor situate within the county, from the first day of the term. Under that act, where the defendant executed a mortgage on his real estate during the term and prior to the actual rendition of the judgment, the court held that the lien of the judgment was superior to the lien of the mortgage. *Norfolk State Bank v. Murphy* (1894) 40 Neb. 735, 38 L.R.A. 243, 59 N. W. 706.

In *Ocobock v. Baker* (1897) 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582, it appeared that the holder of a mortgage executed on the 2d day of December, 1893, brought a foreclosure action and joined a judgment creditor as a party defendant. The creditor's judgment had been obtained at a term of court commencing on the 20th day of November, 1893, but the actual rendition of the judgment was subsequent to the filing of the mortgage. The

court held that as the lien of the judgment related back to the first day of the term at which judgment was rendered, it took precedence of the mortgage.

In *Hayden v. Huff* (1900) 60 Neb. 625, 83 N. W. 920, wherein it appeared that property was conveyed on the 26th of October, 1891, and that in December, 1891, during the September term of court, judgments were rendered against the then owner of the property in controversy, the court stated that the several actions in which the judgments were rendered having been commenced prior to the September term of court, the judgments would relate back to and become liens on the property of the judgment debtor from the first day of the term.

In *Doe v. Startzer* (1901) 62 Neb. 718, 87 N. W. 535, it appeared that the plaintiff sought to restrain the defendant from selling certain real estate under an execution. The plaintiff had received a deed to the property in question on the 6th day of April, 1896. On the 1st day of July, 1896, judgment had been rendered for the defendant herein against the transferrer of the property. The action had been commenced prior to the term at which judgment was rendered, and the court held that the judgment would relate back to the first day of the term, which was February 24th, 1896, and the lien thereof would attach from that day, the transferee not being a bona fide purchaser.

In a North Carolina case decided before the enactment of the common-law rule into statute, it appeared that certain property which the plaintiff had purchased on the 9th day of May, 1833, was seized and sold by the sheriff in the execution of judgments confessed by the vendor on the 12th day of May, 1833. It was held that the sale was proper, since by the doctrine of relation back the judgments would attach as of the first day of the term, which was the 8th of May. The court said: "No position can be more firmly established than that the judgments of a court of record, on whatever day of the term they may in fact be rendered, in law relate to, and are

considered as judgments of, the first day of the term. . . . This legal relation of the judgment to the first day of the judicial term is as perfect as was, at common law, the relation of an act of Parliament to the first day of the legislative session." *Farley v. Lea* (1838) 20 N. C. 307 (4 Dev. & B. L. 169), 32 Am. Dec. 680.

In *Finley v. Smith* (1842) 24 N. C. (2 Ired. L.) 225, the court, approving the decision in *Farley v. Lea* (N. C.) supra, held that where a conveyance was made after the first day of the term of a court, and before the rendition of a judgment at the same term, the lien of the judgment would relate back to the first day of the term and take priority over the conveyance as a lien on the subject-matter thereof, though the judgment was one by confession.

In *Fowle v. McLean* (1915) 168 N. C. 537, 84 S. E. 852, the court discussed the statute (N. C. Revisal, §§ 574, 575) providing that judgments entered during a term of court should relate back to the first day of the term, but refused to apply it where such application would work injury to the rights of a third person who had acted in good faith.

In *Urbana Bank v. Baldwin* (1827) 3 Ohio, 65, it appeared that Baldwin had compromised a pending suit with C. and E. B. Cavalier, by conveying his property to them under a deed dated November 21, 1820. On the 25th of November, Baldwin confessed judgment in a suit instituted by the Urbana Bank. The term of court in which judgment was confessed commenced on the 20th of November. The court held that the lien of the judgment would relate back to that date, and attach to the property conveyed to C. and E. B. Cavalier, saying: "The case may be a hard one, but the law is clear in favor of the plaintiff's lien. The suit was pending on the first day of the term, and when that is the case the judgment relates back to that day, no matter on what day of the term it was confessed."

In *Riddle v. Bryan* (1831) 5 Ohio, 49, it appeared that one Dunseth had confessed judgment to the Farmers'

and Mechanics' Bank of Cincinnati on January 19, 1820, during a term of court which commenced on the 6th of the previous December. Under a sheriff's sale on execution, the property was conveyed to one Longworth. At the same December term, Bryan obtained a judgment against Dunseth, which was actually rendered on January 14th, 1820. Under the law in force at the time the judgments were rendered, the property of a defendant was bound from the first day of the term in which judgment was rendered, except that judgments by confession were a lien only from the day they were actually signed or entered. In view of these statutory provisions the court held that the judgment lien of Bryan would take priority over the conveyance to Longworth as a lien on the premises.

Where it appeared that two debtors, together with their wives, had executed a mortgage of their property, which mortgage was entered for record on the 12th day of April, 1842, and their creditor obtained a judgment which was entered on April 20, the court held that the judgment would relate back to the 10th day of April, which was the first day of the term, and would have priority as a lien over the mortgage from that date. *Jackson v. Luce* (1846) 14 Ohio, 514.

In *Davis v. Messenger* (1867) 17 Ohio St. 231, it appeared that the plaintiff had obtained a judgment at a term of court which began on the 9th day of May, 1859. The land to which the judgment would have attached was mortgaged by the debtor, and the mortgage was left for record at 11 o'clock A. M., on the same day that the term commenced. The plaintiff maintained that his judgment had priority over the mortgage lien, alleging that the judges of the district had specified precisely that the term should commence at 10 o'clock A. M., on the 9th day of May. The defendant then showed that the court did not commence its session until after 11 o'clock A. M. on that day. By the terms of the statute (Swan & C. Stat. 1064) a judgment was made a lien on the lands of the debtor from the first day

of the term at which the judgment was rendered. The court held that the lien of the judgment would have priority over the mortgage, since the judges had specified that the term should start at 10 o'clock A. M., on May 9th, and the statute (4 Curwen's Stat. 3089) provided that the record of the judge's order should be full and sufficient evidence of the legal terms for holding court.

In *Hemminway v. Davis* (1873) 24 Ohio St. 150, on a further appeal involving the same question, the court approved and applied the holding in *Davis v. Messenger* (Ohio) supra.

But compare the earlier case of *Follett v. Hall* (1847) 16 Ohio, 111, 47 Am. Dec. 365, wherein it appeared that a mortgage had been handed in for record on the first day of the term and two hours before court convened, and it was held that, while a judgment related back to the first day of the term, still it would not, in this instance, be a prior lien on the property mortgaged. A majority of the court concurred in the opinion that "if judgments attach only as liens from the beginning of the term of court, they attach from the time on the first day of the term, at which the court was duly organized and opened."

In the early case of *Mutual Assur. Soc. v. Stanard* (1815) 4 Munf. (Va.) 539, it was held that a judgment would relate back and become a lien on the lands of the debtor from the first day of the term in which it was rendered. It was accordingly held that where a debtor conveyed his property by a deed of trust after the commencement of the term in which judgment was rendered, but prior to the rendition thereof, the court held that by the doctrine of relation back the judgment had priority over the deed as a lien on the debtor's realty.

And in *Skipwith v. Cunningham* (1837) 8 Leigh (Va.) 271, 31 Am. Dec. 642, the decision in *Mutual Assur. Soc. v. Stanard* (Va.) supra, was approved, the court holding that the lien of a judgment on the realty of the debtor related back to the first day of the term in which it was rendered so as to

have priority over an intermediate trust deed.

See also the decision in *Hockman v. Hockman* (1896) 93 Va. 455, 57 Am. St. Rep. 816, 25 S. E. 534, wherein it appeared that on the 9th day of November, 1892, a decree was made by the judge in vacation in favor of the appellant against one Hockman, the decree being indorsed by the clerk as filed at 12 M., on that day. On the same day, at 8:30 A. M., a deed executed by Hockman was admitted to record, which deed conveyed his property to one Hansbrough as trustee. A question arose as to the priority of lien between the decree and the trust deed. By statute (Code, § 3567) it was provided as follows: "Every judgment for money rendered in this state, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled, at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered." The court, in holding that the decree would take priority over the trust deed, said: "It being established by the decisions of this court that under the statute, as well as by the rule of the common law, a judgment or decree recovered or rendered during the term of a court, in an action or cause that was ready for trial on the first day of the term, becomes a lien on the real estate of the debtor as of the first day of the term, and that the lien thereof begins with the day itself, the language of the statute furnishes no ground for fixing a different or other time of the day for the commencement of the lien of a judgment or decree confessed or rendered in vacation. It discloses no intention on the part of the legislature to abrogate the principle of unity of the common law, in respect to the day, as a point of time. Its provisions give no warrant for drawing any distinction in this respect between judgments and decrees pronounced in turn by the courts, and judgments and decrees confessed or rendered in vacation—certainly none to the prejudice of the latter. The one

class becomes a lien from 'the commencement of the term,' the day on which the term began; the other, from 'the date of the judgment,' the day on which it was confessed or rendered. In respect to the time of the day when the lien of each begins, there is no distinction. Both begin with the first moment of the day on which the judgment or decree becomes a lien."

In *New South Bldg. & L. Asso. v. Reed* (1898) 96 Va. 345, 70 Am. St. Rep. 858, 31 S. E. 514, it appeared that at a term of the circuit court beginning on April 10, 1893, two judgments were rendered against the defendant, one on May 16, and the other on May 19. On April 17, 1893, the defendant conveyed his property in trust to a loan association to secure his debts. The judgment creditors charged that their judgments were liens on the property of the defendant from the first day of the term in which they were rendered. The loan association claimed to be a bona fide purchaser without notice. The court, citing *Hockman v. Hockman* (Va.) *supra*, as authority, said: "The judgments were rendered after the recordation of the deed of trust, but they operate as liens upon the real estate of the judgment debtor from the first day of the term of the court at which they were rendered. This, we have seen, was before the deed of trust was recorded, and hence judgments rendered at that term have priority over the deed of trust recorded during the term."

In *Smith v. Parkersburg Co-op. Asso.* (1900) 48 W. Va. 232, 37 S. E. 645, the evidence showed that subsequent to the commencement of a term of court, but prior to the final rendition of a judgment therein, one Smith purchased certain property of the defendant in the action. The creditor maintained that this property became subject to the prior lien of a judgment on attachment, which was rendered during the term and subsequent to the sale of the defendant's property. The case was ready for trial at the commencement of the term, and the judgment creditor claimed that, by the doctrine of relation back, it attached as from the first day of the term. The

court, holding that the judgment would take priority over the conveyance, said: "It was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term, and are considered as rendered on that day, and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment. This general principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are in a great degree left to conjecture." This rule has always been recognized in Virginia, in cases matured for a term and ready for judgment on the first day of the term, and is so recognized in this state."

See, however, *Morgan v. Sims* (1858) 26 Ga. 283, wherein there was a contest between a judgment creditor and one claiming as a bona fide purchaser from the debtor, as to the priority of the judgment as a lien on the property purchased. The conveyance had been made after the beginning of the term of court, but before the rendition of the judgment therein. The judgment creditor maintained that the lien of the judgment related back to the first day of the term. The trial court, in accordance with this view, had set aside a portion of the property to satisfy the lien. On this appeal, the purchaser objected to an instruction to the trial jury that "if they believed from the evidence that the defendant was in possession on the first day of the term of the court at which the judgment was had, although the judgment was not signed until the 19th of February, that its lien commenced from the first day of the term," and the court held that this instruction was error, since, in Georgia, property was bound only from the signing of the judgment, which did not relate back to the first day of the term.

See also *Murfree v. Carmack* (1833) 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232, wherein it was said that the English rule that a judgment related back to the first day of the term in which it was rendered did not apply in Tennessee, and a judgment would take effect only from the day of its actual rendition. It appeared that on the same day in which a judgment was rendered the debtor had executed a conveyance of his lands, and the court held that, while the law did not generally take cognizance of the fraction of a day, still, in this instance, for the ends of justice, the day might be divided, and either party might prove that his lien was in fact first in point of time.

## II. Qualifications of rule.

### a. Protection of bona fide purchaser.

In recognition of the common-law maxim that "a legal fiction is always consistent with equity," the courts have refused to apply the doctrine of relation back where such application would invade the rights of a bona fide purchaser for value. *Clements v. Berry* (1850) 11 How. (U. S.) 898, 13 L. ed. 745, reversing (1848) 9 Humph. (Tenn.) 312; *Pope v. Brandon* (1830) 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Quinn v. Wiswall* (1845) 7 Ala. 645; *Doe v. Startzer* (1901) 62 Neb. 718, 87 N. W. 535; *Fowle v. McLean* (1915) 168 N. C. 537, 84 S. E. 852; *Odell Hardware Co. v. Holt-Morgan Mills* (1917) 178 N. C. 308, 92 S. E. 8. And see the reported case (*MCKINNEY v. STREET*, ante, 1070).

In *Pope v. Brandon* (1830) 2 Stew. (Ala.) 401, 20 Am. Dec. 49, in holding that a judgment rendered during a term of court would not relate back to the first day of the term so as to defeat the rights of a bona fide assignee, the court said: "The argument of the retrospective influence of judgments is predicated upon the idea that, as the whole term is considered in law as but one day, everything done during the term must relate to its commencement. This conclusion does not necessarily follow. . . . This fiction, like all others which the law acknowledges, is designed to advance, but never to de-

feat, the purposes of justice. . . . To give a retroactive effect to a judgment would be rather subversive than promotive of justice, as a purchaser could not be constructively advised of it, until it had an actual existence."

In *Quinn v. Wiswall* (1845) 7 Ala. 645, the court, holding that a judgment would bind land only from the date of its rendition, and would not relate back to the first day of the term, said that the rule that a bona fide conveyance was inoperative against a subsequent judgment was contrary to that maxim which declares that a legal fiction shall work injury to no one.

In *Doe v. Startzer* (1901) 62 Neb. 718, 87 N. W. 535, it was held that a judgment would relate back to the first day of the term in which it was rendered, so as to have priority over a conveyance made after the beginning of the term, since the purchaser had not shown himself to be a bona fide holder for value.

In the reported case (*MCKINNEY v. STREET*, ante, 1070) the court held that the doctrine of relation back will not be invoked where its application would give a judgment priority over a conveyance made to a bona fide purchaser for value.

That case was cited and approved in *Fowle v. McLean* (1915) 168 N. C. 537, 84 S. E. 852, wherein the court stated that the statute (N. C. Revisal, §§ 574, 575) providing that judgments entered during the term should relate to the first day of the term would not apply to affect the rights of bona fide purchasers of the property of the debtor, registered during the term at which judgment was rendered.

And where, on agreement, judgment was entered, nunc pro tunc after the term, the court held that the statutory provision that judgments entered and docketed during any term of court should relate back to the first day of the term would not apply, and that the lien of the judgment would not attach to property in the hands of bona fide claimants for value. *Odell Hardware Co. v. Holt-Morgan Mills* (1917) 173 N. C. 308, 92 S. E. 8.

In *Berry v. Clements* (1848) 9 Humph. (Tenn.) 312, the court held

that while the doctrine of relation back might be applicable between creditors, it could not be invoked where its application would bind property as against a bona fide purchaser for value. In *Clements v. Berry* (1850) 11 How. (U. S.) 398, 13 L. ed. 745, the court reversed (1848) 9 Humph. (Tenn.) 312, on the ground that the purchaser was not, in that case, a bona fide holder for value, and so not exempt from an application of the doctrine of relation back. But the court reaffirmed the abstract rule that the doctrine would not be invoked as against bona fide purchasers, saying: "This rule would not apply, perhaps, to a bona fide purchaser of real estate for a valuable consideration. . . . But the trustee in this case cannot be considered a purchaser, as the assignment was made to him not on a purchase for a valuable consideration, but for the benefit of certain creditors."

#### *b. Miscellaneous.*

It has been held that the common-law fiction of the relation of judgments to the first day of the term does not apply, where judgment could not have been rendered at the beginning of the term, owing to the incomplete condition of the case at that time. *Yates v. Robertson* (1885) 80 Va. 475. In that case it appeared that between the commencement of the term of court in which judgment was rendered, and the actual rendition thereof, the debtor had executed a trust deed of his property. The notices in the action had been served and acknowledged after the commencement of the term. Disposing of the creditors' contention that, under the laws of Virginia, the judgment lien would relate back to the first day of the term, the court said: "It is true that for some purposes our law regards the whole term of a court as one day, so that a judgment given at any time during a term relates back to the first day of the term, as if rendered then. This is not always so, however. The principle does not apply to a judgment rendered during a term in a case which was in such a condition that

the judgment could not have been rendered on the first day of the term."

But in *Hoagland v. Green* (1898) 54 Neb. 164, 74 N. W. 424, the appellants sought to subject certain lands in the possession of George Green, to the payment of judgments held by them against his transferrer, Joseph Green. It appeared that the appellants had obtained deficiency judgments against Joseph Green on November 17, 1892, at a term of court commenced on September 17, 1892. After the beginning of the term, but before the judgments were rendered, Joseph Green and his wife executed three mortgages on the land in controversy to a loan and trust company, and then conveyed the land to George Green. The questions on the appeal were, first, whether the judgments were liens binding on the property conveyed to George Green, and, secondly, whether they would have priority as liens over the loan and trust company's mortgages. The appellee maintained that the Nebraska statute (Code Civ. Proc. § 477) was declaratory of the common law, and that, since the case was not in a situation where damages could have been ascertained and judgment rendered on the first day of the term, the common-law exception in this regard would apply. The court said that, while the statute was declaratory of the common law in a broad sense, it did not exactly express the common-law rule, and its language must govern rather than common-law precedents to the contrary. It was held that by virtue of the statute the land would be subjected to the lien of the judgments prior to the claims of the mortgagee and of George Green.

It has been held in Ohio that, in order to avail himself of the doctrine of relation back, a judgment creditor must enter judgment on the court journal during the term in which it is rendered. *Coe v. Erb* (1898) 59 Ohio St. 259, 69 Am. St. Rep. 764, 52 N. E.

640. In that case the question was whether a judgment in an action commenced prior to the term in which it was announced, but not officially entered in the journal during the term, would relate back to the first day of the session so as to have priority of lien on the realty of the judgment debtor. It appeared that the debtor had conveyed the property in question to a bona fide purchaser during the term, but prior to the announcement of the judgment. The statute (Rev. Stat. § 5375) provided as follows: "Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered." It was contended that the statute required an entry of judgment on the journal during the term in which it was rendered, and the court, in agreement with this contention, said: "In the case at bar one risk which the purchaser took in buying when he did, although unknown to him, was that during the term a valid judgment might be taken against his grantor. He incurred no other peril by reason of the pending action; and it is difficult to see that he is in any worse plight than he would have been had he examined the records of the court the day after the final adjournment of the January term, and found that no judgment had been taken against his grantor. . . . Our conclusions are that § 5375 requires that, in order to create a lien as of the first day of the term, there must be an entry of judgment on the journal during the term; that the entry made in this case, after the term, was unauthorized and worked a fraud upon the plaintiff in error."

R. E. B.



GEORGE E. REED et al., Appts.,  
v.  
LETTIE W. STEVENS et al.

*Connecticut Supreme Court of Errors — July 16, 1919.*

(— Conn. —, 107 Atl. 495.)

**Covenant — breach — cloud on title.**

1. A cloud on title is not a breach of covenant against encumbrances.  
[See note on this question beginning on page 1084.]

**— warranty — breach — deed of incompetent.**

2. The existence of a void deed from an incompetent is not a breach of the covenants of seisin, right to convey, and against encumbrances, in a subsequent deed by one derailing title through settlement of the estate of the incompetent.

**Cloud on title — deed from incompetent.**

3. A void deed from an incompetent is a cloud on the title of one who acquires through purchase at settlement of the estate of the incompetent.

[See 5 R. C. L. 657.]

**APPEAL** by plaintiffs from a judgment of the Court of Common Pleas for Fairfield County (Walsh, J.) in their favor for a certain amount less than the amount found for defendants on their counterclaim, in an action brought to foreclose a mortgage deed. *Judgment set aside.*

The facts are stated in the opinion of the court.

Mr. Howard W. Taylor for appellants.

Mr. Henry C. Wilson for appellees.

Gager, J., delivered the opinion of the court:

On January 25, 1902, one James was the owner of the land described in the mortgage deed sought to be foreclosed, and upon that date a conservator of James was duly appointed, and this appointment continued until the death of James, May 13, 1905. August 15, 1903, James executed a deed of the land described in the mortgage to McNamara, who was made a party to this action. The plaintiffs obtained title to said lands upon the settlement of James's estate, in January, 1906. The plaintiffs, under an agreement with James made before the conservator proceedings, were in possession with James, and continued in possession until November 21, 1914, and on the latter date the plaintiffs sold and conveyed the lands to the defendant Lettie Stevens upon the same day, taking back a mortgage from Lettie Stevens to

secure a note of \$1,000, representing part of the purchase price. The plaintiffs all the time knew of the deed from James to McNamara, and the defendant Stevens became aware of the James deed prior to accepting her deed, but accepted the deed upon the representation of one of the plaintiffs that the lands were free of encumbrance. In the foreclosure action the defendant Stevens counterclaimed for damages on account of the existence of the deed from James to McNamara, as a violation of the covenant against encumbrances. The counterclaim contained allegations of other encumbrances, but these were either not pressed or removed from the case by agreement. The court found the deed from James to McNamara, executed while James was incompetent, null and void, and that McNamara had no interest in the property, either legal or equitable, but held that the deed did violate the covenants against encumbrances in the deed from the plaintiffs to the defendant Stevens, allowed

damages of \$300 therefor, deducted this sum from the indebtedness on the mortgage note, and rendered a judgment of foreclosure for the balance. From this judgment the plaintiffs appeal. McNamara took no appeal, and the conclusiveness of the finding that the deed of James to him was null and void is not questioned. The deed from the plaintiffs to the defendant was in the usual form of warranty deed, containing the following covenants, viz.:

"To have and to hold the above-bargained premises, with the privileges and appurtenances thereof, unto her, the said grantee, her heirs and assigns forever, to them and their own proper use and behoof. And also, we the said grantors do for ourselves, our heirs, executors, and administrators covenant with the said grantee, her heirs and assigns, that at and until the ensealing of these presents we are well seised of the premises, as a good indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as is above written; and that the same is free from all encumbrances whatsoever.

"And furthermore, we the said grantors do by these presents bind ourselves and our heirs forever to warrant and defend the above granted and bargained premises to her the said grantee, her heirs and assigns, against all claims and demands whatsoever."

Other facts are found, but in view of the conclusion reached their statement is unnecessary.

The first reason of appeal is stated at follows, viz.: That the court, having sustained the first claim of law made by the plaintiffs, to wit, that the McNamara deed upon the facts found was null and void, erred in overruling the second claim of law made by the plaintiffs, to wit: "That the McNamara deed did not constitute in law a breach of the covenants in the warranty deed from the plaintiffs to the defendant Stevens."

This reason of appeal is well founded. The existence of a null and void deed does not impair seisin, is no impairment of the right to convey, and constitutes no encumbrance. It is a mere cloud upon the title.

~~Covenant—  
warranty—  
breach—deed of  
incompetent.~~

"The covenant of warranty is a contract by which the grantor of land undertakes to protect the land granted from all lawful claims and demands existing at the time of the grant, and the contract is made, not only with his immediate grantee, but with whomsoever may become the owner of the land by a title derived through the grantee. *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Mitchell v. Warner*, 5 Conn. 498; *Rawle, Covenants for Title*, 4th ed. 334; 3 Washb. Real Prop. 4th ed. 466; 2 Sugden, Vendors, Perkin's ed. 240. It is not necessarily an undertaking that there is no encumbrance on the land at the time, but it is an undertaking that the purchaser and his assigns shall at all times enjoy the land free from all such encumbrances. *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Rawle, Covenants*, 4th ed. 215; *Whitney v. Dinsmore*, 6 Cush. 124; *Russ v. Steele*, 40 Vt. 310."

The point of this is that an encumbrance violating the covenant of warranty or against encumbrance must be a lawful claim or demand enforceable against the grantee. In 15 C. J. p. 1234, it is said: "As now generally recognized by the courts, a covenant against encumbrances is one which has for its object security against those rights to or interests in the land granted, which may subsist in third persons to the diminution in value of the estate, although consistent with the passing of the fee."

See also *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638, citing *Rawle, Covenants for Title*, p. 94. The covenant against encumbrances differs in its nature as a contract from the covenant of warranty, but the claims as to which both cove-

nants are made are of the same nature. They must be lawful claims impairing the estate granted. Some point is made in appellant's brief that because the apparent outstanding claim in McNamara was the entire title, therefore it could not be an encumbrance because inconsistent with the passing of the fee by the conveyance. McNamara's deed, if good, would have constituted a violation of the covenant of good right to bargain and sell, and eviction under it would have constituted a violation of the warranty clause. The distinction does not seem important in this case. A deed null and void ab initio, as is the real meaning of the finding, could furnish no basis of any lawful claim of any sort, whether of a claim of whole title or of a subordinate enforceable interest. The court was therefore in error in holding that this null and void deed constituted a breach of any covenant in the deed, or furnished any basis for damages real or nominal. The determination of this point disposes of the whole case, and renders unnecessary any discussion of the remaining reasons of appeal, except, perhaps, the second, which is that the court also erred in overruling the plaintiff's claim that the McNamara deed, being null and void, did not constitute a cloud upon the plaintiff's title when they deeded to the defendant Stevens. This action of the court, if construed as holding that the null and void deed was a cloud on the title, would have been inconsistent with the judgment actually rendered, except upon the erroneous theory that a cloud on the title and an encumbrance are one and the same thing. But the deed in question, being invalid, was a cloud on the title, but not an encumbrance or in violation of any covenant in the deed.

Cloud on title—  
deed from incompetent.

"A cloud upon one's title is something which shows prima facie some right of a third person to it." *Waterbury Sav. Bank v. Lawler*, 46 Conn. 245. In *Welles v. Rhodes*, 59

Conn. 506, 22 Atl. 286, Justice Torrance, in commenting on this, said: "Ordinarily such a cloud may be caused by the existence of such documents or such a state of facts as prima facie show, either alone or with the aid of extrinsic facts, some right adverse to the title of the party seeking relief."

The general rule is: "Where a deed is apparently valid, and its invalidity can be shown only by the introduction of extrinsic evidence, it is a cloud on the title justifying the interference of equity." *Alden v. Trubee*, 44 Conn. 455; 32 Cyc. p. 1317.

And this is precisely the import of the facts found as to the McNamara deed. Whatever the court may have intended to hold, if anything, with reference to the question whether this deed was a cloud upon defendant's title is immaterial, in view of the conclusion of law as stated by the court upon which the judgment was based, viz., that the McNamara deed was a breach of the covenants against encumbrances, because to be a cloud the claim must be invalid, while only lawful or valid claims violate the covenants as to encumbrances.

In *Luther v. Brown*, 66 Mo. App. 230, suit was brought to recover the expenses incurred by the plaintiff in an action to remove a cloud from his title. The court, in denying the plaintiff's right to recover, said: "While it is well settled that any claim which impairs the use of an estate in land or prevents or impairs its transfer is an encumbrance, yet to constitute an encumbrance within the meaning of the covenant against encumbrances such claim must be a valid claim. It is only such claims that are within the purview of any of the implied covenants, unless it be the covenant for further assurance. Hence the fact that, at the date of the conveyance, there was an apparent title outstanding in others, can furnish no cause of action to the plaintiff on the covenant against encumbrances, since all the evidence

concedes that such apparent claim or title was not valid, and that the defendant had the title to the land when he conveyed it. . . . We must conclude, therefore, that the expenses incurred by the plaintiff in the suit to remove the cloud from his title are not recoverable in this action under either of the covenants in defendant's deed."

We therefore hold that the McNamara deed, being null and void, was at the most a cloud upon the title transferred by the plaintiffs to the defendant Stevens, and as a

cloud upon the title it was the basis of no lawful claim by the defendant Stevens against the plaintiffs, as set out in the counterclaim, and therefore in no respect violated the covenants in the deed, and that the court erred in allowing damages to the defendant under the counterclaim.

There is error, the judgment is set aside, and the cause remanded, with direction to enter judgment in accordance with this opinion.

The other Judges concur.

Covenant—  
breach—cloud on  
title.

### ANNOTATION.

#### Unfounded outstanding claims to or against real property as breach of covenants of deed.

Save in certain exceptional cases, presently to be noticed, it may be taken as the general rule that none of the ordinary covenants of a deed of conveyance is violated by the existence of an unfounded, outstanding claim to or lien upon the property conveyed. This statement is substantiated by the following cases, the nature of the covenant involved in each of which is parenthetically indicated:

**United States.** — Noonan v. Lee (Noonan v. Braley) (1863) 2 Black, 499, 17 L. ed. 278 (warranty); Andrus v. St. Louis Smelting & Ref. Co. (1889) 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645 (quiet enjoyment); Vorhis v. Forsythe (1864) 4 Biss. 409, Fed. Cas. No. 17,004 (encumbrances).

**Arkansas.** — Hoppes v. Cheek (1860) 21 Ark. 585 (quiet enjoyment); Longergan v. Baber (1894) 59 Ark. 15, 26 S. W. 13 (encumbrances).

**Colorado.** — Tierney v. Whiting (1874) 2 Colo. 620 (warranty); Rittmaster v. Richner (1900) 14 Colo. App. 361, 60 Pac. 189 (against taxes; warranty); Stearns v. Jewel (1915) 27 Colo. App. 390, 149 Pac. 846 (seisin; warranty).

**Connecticut.** — REED v. STEVENS (reported herewith) ante, 1081 (seisin; right to convey; encumbrances; warranty).

**Georgia.** — Davis v. Smith (1848) 5 Ga. 274, 48 Am. Dec. 279 (warranty).

**Illinois.** — Beebe v. Swartwout (1846) 8 Ill. 162 (quiet enjoyment); Sisk v. Woodruff (1853) 15 Ill. 15 (warranty); Moore v. Vail (1855) 17 Ill. 185 (warranty); Ohling v. Luitjens (1863) 32 Ill. 23 (warranty); Barry v. Guild (1888) 126 Ill. 439, 2 L.R.A. 334, 18 N. E. 759 (quiet enjoyment; warranty); Dugger v. Oglesby (1878) 3 Ill. App. 94, reversed on other grounds in (1881) 99 Ill. 405 (warranty).

**Indiana.** — Crance v. Collenbaugh (1874) 47 Ind. 256 (warranty); Sheetz v. Longlois (1880) 69 Ind. 491 (warranty); Rife v. Diamond Flint Glass Co. (1908) 42 Ind. App. 346, 85 N. E. 726 (encumbrances).

**Iowa.** — Funk v. Cresswell (1857) 5 Iowa, 62 (encumbrances); Jerald v. Elly (1879) 51 Iowa, 321, 1 N. W. 639 (seisin); Eversole v. Early (1890) 80 Iowa, 601, 44 N. W. 897 (warranty); Thorne v. Clark (1890) 112 Iowa, 548, 84 Am. St. Rep. 356, 84 N. W. 701 (warranty); Smith v. Keeley (1910) 146 Iowa, 660, 125 N. W. 669 (warranty).

**Kansas.** — Bedell v. Christy (1901) 62 Kan. 760, 64 Pac. 629 (quiet enjoyment); Walker v. Kirshner (1895) 2 Kan. App. 371, 42 Pac. 596 (warranty).

**Kentucky.**—Booker v. Meriwether (1823) 4 Litt. (Ky.) 212 (warranty); Hunter v. Keightley (1919) 184 Ky. 335, 213 S. W. 201.

**Maine.**—Dinsmore v. Savage (1878) 68 Me. 191 (encumbrances); Madocks v. Stevens (1896) 89 Me. 336, 36 Atl. 398 (encumbrances).

**Massachusetts.**—Hamilton v. Cutts (1808) 4 Mass. 349, 3 Am. Dec. 222 (warranty); Jenkins v. Hopkins (1829) 8 Pick. 346 (encumbrances); Whitney v. Dinsmore (1850) 6 Cush. 124 (warranty); Tibbetts v. Leeson (1888) 148 Mass. 102, 18 N. E. 679 (encumbrances).

**Michigan.**—Case v. Erwin (1869) 18 Mich. 434 (encumbrances) Seckler v. Fox (1893) 51 Mich. 92, 16 N. W. 246 (seisin); White v. Gibson (1906) 146 Mich. 547, 108 N. W. 1049 (encumbrances).

**Mississippi.** — Dyer v. Britton (1876) 53 Miss. 270 (warranty); Coopwood v. McCandless (1911) 99 Miss. 364, 54 So. 1007 (warranty).

**Missouri.**—Morgan v. Hannibal & St. J. R. Co. (1876) 63 Mo. 129 (warranty); Luther v. Brown (1896) 66 Mo. App. 227 (encumbrances; further assurance); Egan v. Martin (1897) 71 Mo. App. 60 (warranty); Mackenzie v. Clement (1910) 144 Mo. App. 114, 129 S. W. 730 (warranty); Thompson v. Conran (1916) — Mo. App. —, 181 S. W. 595 (encumbrances).

**New Hampshire.**—Breck v. Young (1841) 11 N. H. 485 (seisin).

**New Jersey.**—Ratkevicz v. Kara (1918) — N. J. —, 103 Atl. 912, affirming (1917) 88 N. J. Eq. 201, 102 Atl. 634 (encumbrances).

**New York.**—Greenby v. Wilcocks (1806) 2 Johns. 1, 3 Am. Dec. 379 (warranty); Folliard v. Wallace (1807) 2 Johns. 395 (warranty); Kelly v. Dutch Church (1841) 2 Hill, 105 (quiet enjoyment); Loughran v. Ross (1871) 45 N. Y. 792, 6 Am. Rep. 173 (seisin; quiet enjoyment); Fowler v. Poling (1849) 6 Barb. 165 (quiet enjoyment; warranty); Beyer v. Schultze (1887) 22 Jones & S. 212 (quiet enjoyment; warranty).

**North Carolina.**—Wilder v. Ireland (1860) 53 N. C. (8 Jones, L.) 85 (quiet enjoyment); Fishel v. Browning

(1907) 145 N. C. 71, 58 S. E. 759 (quiet enjoyment).

**Pennsylvania.** — Brick v. Coster (1842) 4 Watts & S. 494 (warranty); Spear v. Allison (1852) 20 Pa. 200 (quiet enjoyment); Stutt v. Building Asso. (1890) 12 Pa. Co. Ct. 344 (encumbrances).

**Rhode Island.**—Bowers v. Narragansett Real Estate Co. (1907) 28 R. I. 329, 67 Atl. 324 (encumbrances).

**Texas.**—Flanagan v. Ward (1854) 12 Tex. 209 (warranty); Norton v. Schmucker (1892) 83 Tex. 212, 18 S. W. 720 (warranty); Maverick v. Routh (1894) 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008 (warranty); Ward v. Nelson (1910) 62 Tex. Civ. App. 281, 131 S. W. 310 (warranty); Adams v. Cox (1912) — Tex. Civ. App. —, 150 S. W. 1195.

**Vermont.**—Phelps v. Sawyer (1826) 1 Aik. 150 (warranty); Williams v. Wetherbee (1826) 1 Aik. 233 (warranty); Williams v. Wetherbee (1827) 2 Aik. 329 (warranty); Judevine v. Pennock (1843) 15 Vt. 683 (encumbrances); Knapp v. Marlboro (1861) 34 Vt. 235 (quiet enjoyment); Swazey v. Brooks (1861) 34 Vt. 451 (warranty); Gleason v. Smith (1868) 41 Vt. 293 (warranty); Cummings v. Holt (1883) 56 Vt. 384 (encumbrances); Noyes v. Rockwood (1884) 56 Vt. 647 (encumbrances); Fleet v. Wait (1907) 80 Vt. 177, 66 Atl. 1031 (encumbrances); McKillop v. Burton (1909) 82 Vt. 403, 74 Atl. 78 (warranty).

**West Virginia.**—Smith v. Parsons (1890) 33 W. Va. 644, 11 S. E. 68 (warranty).

**Wisconsin.**—Mitchell v. Pillsbury (1856) 5 Wis. 407 (encumbrances).

**Canada.** — Schnare v. Zwicker (1898) 31 N. S. 177 (quiet enjoyment; warranty).

As stated in Noyes v. Rockwood (1884) 56 Vt. 647, the covenants in a deed are not that illegal or fictitious claims shall not be set up against the premises conveyed, but that no legal claims exist against them.

No covenant is intended to protect against interruptions subsequent to the conveyance, by persons not claiming lawfully. Mackintosh v. Stewart (1913) 181 Ala. 328, 61 So. 956.

The law will never presume that covenants in a deed apply to the wrongful claims of others, unless they are so expressed, because the law gives full protection against all such claims. *Folliard v. Wallace* (1807) 2 Johns. (N. Y.) 395.

The expenses incurred by the grantee in a suit to remove a cloud from his title are not recoverable in an action on the statutory covenant implied in the words "grant, bargain, and sell." *Luther v. Brown* (1896) 66 Mo. App. 227.

The exceptions to the general rule above stated exist—

—in the case of a covenant for further assurance, where the outstanding title is in the grantor himself (see *Luther v. Brown* (Mo.) *supra*);

—in the case of a covenant against encumbrances, where the defect in the outstanding encumbrance is remediable (see *Kelsey v. Remer* (1875) 43 Conn. 129, 21 Am. Rep. 638), or where there is an adverse possession which has not yet ripened into title (see *Mackintosh v. Stewart* (1913) 181 Ala. 328, 61 So. 956). It may be noted, however, that such a possession is no breach of a covenant of warranty (see *Noonan v. Lee* (Noonan v. Braley) (1863) 2 Black (U. S.) 499, 17 L. ed. 278; *Peters v. Bowman* (1878) 98 U. S. 56, 25 L. ed. 91; *Phelps v. Sawyer* (1826) 1 Aik. (Vt.) 150);

—in the case of a covenant of warranty, where the breach complained of is an outstanding legal title, to which there is an equitable defense (see *Smith v. Keeley* (1910) 146 Iowa, 660, 125 N. W. 669; *Mackenzie v. Clement* (1910) 144 Mo. App. 114, 129 S. W. 730; *Lane v. Fury* (1877) 31 Ohio St. 574).

#### **As breach of covenant of seisin.**

A covenant of seisin is not broken by the existence of a null and void deed. *REED v. STEVENS* (reported herewith) ante, 1081.

Or by the existence of a subsequent written contract from a former owner for the conveyance of the legal estate to another person than the grantee. *Seckler v. Fox* (1893) 51 Mich. 92, 16 N. W. 246.

Or by a third party's possession of part of the land under a mistake as to the boundary. *Stearns v. Jewel* (1915) 27 Colo. App. 390, 149 Pac. 846.

Or by a subsequent entry by a third person without color of title. *Breck v. Young* (1841) 11 N. H. 485.

#### **As breach of covenant of right to convey.**

The existence of a null and void deed is no violation of a covenant that the grantor has a good right to convey. *REED v. STEVENS* (reported herewith) ante, 1081.

#### **As breach of covenant against encumbrances.**

A covenant against encumbrances is not broken unless there is, at the time of the conveyance, a valid, legal, and subsisting lien. *Thompson v. Conran* (1916) — Mo. App. —, 181 S. W. 595; *Luther v. Brown* (1896) 66 Mo. App. 227; *Rife v. Diamond Flint Glass Co.* (1908) 42 Ind. App. 346, 85 N. E. 726; *Funk v. Cresswell* (1857) 5 Iowa, 62.

"To create an encumbrance the estate must be burdened with some right, title, or interest which the law will recognize and protect." *Dinsmore v. Savage* (1878) 68 Me. 191.

The existence of a null and void deed is a mere cloud upon the title and does not violate a covenant in a deed that the property conveyed is free from all encumbrances whatsoever. *REED v. STEVENS* (reported herewith) ante, 1081.

Such covenant is not broken by the existence of a title of record in a third person claiming under an inferior title. *Vorhis v. Forsythe* (1864) 4 Biss. 409, Fed. Cas. No. 17,004.

Or by the existence of an agreement on the part of the grantor to give a city 5 feet of the land for widening a street on condition that the work should be done within a limited time, where such time had expired prior to the conveyance of the premises. *Fleet v. Wait* (1907) 80 Vt. 177, 66 Atl. 1031.

The covenants of a deed are not violated by the existence of a contract giving a right of way to a railroad company, where such right of way was conditioned upon construction of

the road within twelve months, and the railroad had forfeited its rights by failure to construct the road within the time provided. *Hunter v. Keightley* (1919) 184 Ky. 835, 213 S. W. 201.

In order that a sale of the premises under a judgment may constitute a breach of a covenant against encumbrances such sale must have been valid. *Jenkins v. Hopkins* (1829) 8 Pick. (Mass.) 346.

But a grantee, who, in good faith, has paid the amount of a judgment rendered in an attachment suit in order to free the land from the lien created by the attachment, is entitled to recover the amount so paid in an action for a breach of covenant against encumbrances, although there was a defect in the levy of an execution upon the land and it was not certain that the party would discover that his levy was invalid and would cause another to be made during the existence of the attachment lien. *Kelsey v. Remer* (1875) 43 Conn. 129, 21 Am. Rep. 638.

A covenant against encumbrances is not broken by a mortgage which at the time of the conveyance had been paid off, although not discharged of record. *Judevine v. Pennock* (1843) 15 Vt. 683.

Or by a mortgage which, by reason of equities with notice of which the mortgagee was chargeable, was not enforceable against the granted premises. *Case v. Erwin* (1869) 18 Mich. 434.

A covenant against encumbrances is not breached by the existence of unpaid taxes unless such taxes were lawfully assessed (*Maddocks v. Stevens* (1896) 89 Me. 336, 36 Atl. 398; *Mitchell v. Pillsbury* (1856) 5 Wis. 407), or by an invalid tax title (*Rittmaster v. Richner* (1900) 14 Colo. App. 361, 60 Pac. 189; *Tibbetts v. Leeson* (1888) 148 Mass. 102, 18 N. E. 679; *White v. Gibson* (1906) 146 Mich. 547, 109 N. W. 1049; *Cummings v. Holt* (1883) 56 Vt. 384) even though the tax title has been adjudged paramount to that of the purchaser (*Lonergan v. Baber* (1894) 59 Ark. 15, 26 S. W. 13).

An action will not lie on a covenant against encumbrances to recover the

amount paid for a local improvement unless it appears that the cost of such improvement has been validly assessed against the abutting owner. *Bowers v. Narragansett Real Estate Co.* (1907) 28 R. I. 329, 67 Atl. 324.

A covenant against encumbrances is not broken by the existence of an unpaid municipal claim for water pipe not entered of record so as to preserve its lien upon the land against which it was assessed. *Stutt v. Building Asso.* (1890) 12 Pa. Co. Ct. 344.

A covenant against encumbrances is not broken by the wrongful occupation of the premises by a third person at the time of the conveyance. *Dinsmore v. Savage* (1878) 68 Me. 191; *Jerald v. Elly* (1879) 51 Iowa, 321, 1 N. W. 639.

So, a covenant against encumbrances is not broken by an outstanding lease which by its terms expired immediately upon the sale of the premises, although the lessee refuses to surrender possession to the purchaser upon demand. *Noyes v. Rockwood* (1884) 56 Vt. 647.

And a covenant against lawful and paramount encumbrances is not violated where the foundation of a building on the adjoining lot was, at the time of the conveyance, 9 inches over the line of the premises conveyed. *Ratkewicz v. Kara* (1918) — N. J. —, 103 Atl. 912, affirming (1917) 88 N. J. Eq. 201, 102 Atl. 634.

An implied covenant that the grantor was seised of an indefeasible estate in fee simple, free from encumbrances done or suffered by himself, is violated by an adverse possession, though such possession has not yet ripened into title, since the possibility that it may do so renders it an encumbrance upon the title from the moment of its commencement. "Covenants for title are always intended to guard against titles adverse to the covenantors, although they may result from the wrongful act of strangers." *Mackintosh v. Stewart* (1913) 181 Ala. 328, 61 So. 956.

**As breach of covenant for quiet enjoyment.**

A covenant for quiet enjoyment is not broken by a disturbance of posses-

sion, except by one having a superior right of possession. *Andrus v. St. Louis Smelting & Ref. Co.* (1888) 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645; *Claunch v. Allen* (1847) 12 Ala. 159; *Hoppes v. Cheek* (1860) 21 Ark. 585; *Beebe v. Swartwout* (1826) 8 Ill. 162; *Bedell v. Christy* (1901) 62 Kan. 760, 64 Pac. 629; *Kelly v. Dutch Church* (1841) 2 Hill (N. Y.) 105; *Wilder v. Ireland* (1860) 53 N. C. (8 Jones, L.) 85; *Fishel v. Browning* (1907) 145 N. C. 71, 58 S. E. 759; *Spear v. Allison* (1852) 20 Pa. 200; *Knapp v. Marlboro* (1861) 34 Vt. 235.

In such case, the remedy of the grantee is against the wrongdoer, and not the covenantor. *Bedell v. Christy* (1901) 62 Kan. 760, 64 Pac. 629, *supra*.

So, such a covenant is not breached by an entry, though by the grantor himself, if the entry was without claim of title. *Claunch v. Allen* (1847) 12 Ala. 159.

But where the covenantor himself does an act asserting title, it will constitute a breach of the covenant. *Beebe v. Swartwout* (1846) 8 Ill. 162.

To constitute a breach of a covenant of quiet enjoyment there must be a union of acts of disturbance and lawful title, and a possession by a mere intruder without color of title, through mistake as to the boundary, is no breach. *Hoppes v. Cheek* (1860) 21 Ark. 585.

A covenant for quiet possession is not broken by occupancy of the premises by a third person under an inferior title. *Andrus v. St. Louis Smelting & Ref. Co.* (1888) 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645.

#### **As breach of covenant for further assurance.**

An apparent outstanding title does not violate a covenant for further assurance unless the defect is one which can be supplied by the grantor himself. *Luther v. Brown* (1896) 66 Mo. App. 227.

#### **As breach of warranty.**

A covenantee cannot claim a breach of warranty by reason of the existence of an outstanding title purchased by him, or to which he has yielded posses-

sion, or under which he has been evicted, in a suit to which the covenantor was not a party, where such title is not paramount.

**Colorado.**—*Rittmaster v. Richner* (1900) 14 Colo. App. 361, 60 Pac. 189.

**Georgia.**—*Davis v. Smith* (1848) 5 Ga. 274, 48 Am. Dec. 279.

**Illinois.**—*Sisk v. Woodruff* (1853) 15 Ill. 15; *Moore v. Vail* (1855) 17 Ill. 185; *Barry v. Guild* (1888) 126 Ill. 439, 2 L.R.A. 334, 18 N. E. 759; *Dugger v. Oglesby* (1878) 3 Ill. App. 97, reversed on another point in (1881) 99 Ill. 405.

**Indiana.**—*Crance v. Collenbaugh* (1874) 47 Ind. 256; *Sheets v. Longlois* (1880) 69 Ind. 491.

**Iowa.**—*Eversole v. Early* (1890) 80 Iowa, 601, 44 N. W. 897.

**Kansas.**—*Walker v. Kirshner* (1895) 2 Kan. App. 371, 42 Pac. 596.

**Kentucky.**—*Booker v. Meriwether* (1823) 4 Litt. 212.

**Massachusetts.**—*Hamilton v. Cutts* (1808) 4 Mass. 349, 3 Am. Dec. 222; *Whitney v. Dinsmore* (1850) 6 Cush. 124.

**Mississippi.**—*Dyer v. Britton* (1876) 53 Miss. 270; *Coopwood v. McCandless* (1911) 99 Miss. 364, 54 So. 1007.

**Missouri.**—*Morgan v. Hannibal & St. J. R. Co.* (1876) 63 Mo. 129; *Egan v. Martin* (1897) 71 Mo. App. 60.

**New York.**—*Greenby v. Wilcocks* (1806) 2 Johns. 1, 3 Am. Dec. 379; *Fowler v. Poling* (1849) 6 Barb. 168; *Beyer v. Schultze* (1887) 22 Jones & S. 212.

**Texas.**—*Flanagan v. Ward* (1854) 12 Tex. 209; *Maverick v. Routh* (1894) 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008; *Ward v. Nelson* (1910) 62 Tex. Civ. App. 281, 181 S. W. 310.

**Vermont.**—*Williams v. Wetherbee* (1826) 1 Aik. 233; *Williams v. Wetherbee* (1827) 2 Aik. 329; *Swazey v. Brooks* (1861) 34 Vt. 451; *McKillop v. Burton* (1909) 82 Vt. 403, 74 Atl. 78.

**Canada.**—*Schnare v. Zwicker* (1898) 31 N. S. 177.

A covenant to convey title good and sufficient in law against all other claims must be construed to mean



"lawful claims." *Folliard v. Wallace* (1807) 2 Johns. (N. Y.) 395.

A covenant to warrant and defend against all persons claiming the granted premises can be construed as meaning only such persons as have valid claims, not pretenses of claims without legal foundation and right. *Gleason v. Smith* (1868) 41 Vt. 293.

A covenant of warranty "against the claims of all persons whatsoever" does not protect the grantee against damage by reason of an eviction by trespassers. *Fishel v. Browning* (1907) 145 N. C. 71, 58 S. E. 759.

The effect of a covenant of general warranty of title is only to bind the covenantor to warrant and defend against legal and rightful claims made adversely to the land, and not against such as are invalid and cannot be made to affect the right and title acquired by the grantee under the deed. *Brick v. Coster* (1842) 4 Watts & S. (Pa.) 494.

A covenant of warranty is intended to cover real claims, and not those which only appear to be real. *Mackenzie v. Clement* (1910) 144 Mo. App. 114, 129 S. W. 780.

A covenant of warranty is not broken by the existence of a null and void deed. *REED v. STEVENS* (reported herewith) ante, 1081.

Or by the assertion by a third person of an unfounded claim of title. *Tierney v. Whiting* (1875) 2 Colo. 620; *Stearns v. Jewel* (1915) 27 Colo. App. 390, 149 Pac. 846; *Norton v. Schmucker* (1892) 83 Tex. 212, 18 S. W. 720.

No breach of a covenant of warranty to defend against all persons lawfully claiming the whole or any part of the premises conveyed is disclosed by a complaint alleging that a third person claimed to own the property through a quitclaim deed made by the defendant some time before the deed under which the plaintiff holds was executed, and that when such quitclaim was made the defendant had no right or interest of any kind in the property. *Rittmaster v. Richner* (1900) 14 Colo. App. 361, 60 Pac. 189.

The failure of a vendor who paid an encumbrance on the premises and took  
5 A.L.R.—69.

a release thereof, to record the release or deliver it to his vendee, is not a breach of a warranty of title. *Adams v. Cox* (1912) — Tex. Civ. App. —, 150 S. W. 1195.

The covenantee cannot recover in an action on a covenant for general warranty the costs expended by him in the successful defense of a suit by an adverse claimant of the land (*Smith v. Parsons* (1890) 33 W. Va. 644, 11 S. E. 68; *Smith v. Keeley* (1910) 146 Iowa, 660, 125 N. W. 669); or the costs incurred by the covenantee in an action to obtain possession of the premises from a third person claiming it under a contract from the grantor's decedent to convey on certain conditions (*Gleason v. Smith* (1868) 41 Vt. 293); or the expense of an action brought by him to quiet title, although the evidence of the facts rendering the outstanding adverse claim invalid did not appear of record, but had to be obtained outside. *Thorne v. Clark* (1900) 112 Iowa, 548, 84 Am. St. Rep. 356, 84 N. W. 701.

But if the hostile title asserted against the grantee is a legal title in fact outstanding, but for equitable reasons not enforceable against him, he may maintain an action in equity to quiet the title as against such hostile claim, or, when it is asserted against him, interpose an equitable defense thereto; and although he is successful in thus defeating the outstanding legal title he is nevertheless entitled to recover against his grantor the reasonable expenses involved in quieting his title or making his equitable defense to the hostile title. *Smith v. Keeley* (1910) (Iowa) supra.

A grantee who has surrendered the premises to a purchaser upon a foreclosure which was void as to such grantee by reason of his not having been made a party has no claim for damages against his grantor upon his covenant of warranty. *Ohling v. Luitjens* (1863) 32 Ill. 23.

In order that a title by adverse possession may operate as a breach of a covenant of warranty, it must be a subsisting title at the date of the deed. *Phelps v. Sawyer* (1826) 1 Aik. (Vt.) 150; *Noonan v. Lee* (Noonan v.

Braley (1863) 2 Black (U. S.) 499, 17 L. ed. 278, and *Peters v. Bowman* (1878) 98 U. S. 56, 25 L. ed. 91.

But an outstanding legal title in a claimant is a lawful claim within the meaning of a covenant to defend against all lawful claims, although the claimant may be unable to recover the property because of an equitable defense. *Mackenzie v. Clement*

(1910) 144 Mo. App. 114, 129 S. W. 730.

And the covenantee may recover on a covenant of general warranty the expense incurred in obtaining the reformation of a deed in the grantor's chain of title, which was invalid in law for want of any sufficient acknowledgment. *Lane v. Fury* (1877) 31 Ohio St. 574. E. S. O.

C. A. BARTON, Respt.,  
v.  
I. R. WOODWARD et al., Appts.

*Idaho Supreme Court — July 11, 1910.*

(— Idaho, —, 182 Pac. 916.)

**Malicious prosecution — lunacy proceedings.**

1. An action for malicious prosecution lies against one who institutes a lunacy proceeding against another, maliciously and without probable cause.

[See note on this question beginning on page 1097.]

— effect of statute.

2. An action for malicious prosecution does not fall within the provisions of Comp. Laws, § 4055, subds. 4, 5.

[See 17 R. C. L. 734.]

**Appeal — question not before court.**

3. Whether the trial court erred in submitting the question of probable cause to the jury is not before this court when the instructions are not in the record.

[See 2 R. C. L. 137.]

**Malicious prosecution — want of probable cause — judgment as evidence.**

4. Judgment on the merits for the defendant in a lunacy proceeding is not evidence of want of probable cause.

[See 18 R. C. L. 39, 40.]

— burden of proof.

5. In an action for malicious prosecution it is incumbent upon the plaintiff to prove want of probable cause by preponderance of the evidence, and this may not be shown by proof of malice.

ecution it is incumbent upon the plaintiff to prove want of probable cause by preponderance of the evidence, and this may not be shown by proof of malice.

[See 18 R. C. L. 51.]

**Evidence — certificates authorizing practice of medicine.**

6. In an action for malicious prosecution, certificates admitting plaintiff to practise medicine in other states are not admissible in the absence of evidence tending to show his intention to engage in the practice there.

**Trial — introduction of evidence — waiver of motion for nonsuit.**

7. The introduction of evidence by defendant waives a motion for nonsuit because of the insufficiency of that introduced by plaintiff.

Headnotes 1-6 by MCCARTHY, Dist. J.

(Budge, J., dissents in part.)

**APPEAL** by defendants from a judgment of the District Court for Canyon County (Dunn, J.) in favor of plaintiff in an action brought to recover damages for malicious prosecution of a proceeding in lunacy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Alfred A. Fraser and John H. Norris for appellants.

Messrs. R. E. Haynes and Thompson & Bicknell, for respondent:

An action for malicious prosecution is an action not founded upon an instrument of writing, and is not one for an injury to the person.

Piller v. Southern P. R. Co. 52 Cal. 42; Sharp v. Miller, 54 Cal. 329; Wood v. Currey, 57 Cal. 208; Re Schreiber, 19 Idaho, 531, 37 L.R.A. (N.S.) 693, 114 Pac. 29.

The discharge of the plaintiff was prima facie evidence of the want of probable cause, so that it was incumbent upon defendants to show that they had probable cause for instituting insanity proceedings.

Olson v. Tvete, 46 Minn. 225, 48 N. W. 914; Chapman v. Dodd, 10 Minn. 350, Gil. 277; Price v. Denison, 95 Minn. 106, 103 N. W. 728; Tabert v. Cooley, 46 Minn. 366, 13 L.R.A. 463, 49 N. W. 124; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45.

Probable cause is a mixed question of law and fact.

Jackson v. Bell, 5 S. D. 257, 58 N. W. 671; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506.

Plaintiff was entitled not only to actual damages, but punitive damages.

Spear v. Hiles, supra; Brown v. Evans, 8 Sawy. 488, 17 Fed. 912.

McCarthy, District Judge, delivered the opinion of the court:

This is an action to recover damages for malicious prosecution of a lunacy proceeding.

A demurrer was filed to the complaint on two grounds: First, that it did not state facts sufficient to constitute a cause of action; and, second, that the action was barred by Comp. Laws, § 4055, subds. 4 and 5. The Statutes of Limitation were also pleaded in the answer. The cause was tried to a jury, and resulted in a verdict and judgment for plaintiff. This appeal is from the judgment.

The record discloses that a hearing was had before the probate judge on April 21, 1911, and on the same day respondent was discharged. This action was commenced on August 5, 1913. Appellants contend that the action is

barred by subdivisions 4 and 5, § 4055, Comp. Laws, which limit the time within which certain actions may be brought to two years, and which are as follows:

"(4) An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.

"(5) An action for libel, slander, assault, battery, false imprisonment or seduction."

It is urged that the action is for an injury to the person, or that it is so clearly akin to an action for libel or slander as to make the statute with reference thereto applicable.

While it may be said that an action for malicious prosecution bears a strong resemblance to an action for libel (Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 281, 2 Atl. 513; Chapman v. Calder, 14 Pa. 365; 26 Cyc. 7 and 8), they are not identical.

The cases which have been cited in an endeavor to show that a malicious prosecution is an injury to the person construe statutes which contain language not found in ours, and are, consequently, of little assistance in reaching a correct interpretation of the subdivision relied on.

Comp. Laws, § 4055, subd. 4, fixing two years as the period of limitation, prior to amendment, contained the following provision: "An action to recover damages for the death of one caused by the wrongful act of another."

Subdivision 4 was amended by Sess. Laws 1903, p. 56, so as to contain the provision herein first quoted.

Construing the statute as amended in the light of the law as it was prior to amendment, it is clear that this subdivision was originally designed to limit the time of commencement of actions for physical injuries resulting in death, and that the amendment was made to extend the statute to include, and to limit

actions based upon, like injuries which did not result in death. It follows that the present action is not barred by either subdivision 4 or 5 of § 4055, supra.

The contention with respect to the general demurrer is that respondent has no cause of action against either of the appellants for the reason that he was not charged with, nor prosecuted for, any crime; that no civil action was commenced or prosecuted against him; and that this action will only lie where there has been a malicious prosecution of a criminal or civil action. While there are authorities which go to the extent of so holding, the modern and better rule is to the effect that an action for malicious prosecution will lie against one who has maliciously and without probable cause instituted

—lunacy proceedings.

proceedings against another. Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58; Kellogg v. Cochran, 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677; Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672; 26 Cyc. 14.

Appellants contend that the court erred in submitting the question of probable cause to the jury; but, as the instructions are not before us, the record presents no such question for review.

Appellants specify the insufficiency of the evidence to support the verdict and judgment. In this connection it may be said there are decisions to the effect that the discharge of the defendant on preliminary examination is prima facie evidence of want of probable cause. Without discussing the soundness of that rule, it may be said it has no application to this case. The hearing had before the probate judge was a final trial, not a preliminary examination, and even these authorities do not go so far as to hold that a verdict or judgment of acquittal on the merits constitutes proof of want of probable cause for the

commencement of the action. 26 Cyc. 40, c.

In a trial on the merits in a civil or criminal case, or in a lunacy proceeding, the question of probable cause is not passed on by the court, judge, or jury; nor is it the criterion of the decision or verdict. The decision is on the merits, and, if the defendant wins, it simply means that the plaintiff has not proved his case by the preponderance of the evidence or beyond a reasonable doubt. Therefore the verdict or decision has no logical bearing on the question of probable cause and is not even admissible on that issue. It is admissible simply for the purpose of proving final and favorable termination of the action, which is another and separate question.

Malicious prosecution—want of probable cause—judgment as evidence.

We find no proof of want of probable cause in the evidence submitted by respondent, and conclude that the motion for a nonsuit should have been sustained. Since appellants did not rest upon the motion, but introduced evidence, it is waived. The question then arises:

Trial—introduction of evidence—waiver of motion for nonsuit.

Does the evidence introduced by them supply the weakness in respondent's case and show want of probable cause? Our answer to this is, No. The evidence introduced by appellants certainly does not tend to show want of probable cause. On the other hand, it is shown that, prior to the making of the accusation, two reputable physicians, who had attended respondent and thus had recent opportunity to examine him and to judge of his mental condition, told one of the appellants, and he told the other, that respondent was insane. It is also shown that, on an occasion when respondent was before the Idaho state medical board, an applicant for a license to practise medicine and surgery, his conduct was such as to excite the suspicion of those who observed it, including

Appeal—question not before court.

one of appellants, as to his mental balance; also, that shortly prior to his arrest on the insanity charge, it came to the knowledge of appellants that he had written prescriptions which are referred to in the record as "freakish," one of which was for strychnine in doses which, had one of them been taken by the patient for whom it was intended, would have proved fatal; another was for an eye wash which, had it been applied, would have ruined or destroyed the eyesight. On the lunacy hearing the commission of physicians appointed to examine him reported that he was suffering from paranoia, but recommended that he be not restrained. We conclude that respondent did not sustain the burden incumbent upon him, and that no court or jury could reasonably find from the evidence introduced that, in making the lunacy accusation against him, appellants acted without probable cause.

It is true there is evidence which would justify a finding of malice, but it is too well established to admit of argument that want of probable cause cannot be inferred from malice. It has been said in some cases that the fact that a criminal case is prosecuted from some private or personal motive, other than a public motive, is of itself evidence of want of probable cause. This is not a logical statement. Probable cause depends upon what the prosecuting witness knew, or ought, as a reasonably prudent man, to have known, when he instituted the proceeding. If he had no sufficient information to justify a reasonably prudent man in believing the defendant was guilty, then the inference may be drawn that he was acting from an improper motive. However, improper motive is proof of malice, but not, of itself, proof of want of probable cause. Moreover, an examination of the cases just above referred to discloses that in almost every instance the evidence showed facts within the knowledge of the prose-

cuting witness which proved that he acted without probable cause.

Since appellants did not ask for a directed verdict at the close of the evidence, it is not incumbent upon this court to finally dispose of the case on this appeal. We conclude the evidence is insufficient to establish want of probable cause.

For the instruction of the trial court upon a new trial, we express the opinion that the certificates of admission to practise medicine in other states, offered by respondent and admitted by the trial court over appellants' objection, are not admissible in the absence of evidence tending to show his intention to engage in the practice there. They do not prove a right of the respondent to practise medicine in this state. They are not legitimate evidence of damage to respondent's business; we do not consider that they are any evidence of damage to his reputation or his feelings. While not legally relevant or material, they are exceedingly prejudicial. They serve to inject into the case a question of whether the refusal of the medical board to admit the respondent to practise in this state was right or wrong and prejudice appellants, inasmuch as one of them was a member of the medical board and also filed a complaint against respondent for practising medicine without a license, acting under the orders of the medical board.

**Evidence—  
certificates authorising practice of medicine.**

The judgment of the trial court is reversed, and the case remanded, with instructions to grant a new trial. Costs awarded to appellants.

Morgan, Ch. J., concurs.

Budge, J., concurring in part and dissenting in part:

Some time ago this case was assigned to me for the purpose of writing an opinion. I prepared an opinion, setting forth my views on the whole case. Inasmuch as that portion of my original draft which related to the question of the Statute of Limitations, and the absence of

the court's instructions from the record, has been embodied in the majority opinion, I concur to that extent. As to the remainder of the majority opinion, I dissent.

I am clearly of the opinion that there is sufficient evidence in this record to sustain the jury's finding that the appellants instituted the lunacy proceeding without probable cause. While the rule is well settled that the plaintiff has the burden of establishing want of probable cause, since want of probable cause involves a negative, slight proof thereof is all that the law requires (18 R. C. L. 52, § 32; Vinal v. Core, 18 W. Va. 1, 41; Chapman v. Dodd, 10 Minn. 350, Gil. 277, 291; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644, 647; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 626, 71 N. W. 558; Grant v. Deuel, 3 Rob. (La.) 17, 38 Am. Dec. 228; 26 Cyc. 85, note 21), or, as stated by the supreme court of Montana: "When the proof tends to show the absence of the former [probable cause], a prima facie case is made for the jury. The burden then rests upon the defendant to rebut this prima facie case; and this he must do by any evidence tending to show the existence of probable cause and the want of malice on his part." Martin v. Corscadden, 34 Mont. 308, 319, 86 Pac. 36.

Interpreting this rule, the Supreme Court of the United States has said that it requires the plaintiff to prove this part of the case by only such circumstances as are affirmatively within the plaintiff's control, and that he may be fairly expected to be able to produce. Discussing the point in a recent case, that court said: "While it is true that the want of probable cause is required to be shown by the plaintiff and the burden of proof is upon her in this respect, such proof must necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution

are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. 1 Greenl. Ev. § 78. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise, as are affirmatively within her control, and which she might fairly be expected to be able to produce. As Mr. Justice Clifford put it, in *Wheeler v. Nesbitt*, 24 How. 544, 16 Led. 765, the plaintiff must prove this part of the case 'affirmatively, by circumstances or otherwise, as he may be able.'" *Brown v. Selfridge*, 224 U. S. 189, 192, 56 L. ed. 727, 729, 32 Sup. Ct. Rep. 444, 446.

Thus it had been held that proof tending to show that the prosecution was to accomplish some collateral purpose is sufficient to establish a prima facie want of probable cause and to impose on the defendant in an action for malicious prosecution the burden of showing that he had probable cause. 18 R. C. L. 53, § 34; *Prough v. Entriken*, 11 Pa. 81; *Schmidt v. Weidman*, 63 Pa. 173; *Wenger v. Phillips*, 195 Pa. 214, 78 Am. St. Rep. 810, 45 Atl. 927; *MacDonald v. Schroeder*, 214 Pa. 411, 6 L.R.A.(N.S.) 701, 63 Atl. 1024, 6 Ann. Cas. 506.

In the latter case, the court used the following language: "Nothing is better settled by our cases than that, where one commences a criminal prosecution for the purpose of compelling his debtor to pay a just debt, it is prima facie evidence of want of probable cause and of malice, and shifts the burden of showing it was not so on the defendant."

No reason is apparent to my mind for limiting the rule to cases arising upon debt. The principle upon which the rule is based, and the reason for holding that proof that the prosecution was instituted for the purpose of collecting a debt is

sufficient to make out a prima facie want of probable cause, are that it shows a collateral purpose. In other words, if the proof tends to show in any case that the prosecutor was seeking to accomplish some collateral purpose, a prima facie want of probable cause is established. The rule is doubtless based upon the psychological truth that a person seeking to accomplish some collateral or ulterior purpose will act upon much less convincing evidence than one whose only purpose is to promote the public good. Hence there may be much evidence which tends to show both malice and want of probable cause, and the cases which hold that probable cause cannot be inferred from malice do not go to the extent of holding that a want of probable cause may not be inferred from the same evidence from which malice is inferred. It is a matter of frequent occurrence in the trial of causes that some particular piece of evidence may be admissible for more than one purpose. Evidence that a prosecution was to accomplish some collateral purpose is one instance thereof; for the attempt to use the machinery provided for the enforcement of the law to accomplish and cloak some private collateral or ulterior purpose, while evidence of express malice, is also some evidence that the prosecutor is acting without probable cause.

The evidence of express malice in this record is overwhelming, and much of this evidence expressly shows that the lunacy proceeding was instituted to accomplish a private collateral and ulterior purpose. The statements of appellants, that they would "get him yet," referring to respondent; that they wanted to get him because he was interfering with their business; the institution of a criminal proceeding against respondent shortly before the lunacy proceeding and at a time when all of the facts, according to appellants' own testimony, upon which they pretended to base their belief that respondent was insane, were in their possession; the statement of appel-

lant J. C. Woodward, in reply to witness Hinkston's question inquiring what he had against Dr. Barton, that "he was turning the poorer classes of people against him;" the evidence touching various medical examinations,—all tend to show that the appellants were seeking, not only to put respondent out of any competition with them, but to put him out of business entirely and to put him in a situation where it would forever be impossible for him to become admitted to the practice of medicine in this state. To say that this evidence is evidence of malice is no answer to the argument that it also shows affirmatively, if not conclusively, a private, collateral, and ulterior purpose on the part of appellants. It is therefore sufficient to establish a prima facie showing of want of probable cause. Furthermore, it is clearly apparent from these statements made by appellants concerning respondent, not only that they had no probable cause to believe him insane, but did not in fact entertain any such belief.

The fact that some of this evidence was adduced while appellants were putting in their defense does not change the applicability of the rule. The motion for nonsuit at the close of respondent's case having been denied, and appellants having elected to put in their defense, the jury was not only entitled but was in duty bound to consider all of the evidence in the case.

Since there is evidence sufficient in law to establish a prima facie showing of want of probable cause, the fact that there is other evidence tending to show probable cause is not material. The jury may have disbelieved and disregarded all of the evidence introduced to show probable cause. Inasmuch as the evidence is conflicting, the fact that there is substantial evidence to sustain the verdict is all that the law requires.

In the majority opinion it is stated that two physicians who are alleged to have examined respondent

informed one of the appellants, who informed the other, that respondent was insane. It does not appear from the evidence that either of these physicians gave the appellants any information as to the facts and circumstances upon which they based their belief as to respondent's insanity. It was the duty of appellants, before making the charge of insanity, to have made an investigation such as prudent and cautious men would have made under like circumstances. They were themselves physicians and saw respondent in the town of Payette almost daily for a year after Dr. Phy, one of the above-mentioned physicians, is alleged to have told one of them that the respondent was insane. They were equally competent to judge as to his insanity, but the record discloses that they made no effort to investigate the facts with a view of ascertaining the truth of the claim made by their informers that respondent was insane. The commission which was called to examine respondent, upon the hearing involving the question of his sanity, was composed of three physicians, who reported to the court that respondent was slightly paranoiac. All of the physicians reached the conclusion that the charge in the complaint was not true, and the court found that the charge was not sustained.

The evidence concerning respondent's conduct before the Idaho state medical board establishes nothing more than that he was of a highly nervous temperament.

Touching the matter of the two written prescriptions, referred to in the majority opinion as "freakish," the one which was for strychnine was satisfactorily explained, and the most that could be said of it is that it was a mistake, or an act of carelessness, which was immediately corrected by respondent when his attention was called to it. The one for the eye wash was never used, and the record is very meager with reference to it. Suffice it to say that these were the only prescriptions

written by respondent, so far as the record discloses, that were questioned. It does not seem to me that this proof, offered on the part of appellants, is sufficient to establish probable cause, when considered in the light of the entire record.

Certificates authorizing the respondent to practise medicine in certain other states, and a diploma issued to respondent by the Jefferson Polytechnic Hospital of Chicago, were introduced in evidence, over appellants' objection, and their admission is assigned as error; the theory of appellants being that the only purpose in offering this evidence was to give the jury the false impression that respondent was authorized to practise medicine, and to prejudice the jury. The objection is not well taken.

As the case stands before us, it presents a situation in which appellants wantonly, maliciously, and without probable cause, preferred a charge of lunacy against respondent. The complaint alleges injury to respondent's credit, reputation, and avocation as a physician and surgeon, injury to his good name, fame, and reputation generally, and to his practice of optometry; that he was brought into public scandal, infamy, and disgrace, and suffered great anxiety and pain of body and mind, by reason of which his health was greatly impaired. The exhibits are the concrete evidence of years of study and preparation for his chosen profession. Certificates and diplomas of this character have a direct tendency to add to the standing of their possessor wherever he may be. It would be difficult to imagine a tort more calculated to inflict mental anguish and humiliation than a baseless charge of this character, the results of which, even if unsuccessful, as in this case, would naturally be to wipe out, in some measure, the results of years of toil, study, and preparation.

While respondent was not licensed to practise medicine in the state of Idaho, these certificates



neither proved nor tended to prove, nor were they offered for the purpose of proving, that he was so licensed. He is not seeking to recover damages solely to his business, but damages generally for injury to his standing, reputation, and his feelings. The presumption is that the court instructed the jury as to the purpose for which these certificates were admitted.

The injury and the damage caused by this charge, for which respondent is entitled to recover, is not confined solely to any damages he may sustain within the state of

Idaho, but is limited only by the whole extent of the injury and damage caused. Should respondent desire at any time to return to either of the states wherein he has been admitted to practise, and pursue there his profession, or should he be called there, which is neither unlikely nor unusual, a charge of this character could not help but cause serious and far-reaching impairment of his professional standing.

For the foregoing reasons, it is my opinion that the judgment should be affirmed.

### ANNOTATION.

#### Action for malicious prosecution for instituting lunacy proceedings.

The present note is confined to the question whether the institution of a lunacy proceeding furnishes a basis for an action for malicious prosecution, and does not consider collateral questions, such as the existence of malice or want of probable cause.

The institution of a lunacy proceeding maliciously and without probable cause is, according to all the cases which have passed upon the question, ground for an action for malicious prosecution. *BARTON v. WOODWARD* (reported herewith) ante, 1090; *Lockenour v. Sides* (1877) 57 Ind. 360, 26 Am. Rep. 58; *Treloar v. Harris* (1917) — Ind. App. —, 117 N. E. 975; *Davenport v. Lynch* (1859) 51 N. C. (6 Jones, L.) 545; *Suhre v. Kott* (1917) — Tex. Civ. App. —, 193 S. W. 417. At least, the institution of a lunacy proceeding is ground for an action for malicious prosecution where it occurs in furtherance of a conspiracy to injure the person against whom it is brought. *Davenport v. Lynch* (1859) 51 N. C. (6 Jones, L.) 545; *Smith v. Nippert* (1890) 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846, s. c. on second appeal (1891) 79 Wis. 185, 48 N. W. 253.

An action was held to lie for a conspiracy in issuing a commission in lunacy in *Turner v. Turner* (1818) Gow, N. P. (Eng.) 20.

An action for malicious prosecution in causing a person to be unlawfully

arrested and committed to an insane asylum was sustained in *Kellogg v. Cochran* (1890) 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677; but the only ground of demurrer argued was that the plaintiff had not the legal capacity to sue. The court, however, adds that no particular in which the complaint failed to state a cause of action had been suggested or discovered.

That the institution of a lunacy proceeding is ground for an action for malicious prosecution is admitted or assumed in other cases that have had for decision collateral questions, such as the existence of malice or want of probable cause (*Griswold v. Griswold* (1904) 143 Cal. 617, 77 Pac. 672; *Hiersche v. Scott* (1901) 1 Neb. (Unof.) 48, 95 N. W. 494; *Figg v. Hanger* (1903) 4 Neb. (Unof.) 792, 96 N. W. 658 [action dismissed by court because there was no proof of want of probable cause]; *Manz v. Klippel* (1914) 158 Wis. 557, 149 N. W. 375), or whether the advice of an attorney is a defense (*Biddle v. Jenkins* (1901) 61 Neb. 400, 85 N. W. 392; *Manz v. Klippel* (Wis.) supra).

An action was sustained in *Dobbin v. Decow* (1875) 25 U. C. C. P. 18, for malicious arrest against one who maliciously and without probable cause procured a warrant to recommit another, who had escaped from an insane asylum, where, on the next day,

the plaintiff was discharged, after a medical examination, as being sane.

The action for malicious prosecution lies even though there is no arrest of the person. *Lockenour v. Sides* (1877) 57 Ind. 360, 26 Am. Rep. 58.

The fact that a statute authorizes the making of an affidavit that a person is insane is no defense. *Suhre v. Kott* (1917) — Tex. Civ. App. —, 193 S. W. 417. A statute empowering any person to represent in writing to the probate court that another is insane was involved in the following cases sustaining an action for malicious prosecution of a lunacy proceeding, but there is no discussion of the effect of the statute: *Lockenour v. Sides* (Ind.) supra; *Treloar v. Harris* (1917) — Ind. App. —, 117 N. E. 975; *Biddle v. Jenkins* (1901) 61 Neb. 400, 85 N. W. 392.

In *Lockenour v. Sides* (Ind.) supra, it was claimed that there could be no recovery for the institution of lunacy proceedings for the reason that the proceedings to test the plaintiff's sanity were not criminal proceedings, and he was not arrested or in any manner deprived of his personal liberty, nor was his property interfered with; and as to the expense to which he was put, he was fully indemnified by his judgment for costs against the parties filing the complaint. The court reviews the cases passing upon the right to maintain an action for maliciously and without probable cause prosecuting a mere civil action, and concludes that, according to the better theory, such an action lies, but states, with reference to the lunacy proceedings, that "the proceedings to procure the plaintiff to be found insane and to place him under guardianship are not entirely like a civil action in which the plaintiff therein claims some right in his own behalf. If the proceedings were instituted and carried on by the defendants maliciously and without probable cause, as alleged, the defendants were officious intermeddlers, without any claim of right or interest in the matter, and they are in our opinion liable to the plaintiff for the damages in excess of the taxable costs sustained by him by means of the pro-

ceedings." In *Treloar v. Harris* (1917) — Ind. App. —, 117 N. E. 975, the person accused of being insane was arrested and confined for several days prior to the trial. It was urged in this case that a proceeding under the statute to determine whether the person was of unsound mind and entitled to treatment in the insane hospital of the state is not a civil action, but a special proceeding, extrajudicial in character, the institution or prosecution of which does not authorize an action for malicious prosecution. The court denies the contention, holding that the institution of the lunacy proceedings maliciously and without probable cause affords the basis of an action for malicious prosecution, stating that "the gist of the action for malicious prosecution is that the 'plaintiff has been improperly made the subject of legal process to his damage.'"

. . . The essential element for such an action is a malicious prosecution of some legal proceeding without probable cause, before some judicial officer or tribunal. The scandal or the humiliation, vexation, and expense resulting to the person thus wrongfully prosecuted furnishes the ground upon which an action for malicious prosecution will lie."

The affidavit in *Suhre v. Kott* (1917) — Tex. Civ. App. —, 193 S. W. 417, was filed before a justice of the peace, who issued a warrant for the arrest of the alleged insane person; it was urged to be a justification of the affidavit that the justice of the peace exercised judicial discretion in issuing a warrant for the arrest of the alleged incompetent, but this contention is denied, the court stating that if that were the law, there could be no case in which damages for malicious prosecution could be recovered. It is further stated that "the statute provides for the county judge exercising discretion as to issuing a warrant when an affidavit of lunacy is made, but no such provision applies in the case of the justice of the peace. It was evidently the intention of the statute to lodge the discretion as to imprisoning a man for lunacy with the county judge, and not with a justice of the

peace, for the language is not used in connection with the latter, and the law requires him to make his writ returnable to the county judge, who is the ultimate arbiter as to the fate of the man charged with lunacy. As before stated, even if the justice of the peace had the power to refuse to issue the writ, he did not do it in this case, and no such high premium is put upon the wisdom, prudence, and discretion of a justice of the peace that his acceding to the request of appellants would shield them from liability." Discussing generally the nature of an action for malicious prosecution, the court states that "the essence of the action for malicious prosecution is causing legal process to regularly issue for the mere purpose of vexation, annoyance, or injury; and three elements are required to establish a case of malicious prosecution: First, that the suit was instituted with malice; second, that it was brought without probable cause; and, third, that the malicious action has terminated in the acquittal or discharge of the person claiming damages." It is then stated that the three essentials mentioned were alleged in the petition in this case.

In *Davenport v. Lynch* (1859) 51 N. C. (6 Jones, L.) 545, where the action was based upon maliciously suing out inquisitions of lunacy and also for conspiracy in suing out process to have the plaintiff declared a lunatic with a view and for the purpose of coercing him to make a different disposition of his property from that which he willed, the court states: "We think . . . that his Honor might well have left it to the jury to infer malice and an evil motive throughout from the want of probable cause,—the utter groundlessness for the successive applications by the defendants for the proceedings in lunacy. But we suppose as the testimony is not given that it was not necessary to submit the case in that point of view to the jury, because the court put the case on the ground of an express malicious and combined purpose in the defendants to pervert the proceedings in lunacy to effect the ends of unjustly harassing

the plaintiff, separating his grandson from him, and indirectly impeaching the validity of his will after death instead of being bona fide for the purpose of having due care taken of the person and property of one really incapable of managing his affairs. In such a case of real conspiracy to vex a person who appears to be in no way a proper subject for such proceedings, the actors can in no degree be justified or excused by any professional advice, for such advice is only evidence to rebut the imputation of malice implied, and therefore does not palliate the wrong done upon an express and formal design to oppress, though done under color and pretense of such advice."

The element of conspiracy seems to be the chief ground of decision in *Smith v. Nippert* (1890) 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846, s. c. on second appeal (1891) 79 Wis. 135, 48 N. W. 253. In that case there was held to be a cause of action stated in a complaint which alleged in substance that the defendants, maliciously conspiring together with intent to injure, defame, and destroy the character of the plaintiff and to deprive her of her means of support, and to force her to leave the community where she lived, wilfully, maliciously, and falsely sued out an inquisition of lunacy against her for the purpose of driving her from where she dwelt, and by maliciously causing it to be believed that she was insane and not a proper person to be employed or introduced in the households where she had theretofore found employment. Another object of the conspiracy was alleged to be to destroy the plaintiff's testimony in a criminal prosecution against one of the defendants. The court states that this complaint "clearly alleges an illegal conspiracy and an attempt to pervert the inquisition of lunacy to a most unlawful purpose to the actual damage of the plaintiff. But damage sustained is the gravamen of the complaint. Now the question is, Does not such an agreement between the defendants wrongfully injure or prejudice the plaintiff in the community where she obtained employment by causing it to

be believed that she was insane, whether they acted from malicious or vindictive feeling towards her or maliciously intended to accomplish unlawful purposes by improper means, where damage results, constitute an actionable wrong? It would seem to be a reproach upon the law if the agreement to do these things and the actual doing of them could not be redressed

at the suit of the aggrieved party. This is not an action for a mere conspiracy where nothing has been done to accomplish the unlawful purpose, but the facts show that the defendants have proceeded to acts which it is alleged greatly injured the plaintiff in her reputation and business, and brought her into public disgrace."

W. A. E.

## FLORENCE S. FRIEND

v.

## CHILDS DINING HALL COMPANY.

*Massachusetts Supreme Judicial Court — September 11, 1918.*

(231 Mass. 65, 120 N. E. 407.)

### Sale — food — warranty of fitness.

1. The rule that it is an implied term in every sale of provisions by a dealer for immediate use, where the selection is not made by the buyer, that the food is fit for consumption, applies to food furnished by the keeper of a restaurant to a patron, to be consumed on the premises.

[See note on this question beginning on page 1115.]

### Food — duty of keeper of restaurant.

2. It is the implied duty of the keeper of an eating house to furnish patrons with food fit to eat.

[See 11 R. C. L. 1118; 14 R. C. L. 510.]

### Innkeeper — relation to guest.

3. The relation between guest and host in a public house is one of contract.

[See 14 R. C. L. 499, 500, 513.]

### Food — unfit — merchantability.

4. Food for immediate use which is not fit to eat is not merchantable as food.

### Common law — what is.

5. A common-law rule not changed when the settlers emigrated to the New World became part of the common law of the country, whether its origin was custom or statute.

### Definition — victuals.

6. The word "victuals" commonly means food ready to eat, and "victualer" means one who supplies food or drink prepared for consumption on the premises.

### Innkeeper — ground of liability to guest.

7. The liability of the proprietor of an eating house to his guest for serv-

ing bad food rests upon an implied term of the contract, and does not sound exclusively in tort, although he may be held for negligence if that be proved.

### Evidence — sufficiency — stones in beans.

8. The jury may find that beans which contain stones similar in size and appearance to the beans are not proper to be served as food by a restaurant keeper.

### Food — failure to exercise due care — effect.

9. The liability of the keeper of a restaurant for breach of his contract to furnish fit food to a patron is not affected by failure of the patron to exercise due care with respect to partaking of it.

### Trial — question of fact — harmful substance in food.

10. The jury must determine whether or not, on all the facts of the case, a patron of a restaurant, injured by foreign substances in the food, made a rational investigation respecting the character of the food furnished, and whether or not the noxious character of the thing which caused the harm ought to have been discovered.

— stones in beans — liability.

11. The keeper of a restaurant is liable in damages for injury to a pa-

tron by stones in beans furnished the patron for immediate consumption upon the premises.

(Crosby, J., dissents.)

**REPORT** by the Superior Court for Suffolk County (Bell, J.) for the determination by the Supreme Judicial Court of questions arising upon direction of a verdict for defendant in an action brought to recover damages for breach of an implied warranty of fitness of food served by defendant at his restaurant. *Verdict entered for plaintiff.*

The facts are stated in the opinion of the court.

Messrs. James H. Baldwin and Charles H. Donahue, for plaintiff:

A recovery can be had in an action of contract because, just as there was an implied condition of soundness in a sale, even before the Sales Act, when the selection was left to the dealer, so there is an implied condition of soundness in a contract to serve food to be eaten on the premises.

Roberts v. Anheuser Busch Brewing Asso. 211 Mass. 450, 98 N. E. 95; Farrell v. Manhattan Market Co. 198 Mass. 274, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 178, 100 N. E. 1078, Ann. Cas. 1914B, 884; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; Leahy v. Essex Co. 164 App. Div. 903, 148 N. Y. Supp. 1063; Race v. Krum, 162 App. Div. 911, 146 N. Y. Supp. 198, 163 App. Div. 924, 147 N. Y. Supp. 818; Norton v. Doherty, 8 Gray, 372, 63 Am. Dec. 758.

Mr. Fitz-Henry Smith, Jr., for defendant:

There is no "sale" of the food served or furnished by a restaurant keeper, and the provisions of the Sales Act, so-called, and of the law of sales, relating to implied warranties, do not apply to a restaurant keeper.

Merrill v. Hodson, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; Clancy v. Barker, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, 16 Am. Neg. Rep. 664.

If it be held that there is a "sale" of food by a restaurant keeper, there is no implied warranty that the food served or furnished by him is wholesome and free from foreign substance.

Farrell v. Manhattan Market Co.

198 Mass. 283, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 179, 100 N. E. 1078, Ann. Cas. 1914B, 884; Valeri v. Pullman Co. 218 Fed. 519; Merrill v. Hodson, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; Travis v. Louisville & N. R. Co. 183 Ala. 415, 62 So. 851; Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253.

A restaurant keeper serves cooked food for consumption on the premises; he does not sell "provisions" to be cooked by the purchaser, and is not a "dealer."

Gearing v. Berkson, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785; Giroux v. Stedman, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538; Merrill v. Hodson, 88 Conn. 321, L.R.A. 1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; Farrell v. Manhattan Market Co. 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142.

The only representation, if any, by a restaurant keeper, in respect of food served or furnished by him, is that he believes the food to be sound, and there is no liability, in the absence of proof of knowledge on the part of the restaurant keeper, that the food was not fit to be eaten.

Farrell v. Manhattan Market Co. supra; Travis v. Louisville & N. R. Co. 183 Ala. 424, 62 So. 851; Roberts v. Anheuser Busch Brewing Asso. 211 Mass. 449, 98 N. E. 95; Wilson v. J. G. & B. S. Ferguson Co. 214 Mass. 265, 101 N. E. 381.

A restaurant keeper is not an insurer of the food served or furnished by him, and is liable only for knowingly or negligently furnishing deleterious food.

Beale, Innkeepers & Hotels, § 169;

22 Cyc. 1081; 16 Am. & Eng. Enc. Law, 2d ed. 547; *Valeri v. Pullman Co.* 218 Fed. 519; *Merrill v. Hodson*, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; *Travis v. Louisville & N. R. Co.* 183 Ala. 415, 62 So. 851; *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 179, 100 N. E. 1078, Ann. Cas. 1914B, 884.

If it be held that there is a "sale" of food by a restaurant keeper, there is no implied warranty as regards defects which an examination ought to have revealed, and an examination by the plaintiff before she attempted to eat the beans would have revealed that the dark objects were stones.

*Invans v. Laury*, 67 N. J. L. 153, 50 Atl. 355; *Mixer v. Coburn*, 11 Met. 562, 45 Am. Dec. 230; *Inter-State Grocer Co. v. George William Bentley Co.* 214 Mass. 232, 101 N. E. 147; *Williston, Sales*, § 234.

*Rugg, Ch. J.*, delivered the opinion of the court:

The plaintiff introduced evidence tending to show that the defendant kept a restaurant in Boston, which she entered, and ordered from a waitress of the defendant from its menu, "New York baked beans and corned beef." This food was served to her and she sat at a table to eat it. She further testified: "I started to eat the food, and there were two or three dark pieces which I thought were hard beans, that is, baked more than the others, and I put two in my mouth and bit down hard on them, and . . . I was hurt. . . . I took those things out of my mouth and found they were stones."

There was no further evidence that the plaintiff had anything to do with the selection of the beans. She gave no instructions respecting the food other than to order it. There was no evidence of express warranty or that the defendant knew of the presence of the stones in the food. There was evidence of injury to the plaintiff. At the close of the evidence the plaintiff elected to rely upon a count for breach of an implied warranty of fitness to eat, in a contract for food to be eat-

en on the premises of the defendant. The defendant introduced no evidence. The question is whether the plaintiff was entitled to go to the jury.

There is strong ground for holding that the contract made between one who keeps a restaurant and one who resorts there for food to be served and eaten on the premises is a sale of food. The evidence in *Com. v. Worcester*, 126 Mass. 256, was that on two or three different occasions people resorted to the defendant's dwelling house and there were served with meals; with these, and as a part thereof, intoxicating liquors were provided. The price paid was single, including both food and drink. The complaint was for keeping a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors. It was held that "the purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of a meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase and all were charged in one collective price."

That decision rests entirely upon common-law principles as to sales, and Stat. 1875, chap. 99, § 17, then in force (now Rev. Laws, chap. 100, § 64), making delivery of intoxicating liquor under certain circumstances prima facie evidence of sale, was not adverted to, and very likely was not applicable to the facts there presented. Precisely the same point was held in *State v. Loti*, 72 Vt. 115, 47 Atl. 392. The defendant in *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308, was charged with selling milk not of good standard quality, contrary to Stat. 1886, chap. 318, § 2. The evidence was that a guest at the inn of the defendant, conducted on the American plan, was served as a part of his breakfast, for which he paid a single price, with a glass of milk not of

the quality required by the statute. It was said, in the course of the opinion holding that the defendant might be found guilty: "The milk bought by the witness Kelly was purchased by and delivered to him as a part of his breakfast, and was just as much a sale as if a specific price had been put upon it, or it had been bought and paid for by itself." Similar decisions have been made by other courts. In *People v. Clair*, 221 N. Y. 108, L.R.A.1917F, 766, 116 N. E. 868, it was held that the serving of partridges by a hotel keeper to guests who paid for board and room at the rate of \$2 per day was a sale, as matter of law, in violation of a statute which provided that such game should "not be sold, offered for sale, or possessed for sale for food purposes." A similar decision was rendered in *Com. v. Phoenix Hotel Co.* 157 Ky. 180, 162 S. W. 823, with reference to the possession of quail by an innkeeper, with intent to serve to his guests, in violation of a statute which prohibited the sale of such birds. It there was said (157 Ky. at page 185): "The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it, and the proprietor of the hotel or restaurant as certainly exposes it for sale, and sells it, as if it were purchased for compensation from a dealer who had it for sale, and was carried home by the purchaser to be served on his table."

It was decided in *Com. ex rel. Allegheny County v. Miller*, 131 Pa. 118, 6 L.R.A. 633, 18 Atl. 938, that where the keeper of a restaurant served oleomargarin with a meal to a guest, who was charged and paid 50 cents for the meal, there was a sale within the terms of a statute which prohibited the sale of oleomargarin. In view of these decisions, it would be difficult for this court to hold that the transaction arising from a contract to serve to a guest food to be eaten by him upon the premises of the keeper of an eating house is not a sale. If it is a sale, then plainly it is governed by

the Sales Act, Stat. 1908, chap. 287, § 15 (1), which is in these words: "Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

It is manifest that at least it might be inferred, from the relations of the parties, that the guest who asks to be served food upon the premises of one who is the keeper of a restaurant makes known, as the particular purpose for which the food is required, that it is then and there to be eaten, and that he relies upon the latter's skill or judgment in the selection and preparation of the food. Hence there would be an implied warranty that it was reasonably fit for such purpose.

If the transaction is a sale, the rule is the same apart from the Sales Act. That was settled after great consideration in *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, a case decided before the Sales Act took effect. It there was held (198 Mass. p. 284) that the English rule as to implied condition of soundness in the sale of food by a dealer prevails here. That rule was stated (198 Mass. at pages 280, 281) in these words: "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the Sale of Goods Act, if the sale is made by one not a dealer, there is no liability, by force of § 14. If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food, whether supplied under a pre-existing contract . . . or in re-

sponse to an order not given in person, . . . or even when the order is given in person in the dealer's shop, provided . . . that the selection is left to the dealer."

But there is authority to the effect that, when food is furnished to a guest by the keeper of a restaurant or inn, the transaction does not constitute a sale, that the title to the food does not pass, that the customer may consume so much as he pleases, but that he cannot carry away of the portion ordered that which he does not eat, or give or sell it to another; and that the charge made is not for the food alone, but includes the service rendered and the providing of a place in which to eat. It is stated in *Beal on Innkeepers*, § 169: "The title to food never passes as a result of an ordinary transaction of supplying food to a guest; or, as it was quaintly put in an old case, 'He does not sell, but utters, his provision.'" *Parker v. Flint*, 12 Mod. 254, 88 Eng. Reprint, 1303.

Therefore it seems desirable to consider somewhat the relation of the guest to a keeper of a place where food is served for immediate consumption. It is ancient law that when one resorts to a tavern, inn, or eating place, there for a consideration to be served with food for immediate consumption, and is received as a guest by the keeper, a duty is implied that the food shall be fit to eat. It has been said that "if a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern keeper; . . . an action lies against him without express warranty, for it is a warranty in law." *Burnby v. Bollett*, 16 Mees. & W. 644, 646, 647, 654, 153 Eng. Reprint, 1348, where are the references to numerous older cases. *Keilw.* 91, 72 Eng. Reprint, 254. "A taverner or vintner was bound, as such, to sell wholesome food and drink." *Ames, Lectures on Legal*

*History*, p. 137, citing also cases from the Year Books. "If a man sells victual which is corrupt, without a warranty, an action lies, because it is against the commonwealth." *Roswel v. Vaughan*, Cro. Jac. 196, 197, 79 Eng. Reprint, 171.

To the same effect, in substance, are 1 Rolle, Abr. 95, 1 Fitzh. Nat. Brev. 94C, note, supposed to be by Lord Chief Justice Hale, 1 Bl. Com. 430, and 3 Bl. Com. 166. See *Williston, Sales*, § 241, note 82; *Farrell v. Manhattan Market Co.* supra.

The relation between guest and host in a public house is one of contract. It seemingly is the result of those early authorities that it was an implied term or

**Innkeeper—  
relation to  
guest.**

condition of that contract that the food and drink furnished should not be harmful, but appropriate for eating. There are numerous other illustrations in the

**Sale—food—  
warranty of  
fitness.**

law of contracts, of an implied condition that the thing sold is merchantable. See for example *Murchie v. Cornell*, 155 Mass. 60, 63, 14 L.R.A. 492, 31 Am. St. Rep. 526, 29 N. E. 207; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 451, 453, 15 L.R.A. (N.S.) 855, 82 N. E. 682; *Interstate Grocer Co. v. George William Bentley Co.* 214 Mass. 227, 231, 101 N. E. 147. Food for immediate use which is not fit to eat is not merchantable as food. This

**Food—unfit—  
merchant  
ability.**

rule was held in *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, to be applicable to cases where a purchaser buys from a dealer food at retail, for immediate use. That rule now prevails generally in this country. *Flesscher v. Carstens Packing Co.* 93 Wash. 48, 54, 160 Pac. 14, 13 N. C. C. A. 173; *Zielinski v. Potter*, 195 Mich. 90, L.R.A. 1917D, 822, 161 N. W. 851; *Catani v. Swift & Co.* 251 Pa. 52, 54, L.R.A. 1917B, 1272, 95 Atl. 931; *Nelson v. Armour & Co.* 76 Ark. 352, 90 S. W.



(231 Mass. 65, 180 N. E. 407.)

288, 6 Ann. Cas. 237; Askam v. Platt, 85 Conn. 448, 83 Atl. 529; Race v. Krum, 222 N. Y. 410, 414, L.R.A.1918F, 1172, 118 N. E. 853; Osgood v. Lewis, 2 Harr. & G. 495, 520, 18 Am. Dec. 317; Dulaney v. Jones, 100 Miss. 835-840, 57 So. 225; Parks v. C. C. Yost Pie Co. 93 Kan. 334-337, L.R.A.1915C, 179, 144 Pac. 202, 7 N. C. C. A. 100. See, however, Crigger v. Coca Cola Bottling Co. 132 Tenn. 545-552, L.R.A. 1916B, 877, 179 S. W. 155, Ann. Cas. 1917B, 572, 11 N. C. C. A. 359; and Green v. Ashland Water Co. 101 Wis. 258, 263 to 265, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265.

The authorities already cited appear to show that by the common law of England it was an implied term of the contract that the guest should be furnished wholesome food by the proprietor of a public eating house to which he resorted for refreshment.

The historical review, the principles discussed, and the ground of decision in *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608, 618, 614, 74 L. J. K. B. N. S. 386, 21 Times L. R. 300, 53 Week. Rep. 354, 92 L. T. N. S. 527 (although that case arose under the Sales of Goods Act), afford basis for the conclusion that it has continued to be the law of England to the present. At all events there is nothing to indicate that this common-law rule was changed in England before the emigration of our ancestors to the New World. Hence that principle was brought over with them, and has

become a part of our heritage. This is so whether the origin of that law was general custom or statutory enactment. *Crocker v. Justices of Superior Ct.* 208 Mass. 162, 166, 167, 94 N. E. 369, 21 Ann. Cas. 1061. There is no adjudication or dictum of this court (so far as we are aware) which indicates that the principle has not heretofore and does not now prevail here. The implication in *Emerson v. Brigham*, 10 Mass. 197, 200, 201, 6 Am. Dec. 109, from the use of the word "victuals,"

Common law—  
what is.

which commonly refers to food ready to eat, and "victualer," which usually is the synonym of publican," and means

Definition—  
victuals.

one who serves food or drink prepared for consumption on the premises (*Tyson v. Smith*, 9 Ad. & El. 406, 423, 112 Eng. Reprint, 1265, 1 Nev. & P. 784, 6 L. J. K. B. N. S. 189), is that this principle was then in the mind of the court. The question has not been raised in any of our recent decisions in actions against those who serve food for immediate consumption on their premises. *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265, 101 N. E. 381; *Gearing v. Berkson*, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785. Some of these rest on negligence, and others on *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142. The exhaustive review of cases in the *Farrell* opinion demonstrated that it was the law, both of England and of this commonwealth, that in the absence of statute it was an implied term of every sale of provisions by a dealer for immediate use, where the selection was not made by the buyer, that the food was fit for consumption. The principles there discussed and the result there reached appear to be equally applicable to the case at bar. It would be an incongruity in the law amounting at least to an inconsistency, to hold with reference to many keepers of restaurants who conduct the business both of supplying food to guests and of putting up lunches to be carried elsewhere, and not eaten on the premises, that, in case of want of wholesomeness, there is liability to the purchaser of a lunch to be carried away, founded on an implied condition of the contract, but that liability to the guest

who eats a lunch at a table on the premises rests solely on negligence. The guest of a keeper of an eating house or of an innkeeper is quite as helpless to protect himself against deleterious food or drink as is the purchaser of a fowl from a provision dealer. The opportunity for the innkeeper or restaurant keeper who prepares and serves food to his guest, to discover and provide against deleterious food, is at least as ample as is that of the retail dealer in foodstuffs. The evil consequences in the one case are of the same general character as in the other. Both concern the health and physical comfort and safety of human beings. On principle and on authority it seems to us that the liability of the proprietor of an eating house to his guest for serving

Innkeeper—  
ground of  
liability to  
guest.

bad food rests on an implied term of the contract, and does not sound exclusively

in tort, although of course he may be held for negligence, if that is proved. Without repeating the reasoning of *Farrell v. Manhattan Market Co.* supra, we are of the opinion that, on sound legal principles, it bears with equal force upon the facts here presented. Even if there were no common-law authority (which there is, as already pointed out), it would not be practicable to establish a distinction upon this point which could be supported in reason, between the liability of a retail dealer in meat for immediate consumption and of a victualer who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to sustain liability of the latter with at least equal cogency. They appear to us to rest upon the same footing in principle.

The tendency of recent decisions has been to extend liability of the manufacturer of foods to persons injured by their harmful nature, although they purchase from a dealer and have no contractual relation with the manufacturer. *Haley v.*

*Swift & Co.* 152 Wis. 570, 140 N. W. 292; *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A.(N.S.) 923, 70 Atl. 314; *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, 19 Am. Neg. Rep. 107; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A.(N.S.) 238, 103 S. W. 245; *Parks v. C. C. Yost Pie Co.* 93 Kan. 334, 337, L.R.A.1915C, 179, 144 Pac. 202, 7 N. C. C. A. 100; *Catani v. Swift & Co.* 251 Pa. 52, 56, L.R.A. 1917B, 1272, 95 Atl. 931; *Mazetti v. Armour & Co.* 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633, Ann. Cas. 1915C, 140; *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791. See *Ketterer v. Armour & Co.* L.R.A.1918D, 798, 160 C. C. A. 111, 247 Fed. 921. That tendency points in the direction of stricter liability of those who provide food.

The conclusion here reached is in harmony with *Bark v. Dixon*, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, 3 N. C. C. A. 106; *Race v. Krum*, 222 N. Y. 410, L.R.A. 1918F, 1172, 118 N. E. 853, and *Doyle v. Fuerst & Kraemer*, 129 La. 838, 40 L.R.A.(N.S.) 480, 56 So. 906, Ann. Cas. 1913B, 1110. It ought to be said, however, that none of those decisions discuss the principles here relied on as the basis of our judgment. The results reached and the grounds of decision stated in those cases would seem to require the conclusion here reached. It is the precise point decided in *Leahy v. Essex Co.* 164 App. Div. 903, 148 N. Y. Supp. 1063.

Apparently the larger number of decisions by courts of this country hold that the liability of the innholder and restaurant keeper for furnishing deleterious food rests upon negligence. The earliest adjudication to that point is *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253. The opinion in that case is brief, and contains no reference to the fundamental conceptions of liability by dealers in food, and does not advert to the responsibility of innkeep-

ers, victualers, and vintners at common law. That case was referred to, but not adopted, in Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 179, 100 N. E. 1078, Ann. Cas. 1914B, 884. It has been followed in Travis v. Louisville & N. R. Co. 183 Ala. 415, 424, 62 So. 851; Greenwood Café v. Lovinggood, 197 Ala. 34, 72 So. 354; Merrill v. Hodson, 88 Conn. 314, 321, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; and Valeri v. Pullman Co. (D. C.) 218 Fed. 519. No allusion is made in any of these decisions to the common-law authorities and principles to which reference has been made, and upon which this judgment in part rests. We feel constrained not to adopt their conclusions, so far as they are inconsistent with the reasoning of this opinion. The decision in Bigelow v. Maine C. R. Co. 110 Me. 105, 43 L.R.A. (N.S.) 627, 85 Atl. 396, goes upon a different ground, and that here discussed is expressly left open at page 111.

It has been urged that public policy demands that the standard imposed upon a restaurant keeper ought to be that of reasonable care, and nothing more. Earnest argument is made to the effect that otherwise the opportunity for groundless litigation will be fostered. These considerations, when given their full weight, do not appear to us to overbalance the reasons which have been stated.

The baked beans served to the plaintiff with the stones of the size of and resembling beans might have been found to be not reasonably fit to be eaten. A foreign substance of that sort, with its possibilities for harm to teeth, may have been determined by the jury not proper to be served in food.

It has been argued that it should have been ruled as matter of law that the plaintiff was not in the exercise of due care, and, on that ground, could not prevail. Due care is not a term of the law of contract, but of torts. This

is an action of contract. The obligation resting upon the defendant and accruing to the plaintiff arose out of the contract.

The defendant has urged that, if liability be treated as arising either out of a sale or a breach of contract, the plaintiff fails to show requisite examination on her own part, and that reasonable inspection would have revealed the existing defect in the food, and that under such circumstances, as matter of law, there can be no recovery. Whatever may be the merit of these contentions under appropriate conditions, they are not pertinent to the facts disclosed on this record. If these contentions in favor

**Trial—question of fact—harmful substance in food.**

of the defendant are assumed to be sound, and if further it be assumed that § 15 (3) of the Sales Act is applicable, to the effect that there is "no implied warranty as regards defects which such examination ought to have revealed," nevertheless it was a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her, and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered.

Our conclusion is that, whether the transaction established on the evidence between the plaintiff and the defendant be treated as a sale of food, or as a contract for entertainment, where the defendant simply "utters his provisions" (to use the neat phrase of Parker v. Flint, 12 Mod. 254, 88 Eng. Reprint, 1303, employed more than two centuries ago) for the benefit of the plaintiff, there was a case to be submitted to the jury.

**stones in beans—liability.**

In accordance with the terms of the report, and with leave reserved with the consent of the jury, pursuant to Stat. 1915, chap. 185, § 1, amending Rev. Laws, chap. 173, § 120, verdict is to be entered for the plaintiff for \$150.

Crosby, J., dissenting:

I cannot agree with the decision

**Evidence—sufficiency—stones in beans.**

**Food—failure to exercise due care—effect.**

of the majority in this case; and because I believe it to be wrong in principle, and contrary to the great weight of authority, I feel constrained to express my dissent.

The decision in effect is that an innkeeper, or the keeper of a restaurant who serves food to a guest, is liable as an insurer of the safety of the person of his guest against injury, although he may be wholly free from any negligence in providing and serving such food.

The plaintiff testified that she entered the defendant's restaurant and there ordered of a waitress "New York baked beans and corned beef," which were served to her. She further testified: "I started to eat the food, and there were two or three dark pieces, which I thought were hard beans, that is, baked more than the others, and I put two into my mouth and bit down hard on them, and . . . I was hurt. . . . I took those things out of my mouth and found they were stones."

There was no evidence of an express warranty or that the defendant knew of the presence of the stones in the food, and unless the plaintiff can recover upon an implied warranty that the food served to her was wholesome and fit for consumption, the defendant is not liable.

The question then presented is whether the keeper of a restaurant is an insurer of the quality of the food which he serves, or whether he is liable only for failure to exercise reasonable care in providing and serving food so furnished. Before the decision in this case, the question does not appear to have been decided in this commonwealth. The Sales Act, Stat. 1908, chap. 237, § 15 (which is declaratory of the common law so far as pertinent to this case), cannot, in my opinion, be held to apply to a case where food is furnished by a keeper of a restaurant to a customer, or by an innkeeper to his guest, because food so served does not constitute a sale thereof; while the customer may consume so much as he desires. He

has no right to carry away any portion thereof which he orders but does not eat, nor does the title to such food pass to him so that he can sell or give it to another. The charge made for the food is not limited to the food consumed, but includes the furnishing of a place where it may be eaten and the service rendered in connection therewith. *Beale, Innkeepers*, § 169; *Parker v. Flint*, 12 Mod. 254, 88 Eng. Reprint, 1303; *Merrill v. Hodson*, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; *Valeri v. Pullman Co. (D. C.)* 218 Fed. 519.

Nor is the defendant a "dealer" within the meaning of the Sales Act, or independently of it. A dealer is defined as a trader, especially a person who makes a business of buying and selling goods. In *Saunderson v. Rowles*, 4 Burr. 2064, 2068, 98 Eng. Reprint, 77, it was said of a victualer: "He makes no particular contract, like a trader. He cannot be said to get his living by buying and selling as a trader does. He buys, only to spend in his house, and when he utters it again, it is attended with many circumstances additional to the mere selling price."

In the case of *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, this court, after tracing the history of the law in England upon this question and referring to many cases, said (198 Mass. at page 280): "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the Sale of Goods Act, if the sale is made by one not a dealer, there is no liability, by force of § 14." Stat. 56 & 57 Vict. chap. 71, § 14.

Section 15 of the Massachusetts act is similar to § 14 of the English act above referred to. And in *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, it was held that the defendants, who were farmers, and killed and sold

two hogs, the produce of their farms, "were not common dealers in provisions or market men," and that there was not an implied warranty that the hogs were fit for food, even if sold with knowledge that they were to be used for that purpose. *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608.

It was said in *Gearing v. Berkson*, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785, on the authority of *Farrell v. Manhattan Market Co. supra*, that "even before the enactment of this statute, it was recognized as the law in this commonwealth that where the buyer at a shop relies on the skill and judgment of the dealer in selecting food, and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, he is liable if it is not fit to be eaten; while, in case the buyer himself selects provisions, the dealer's implied warranty does not go beyond the implied assertion that he believes the food to be sound."

It cannot be questioned that this doctrine is sound as applied to a dealer; but I believe it has no application to the serving of food by an innkeeper or the keeper of a restaurant, because the food so furnished is not a sale, and because the person who so furnishes the food is not a dealer. The question is whether one who furnishes food to be consumed on the premises is an insurer that it is sound and wholesome and free from deleterious substances. That a right of action, based upon negligence, to recover for the harmful consequences resulting from a sale of unwholesome food, will lie, is well established. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884, and cases cited.

While innkeepers, common carriers, and others are held absolutely liable under certain circumstances, so far as I am aware an innkeeper never has been held to be an insurer of the quality of the food served to his guests, nor is a common carrier of passengers liable as an insurer

of their safety; so to extend the rule as to innkeepers and keepers of restaurants, I believe to be contrary to the common law, and against the weight of authority in England and in this country. *Parker v. Flint*, 12 Mod. 254, 88 Eng. Reprint, 1308; *Crisp v. Pratt*, Cro. Car. 549, 79 Eng. Reprint, 1072; *Bigelow v. Maine C. R. Co.* 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396; *Merrill v. Hodson*, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Travis v. Louisville & N. R. Co.* 183 Ala. 415, 62 So. 851; *Clancy v. Barker*, 69 L.R.A. 653, 61 C. C. A. 469, 131 Fed. 161, 16 Am. Neg. Rep. 664; *Valeri v. Pullman Co.* (D. C.) 218 Fed. 519, 22 Cyc. 1081; 16 Am. & Eng. Enc. Law, 2d ed. 547; *Beale, Innkeepers*, § 169; *Burdick, Sales*, 2d ed. 113.

In *Beale on Innkeepers*, § 169, the rule is stated that "he [an innkeeper] is not an insurer of the quality of his food, but he would be liable for knowingly or negligently furnishing bad and deleterious food. An innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs, and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of the food supplied to him; nor can he claim a certain portion of food as his own, to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest." *Merrill v. Hodson*, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917.

It seems to me that neither under the Sales Act nor at common law can the serving of food by an innkeeper, or the keeper of a restaurant, be deemed to be a sale of goods. The act (§ 1) defines a sale of goods to be "an agreement whereby the

seller transfers the property in goods to the buyer for a consideration called the price." For the reasons stated, such a transaction cannot be held to be a "sale." Nor does the food so supplied seem to me to be "goods," as that word is defined in § 76 of the act, namely: "'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The transaction involved in serving a guest with food for his consumption in a restaurant is not, in my opinion, an agreement for the transfer of the general property of the food so furnished and appropriated by the guest for the satisfaction of his appetite, involving as it does the personal service rendered in supplying the food and furnishing a place, with the things necessary, to consume it. If the furnishing of food by an innkeeper or restaurateur is considered as a sale, as previously pointed out, even in the case of sales of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten, and this was true before as well as since the Sales Act, § 15. *Farrell v. Manhattan Market Co. and Giroux v. Stedman*, supra; *Jones v. Just* (1868) L. R. 3 Q. B. 197, 37 L. J. Q. B. N. S. 89, 18 L. T. N. S. 208, 16 Week. Rep. 643, 23 Eng. Rul. Cas. 466; *Emmertson v. Mathews*, 7 Hurlst. & N. 586, 158 Eng. Reprint, 604, 31 L. J. Exch. N. S. 139, 8 Jur. N. S. 61, 5 L. T. N. S. 681, 10 Week. Rep. 346. The law relating to the sale of provisions is the same as in case of the sale of other chattels. *Bigge v. Parkinson*, 7 Hurlst. & N. 955, 158 Eng. Reprint, 758, 31 L. J. Exch. N. S. 301, 8 Jur. N. S. 1014, 7 L. T. N. S. 92, 10 Week. Rep. 349.

The case of *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253, decides the precise question involved in the present case. The plaintiff was

made ill by eating oysters served in the defendant's restaurant. The court held that the defendant was not an insurer of the soundness of its food and could not be charged with liability upon an implied warranty, but could be held liable only for negligence,—citing the earlier case of *Wiedeman v. Keller*, 58 Ill. App. 382.

In *Travis v. Louisville & N. R. Co.* 183 Ala. 415, 62 So. 851, the plaintiff was made ill by eating unwholesome food furnished by the defendant in one of its dining cars. It was held that there is no warranty of the fitness of food served by a restaurant keeper, provided it belongs to that class of food which is generally fit for human consumption, and that the defendant was only liable for failure to exercise reasonable care in the selection and preparation of the food.

The same court, in *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354, held that the keeper of a hotel, dining car, café, or other public eating place engaged in serving food to customers, is bound to use due care in furnishing such food,—citing *Travis v. Louisville & N. R. Co.* supra.

The precise question involved in the present case was considered in the recent case of *Merrill v. Hodson*, 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917, supra. The plaintiff was made sick by eating canned sweetbreads, alleged to have been unwholesome, which were served to her by the defendants in their restaurant. It was held that the furnishing of food and drink by a restaurant keeper to a customer for immediate consumption upon the premises is not a sale of the food, either under the Sales Act of that state, Pub. Acts 1907, chap. 212 (which is substantially the same as our act), or at common law, and that therefore, under § 15 of the act, there was not an implied warranty of quality or soundness of the food furnished. The court intimated that an action for negligence is the only remedy for the consequences of

eating unwholesome food supplied by the keeper of a restaurant or inn in the usual course of his business.

In *Bigelow v. Maine C. R. Co.* 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396, the plaintiff alleged that she suffered injury to her health by eating unwholesome canned asparagus, served to her by the defendant in its dining car. She claimed that the defendant was an insurer of the quality of the food which it served. The court held that the defendant was not liable in the absence of an express warranty.

The case of *Valeri v. Pullman Co.* supra, was an action brought to recover for personal injuries sustained by reason of eating unwholesome food in a dining car of the defendant. The court in that case said (218 Fed. at page 524): "In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food." "It seems to me idle, in determining this question, to seek analogies derived from implied warranties in the sales of goods. In the first place, one is met at the outset by the legal theory which has long prevailed, that food furnished by a victualer is not a sale."

In discussing this question, it was said by the court in *Clancy v. Barker*, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 163, 16 Am. Neg. Rep. 664, that "the general rule of law governing the liability of innkeepers when these defendants made their agreement with the plaintiff, the rule which had received the approval of every court which had ever decided the question, so far as we have been able to discover, was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, com-

fort, and entertainment of his visitor."

The contention that an innkeeper or victualer at common law impliedly warrants the wholesomeness of food furnished cannot, in my opinion, be sustained. An examination of the older English cases upon this subject will show, I think, that where a liability has been held to exist, it rests upon the ground either that the person furnishing the food or drink knew that it was unwholesome, or because it was furnished in violation of an ancient statute which imposed a penalty for furnishing such food or drink, and therefore was "against the commonwealth."

In the leading case of *Burnby v. Bollett*, 16 Mees. & W. 644, 153 Eng. Reprint, 1348, 17 L. J. Exch. N. S. 190, 11 Jur. 827, where all the older authorities are collected, it was held that where a farmer bought in the public market the carcass of a pig for consumption as food, and afterwards sold it to another without warranty, although it was unfit for human consumption, no warranty of soundness was implied by law between the last seller and the purchaser.

Mr. Benjamin, in his book on Sales, 4th ed. at page 671, after referring to this case, states that "the notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which make the sale of unsound food punishable. . . . It is submitted that it results clearly from these authorities that the responsibility of a victualer . . . for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility, imposed by statute, that they shall make good any damage caused by their sale of unwholesome food."

The statute referred to in *Burnby v. Bollett*, supra, was swept away by Stat. 7 & 8 Vict. chap. 24.

In *Roswel v. Vaughn*, Cro. Jac. 196, 79 Eng. Reprint, 171, cited in the opinion in the present case, it was said that "if a man sells victuals

which is corrupt, without warranty, an action lies, because it is against the commonwealth," the ground of the decision obviously being that the liability rests upon the violation of the statute in making such a sale punishable as a criminal offense. The action was on the case in the nature of deceit, in which it was alleged that the defendant falsely represented that he was the incumbent of a vicarage and had a right to the tithes, and which he undertook to sell to the plaintiff, but without express warranty. It was held that the action would not lie.

It is stated by Blackstone (vol. 1, p. 430), "So, likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring action against the master," and cites 1 Rolle, Abr. 95, which refers to a statement in the Year Book, 9 Hen. VI. p. 53: "If a taverner sells wine, knowing it to be corrupt, to another as sound, good, and not corrupt, without any express warranty, still an action of deceit lies against him, for there is a warranty in law."

There would seem to be no doubt as to the correctness of the rule stated, as it expressly appears in the case cited that the innkeeper knew the wine was unwholesome.

In referring to these old English cases, it is stated in Williston on Sales, §§ 241, 242: "There is considerable talk in the early law in regard to a special obligation of warranty in the sale of provisions, more extensive than that arising in the sale of other articles. The old authorities seem to have been rested, in part at least, upon the language of an old statute. But whatever the basis of the doctrine, it was laid down broadly by Blackstone, that 'in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit) may be had.' This statement is frequently repeated and relied on as a ground for decision. . . . It is doubtful, however, if it would now generally be held that there was such a warranty

unless the seller was a dealer." Burdick, Sales, 2d ed. p. 113.

Whatever may have been the reason for the decisions in the English cases above referred to, and many others cited in the opinion in the present case, it seems to me that there is no analogy to be drawn from them in favor of the contention that there is an implied warranty of fitness in the furnishing of food by an innkeeper or victualer, because such a transaction is in no sense a sale, as established by decisions rendered by the English courts more than two centuries ago, the soundness of which has never been questioned in subsequent English cases. *Crisp v. Pratt*, Cro. Car. 549, 79 Eng. Reprint, 1072; *Saunderson v. Rowles*, 4 Burr. 2064, 2068, 98 Eng. Reprint, 77; *Parker v. Flint*, 12 Mod. 254, 88 Eng. Reprint, 1303.

Without referring in detail to the decisions cited in the opinion of the majority of the court, it seems to me they all are distinguishable from the case at bar, either because the ground of liability in the cases cited is based upon negligence, or because the actions were brought against persons who were dealers.

The case of *Com. v. Worcester*, 126 Mass. 256, which held that the defendant might be convicted of keeping and maintaining a tenement used for the illegal sale and keeping of intoxicating liquor, under General Statutes, chap. 87, § 6, if he furnished such liquor with meals supplied to customers, does not seem to me conclusive upon the question whether an innkeeper, or keeper of a restaurant, who makes a sale of food or drink to guests, is liable in an action of contract upon an implied warranty. Apparently the only question in that case was whether the furnishing of the liquor for a price which included the price of the meal could in any event be regarded as a sale within the meaning of the statute. The question whether the furnishing of food or drink by an innkeeper or victualer to a guest, in good faith, did or did not constitute a sale with an implied warranty that



it was wholesome and fit for food for human consumption, was not raised or considered in the brief opinion.

The case of *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308, was a complaint against the defendant for a sale of milk not of the standard quality, under Stat. 1886, chap. 318, § 2. The milk was sold in connection with food furnished as a part of a meal, and the price paid included both. The question whether the transaction amounted to a sale would seem to have been wholly immaterial to the decision, as the statute (§ 2) in part provided that the sale, exchange, delivery, or having custody or possession with intent to sell or exchange, of milk not of standard quality, is a criminal offense. Accordingly a delivery of such milk would be a violation of the statute even if there were no sale. The question whether the transaction was a sale by an innkeeper or victualer which made him liable upon an implied warranty was not considered or decided, so far as appears by the record.

I do not think that the case of *Com. v. Worcester*, *supra*, and the case of *Com. v. Warren*, *supra*, involving, as they do, violations of criminal statutes, should be regarded as decisive in cases involving civil liability arising from contract, which it is plain the court never intended to pass upon. Manifestly, the court never intended by the judgment in those cases, to decide that the furnishing of food to a guest created a contract of sale which carried with it an implied warranty that the food furnished was sound. There seems to me to be no controlling reason for holding that we are bound by these cases, or that they are not clearly distinguishable from the case at bar.

The only cases in this country or in England which, so far as I am aware, decide the precise point in the present case and hold that there is an implied warranty in the furnishing of food, are *Leahy v. Essex Co.* 164 App. Div. 903, 148 N. Y. Supp.

1063, and *Rinaldi v. Mohican Co.* 171 App. Div. 814, 157 N. Y. Supp. 561. The former was decided by the appellate division of the supreme court of New York on the authority of *Race v. Krum*, 162 App. Div. 911, 146 N. Y. Supp. 197. The latter has recently been decided by the New York court of appeals, 222 N. Y. 410, L.R.A.1918F, 1172, 118 N. E. 853. That decision holds that as the defendant, a druggist, manufactured the ice cream which he sold to the plaintiff, and which made him ill, the defendant could be found liable. It is to be observed that the court carefully refrained from deciding the question which has arisen in the case at bar, when it was said (222 N. Y. at page 413): "In this connection, however, it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer who makes or prepares the article that he is selling."

This statement of the liability of a manufacturer is in accord with the rule stated in *Jones v. Just* (1868) L. R. 3 Q. B. 197, 37 L. J. Q. B. N. S. 89, 18 L. T. N. S. 208, 16 Week. Rep. 643, 23 Eng. Rul. Cas. 466; *Leavitt v. Fiberloid Co.* 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682; and *Haley v. Swift & Co.* 152 Wis. 570, 140 N. W. 292. It is apparent that the two cases above referred to, decided by the appellate division of the supreme court of New York, are not of controlling importance.

While the case of *Farrell v. Manhattan Market Co.* *supra*, is cited and relied on by the plaintiff in support of her contention, it seems to me to mark clearly the distinction between a sale of provisions by a dealer, and the furnishing of cooked food by an innkeeper or restaurateur for immediate consumption upon the premises. It is evident that this court did not in that case decide that such persons were "dealers," when it is stated on page 286 of 198 Mass.

15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 487, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142: "Whatever may be the rule in respect to caterers in serving meals, there is no case in which it has been held that, in the sale of provisions by a dealer, the test of his liability is negligence." *Merrill v. Hodson*, 88 Conn. 314, 321, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917.

In referring to the case of *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, it is stated in the opinion in the *Farrell Case* (198 Mass. at page 286): "All that was decided in that case was that the declaration was good. Whether negligence is the ground for holding a caterer or innkeeper liable for serving poisonous food was not discussed."

In the *Farrell Case*, 198 Mass. 280, it is also stated that "the rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the Sale of Goods Act, if the sale is made by one not a dealer, there is no liability, by force of § 14."

And in referring to the law of this commonwealth, it is stated (198 Mass. 283) that "there is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten. *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608, and *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538."

The general rule of law, which has always prevailed, so far as I have been able to discover, is that innkeepers and restaurateurs are not insurers of the safety of their guests whom they serve with food, but that their obligation is limited to their exercise of reasonable care in the furnishing and serving such food.

It does not seem to me that public policy or justice demands that a restaurant keeper or innkeeper

should be held to warrant impliedly the wholesomeness of food served by him, making him in effect an insurer of its fitness for consumption, no matter how carefully it may be prepared and served. I am of opinion that the absolute liability which the opinion of the majority of the court imposes is not necessary for the protection of the public, but is apt to result in the prosecution of groundless claims which it will be difficult, if not impossible, to meet.

The fact that this is the first case that has ever arisen in this commonwealth where it has been attempted to charge the keeper of a restaurant or a hotel upon an implied warranty respecting the quality of food furnished would seem to make it plain that the rights of individuals and the public are amply protected by holding those engaged in those occupations liable only for negligence.

If it be deemed necessary, for the protection of patrons of restaurants, hotels, and other places where food is served for immediate consumption upon the premises, to hold persons engaged in such occupations as insurers, it would seem to me to be a subject for legislative, rather than judicial, determination.

I believe the decision of the majority is wrong in principle, and that it imposes an unjust and unnecessary burden upon a large number of persons engaged in a useful and necessary business. I am also constrained to dissent from the decision because I believe it is contrary to the rule as laid down by the English courts from the earliest times, and is at variance with the decisions of the courts of the United States, and of the courts of last resort in several states.

So far as I am aware, the result reached in the opinion is not supported by the decision of any court of last resort where the precise question in the case at bar has been considered.

## ANNOTATION.

**Implied covenant of fitness by one serving food.**

As to implied warranty by other than packer of fitness of food sold in sealed cans, see annotation following *Ward v. Great Atlantic & P. Tea Co.* ante, 242.

**In general.**

The weight of authority, jurisdictionally at least, is to the effect that, in the absence of statute, one serving food to be immediately consumed on the premises is neither an insurer of the fitness and wholesomeness of the food served, nor liable upon an implied warranty thereof. The following cases so hold: *Valeri v. Pullman Co.* (1914) 218 Fed. 519; *Travis v. Louisville & N. R. Co.* (1913) 183 Ala. 415, 62 So. 851; *Loucks v. Morley* (1919) — Cal. App. —, 179 Pac. 529; *Merrill v. Hodson* (1914) 88 Conn. 314, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; *Sheffer v. Willoughby* (1896) 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253, affirming (1895) 61 Ill. App. 263; *Bigelow v. Maine C. R. Co.* (1912) 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396, cited with approval in *Trafton v. Davis* (1913) 110 Me. 318, 86 Atl. 179. In *Travis v. Louisville & N. R. Co.*, (1913) 183 Ala. 415, 62 So. 851, in holding that there is no implied warranty of the fitness of oysters served on a railroad dining car for immediate consumption, it was said that a restaurant keeper merely warrants that the food which he serves in his restaurant belongs to that class of food which is generally accepted to be fit for ordinary human consumption, and that he has used, in the selection and preparation of his food, that degree of care which the law exacts of those who follow his occupation for a livelihood; and that the law requires that in the selection of food for his restaurant, and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected

to exercise in the selection and preparation of food for his own private table. And in *Bigelow v. Maine C. R. Co.* (1912) 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396, like reasoning was applied to canned asparagus served on a railroad dining car. And in *Valerie v. Pullman Co.* (1914) 218 Fed. 519, the Federal court, following what was said to be the common-law rule, held that the proprietor of a buffet car was neither an insurer of the fitness of the food sold, nor liable upon an implied warranty. This case arose in New York, and the court expressly refused to follow appellate division decisions to the contrary (*Race v. Krum* (1914) 162 App. Div. 911, 146 N. Y. Supp. 197, affirmed on reargument in (1914) 163 App. Div. 924, 147 N. Y. Supp. 818, and subsequently affirmed with limitations in (1918) 222 N. Y. 410, L.R.A.1918F, 1172, 118 N. E. 853, and *Leahy v. Essex Co.* (1914) 164 App. Div. 903, 148 N. Y. Supp. 1063, both of which are set out infra), there being no decision of the question by the court of appeals at the time of the then present decision.

But this rule has been limited to cases where the one serving the food was not the one who made and prepared it. At least, in the New York case of *Race v. Krum* (1918) 222 N. Y. 410, L.R.A.1918F, 1172, 118 N. E. 853, holding that a druggist who manufactured ice cream for consumption on the premises impliedly warranted it to be fit for human consumption, it was said that, in this connection, "it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers," etc., but with one who had the opportunity of determining the quality of the cream by ascertaining whether the ingredients which went into the cream were poisonous, and whether its subsequent care was such as to properly protect it from contamination by filth. Likewise, in *Barrington v. Hotel Astor* (1918) 184 App. Div. 317, 171

N. Y. Supp. 840, it was held that a hotel keeper who served food prepared by him, to be eaten on the premises, impliedly warranted that it was wholesome, it being maintained that the transaction was a sale and delivery, and a corresponding purchase by the guest, so that the general common-law rule regarding an implied warranty of fitness in the sale by dealers of food applied. In this case it was said that the cases which hold to the contrary are "based upon reasoning having to do in large measure with the earlier method of furnishing accommodations by innkeepers to their guests, where, for a stipulated daily sum, the host furnished the lodging, food, and service," and that "this reasoning would seem to be without application to modern conditions, where any person, whether a guest of the hotel or not, may enter its restaurant and order such food as he desires, paying a stipulated price therefor. I can see no logical reason why this is not a sale and delivery upon the part of the hotel keeper, and a corresponding purchase upon the part of the guest. Whatever refinements of distinction may have been made in the past as to the liability of a hotel keeper, it seems to me that under modern conditions the food is sold, and the hotel keeper impliedly warrants that it is wholesome to eat, contains no deleterious matter, and is the food ordered. This applies, of course, only to such food as the hotel keeper himself prepares. Where food, from its nature, is obviously prepared by other persons, such as canned goods, or goods known by a trade-name, and, therefore, obviously prepared elsewhere, the rule is different."

And there is authority to the effect that even in the absence of statute, and without reference to when or where the food was manufactured or prepared, the true rule is that there is an implied warranty of fitness by restaurant keepers, etc., serving food to be consumed on the premises. This rule was laid down in the reported case (*FRIEND v. CHILDS DINING HALL Co.* ante, 1100) wherein the majority of the court maintained that such a

transaction was a sale, and that no distinctive case was made because of the fact that the food was sold and served to be eaten on the premises. And in *Race v. Krum* (1914) 162 App. Div. 911, 146 N. Y. Supp. 197, reargument denied in (1914) 163 App. Div. 924, 147 N. Y. Supp. 818, it was broadly held that, as matter of law, there was an implied warranty as to fitness for food in the sale of ice cream to a customer in a drug store, for immediate consumption upon the premises. This judgment was affirmed in (1918) 222 N. Y. 410, L.R.A.1918F, 1172, 118 N. E. 853, but the decision, as already shown, was on the ground that the druggist made and prepared the ice cream in question, and, therefore, that in selling it he acted as a dealer rather than as one belonging to the class formed by hotel proprietors, restaurant keepers, dining car managers, and people engaged in business of that kind. And again, in *Leahy v. Essex Co.* (1914) 164 App. Div. 903, 148 N. Y. Supp. 1063, following the decision of the appellate division in *Race v. Krum*, it was held that there is an implied warranty of fitness for consumption in the sale of pie to be eaten on the premises by a lunch-room proprietor. And in *Muller v. Childs Co.* (1918) 185 App. Div. 881, 171 N. Y. Supp. 541, where a patron of defendant's restaurant was alleged to have been injured by eating unwholesome meat pie, it was held that if the injury was the result of the eating of the pie the restaurant keeper was liable upon an implied warranty of fitness, the court citing the decision of the court of appeals in *Race v. Krum* (N. Y.) *supra*, and evidently classifying the defendant as a dealer. In the *Leahy Case*, it does not appear who prepared the pie, but in the *Muller Case* it seems to have been assumed that the pie was prepared by the defendant. And it appears that the early English authorities are to the same effect. Thus, in 1 Rolle, Abr. 95, it was said that, since there is a warranty in law, a publican who sells unwholesome food or drink is liable for consequent injuries to a patron. And in *Year Book*, 9 Hen. VI. p. 53, it was held that if

one go to a tavern to eat, and the taverner serves him meat which is corrupted, an action lies for resulting injuries without any express warranty, "for there is a warranty in law."

**Under statute.**

It has been held that the serving of food for immediate consumption on the premises of the server is not a "sale for domestic uses," within the meaning of a statute creating an implied warranty of the fitness of food sold by "one who makes a business of selling provisions for domestic use." *Loucks v. Morley* (1919) — Cal. App. —, 179 Pac. 529.

And in *Merrill v. Hodson* (1914) 88 Conn. 814, L.R.A.1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917, it was again held that a restaurant keeper's service of food for immediate consumption was not a sale of goods, within the

meaning of a statute defining a sale of goods, and declaring that there is an implied warranty that the goods sold shall be reasonably fit for the purpose for which they are ordered. This was upon the ground that in ordering food in a restaurant, to be consumed on the premises, the patron does not become the owner of the food served, but only purchases the privilege of consuming what he cares to, of that served.

On the other hand, in the reported case (*FRIEND v. CHILDS DINING HALL CO.* ante, 1100), it was held that the serving food by a restaurant keeper, to be immediately eaten on the premises, was a sale, and within the meaning of a statute making it an implied term in every sale of provisions by a dealer for immediate use, where the selection is not made by the buyer, that the food is fit for consumption.

G. J. C.

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**BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.,  
v.  
ARMSTRONG, LEE, & COMPANY.**

*Ohio Supreme Court — February 11, 1919.*

(— Ohio St. —, 124 N. E. 186.)

**Carrier — contract to protect perishable goods — validity.**

1. A special contract between a common carrier and a shipper, made in view of an unusual flood, for the immediate and necessary removal of perishable goods beyond the reach of the flood, is not per se void unless its terms are unjust, unreasonable, or discriminatory in their nature or in their operation.

[See note on this question beginning on page 1120.]

**Case — negligent performance by carrier.**

2. One may sue in tort or conversion

for negligent performance by a carrier of its contract to transport goods.

[See 4 R. C. L. 948.]

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**Headnote 1 by the COURT.**

**ERROR** to the Court of Appeals for Muskingum County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the value of two carloads of wheat destroyed in a flood because of defendant's negligent failure to remove it to a place of safety, under a special contract. *Affirmed.*

Statement by Wanamaker, J.:

On the 23d day of August, 1913, Armstrong, Lee, & Company filed their petition in the court of com-

mon pleas of Muskingum county, averring that they delivered to the Baltimore & Ohio Railroad Company at their grain elevator at

Zanesville, Ohio, 2,168½ bushels of wheat, in two cars, with the agreement and understanding that the railroad company was "to safely and immediately transport and deliver same over its railroad to high ground out of reach of water," and averring that "the said defendant then and there received same and agreed to safely transport and deliver same to plaintiff on and at high ground out of reach of water for said hire; that said defendant at the time of receipt and agreement aforesaid knew the contents of said car and that same was in danger of inundation at point where shipment was made."

The petition further averred that "said defendant did not safely or immediately transport said wheat to said high ground, as it agreed to do, but, on the contrary, said defendant, after receiving said shipment and removing same from the custody and control of plaintiff, wrongfully, recklessly, and negligently delayed the forwarding of same to said high ground, and wrongfully, recklessly, and negligently permitted said car to become so situated," in the flooded districts of Zanesville, that said wheat became and was of "no value and wholly worthless." Damages were asked in the amount of \$2,201.44.

Defendant answered by a first defense constituting a general denial with many admitted facts; a second defense averring in substance that said wheat was caught in an unusual flood of water and was so badly damaged as to render it worthless by said unusual flood, and not by any default, negligence, or misconduct on the part of the defendant; and a third defense in substance that, "under the laws of Ohio regulating intrastate commerce, the defendant is prohibited from making or entering into any contract for the shipment of freight not provided for or authorized by its published tariffs; . . . that the contract or agreement alleged in each of the causes of action in the petition herein was not authorized or provided for by

defendant's said tariffs or schedules; and that said alleged contracts or agreements were illegal, null, and void, and in violation of §§ 505, 506, 508, 510, 513, and 564 and 567 of the General Code of Ohio."

Upon trial to a jury in the court of common pleas a verdict was rendered against the railroad company for the full amount, and judgment entered on the verdict.

Error was prosecuted to the court of appeals, which affirmed the judgment of the court of common pleas.

Error is now prosecuted here for the reversal of the judgment of the court of appeals.

Messrs. Frazier & Frazier, for plaintiff in error:

The trial court erred in refusing to direct a verdict for defendant.

Kimball v. Rutland & B. R. Co. 26 Vt. 247, 62 Am. Dec. 567; Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781; Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 459; Hall v. Pennsylvania Co. 90 Ind. 459; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132; Gratiot Street Warehouse Co. v. St. Louis, A. & T. H. R. Co. 221 Ill. 418, 77 N. E. 675; Porter v. Chicago & N. W. R. Co. 20 Iowa, 78; Kingman St. Louis Implement Co. v. Southern R. Co. 133 Mo. App. 317, 112 S. W. 721.

The contract sued on was illegal and void.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Southern R. Co. v. Prescott, 240 U. S. 633, 60 L. ed. 837, 36 Sup. Ct. Rep. 469; Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Engemoen v. Chicago, St. P. M. & O. R. Co. 127 C. C. A. 426, 210 Fed. 896; Melody v. Great Northern R. Co. 25 S. D. 606, 30 L.R.A. (N.S.) 568, 127 N. W. 543, Ann. Cas. 1912C, 727; Siemon'sma v. Chicago, M. & St. P. R. Co. 158 Iowa, 483, 139 N. W. 1077; Roberts v. Nashville, C. & St. L. R. Co. 135 Tenn. 48, 185 S. W. 69; St. Louis, I. M. & S. R. Co. v. West Bros. — Tex. Civ. App. —, 159 S. W. 142; Central R. Co. v. Mauser, 241 Pa. 603, 49 L.R.A. (N.S.) 92, 188 Atl. 791; Atchison, T. & S. F. R. Co. v. Robinson,

233 U. S. 173, 180, 181, 58 L. ed. 901, 905, 906, 34 Sup. Ct. Rep. 556; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Winn v. Adams Exp. Co.* 149 Iowa, 259, 128 N. W. 663.

Mr. C. T. Marshall, for defendant in error.

The trial court properly overruled the motion to direct a verdict for defendant.

5 Enc. Pl. & Pr. 320; *Bates*, Pl. & Pr. p. 1167; *Tuggle v. St. Louis, K. C. & N. R. Co.* 62 Mo. 425; *Baltimore & O. R. Co. v. Pumphrey*, 59 Md. 390.

The alleged contract was not illegal, and defendant was responsible for its negligence or other breach of duty.

*Wheeler v. Oceanic Steam Nav. Co.* 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 125; *New York C. R. Co. v. Lockwood*, 17 Wall. 363, 21 L. ed. 635; *Lamb v. Camden & A. Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Robertson v. Old Colony R. Co.* 156 Mass. 526, 32 Am. St. Rep. 482, 31 N. E. 650; *Chicago, M. & St. P. R. Co. v. Wallace*, 80 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; *California Powder Works v. Atlantic & P. R. Co.* 113 Cal. 329, 36 L.R.A. 648, 45 Pac. 691.

Technicalities which do not affect substantial rights must be disregarded.

*Taylor v. Browder*, 1 Ohio St. 225; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 78 Am. St. Rep. 743, 57 N. E. 446; *Way v. Langley*, 15 Ohio St. 392.

Wanamaker, J., delivered the opinion of the court:

Plaintiff below claims that the action is one for wrongful conversion of wheat, and that such a case is not only pleaded, but abundantly proven under the evidence.

The Constitution of Ohio, in its Bill of Rights (§ 16), says: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law," etc.

The record overwhelmingly discloses, and it is admitted in the pleadings, that these two carloads of wheat were lost, at least in value, while in the custody of the railroad company and while on its tracks; that prior thereto it had removed the wheat from the siding at the milling company's elevator to another point on the railroad company's line. The question of negligence on the part of the railroad company was submitted to the jury, under proper instructions of the court, and if the petition stated a cause of action the verdict of the jury was abundantly warranted.

Did the petition state a cause of action? The petition does aver that "plaintiff delivered to the defendant on board cars" the wheat in question, and that while the same remained in the possession of the railroad company it was made wholly worthless and of no value whatsoever, and that this was by reason of the negligence of the railroad company in respect to handling said cars. The language of the pleading, and the evidence as well, indicate that a contract was made between the railroad company and the milling company touching the handling of said cars and their removal to a place of safety.

Now, it is well-settled law, that is elementary, that though one have a contract, if there has been negligence in the performance of that contract, he may sue in tort, or for conversion, and claim his damages upon proper proof. And that was done in this case.

The Code of Ohio was clearly intended to abolish common-law distinctions and technicalities as to the manner of stating the various causes of action in tort or contract and otherwise. The cause was designated as a civil action, and the pleader had a good petition when he put in it: (1) A statement of facts constituting the cause of action, in

Case—negligent performance by carrier.

ordinary and concise language; (2) a demand for the relief to which the plaintiff claims to be entitled.

Hence, in such cases as the one at bar, at least, it becomes unimportant to undertake to classify the action as one strictly in contract or strictly in tort.

The evidence clearly supports the claim that the railroad company came into possession of these cars at 2 or 3 o'clock in the afternoon, when they were still in good merchantable condition; that they were removed by the railroad company to some other point, not entirely clear by the record, but in the flood district; and the jury below, and the courts below, found that the above was negligence on the part of the railroad company.

As to the third defense, that the agreement pleaded was in violation of certain sections of the General Code of Ohio, we have already declared the elementary law as to pleading upon contracts, that the party may sue in tort for negligence of the other party in failing to observe due care with reference to his bailment. But, even if the party in his petition had declared upon special contract, we see nothing in this contract in violation of these sec-

tions. These sections relate to the duties of a common carrier, and their purpose is to prevent discrimination between different members of the public as to charges for services as a common carrier. The service in this case was not as a common carrier, but as an uncommon carrier, in an uncommon situation, an emergency under uncommon circumstances, for which the milling company was liable for a reasonable and just charge.

*Carrier—contract to protect perishable goods—validity.*

But, even as to a special contract between the carrier and the shipper, such special contract is not per se void, unless it exhibits an unjust and unreasonable charge discriminatory in its nature. No claim of this character is made in this case.

It is likewise unimportant in this case to determine whether the railroad company acted as a common carrier or otherwise. The facts pleaded and proven abundantly justify the recovery.

Judgment affirmed.

Nichols, Ch. J., and Jones, Mathias, Johnson, and Donahue, JJ., concur.

Robinson, J., not participating.

## ANNOTATION.

### Carriers: validity of special contract in emergency.

The reported case (*BALTIMORE & O. R. Co. v. ARMSTRONG, L. & Co.* ante, 1117) seems to have been the only one to have passed upon the question of the validity of a contract between a carrier and a shipper, made in view of an emergency such as a flood or fire, for the immediate transportation of perishable goods to a safe place. However, the decision therein to the effect that such a contract, if not unjust, unreasonable, or discriminatory in its nature or operation, is not per se void, is in keeping with the general rule of law that emergencies often may sanction the use by carriers and their agents of extraordinary powers.

The case of *Bowles v. Quincy, O. & K. C. R. Co.* (1916) — Mo. App. —, 187 S. W. 131, while perhaps technically within the scope of the present annotation, involved another phase of the question. In that case, where a shipment of hogs was delayed on account of a bridge of a connecting carrier being out, it was held that a contract entered into subsequently to the acceptance of the hogs for transportation, and which excused the carrier from liability for damages arising from such delay, was without consideration and consequently invalid.

G. J. C.



STATE OF OREGON, Resp.,  
v.  
J. M. DONAHUE, Appt.

*Oregon Supreme Court (Dept. No. 2) — December 15, 1914.*

(75 Or. 409, 144 Pac. 755.)

**Criminal law — entry of arraignment nunc pro tunc.**

1. The court may, after the expiration of the term, order an entry nunc pro tunc upon the record of a criminal case showing arraignment and plea, upon affidavits of bystanders that accused was in fact arraigned and pleaded.

*[See note on this question beginning on page 1127.]*

**Larceny — removing felled timber.**

2. The cutting and removal of timber from another's land with larcenous intent is covered by a statute providing for the punishment of anyone who shall steal goods and chattels, and not by a statute providing for the punishment of anyone who shall wilfully cut down timber standing on another's land or wilfully take and remove from such land timber previously cut.

**Indictment — larceny or trespass.**

3. An indictment for wilfully, unlawfully, and feloniously taking, stealing, and carrying away a specified number of feet of saw logs charges larceny, and not merely violation of a statute providing for punishment of one who wilfully cuts down or wilfully takes and removes from another's land previously cut and severed trees.

**Criminal law — offenses within two statutes — effect.**

4. It is no defense to an indictment

under one statute that accused might also be punished under another.

**— necessity of arraignment.**

5. It is essential to a conviction of a felony that accused be arraigned and that he plead or refuse to plead.

*[See 8 R. C. L. 107.]*

**Larceny — timber — severance from land.**

6. Timber becomes the subject of larceny the moment it is severed from the realty.

*[See 17 R. C. L. 33.]*

**Appeal — neglect to instruct — waiver.**

7. In the absence of any request it is not reversible error for the trial court to omit, in a criminal case, to instruct the jury that there is a presumption of defendant's innocence, which follows him throughout the trial and until the jury are convinced of his guilt beyond a reasonable doubt.

*[See 14 R. C. L. 795.]*

**APPEAL** by defendant from a judgment of the Circuit Court for Washington County (Campbell, J.) convicting him of theft of certain saw logs.  
*Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. B. Dufur and W. P. Myers, for appellant:

The indictment attempted to charge the defendant with the crime of grand larceny, but is so vague and uncertain in its terms that it is impossible to tell whether the acts set out in the indictment constitute larceny or trespass.

*People v. Williams*, 35 Cal. 671, 4 Mor. Min. Rep. 185; 1 Whart. Crim. Law, 11th ed. §§ 31, 40-42; *Bishop*, New Crim. Proc. § 81; *Binhoff v. State*, 49 Or. 419, 90 Pac. 586.

In a criminal case there must not  
5 A.L.R.—71.

only be an arraignment and plea, but it must appear affirmatively from the record that the statutory requirements were complied with.

*State v. Walton*, 50 Or. 142, 13 L.R.A. (N.S.) 811, 91 Pac. 490; 1 *Bishop*, New Crim. Proc. § 733, p. 4; *Crain v. United States*, 162 U. S. 643, 40 L. ed. 1102, 16 Sup. Ct. Rep. 952; *State v. Fontenette*, 45 La. Ann. 902, 12 So. 937; *Bowen v. State*, 98 Ala. 83, 12 So. 808; *People v. Corbett*, 28 Cal. 323.

Nothing can be entered nunc pro tunc which did not actually occur.

*Frederick & Nelson v. Bard*, 66 Or. 259, 134 Pac. 318; 11 Cyc. 764, § 3; *Hotaling v. Huntington*, 64 Ill. App. 655; *Scott v. Schnadt*, 67 Ill. App. 545; *State v. McDaniel*, 70 Or. 232, 140 Pac. 993.

The court failed to instruct the jury upon the question of the presumption of innocence in favor of the defendant.

*Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

*Messrs. E. B. Tongue and Thomas H. Tongue, Jr.*, for respondent:

The indictment was sufficient.

*State v. Neal*, 21 Or. 170, 27 Pac. 1038; *Woods v. People*, 222 Ill. 293, 7 L.R.A. (N.S.) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 Ann. Cas. 736; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 591, 62 N. E. 418; *People v. Freeman*, 1 Idaho, 322; *State v. Minnick*, 54 Or. 86, 102 Pac. 605; *State v. Jewett*, 48 Or. 586, 85 Pac. 994; *Markham v. United States*, 160 U. S. 324, 40 L. ed. 441, 16 Sup. Ct. Rep. 288; *Caha v. United States*, 152 U. S. 211, 221, 38 L. ed. 415, 419, 14 Sup. Ct. Rep. 513; *Cochran v. United States*, 157 U. S. 286, 290, 39 L. ed. 704, 705, 15 Sup. Ct. Rep. 628; *Evans v. United States*, 153 U. S. 584, 587, 38 L. ed. 830, 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Price v. United States*, 165 U. S. 311, 315, 41 L. ed. 727, 729, 17 Sup. Ct. Rep. 366; *Pointer v. United States*, 151 U. S. 396, 419, 38 L. ed. 208, 217, 14 Sup. Ct. Rep. 410; *United States v. Howard*, 132 Fed. 334; 10 Enc. Pl. & Pr. 472 et seq.

The entry of an order, showing the plea and arraignment, may be entered nunc pro tunc.

*State v. McDaniels*, 70 Or. 232, 140 Pac. 993; *Carter, R. & Co. v. Koshland*, 12 Or. 498, 8 Pac. 556; *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Bilansky v. State*, 3 Minn. 427, Gil. 313; *Grover v. Hawthorne*, 62 Or. 65, 116 Pac. 100, 121 Pac. 804.

Notwithstanding the defendant could have been indicted under § 1984, Lord's Oregon Laws, he can also be indicted for larceny.

*Woods v. People*, 222 Ill. 293, 7 L.R.A. (N.S.) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 Ann. Cas. 736.

It was not error for the court to fail to instruct the jury on the presumption of innocence.

*State v. Magers*, 36 Or. 51, 58 Pac. 892; *State v. Brown*, 28 Or. 148, 41 Pac. 1042; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *Smitson*

*v. Southern P. Co.* 37 Or. 89, 60 Pac. 907; *Page v. Finley*, 8 Or. 45; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Baker County v. Huntington*, 48 Or. 600, 87 Pac. 1036, 89 Pac. 144; *Trickey v. Clark*, 50 Or. 525, 93 Pac. 457.

The taking of the saw logs in the manner in which they were taken constitutes larceny.

*Whart. Crim. Law*, 11th ed. §§ 1099, 1324; *Harberger v. State*, 4 Tex. App. 26, 30 Am. Rep. 157; *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 6; *People v. Gaylord*, 139 App. Div. 814, 124 N. Y. Supp. 517; 18 Am. & Eng. Enc. Law, 2d ed. p. 518; *Smith v. Com.* 14 Bush, 31, 29 Am. Rep. 403; *State v. Hall*, 5 Harr. 492; *Bell v. State*, 4 Baxt. 426; *Bishop, Crim. Law*, 679-766; *State v. Moore*, 33 N. C. (11 Ired. L.) 160, 53 Am. Dec. 401; *Clement v. Com.* 20 Ky. L. Rep. 688, 47 S. W. 550; *Dickens v. State*, 142 Ala. 49, 110 Am. St. Rep. 17, 39 So. 14.

The court did not err in refusing to give the requested instructions, because the instructions were not applicable to the facts in the case, and were not the law.

*Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166.

*Mr. George M. Brown*, Attorney General, also for the State.

*McNary, J.*, delivered the opinion of the court:

On the 15th day of September, 1913, the grand jury of Washington county accused defendant of the theft of 500,000 feet of saw logs. The charging part of the indictment follows: "That the defendant, J. M. Donahue, upon the 1st day of May, A. D., 1913, in the said county of Washington, state of Oregon, then and there being, did then and there wilfully and unlawfully and feloniously take, steal, and carry away 500,000 feet of saw logs of the value of seven hundred and fifty dollars (\$750), the personal property of Elizabeth Freeman."

Conviction followed on the 24th day of April, 1914. On May 2, 1914, counsel for defendant moved for an arrest of judgment upon the assumption that the indictment did not state facts sufficient to constitute an offense and that the evidence failed to establish the commission of a crime. Contempo-

aneously, the circuit court disallowed the motion, and pronounced judgment that defendant should be confined in the penitentiary from one to ten years, and that defendant be paroled on condition that he pay for the timber by him actually felled and removed. On the 20th day of July following, defendant, through his counsel, filed a motion to vacate the judgment of conviction for the reason that the "record failed to show that the defendant had ever been arraigned or entered his plea." This motion, too, was overruled on July 30th. The same day the district attorney moved the court for an order nunc pro tunc of the arraignment and plea of defendant as of April the 24th. At a time coexistent with the application of the district attorney, and in the absence of defendant, the court made the order, upon the statement, embodied in three separate affidavits, that the defendant was duly arraigned and entered a plea of not guilty.

The first assignment of error challenges the sufficiency of the indictment by asserting that it is so indefinite that it is impossible to tell whether the language employed brings the crime within the law of larceny as fixed by § 1947, L. O. L., or the law of trespass on lands of another as defined by § 1984, L. O. L.: "If any person shall wilfully cut down, destroy, or injure any standing or growing tree upon the lands of another, or shall wilfully take or remove from any such lands any timber or wood previously cut or severed from the same, or shall wilfully dig, take, quarry, or remove from any such lands any mineral, earth, or stone, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than \$50 nor more than \$1,000."

The learned district attorney proceeded upon the hypothesis that the felling of timber upon the land of another, cutting the timber into saw logs, and removing the logs so

felled and sawed, constituted larceny as defined by § 1947, L. O. L.: "If any person shall steal any goods or chattels, or any government note, bank note, promissory note, bill of exchange, bond or other thing in action or any book of accounts or order or certificate concerning money due or to become due or goods to be delivered, or any deed or writing containing a conveyance of land or any interest therein, or any bill of sale or writing containing a conveyance of goods or chattels, or any interest therein, or any valuable contract in force, or any receipt, release, or defeasance or any writ, process, or public record, or any railroad, railway, steamboat, or steamship passenger ticket or other evidence of the right of a passenger to transportation, which is the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value \$35, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of \$35, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than \$25, nor more than \$100."

Defendant's counsel ably urges that if any offense was committed by defendant it was not larceny, but the crime of trespass. The testimony disclosed by the bill of exceptions justifies the statement that defendant, prior to the time of the commission of the acts charged in the indictment, was operating a sawmill on lands owned by E. W. Haines adjoining the property of Elizabeth Freeman; that, after exhausting the merchantable timber upon the Haines tract, defendant conducted some negotiations through Mr. Haines for the purchase of the timber owned by Elizabeth Freeman. While there is some conflict in the testimony concerning when the negotiations were had and how far they proceeded,

yet by its verdict the jury determined as a matter of fact that defendant had no legal right to go upon the Freeman land and remove the timber therefrom. Well we might add that competent testimony was brought to the consideration of the jury which would legally sustain either a verdict of exculpation or of conviction.

The question first presented concerns the applicability of the statute to the facts charged. The contention of defendant is that the indictment should have been found under the trespass section of the statute, and not under the larceny section. The former section does not undertake to punish a person who asports timber from places other than upon the lands where the timber is growing or is felled. In dissimilar situations resort must be had to the section denouncing larceny. Moreover, under § 1984, defining trespass on lands of another, the act which it undertakes to forbid is done wilfully, which the statute at § 2393, L. O. L., says embraces "simply a purpose or willingness to commit the act . . . and does not require any intent to violate law, to injure another, or to acquire any advantage;" whereas, in the section defining larceny, an intent by which the offense is committed is an essential element. Therefore, in our opinion, the crime of larceny and the crime of trespass on the land of another are entirely separate and distinct offenses, and the evidence which would support a conviction for a violation of one section would not necessarily show the party accused as guilty of the other. It may be said that this case falls within the provisions of said § 1984, because it refers particularly to the cutting or removing of timber on the land of another, and for that reason it excludes all other punishments for that offense. That idea would be indisputable if the commission of the acts about which complaint is made were identical in measure with the statute making the transaction punishable. Then

the special statute would inevitably operate to limit the effect and force of a general act comprehending the unlawful transaction. The wilful cutting of timber upon the land of another, or its wilful removal, is taken out of the general class of larceny and made in substance an independent offense, but the felling of timber and its subsequent asportation, whether upon

**Larceny—  
removing felled  
timber.**

the land of another or elsewhere, if accompanied by a larcenous intent and not alone wilfully, is still within the pale of the statute defining larceny. Resting within the province of the jury was the decision of this question. There was some testimony given to the jury from which a criminal intent was inferable, and for that account the section of the statute defining larceny was properly used as the tape by which to measure the presence or absence of that intent.

**Indictment—  
larceny or  
trespass.**

The trial court did not, we conclude, err in holding that the defendant was prosecuted under an appropriate provision of the statute. *Woods v. People*, 222 Ill. 293, 7 L.R.A.(N.S) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 Ann. Cas. 736. Besides, it is no defense to an indictment under one statute that a defendant might also be punished under another. *Re Converse*, 137 U. S.

**Criminal law—  
offenses within  
two statutes—  
effect.**

624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *State v. Glenn Lumber Co.* 83 Kan. 399, 111 Pac. 484; *State v. Gallamore*, 83 Kan. 412, 111 Pac. 472; *State v. Leonard*, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69; 2 Bishop, New Crim. Proc. § 612.

Defendant's second grievance finds its root in the trial court's action in ordering a nunc pro tunc entry of the arraignment and plea of defendant upon extraneous evidence supplied by three affidavits, wherein each affiant affirms that he was present in the court room at the time the charge against defendant was called for trial, and saw him

arraigned, and heard him enter a plea of "not guilty" to the indictment. The record discloses that defendant made no objection to the irregularity complained of until after verdict, nor that he was in any manner prejudiced thereby. Irrespective of the doctrine in other jurisdictions, this court has announced the rule that those steps which the law prescribed cannot be dispensed with, and that it is essential to a conviction of a felony that defendant be arraigned and that he plead or refuse to plead. *State v. Walton*, 50 Or. 142, 13 L.R.A.(N.S.) 811, 91 Pac. 490; *State v. Walton*, 51 Or. 574, 91 Pac. 495.

Consequently, we must consider the value of the nunc pro tunc entry. Section 2807, L. O. L., provides that the terms of the circuit court in Washington county shall be held on the third Monday in March, the third Monday in July, and the fourth Monday in November of each year. Therefore, it will be observed that the application for the order, and its allowance, were made at a term subsequent to the one at which the defendant was tried and convicted. There is much authority in support of the rule that a judgment can be amended or corrected at a subsequent term only when there is sufficient record evidence, or evidence quasi record, to sustain the amendment, and that evidence dehors the record cannot be received for this purpose. 23 Cyc. 879. Yet, as stated by Mr. Justice H. J. Bean in *Grover v. Hawthorne*, 62 Or. 65, 121 Pac. 806: "There are many cases which hold that an entry nunc pro tunc may be ordered on any evidence that is sufficient and satisfactory, whether it be parol or otherwise."

It is a part of the ordinary duty of the clerk of the circuit court to note in the record of a trial the essential proceedings, and, if he fails through inadvertence or negligence to make a memorial of that

which actually occurs, we think, on principle, it is competent for a court of record, under its general inherent authority, to correct the mistake and supply the defect of its recording officer so as to have the record conform to the actual facts and truth of the case. This may be done at any time; equally as well after as during the term. While great caution should be exercised by the trial court if his action is merely based on memory, yet that alone would not deprive him of jurisdiction to make the order, and, likewise, the court may make such amendment upon any competent legal evidence, though foreign to the record. In this case, the circuit court brought to the assistance of his memory the affidavits of three responsible persons who bore witness that they were present during the progress of the trial of defendant, and saw him arraigned, and heard him plead not guilty to the indictment. We believe the doctrine best suited to the proper administration of justice is that if the court has performed its whole duty correctly, but the recording officer has erred in making up a proper or full record, the court may, in its discretion, cause the record at any time to be amended or corrected so as to have it declare the whole truth. 23 Cyc. 864; *Doane v. Glenn*, 1 Colo. 454; *Burson v. Blair*, 12 Ind. 371; *Arrington v. Conrey*, 17 Ark. 100; *Stockdale v. Johnson*, 14 Iowa, 179; *Gilman v. Libbey*, 4 Cliff. 447, Fed. Cas. No. 5445. Many other authorities might be cited showing that amendments of the character presented by this case are matters of discretion, but we deem it unnecessary.

Counsel for defendant pleads error upon the part of the court in charging the jury that "now, it is also necessary for me to define to you what the meaning of the words 'goods and chattels' is. Chattels, in the ordinary sense of the word, is any property that is movable; not so connected with the ground as to

—entry of  
arraignment  
nunc pro tunc.

become a part of the ground or the realty. A growing tree is real estate and is not a chattel, but the minute a growing tree becomes disconnected with the ground, is thrown down, then it becomes a chattel. And while the owner of the property as long as the tree was growing only owned real estate, if, without severing her ownership of the real estate, the tree is cut down without her consent, or with her consent, it then becomes a chattel, and capable of asportation, and the person who converts real property into personal property and then carries it away, if he does it unlawfully and wrongfully, would be guilty of larceny. A tree, when it is cut from the stump, cut into these logs, becomes a chattel, and the party who would steal that, carry it away secretly without the knowledge or consent of the owner, would be guilty of larceny under the statutes of this state."

As an abstract proposition of law, we believe the court advised the jury correctly. Accepted by all the authorities is the concept that larceny is predicable of goods personal, and not of chattels real; that is, of such as are annexed to the freehold. Resting in the mind of our legal ancestors was the notion that a period of time varying in extent must intervene between the severance of the thing from the soil and its asportation; in fact, the application of the doctrine at times is so subtle as to require much mental gymnastics. The simpler, more modern, and better doctrine, we think, is found in

**Larceny—timber—severance from land.**

those cases which hold that by the act of severance the wrongdoer converts the property into a chattel, and if he then removes the severed property with a felonious intent he is guilty of larceny, whatever despatch may have been employed by the thief in the removal. Bishop, *Crim. Law*, 7th ed. § 655; *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5; *Harberger v. State*, 4 Tex. App. 26, 30 Am. Rep.

157; 1 Whart. *Crim. Law*, 11th ed. pp. 13, 14; *Bell v. State*, 4 Baxt. 426; *State v. Moore*, 33 N. C. (11 Ired. L.) 160, 53 Am. Dec. 401.

The next assignment of error is founded upon the court's failure to instruct the jury that in criminal cases the law presumes the defendant to be innocent of the crime charged, and that this presumption follows him throughout the trial and until the jury are convinced beyond a reasonable doubt of the guilt of the defendant. No request was made by defendant for such instruction, and for that reason this court many years

**Appeal—neglect to instruct—waiver.**

ago established, and has since followed, the rule that no error is assignable. The duty of the trial judge in this respect is set forth at § 139, L. O. L.: "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."

In fairness to the trial judge defendant should, if he is not satisfied with the charge as delivered by the court, submit such instructions as he may desire with a request that they be given. Omitting to do this, it is not reversible error for the trial court to fail to give particular instructions. *Page v. Finley*, 8 Or. 45; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *State v. Brown*, 28 Or. 148, 41 Pac. 1042; *State v. Magers*, 36 Or. 51, 58 Pac. 892; *Smitson v. Southern P. Co.* 37 Or. 89, 60 Pac. 907; *Baker County v. Huntington*, 48 Or. 600, 87 Pac. 1036, 89 Pac. 144.

So, believing that no error was committed in the trial of the case, the judgment is affirmed.

McBride, Ch. J., and Eakin and Bean, JJ., concur.

A petition for rehearing having been granted, McBride, J., on March

30, 1915, handed down the following opinion:

Upon this rehearing we find no reason to recede from the former opinion. The first contention is that this court erred in the original opinion in holding that the order requiring a record of the defendant's plea of not guilty to be entered *nunc pro tunc* was properly made. In addition to the authorities cited in the original opinion sustaining the conclusions there announced upon this question, we here cite *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487, where the court, discussing the authority of the lower court to make an entry *nunc pro tunc* in the absence of some memorandum of what had actually occurred, says: "We are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist."

In *Bilansky v. State*, 3 Minn. 427, Gil. 313, the court, passing upon the right of the lower court to enter an order *nunc pro tunc* not based upon any written memorandum on file, observes: "But when the facts stand undisputed, and the objection is based upon the technical point alone that the term has passed at which the record was made up, it would be doing violence to the spirit

which pervades the administration of justice in the present age, to sustain it."

In the case at bar the actual fact that the defendant was arraigned and entered his plea of not guilty is not disputed by any affidavit or other evidence, and is conclusively shown by the affidavits of several reputable citizens who were present when the arraignment was made and the plea of not guilty entered. It is evident that § 1984, L. O. L., was not intended to cover cases of felonious taking of logs or timber, but only cases of wilful trespass and taking, where no felonious intent existed. It would furnish a very inadequate protection in cases where an irresponsible person might steal thousands of dollars worth of saw logs and escape with the maximum fine of \$1,000. The legislature never contemplated such an absurdity.

Other objections to rulings and remarks of the trial judge are urged, but they were not excepted to on the trial, and, for the reasons stated in the original opinion, cannot be considered here.

We adhere to our original opinion.

Harris, J., took no part in the consideration of this case.

## ANNOTATION.

### Power to amend record in criminal case after term on evidence dehors record.

- I. Introductory, 1127.
- II. Majority rule, 1127.
- III. Minority rule, 1141.

#### I. Introductory.

It is the purpose of this note to review the decisions in those criminal cases wherein the power of a court to amend its record after the term, on evidence dehors the record, has been discussed. It is concerned only with the amendment of the record after term so as to make it set forth correctly the acts and proceedings of the court during the term. It is to be noted in this connection that the rules

applying in the case of amendment of the record for the purpose of correcting clerical errors and misprisions have no application in the case of amendment of the judgment for the purpose of correcting a judicial error, and cases of that kind are not within the scope of the present discussion.

#### II. Majority rule.

In the majority of the jurisdictions which have passed on the question, the rule obtains that a court has inherent power to correct any clerical error or misprision in its record so as to cause its acts and proceedings to

be set forth correctly; that this power may be exercised after the expiration of the term, as well as during the term, when it appears to the court that the justice and truth of the case require it; and that in allowing the amendment the court may act on any competent legal evidence.

**United States.**—*Kelly v. United States* (1887) 27 Fed. 616; *Re Wight* (1889) 134 U. S. 136, 83 L. ed. 865, 10 Sup. Ct. Rep. 487.

**Alabama.**—*Lewis v. State* (1914) 10 Ala. App. 31, 64 So. 537.

**Arkansas.**—*Green v. State* (1857) 19 Ark. 178; *Freel v. State* (1860) 21 Ark. 213; *Binns v. State* (1879) 35 Ark. 118; *Sweeney v. State* (1880) 35 Ark. 585; *Baker v. State* (1882) 39 Ark. 180; *Goddard v. State* (1906) 78 Ark. 226, 95 S. W. 476; *Bowman v. State* (1909) 93 Ark. 168, 129 S. W. 80; *Hydrick v. State* (1912) 103 Ark. 4, 145 S. W. 542.

**California.**—*People v. Murback* (1883) 64 Cal. 369, 30 Pac. 608; *People v. McNulty* (1892) 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

**Colorado.**—*Wentzel v. People* (1913) 55 Colo. 33, 133 Pac. 415.

**Dakota.**—*Territory v. Christensen* (1887) 4 Dak. 410, 31 N. W. 847.

**Florida.**—*Brown v. State* (1892) 29 Fla. 494, 11 So. 181; *Olive v. State* (1894) 34 Fla. 203, 15 So. 925.

**Idaho.**—*State v. Watkins* (1900) 7 Idaho, 35, 59 Pac. 1106.

**Indiana.**—*State v. Pearce* (1860) 14 Ind. 426; *Long v. State* (1877) 56 Ind. 133; *Knight v. State* (1880) 70 Ind. 375; *Walker v. State* (1885) 102 Ind. 502, 1 N. E. 857.

**Iowa.**—*State v. McComb* (1864) 18 Iowa, 43; *State v. Westfall* (1878) 49 Iowa, 328, 3 Am. Crim. Rep. 343.

**Kansas.**—*State v. Curry* (1906) 74 Kan. 624, 87 Pac. 745.

**Louisiana.**—*State v. Folke* (1847) 2 La. Ann. 744; *State v. Gates* (1854) 9 La. Ann. 94; *State v. Williams* (1876) 28 La. Ann. 310; *State v. Monceaux* (1896) 48 La. Ann. 103, 18 So. 896; *State v. Grandison* (1897) 49 La. Ann. 1014, 22 So. 308; *State v. Hart* (1913) 133 La. 5, 62 So. 161.

**Massachusetts.**—*Com. v. Weymouth* (1861) 2 Allen, 144, 79 Am. Dec. 776.

**Minnesota.**—*Bilansky v. State* (1859) 3 Minn. 427, Gil. 818.

**Montana.**—*State v. Hall* (1918) — Mont. —, 175 Pac. 267.

**Nebraska.**—*Garrison v. People* (1877) 6 Neb. 274.

**New Mexico.**—*Borrego v. Territory* (1896) 8 N. M. 446, 46 Pac. 349.

**New York.**—*People v. Flanigan* (1903) 174 N. Y. 356, 66 N. E. 988.

**North Carolina.**—*State v. Craton* (1845) 28 N. C. (6 Ired. L.) 164; *State v. Swepson* (1881) 84 N. C. 827; *State v. Warren* (1886) 95 N. C. 674.

**Ohio.**—*Mahan v. State* (1840) 10 Ohio, 233; *Hollister v. Judges of District Ct.* (1857) 8 Ohio St. 202; *Benedict v. State* (1887) 44 Ohio St. 679, 11 N. E. 125, 7 Am. Crim. Rep. 11.

**Oklahoma.**—*Re McQuown* (1907) 19 Okla. 347, 11 L.R.A. (N.S.) 1136, 91 Pac. 689.

**Oregon.**—See the reported case (*STATE v. DONAHUE*, ante, 1121).

**Pennsylvania.**—*Com. v. Rusie* (1911) 229 Pa. 587, 79 Atl. 140.

**Vermont.**—*State v. Gomez* (1915) 89 Vt. 490, 96 Atl. 190.

**Washington.**—*State v. Straub* (1896) 16 Wash. 111, 47 Pac. 227; *State v. Engstrom* (1915) 86 Wash. 499, 150 Pac. 1173.

In *Kelly v. United States* (Fed.) supra, the defendant was indicted for manslaughter, and put on trial in the circuit court. The jury disagreed, and were discharged, but the clerk failed to enter the order discharging the jury on the record. The case was certified to the district court, where a new indictment was found against the defendant. On the trial in the district court, the defendant pleaded former jeopardy, and offered the record of the circuit court, showing his arraignment, plea, the impaneling of the jury, and no discharge. On presentation of this record, the district judge who sat at the trial of the case in the circuit court went into the circuit court, which was then standing open, and directed the clerk to enter the order discharging the jury, and certify the record of that fact to the district court, which was accordingly done. This correction of the record of the previous term was made from the recollection of the judge and oth-



ers present at the trial. Proceedings were then resumed in the district court, the plea of former jeopardy was overruled, and, after conviction, on appeal to the circuit court, the power of the court thus to amend its record was sustained. The court said: "The plaintiff in error contends that his plea of former jeopardy should have been sustained, on the ground that the court had no right to correct the record in the manner stated; and that without such correction the plea of former jeopardy would be good, because, as the record then stood, it did not appear that the jury had been discharged. The district judge sat at the trial of the case in the circuit court. The fact was one within his knowledge and the knowledge of all present. The omission was a mere clerical one. Under the circumstances we can discover no error in the order to correct the record in accordance with the fact. The power of a court to amend its own record *nunc pro tunc* has long been recognized, and is well established."

In the case of *Re Wight* (U. S.) *supra*, after a conviction had in the district court, the judge of that court made an order remitting the case to the circuit court. That court remanded the case to the district court. The district court then entered judgment and sentence against the defendant. Thereafter the defendant brought *habeas corpus* on the ground that the district court had no jurisdiction to pronounce sentence, for the reason that it appeared from the record that at the time judgment was entered and sentence pronounced the cause was not pending in the district court, but that the same had been by order of the court remitted to the circuit court, and it did not appear from the record that the case had ever been remanded by the latter court to the district court. The circuit court thereupon, at a term subsequent to that at which the order remanding the case to the district court was made, and on its "recollection of the facts of the making of the said order," made an order for a *nunc pro tunc* record which showed that the case had been remanded from that court to the district court prior to the

time when sentence was passed upon the prisoner. The Supreme Court of the United States held the action of the circuit court in thus amending its record to be a legitimate exercise of power, saying: "Our first impression was that whatever might be the powers of the courts in this regard over their records during the term in which the transactions are supposed to have occurred, the record of which, or failure to make any record of which, is the subject of amendment, yet, when it was attempted to do this after an adjournment and at a subsequent term of the court, the powers of the court in making such changes in the records of the proceedings were limited to those in which there remained written memoranda of some kind in the case, and among the files of the court, by which the record could be amended, if erroneous, or the proper entry could be supplied, if one had been omitted. And especially that in criminal procedure this power to make such entries at a subsequent term of the court, of what had transpired at a former term, as would establish the authority of the court to pass a sentence of fine or imprisonment, either did not exist at all, or, if it did, was limited to cases in which some written evidence of what was done remained in the papers connected with the case. We are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist."

In *Lewis v. State* (1914) 10 Ala. App. 31, 64 So. 537, the original verdict was lost. Parol evidence introduced to show the contents of the verdict supported a finding that the verdict, as rendered, was in the following language: "We, the jury, find the defendant guilty of murder in the second degree, and fix his punishment at imprisonment in the penitentiary for a term of twenty years." This verdict differed from the one set out in the minute entry, in that in the latter the word next preceding "degree" was "first," instead of the word "second," thus showing a finding that the defendant was guilty of murder in the first degree. It was held that the court was warranted in correcting the minute

entry at a subsequent term, to make it recite the verdict as it was found to have been rendered.

In *Green v. State* (1857) 19 Ark. 178, wherein there was no showing in the record that the indictment was returned into court by the grand jury, it was held that if the grand jury did in point of fact return the indictment into court, as required by law, the circuit court might, after term, by a nunc pro tunc entry, make its record show that fact.

In *Freel v. State* (1860) 21 Ark. 213, wherein it appeared from the bill of exceptions that the crime was committed after the date when, according to the record, the indictment was found, it was held to be proper for the trial court, after an appeal was granted, to have the prisoner brought before it, and the error in the bill of exceptions as to the time when the offense was committed corrected; the error having occurred, not in the testimony, but in the drafting of the bill of exceptions.

In *Binns v. State* (1879) 35 Ark. 118, the transcript of the record on which appeal was allowed failed to show that the jurors by whom the appellant was tried were sworn. Afterwards he was brought into the court below, and it was shown to the satisfaction of the court that the jurors were in fact duly sworn when impaneled, but that the clerk had omitted, by inadvertence, to make the record show the fact. The record was thereupon amended by a nunc pro tunc order of the court to cure the omission, and the power to make the amendment was sustained.

In *Sweeney v. State* (1880) 35 Ark. 585, the jury returned a verdict which was recorded as follows: "We, the jury, find the defendant guilty as charged in the indictment." At a subsequent term of court the prisoner was brought into court, and the attorney for the state filed a motion to amend the record in the matter of the verdict, so as to make it speak the truth, showing that at the trial the jury in fact returned into court, in writing, the following verdict: "We, the jury, find the defendant guilty of murder in the first degree. (Signed)

J. L. Robertson, Foreman." On the hearing of the motion to amend the record, the clerk of the court testified that he was present when the verdict was returned into court, and produced the original verdict, which was in the words given above and signed by Robertson. The witness further testified that the papers in the case had been in his custody from the time the verdict was returned to that time, and that the verdict had been in no respect altered or tampered with; that it was by his own clerical misprision in recording the proceedings in the case at the last term that the record failed to show the degree of murder of which the jury found defendant guilty. On this evidence the court ordered the verdict as shown to have been actually returned by the jury, to be recorded by a nunc pro tunc entry.

In *Baker v. State* (1882) 39 Ark. 180, the transcript of the record presented on the application for an appeal, and filed after its allowance, failed to show any arraignment or plea of the prisoner. An alias certiorari was issued, on which the clerk returned a transcript of a nunc pro tunc entry, made at a subsequent term of the court below, showing that the prisoner waived formal arraignment, and entered the plea of not guilty, before trial, at the former term. It was held that the trial court had power so to amend its records, but that the amended record was insufficient to support a conviction, because it did not show that the prisoner was present when the nunc pro tunc entry was ordered to be made. Also the entry as copied in the original transcript, showing the impaneling of the grand jury which found the indictment, showed that a foreman was appointed and sworn, but failed to show, as it should have done, that his fellows were sworn. The court said: "If it can be shown to the satisfaction of the court below that all of the grand jurors were in fact sworn, the defect in the record may be amended by a nunc pro tunc entry, and the prisoner may be arraigned, and required to plead to the indictment."

In *Goddard v. State* (1906) 78 Ark. 226, 95 S. W. 476, the record failed to

show that the jury before which the defendant was tried was sworn as the law required. The trial court, at a subsequent term, heard the testimony of the jurors who tried the case and of other persons present at the trial, and found from this testimony that the jury had been duly sworn as the law required, and amended its record accordingly so as to speak the truth. It was held that the court had authority so to amend its records as to make them speak the truth, and might do so on any legal and competent evidence.

In *Bowman v. State* (1909) 93 Ark. 168, 129 S. W. 80; after an appeal to the supreme court it was discovered that the transcript did not show that the mandate of the supreme court, on the reversal of the case on the former appeal, had ever been filed in the circuit court, and that there was no judgment of the circuit court overruling the demurrer of the defendant as directed by the mandate. Notice of the application to amend the record was given to the defendant's counsel, and the defendant was brought into court when the same was heard and determined. The mandate, with indorsement on it by the clerk of the date of its filing, showed that it had been filed, and that, with the presiding judge's own recollection, he being the judge who had presided throughout all the proceedings in the case, was held to be sufficient evidence on which to base a finding that the defendant's demurrer had been overruled in accordance with the directions of the mandate, and for the entry of an order *nunc pro tunc* to make the record speak the truth.

In *Hydrick v. State* (1912) 103 Ark. 4, 145 S. W. 542, the defendant on appeal assigned as one reason for a reversal of the judgment of conviction the misconduct of the jury in reading an article in a newspaper, which was calculated to prejudice the jurors against the defendant, while they were considering their verdict. The prosecuting attorney filed in the trial court, after the term at which the case was heard, a petition for a *nunc pro tunc* order to have the record amended to show that, on the hearing of a motion by defendant for a new

trial on the ground that the jury was prejudiced by reading the newspaper article before rendering a verdict, testimony was introduced showing that none of the jurors read the article. The defendant admitted that this testimony was introduced, and the court thereupon ordered the record amended by incorporating such testimony. The court said: "It is insisted that the original bill of exceptions represents the entire action taken by the trial judge at the time he signed it, and on this account no further action could now be taken which was not in contemplation of the trial judge at the time he signed the bill of exceptions. But the bill of exceptions is only a vehicle to bring into the record the matters and proceedings happening during the trial. When duly signed and filed, it becomes a part of the record. It presents the testimony given and the matters done at the trial, and therefore, if such testimony actually given, or other matters done at the time of the trial, have been omitted from it, the bill of exceptions can be corrected by incorporating such testimony or other matters. The bill of exceptions, like any other part of the record, should speak the truth, and, like any other part of the record, it may be amended so as to make it speak the truth. The entries in the bill of exceptions should correspond with what was actually done. Hence, if anything has been omitted from it which is properly a part of it, but fails to be incorporated in it, through negligence of the attorneys or inadvertence of the trial judge, then the omission may be supplied by amendment made after the term."

In *People v. Murback* (1883) 64 Cal. 369, 30 Pac. 608, the indictment charged that the murder was committed on the 26th day of November, 1882. Of that crime the defendant was convicted, and, on conviction, judgment was pronounced. But the clerk, in making up his minutes of the proceeding for sentence, entered as part of the proceeding that the court informed the defendant "of the indictment found against him for the crime of murder committed on November 26, 1883." This entry did not express the

fact; and, after discovering the mistake which had been made, the court, on notice to defendant and his counsel, ordered the entry to be corrected by changing the figures "1883" to "1882," so as to express the truth. The order was made March 12, 1883. Meantime an appeal had been taken from the judgment; and it was contended that the court had no jurisdiction, pending the appeal, to make the order. The supreme court sustained the action of the trial court in amending the record so as to make it speak the truth, saying that the mistake was one which could be corrected at any time while the record of the case was subject to the physical control of the court.

In *People v. McNulty* (1892) 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, the record on appeal was found not to show that, when defendant appeared for judgment, he was asked "if he had any legal cause to show why judgment should not be pronounced against him," as required by law. On a suggestion of the diminution of the record there was filed a certified copy of the record of the trial court, containing an amendment of the minutes *nunc pro tunc* as to the fact that when the defendant appeared for judgment he was asked the said question as required by law. It was held that the trial court had power to amend its record so as to conform to the true state of facts, even pending appeal.

In *Wentzel v. People* (1913) 55 Colo. 33, 133 Pac. 415, the defendant was, under a plea of guilty to an information charging him with incest, sentenced to the penitentiary. Some three years later, the defendant's counsel filed a motion to amend the information in certain particulars to make it conform to the facts. The testimony on which the amendment was sought was contradicted and the trial court overruled the motion to amend. The supreme court said: "The question of amendment of the record was clearly within the discretion of the court, subject, as in case of every such discretion, to review, by reason of abuse of such discretion only. Clearly there was no abuse of discretion in this case."

In *Territory v. Christensen* (1887) 4 Dak. 410, 31 N. W. 847, after judgment was pronounced, and the defendant conveyed to the penitentiary, the defendant sued out a writ of error and assigned as errors of record that (1) the plea of defendant did not conform to the statutory form; (2) it did not appear by record that the clerk or district attorney on the trial read the indictment, or stated the plea of the defendant, to the jury; (3) it did not appear by the record that when the verdict was given and recorded, or at any time, the clerk read it to the jury and inquired if it was their verdict; (4) it did not appear that a time was appointed by the court, after the return of the verdict, for pronouncing judgment, or any time allowed after verdict before judgment; (5) the record did not show that before judgment the defendant was informed of the nature of the indictment, or of his plea, or of the verdict, or was asked whether he had any legal cause to show why judgment should not be pronounced against him; (7) judgment was rendered without stating offense. The writ of error came on for argument in the supreme court, at which time the attorney for the territory made an application to the court for a writ of certiorari to the trial court, requiring it to certify further the record of the proceedings had in the trial, alleging that the record sent up was not full and complete. The clerk having made return to the writ of certiorari, it appeared from inspection thereof, and the record returned, that after the allowance of the writ of error and issuance of the writ of certiorari, and after expiration of the term at which judgment was rendered, the trial court made an order correcting and supplying the omissions, irregularities, and errors complained of. This amendment of the record was made after notice to the defendant and his attorneys, and from the recollections of the clerk, of the district attorney, and of the judge presiding at the trial, who was still the presiding judge of that court, and from the inspection of the records and papers filed in the case. It was held by the supreme court that the trial court had power thus to

amend its record after the term at which judgment was rendered. The court said: "The question of amending the record is not a new one. Courts have been in the habit of amending their records ever since the courts of record have had an existence. No two of the cases cited are exactly alike in the facts presented, and very few of them are parallel with the one at bar. All the cases agree that the courts have absolute control over their records during the entire term at which the judgment was rendered, and in which action or proceeding the amendment is sought to be made. We have examined with some care the cases cited and relied upon by the defendant, denying the right of amendment after the term at which the action or proceeding is determined, and it may be said of them, in general, that they are not in point upon the facts of this case. All, or nearly all, of them are cases in which, after expiration of the term, some amendment or modification of the judgment itself is sought to be made, affecting the substantial rights of the parties, upon disputed parol testimony, and the recollections of persons and parties.

. . . But that class of cases is to be distinguished from the one at bar. Here no attempt is made to amend, modify, or in any manner change, the judgment rendered. It is only sought to build up and strengthen the foundation upon which the determination of the court rests, and not in any manner to weaken or strengthen the determination itself. The corrections made are purely clerical; the acts themselves were all done; the proceedings were all had; the steps affecting the defendant's rights were all taken; but the record thereof—the purely clerical part—was not done. The judge himself could not do this. It was no part of his business to reduce to writing the various acts done by himself, and those by him directed to be done. The rights of the prisoner were all saved and protected when the court had done all those things which the statute required to be done in the trial and determination of his case. The record of the proceedings is not necessary to the trial of an action. It is only nec-

essary to a review of the case, and as an evidence in the future of what did in fact occur. There is no statute which requires that this record shall be made up at any particular time. In practice, such record is not usually made at the time of the occurrence of each transaction, and it is no unusual thing that such final records are actually made up after the adjournment of the term, by careful clerks, from papers and memoranda kept of each proceeding as it occurred; and, whether such practice is one to be commended or condemned, this court is not now prepared to say that records so made and entered are not the 'minutes of the court' because they were not entered upon the journal itself contemporaneously with the occurrence of each act. The court itself is the sole judge of the correctness of its own records, and during the continuance of the term, which in law is but one continuous day, may make, alter, modify, and change its records to conform to the facts, at its own will; and, if the clerk has failed to record any act of the court during the term, no good reason can be seen why the clerk should not, by order of the court, supply any omission which sustains the orders and decisions made or rendered by the court, after the term at which such order or decision was made or rendered."

In *Brown v. State* (1892) 29 Fla. 494, 11 So. 181, on appeal, the judgment of the lower court was reversed on the ground that the record did not show that the jury were sworn, or that the prisoner was personally present when sentence was pronounced. At a term of the trial court subsequent to that at which the trial was had, the record was amended to show that the jury was "duly elected, tried, and sworn according to law," and that the defendant was present "in his own proper person, as well as by his counsel, . . . and saying nothing sufficient why the sentence of law should not be passed upon him." The attorney general moved the supreme court to vacate the judgment of reversal, and filed a copy of the amended record in support of the motion. The supreme court, while holding that it had

lost jurisdiction by rendition of final judgment on the former appeal, said: "It was entirely competent for the state to have had the record of that tribunal, if it did not speak the truth, amended while the proceedings were pending here, and by bringing the amended record here they could have arrested our action on the original record before we rendered judgment."

In *Olive v. State* (1894) 34 Fla. 203, 15 So. 925, the record showed that the jury returned a verdict against the accused, and that a motion by the accused for a new trial was overruled, but did not show that the accused was personally present when the motion for the new trial was made and overruled. During the next term of the court, the defendant being present in person and by attorney, the state attorney made a motion that the minutes of the court, made at the former term in reference to the motion for a new trial, be amended so as to speak the truth, and to show that the accused was personally present in court at the time the motion was made, and during the proceedings thereon. It appearing to the court that the accused was present when the motion for a new trial was made, it was ordered that the record be amended to show that fact. The supreme court sustained the action of the trial court, saying: "We entertain no doubt about the power of the trial court during the subsequent term to amend its records so as to speak the truth, and to show what did actually take place during the hearing upon the motion."

In *State v. Watkins* (1900) 7 Idaho, 35, 59 Pac. 1106, the record failed to show the presence of the defendant when the verdict of the jury was received. After the term at which the verdict was rendered, a motion was made in the trial court to amend the record to show the presence of the defendant when the verdict was received—the fact of his presence being undisputed. The motion was allowed by the trial court, and the record was amended to accord with the fact. The supreme court sustained the action of the trial court in amending the record.

In *State v. Pearce* (1860) 14 Ind. 426, the defendant was tried on an

indictment for larceny. On the return of the verdict against the defendant, it was discovered that the entry of the return of the indictment by the grand jury, at a previous term of the court, had been omitted; and thereupon the prosecuting attorney moved that the entry be then made *nunc pro tunc*. The defendant admitted the fact that the indictment had been thus regularly returned, but objected to the *nunc pro tunc* entry, and moved on his part for a new trial, on account of the alleged defect in the record. On appeal, the supreme court said: "The court should have sustained the motion for the *nunc pro tunc* entry. Of its own motion, it should have ordered it on the facts."

In *Long v. State* (1877) 56 Ind. 133, the indictment was duly returned into court by the grand jury, but was never filed or placed on the order book of the court. After the term, on motion of the prosecuting attorney, the trial court made an order *nunc pro tunc* that the indictment be placed on the order book, and marked as filed of the day and date of its return into court, now for then, in all things in manner and form prescribed by law, all of which was done accordingly. On appeal, the supreme court sustained the action of the trial court, saying: "We fail to see anything erroneous in this decision of the court below. If, in fact, the indictment in this cause had been duly returned into the court below by a proper grand jury, and the clerk of the court had failed to make the proper entry of such return, and if, in fact, the indictment had, since its return, been on file in the court, but the clerk had failed to mark it as filed, whenever these facts were brought to the knowledge of the court below, in our opinion, the court not only had the right and power, but it was clearly the duty of the court in the administration of justice, to direct the making of a proper *nunc pro tunc* entry to show the return and filing of the indictment, according to the facts of the case as they previously existed."

In *Knight v. State* (1880) 70 Ind. 375, the original record as made up at the time of the trial did not show any arraignment upon, or plea to, the in-

dictment. Subsequently, at an adjourned session of the term at which the trial was had, and therefore, in legal contemplation, the same term, the record was amended by a nunc pro tunc order of the court to show the arraignment and plea of the accused. The supreme court, after holding the trial court's action in allowing the amendment at the special session a proper exercise of power, said: "If, however, the entry complained of in this case had been made after the close of the term, we would still have to assume that it was made upon proper and sufficient evidence, as the evidence upon which it was made is not before us."

In *Walker v. State* (1885) 102 Ind. 502, 1 N. E. 857, the transcript of the record, when first filed in the supreme court, showed that only eleven of the twelve jurors were present when the verdict was rendered in the trial court. Proceedings were commenced in that court after the appeal was taken, to have the record amended in that respect, and notice of the pendency of the proceedings was served on the appellant. After hearing the evidence, the trial court entered an order nunc pro tunc amending the record as originally made, so as to make it show that all the jurors were present when the verdict was returned, and a transcript of these proceedings was certified to the supreme court. On the question whether the court below had jurisdiction thus to amend its record, the supreme court held that it had complete jurisdiction over the subject.

In *State v. McComb* (1864) 18 Iowa, 48, the name of one of the grand jurors had been omitted from the record. At a subsequent term of the court, the district attorney moved to amend the record of the previous term by inserting the omitted name. The court heard testimony on this motion, and, being satisfied that the omission by the clerk to enter the name was an evident mistake, sustained the motion and ordered the name inserted in the record. On appeal, the supreme court held that the trial court had power thus to correct the record.

In *State v. Westfall* (1878) 49 Iowa, 328, 3 Am. Crim. Rep. 343, the defend-

ants, at the term of court to which the indictment was returned, appeared in person and waived arraignment. The record then made showed that six of the nine defendants had waived arraignment. At the next term a motion was made by the district attorney to correct the record in accord with the fact, which was sustained by the court. The supreme court held that the order of the court below, making the correction in the record, was proper.

In *State v. Curry* (1906) 74 Kan. 624, 87 Pac. 745, the record of each of two former trials recited that when the jury returned into court and announced that they were unable to agree they were discharged, but did not show affirmatively that they were discharged for the reason that the court found they were unable to agree, as was required to be shown by law. The county attorney filed a motion for an order of court correcting the journal entries in the former trials so as to show correctly the facts as they occurred, and, upon evidence of what in fact had taken place at the former trials, the motion was allowed and orders entered correcting the journal entries, by recitals showing that the court in each trial had inquired of the jury as to whether there was any probability of their being able to agree upon a verdict, and that on the answer of the jury the court made a finding that they were unable to agree and thereupon discharged them. On appeal the supreme court said: "It cannot be denied that the court has ample power to correct its record at any time so as to make it speak the truth."

In *State v. Folke* (1847) 2 La. Ann. 744, the original entry on the minutes of the court made no mention of the swearing of the grand jury. The defendant made objection to the indictment that the grand jurors by whom it was preferred were not duly impaneled and sworn. The clerk, thereupon, made an affidavit that the jurors had been sworn according to law, and that the failure to make the entry was an inadvertent omission of his own, and asked permission of the court so to amend the minutes as to make the entry accord with the fact. The judge permitted the amendment to be made.

The supreme court held this action of the judge to be a proper exercise of power, saying: "The power is inherent in courts to direct the correction of the minutes of their proceedings, so as to make the entries conform to the truth, whenever errors or omissions are satisfactorily shown; and in criminal proceedings it is well settled that all ministerial acts are amendable at any time."

In *State v. Gates* (1854) 9 La. Ann. 94, wherein the record on appeal did not show that the jury on whose verdict the judgment was rendered was sworn, the supreme court said: "If the jury were regularly sworn, and the clerk omitted to make the entry on the minutes, it would have been within the province of the court in the exercise of an inherent power, to have directed, upon proper suggestion, that the minutes should be so corrected as to conform to the facts which really existed; for it is well settled that, whenever errors or omissions in ministerial acts in criminal proceedings are satisfactorily shown, they may be amended at any time; and it has even been held that it is no objection to the amendment that it was intended to supply an omission which occurred when a different judge presided."

In *State v. Williams* (1876) 28 La. Ann. 310, the record of the court did not show either that the information on which the prosecution was based had been filed with the consent of the court, or that it had been filed at all. The judge who presided at the trial, by a nunc pro tunc order, caused the record to be amended by supplying the omissions, so as to make it conform to the truth. The supreme court said: "We think the fact in this instance one within the knowledge of the court, and we have ourselves recognized and announced the right and duty of a judge to have the minutes of his court, in criminal as well as civil matters, corrected nunc pro tunc."

In *State v. Monceaux* (1896) 48 La. Ann. 103, 18 So. 896, the record on appeal did not show that the prisoner was present when the jury were sworn and impaneled. The supreme court granted authority to the attorney gen-

eral to correct the record in accordance with the facts. Thereupon he obtained a supplemental transcript from the clerk of the district court, showing that the defendant was present in open court with his counsel at the arraignment, the impaneling and swearing of the jury, and throughout the trial, and had it filed as part of the transcript on appeal.

In *State v. Grandison* (1897) 49 La. Ann. 1014, 22 So. 308, leave to file the information was granted, but an error was committed by the prosecuting officer in his statement of the offense described in the indictment. The court ordered the clerk to file the information presented and the error found its way into the minutes of the court. The trial court allowed a correction of the minutes so as to make it appear of record that the information which had been filed after leave had been granted was the information read to the accused when he was arraigned, and the information upon which he was tried. The supreme court sustained the action of the trial court, quoting from *State v. Gates* (1854) 9 La. Ann. 94, *supra*, as follows: "It is well settled that whenever errors or omissions in ministerial acts in criminal proceedings are satisfactorily shown, they may be amended at any time."

In *State v. Hart* (1913) 133 La. 5, 62 So. 161, at the time the motion to quash was filed the minutes did not show that the appointment of the district attorney pro tem. had been made. The judge at once ordered the minutes to be corrected so as to show the appointment. On appeal the court said: "Minutes of courts may be corrected at any time to supply an omission, if the facts are within the personal knowledge of the judge or so well proved as not to allow of serious dispute."

In *Com. v. Weymouth* (1861) 2 Allen (Mass.) 144, wherein it was held that a judge of the superior court has power to revise and increase a sentence imposed upon a convict during the same term of court, and before the original sentence has gone into operation, or any action has been had upon it, the court said in regard to the pow-



er of a court to amend its record: "The practice in this commonwealth has been substantially in accordance with the rule of the common law.

. . . It has been varied only so far as to adapt it to the different forms and modes of doing business in our courts. During the term, no record, in the strict meaning of that word, is kept of the doings of the court. Its proceedings are noted by the clerk from day to day in brief minutes upon the docket, and from these the extended record is drawn up after the final adjournment for the term. The memoranda thus made have always been subject to such alterations during the term as might be deemed by the court necessary or proper, either by correcting mistakes or by substituting a different entry or judgment from that originally made. Nor is this the extent of the power of the court over its records. Upon due proof that some error has been made in drawing up the record, amendments have been allowed after the final entry of judgment and the adjournment of the court for the term."

In *Bilansky v. State* (1859) 3 Minn. 427, Gil. 313, the defendant moved in arrest of judgment that by the record, among other things, it appeared (1) that no officer was sworn to take charge of the jury; (2) that all the jurors were not sworn; (3) that after the verdict was rendered it was not read to the jury and they asked if it was their verdict, etc., all of which was required to be done by the statute, and to appear of record. The prosecuting attorney then moved the court to correct the record, and to make it show, in accordance with the fact, that each of such acts alleged to have been omitted was in fact done. The amendment was resisted on the ground that the court, after the term, had no power to make such amendments. The court granted the amendment, and on appeal the supreme court, in sustaining its action, said: "While we would go as far as any court in reprobating a rule which would place the proceedings of a court almost entirely at the mercy of the subordinate officers thereof, we would be scrupulously careful in adopting any rule which

5 A.L.R.—72.

would tend to destroy the sanctity or lessen the verity of records. And while we admit the power to amend a record after the term has passed in which the record was made up, we would deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. If a jury is sworn according to law, or any other of the ordinary proceedings takes place in the progress of the trial of a cause, and the clerk omits to record the fact, we can see no reason why the record should not be made to conform to the truth, even after the term, when there exists no doubt about what the truth is. . . . But when the facts stand undisputed, and the objection is based upon the technical point alone that the term has passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age, to sustain it. It is our opinion that this power, of necessity, exists in the district court, and that its exercise must in a great measure be governed by the facts of each case."

In *State v. Hall* (1918) — Mont. —, 175 Pac. 267, the record disclosed that the jury was admonished by the court and placed in charge of the sheriff. An attempt was made to impeach the record by affidavit. The court held that this could not be done, saying: "If it does not speak the truth, the remedy was by motion to have it corrected."

In *Garrison v. People* (1877) 6 Neb. 274, the journal failed to show that an indictment had been found. At a subsequent term of the court the defect in the record was discovered and the court ordered an entry to be made in the journal showing that an indictment was found and returned into open court. The supreme court sustained the action of the trial court in allowing the amendment, saying: "Courts retain authority over their records after the entry of the judgment. They possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. This power authorizes the court to

amend its record to correspond with the facts, and this may be done upon the judge's notes or any other satisfactory evidence. Amendment of the record has been more frequently exercised in civil than in criminal cases, but no good reason exists why it should not apply to both classes alike. The court therefore did not err in permitting the entry to be made."

In *Borrego v. Territory* (1896) 8 N. M. 446, 46 Pac. 349, the record on appeal did not show that the defendants had been arraigned or had pleaded to the indictment. While the cause was pending on appeal, an application was made to the district court where the defendants had been tried and convicted, in which it was averred that in truth and in fact the defendants had been arraigned and had pleaded not guilty before the court below, and that the arraignment and pleas were omitted from the record by the inadvertence of the clerk, and the court was asked to order the correction of the record in these particulars by an entry *nunc pro tunc*. The district court, after considering the application and the proofs submitted on both sides, granted the motion. The clerk then, in return to a *certiorari* from the supreme court, sent up the record as amended, in which the arraignment and pleas of not guilty appeared as entered therein *nunc pro tunc*. The supreme court held that the action of the district court was entirely regular, saying: "The district court, in the *nunc pro tunc* proceeding, acted with entire regularity, and its conclusion is abundantly supported by the proofs adduced, and no error is disclosed therein. The only question is as to whether the district court had any power to amend the record at all. This power is denied by counsel for defendants upon the following grounds: (1) That the amendments can be made in only those cases where there are some written memoranda on file in the cause, on which the amendments may be based; (2) that after the term has expired inaccuracies in the record cannot be corrected or omissions supplied by *nunc pro tunc* entries; (3) that they cannot be made in criminal cases. . . . (1) . . . The rule of prac-

tice which has obtained in this territory since 1854 does not . . . require any written memoranda, if the facts warranting the amendment can be gathered from the officers in immediate connection with the court. . . .

(2) There is diversity of opinion as to the source of the power to make *nunc pro tunc* entries, but there is none as to the existence of the power to make the records now, as of then, conform to and speak the actual truth of past transactions, where, by the neglect or inadvertence of the clerk an omission has occurred or a false entry has been made. . . . (3) It is also urged that whatever the power may be in civil cases it does not extend to those criminal. This point was expressly ruled against in *Re Wight* (1889) 134 U. S. 137, 33 L. ed. 866, 10 Sup. Ct. Rep. 487."

In *People v. Flanigan* (1903) 174 N. Y. 356, 66 N. E. 988, during the trial, the order of commitment consigning the defendant to the city prison was received in evidence without objection, and marked "exhibit D." After the case had been settled and printed, it was discovered that this exhibit did not appear in the return made to the court of appeals because it had been lost, and the clerk could not annex it to the return as a part of the case as settled. Thereupon the district attorney made a motion before the trial judge, on notice to the defendant, to amend the record by annexing thereto a copy of "exhibit D," and for directions to the clerk to certify the same to the court of appeals as a part of the return. The motion was founded on affidavits, showing that the exhibit had been lost. A sworn copy was presented showing the order of commitment. The motion was not opposed and resulted in an order amending the return by setting forth a copy of the commitment. On appeal, the court of appeals held that the trial judge had power to grant the order.

In *State v. Craton* (1845) 28 N. C. (6 Ired. L.) 164, the transcript filed by the prisoner in the supreme court recited that the indictment was found at the February term of court, which was held by William L. Bailey, and it did not show by whom the court was

held at the August term following, at which term the prisoner was tried. Later there was filed in the court a second transcript in which it appeared that the February term was held by one John L. Bailey, and the August term was held by one Richmond M. Pearson. But accompanying the second transcript there was a written statement of the clerk that in fact the original record stated that William L. Bailey (and not John L. Bailey, as it should be) presided at February term, and that it did not state who presided at the August term. On this statement, the truth of which was not contested, a motion was made for a writ of certiorari, with directions to the clerk to send an exact transcript of the record, and it was requested that the writ be made returnable at such a day as to enable that court by proper entries to correct the mistake and supply the omission of the clerk. The motion was sustained and the request granted. The court said: "Possibly the court, under the liberal language of the statute, might amend here in the particular points in which this transcript is defective, as there could be no mistake as to the judges who held the court at the terms mentioned. But for the reasons given in *Ballard v. Carr*, 4 Dev. (N. C.) 575, it is more convenient that it should be done in the superior court, so as to make the records of the two courts consistent. The corrections may be made by changing in the original record the name of Judge Bailey, and by inserting that of Judge Pearson, at August term; and there is no doubt that it is competent to the superior court to make such corrections."

In *State v. Swepson* (1881) 84 N. C. 327, at the August term of the superior court a motion was made in behalf of the state to amend the record of the minute docket of the spring term, so as to show that the defendant was not present at the time of the trial, verdict, and judgment then and there had in the case. The judge presiding refused to hear evidence as to the proposed amendment or to allow the same, on the ground of the want of power. The solicitor for the state made application to the supreme court for a writ of

certiorari to remove the record and proceedings in the case into that court for review. The writ was ordered accordingly, and on review the court held that the trial court had power to entertain the motion of the state to amend the record.

In *State v. Warren* (1886) 95 N. C. 674, the clerk took the recognizance of one Keith and the defendant in the usual form "that the said Keith should appear on Thursday and not depart the court without leave." The defendant insisted, and offered affidavits of himself and others to the effect that the recognizance was not that Keith should not depart the court without leave, but that he should not depart the court on Thursday without leave of the court first had and obtained, and that said Keith complied with the recognizance by remaining in court all that day. Thereupon, on motion of the solicitor, it was ordered by the court that the record of the previous term be amended *nunc pro tunc*, by adding to the entry already made, which set forth the recognizance already taken, the words, "and that he do not depart the court without leave of the same first had and obtained." The supreme court said: "We find no error in the judgment of the superior court. There are no exceptions taken below to the amendment of the record as ordered by the court, and if there had been, it would not have availed the defendant. The court in ordering the amendment exercised a power which is incident to every court of record. Every court has power to amend its own records so as to make them speak the truth (*Parsons v. McBride* (1856) 49 N. C. (4 Jones, L.) 99; *State v. McAlpin* (1843) 26 N. C. (4 Ired. L.) 140; *Ashe v. Streator* (1860) 53 N. C. (8 Jones, L.) 256); and this power may be exercised at any subsequent term of the court."

In *Mahan v. State* (1840) 10 Ohio, 233, the court observed a defect in the record on appeal in that the names of the grand jurors who found the bill did not appear, either in the caption, the indictment, or in any part of the record, and with respect to it said: "In this state, it is clear, if the names of the grand jurors do not appear, at

least in some part of the record, a writ of error will undoubtedly lie, though it is probable that on motion a certiorari would be awarded, and the defect cured by the sending up of a new record. Clerical omissions, in criminal cases, are amendable at common law. The same rule prevails as in civil proceedings, in this respect."

In *Hollister v. Judges of District Ct.* (1857) 8 Ohio St. 202, it was alleged that the judge of the court of common pleas who presided at the term of the district court held in April, 1855, had improperly stricken out of a bill of exceptions, outside of the court room, after the final adjournment of the court, certain material words. In a proceeding to compel the judges of the district court to amend the bill of exceptions by inserting therein the words so stricken out, the defendants answered that the official terms of two of the judges composing the district court at the time of the signing of the bill of exceptions in question had expired, and that the present judges holding the district court knew nothing about the facts in relation to said alteration. The court held that the personal knowledge of the court was not essential to the correction of a clerical error, as they had power to inquire into the matter and inform themselves by competent evidence, and act on that as they act on proofs given in court in the performance of other judicial acts.

In *Benedict v. State* (1887) 44 Ohio St. 679, 11 N. E. 125, 7 Am. Crim. Rep. 11, the clerk of the court, in making up the journal, by inadvertence omitted to journalize the statement from the court docket that the jury was discharged because there was no probability of the jurors agreeing. It was required by law that the record must show the reason for the discharge of the jury. At a subsequent term of the court the state moved for a nunc pro tunc order to be entered as of previous term, reciting that the jury was discharged at that term for the reason that there was no probability of the jurors agreeing. The only evidence offered in support of this motion was the entry to that effect made by the presiding judge on the court docket

at the previous term. The motion to enter the nunc pro tunc order was sustained. On appeal the supreme court held the action of the lower court to be authorized, saying: "The principle is fundamental that every court has a right to judge of its own records and minutes; and if it appear satisfactorily to it that an order was actually made at a former term and omitted to be entered by the clerk, it may at any time direct such order to be entered upon the records, as of the term when it was made. . . . In the case at bar the jury was in fact discharged for the reason that there was no probability of the jurors agreeing. This was one of the grounds which authorized a discharge of a jury in a criminal case without prejudice to future prosecution upon the same indictment. The fact and reason of the action of the court were duly entered upon the court docket, and all that the court could do was done. Judicial action was taken, but there was failure so to make up the journal as to show such action. . . . The views we have here expressed lead us to the conclusion that the action of the court below in supplying the omission to enter upon the journal of the court the reasons for the discharge of the jury by a nunc pro tunc order, and in refusing the application of the prisoner to be discharged from further prosecution, was authorized."

In *Re McQuown* (1907) 19 Okla. 347, 11 L.R.A. (N.S.) 1186, 91 Pac. 689, the original record of the judgment omitted to state that the defendant was ordered committed to jail in default of payment of the fine adjudged against him, or that he waived a jury trial. Subsequently the court found that the defendant did, on arraignment, waive a jury, and that in rendering and pronouncing judgment the court did in fact adjudge that on failure to pay the fine defendant should be committed to jail, and the court ordered nunc pro tunc that the record be made to speak the truth, which was accordingly done. The petitioner contended that the judgment was void for the reason that the record was amended after the expiration of the term of court at which the judgment

was rendered. The supreme court sustained the action of the court below, saying: "The orders, judgments, and proceedings of a court of general jurisdiction are required to be recorded by the clerk of the court. The failure of the clerk or recording officer to make such record does not vitiate the proceedings. The clerk may, at any time during the term at which the proceedings are had, correct, amend, or supply omissions to make the record speak the truth; and the court may at any time, upon proper application, from the memory of the presiding judge, or, upon proper showing, by appropriate order *nunc pro tunc*, cause its records to recite the truth, and may supply any omission from its records; and this may be done in a criminal as well as in a civil cause. Such record, when so supplied, relates to the time when the proceedings were in fact had, and may make valid that which was apparently defective."

In *Com. v. Rusic* (1911) 229 Pa. 587, 79 Atl. 140, the minutes of the trial as originally entered by the clerk did not show that the motion for a new trial, filed by defendant, was argued before the court in the presence of the defendant; and did not show that he was present in the court at the time of the refusal of a new trial, and when sentence was passed upon him. As a matter of fact, he was present on these occasions, and an amendment was allowed after the expiration of the term, for the purpose of making the record conform to the fact in these respects. The supreme court said: "There can be no doubt of the power of the court to amend its record so as to make it conform to the truth, even after the term has expired."

In *State v. Gomez* (1915) 89 Vt. 490, 96 Atl. 190, before the adjournment of the term of the county court whereat the respondent was convicted, he filed a skeleton bill of his exceptions, duly signed and "allowed subject to amendment," and recited his exceptions in general terms. In vacation, an amended bill of exceptions, more fully reciting exceptions referred to in the skeleton bill, and also reciting exceptions not so referred to, was filed as a part of the record, and

passed to the supreme court for final decision. The supreme court ruled that the action of the county court in allowing the amendments to the bill of exceptions in vacation, after the term, was proper.

In *State v. Straub* (1896) 16 Wash. 111, 47 Pac. 227, wherein the original record did not show that the defendant had entered a plea, and it was shown that the omission to plead was not an omission in fact but an omission simply of the record, it was held to be proper for the trial court subsequently to make an order of entry *nunc pro tunc* showing what the actual facts of the case were, and correcting the record in this respect.

In *State v. Engstrom* (1915) 86 Wash. 499, 150 Pac. 1173, the record did not show that the court had refused to give an instruction requested by the defendant, and that the defendant had excepted thereto. After the term the defendant presented to the trial court a statement embodying these facts. The judge refused to certify to the proposed statement for the reason that he did not remember the facts as the applicant recited them, and there was no record kept of the proceedings from which he could refresh his memory. The supreme court sustained the action of the trial court in refusing to certify the statement.

### III. *Minority rule.*

In some jurisdictions, the rule obtains that during the whole of the term in which any judicial act is done the record remains, so to speak, in the breast of the judge of the court, and hence is subject to alteration or amendment, as he may direct, but after the lapse of the term or its final adjournment the judge has no power to change the record further than by *nunc pro tunc* entries to make the record speak the truth, and then only when there is sufficient record evidence to authorize the amendment.

Georgia.—*Smith v. State* (1903) 118 Ga. 84, 44 S. E. 327; *Summerlin v. State* (1908) 130 Ga. 791, 61 S. E. 849; *Parks v. State* (1919) — Ga. App. —, 98 S. E. 90.

Illinois.—*Wallahan v. People* (1867) 40 Ill. 103; *Dougherty v. People* (1886)

118 Ill. 160, 8 N. E. 673; *Fielden v. People* (1889) 128 Ill. 595, 21 N. E. 584; *Knefel v. People* (1900) 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388; *Dreyer v. People* (1900) 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424; *Hubbard v. People* (1902) 197 Ill. 15, 63 N. E. 1076; *Quigg v. People* (1904) 211 Ill. 17, 71 N. E. 886; *Nagel v. People* (1907) 229 Ill. 598, 82 N. E. 315; *McKay v. People* (1908) 145 Ill. App. 277; *People v. Powers* (1916) 200 Ill. App. 536.

**Kentucky.**—*Conn v. Doyle* (1810) 2 Bibb, 248.

**Mississippi.**—*McQuillen v. State* (1847) 8 Smedes & M. 587; *McCarthy v. State* (1879) 56 Miss. 294.

**Missouri.**—*State v. Clark* (1853) 18 Mo. 432; *State v. Jeffors* (1877) 64 Mo. 376; *State v. Feeley* (1905) 194 Mo. 300, 3 L.R.A. (N.S.) 351, 112 Am. St. Rep. 511, 92 S. W. 663; *State v. Gartrell* (1903) 171 Mo. 489, 71 S. W. 1045; *State v. Eaton* (1905) 191 Mo. 151, 89 S. W. 949; *State v. Libby* (1907) 203 Mo. 596, 102 S. W. 641.

**Texas.**—*Dietz v. State* (1875) 43 Tex. 371; *Hill v. State* (1878) 4 Tex. App. 559; *Knight v. State* (1879) 7 Tex. App. 206; *Gerard v. State* (1881) 10 Tex. App. 690; *Craddock v. State* (1881) 15 Tex. App. 641; *Belcher v. State* (1895) 35 Tex. Crim. Rep. 168, 32 S. W. 770; *Sullenger v. State* (1916) 79 Tex. Crim. Rep. 98, 182 S. W. 1140.

**Virginia.**—*Com. v. Cawood* (1826) 2 Va. Cas. 527; *Powell v. Com.* (1854) 11 Gratt. 822; *Barnes v. Com.* (1895) 92 Va. 794, 23 S. E. 784; *Wright v. Com.* (1911) 111 Va. 873, 69 S. E. 956.

In *Smith v. State* (Ga.) *supra*, a petition was filed in the supreme court alleging that by error and mistake the record as sent up by the court below was incorrect in that it failed to show that the venue was proven, and praying that the clerk of the court below be required to send up the original evidence showing that venue was proven, and that the same be made a part of the record. The supreme court refused the petition, saying: "Where the transcript sent up is in accord with the record below, this court has no power to amend the record or to consider a transcript of a paper which is not part of the record of the case."

In *Summerlin v. State* (1908) 130 Ga. 791, 61 S. E. 849, on the call of the case in the supreme court the plaintiff in error moved to amend his bill of exceptions by attaching thereto the original affidavits which were used on the hearing of the motion for a new trial in the court below. The court refused to allow the amendment on the ground that amendments allowable under the Code are confined to such imperfections and omissions as can be supplied from the transcript of the record.

In *Parks v. State* (Ga.) *supra*, wherein it appeared from the brief of evidence in the record transmitted to the supreme court that if any offense was committed by the accused it was subsequent to the finding of the presentment upon which he was tried, the supreme court held that the trial court was without authority to correct the brief of evidence.

But see *Holman v. State* (1887) 79 Ga. 155, 4 S. E. 8, wherein an order was passed at the regular term of court, requiring that the jurors serving during the second week should appear at the next term. Before this order requiring attendance was passed the court had passed an order discharging the grand jury. At the subsequent term the order requiring attendance was amended by inserting the word "traverse" before the word "jurors," so as to make the record conform to the facts. The supreme court held that such a correction was within the power of the court.

In *Wallahan v. People* (1867) 40 Ill. 102, a bill of exceptions was stricken from the record, and an additional transcript was filed at a subsequent term, containing an amended bill of exceptions. It was held that in the absence of any exception to the source of information on which the court below acted in allowing the amendment, it would be presumed that there was something to amend by, some note or memorandum of the evidence sufficient to enable the court to make the proper amendment.

In *Dougherty v. People* (1836) 118 Ill. 160, 8 N. E. 673, the original record filed in the supreme court failed to show that the offense charged was

committed in the county alleged in the indictment. At a subsequent term of the trial court the record was amended on the testimony of witnesses as to their recollection of what evidence was given on the trial to show that the offense charged was committed in the county alleged in the indictment. The supreme court held that the action of the trial court in allowing the amendment was improper, saying: "It clearly appears from this amended record that there was nothing here in the record to amend by. There was no memorial paper, or minute in the case from which what was actually proven on the trial can be clearly ascertained and known, which is indispensable in such cases. *Albers v. Whitney* (1840) 1 Story, 310, Fed. Cas. No. 137; 1 Bacon, Abr. title 'Amendment, F.' The memorial paper or minute by which a record may be amended must be made and preserved as a part of the record, pursuant to law. A private memorandum of a witness is not sufficient. The amended record here affirmatively shows that this amendment to the bill of exceptions was made alone upon the testimony of witnesses as to their recollection of what evidence was given on the trial. If bills of exceptions may be thus amended, what is the limit to the time? And may not the amendment itself, in like manner, be subsequently amended, thus leaving the matter of bills of exceptions to rest entirely in the frail and, it might often be, corrupted, memory of witnesses? The common-law rule in this respect is in force here, and under it no such amendment is admissible."

In *Fielden v. People* (1889) 128 Ill. 595, 21 N. E. 584, the record showed the presence of the plaintiffs in error when the judgment affirming the judgment of the lower court was rendered, as required by law. The plaintiffs in error alleged that they were not present at that time, and stood ready to verify same, and moved to amend the record to conform to the truth. It was held that an amendment in derogation of a judgment would not be allowed at a term subsequent to that at which the final judgment was rendered.

In *McKay v. People* (1900) 145 Ill.

App. 277, the trial court, after the lapse of the judgment term, entered a nunc pro tunc order amending the record by interpolating a motion to quash the indictment and an order thereupon, and also signed a bill of exceptions after jurisdiction had been lost by lapse of time. The appellate court said: "It is true that after a term at which a cause has been disposed of has expired, amendments of the record may be made by nunc pro tunc orders so as to make the record speak the truth. But in such cases the amendment must be based upon some official or quasi official note, or memorandum, or memorial paper remaining in the files of the case or upon the records of the court, the judge's minutes, or some entry in some book required to be kept by law. A private memorandum of a witness is not sufficient; nor can the fact proposed to be incorporated into the record be based upon the recollection of the judge or other person, or upon affidavits or testimony taken after the event has transpired."

In *Knefel v. People* (1900) 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388, it appeared from the record that the motion for a new trial was overruled when in fact it was allowed. After the expiration of the term, a correction of the record was made from the memoranda of the court's orders made in the clerk's minutes at the time. The supreme court held that it was competent for the trial court to examine the minutes of the clerk made under the direction and in the presence of the court, and to correct the record therefrom.

In *Dreyer v. People* (1900) 188 Ill. 40, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424, the record was silent as to whether the officers were sworn to take charge of the jury when the said jury retired to consider the verdict. After the term at which the judgment was rendered, and on affidavits and stenographic notes, the judge certified that the officers were not sworn as required by law. The supreme court refused to allow the amendment of the record on evidence dehors the record, saying: "In cases where a bill of exceptions may be amended after the term at

which the judgment was rendered and after the bill has been settled and signed, for the purpose of supplying an omission or correcting a mistake, the amendment must be based upon some official or quasi official note, or memorandum, or memorial paper remaining in the files of the case or upon the record of the court. A fact proposed to be made a part of the record by amendment of a bill of exceptions cannot rest in the recollection of the judge nor of any other person. It cannot be based upon ex parte affidavits or testimony after the event, and the only basis of the proposed amendment is of that kind. The affidavits and the testimony of McFall were presented to the trial court on the motion for a new trial, and purported to give recollection of persons as to what occurred at the trial. They were not made or kept as a record of the event at the time it is alleged to have occurred, and all that is proposed is that the trial judge, upon their being presented to him again, shall certify his opinion or conclusion that the bailiffs were not sworn, because those persons made affidavits or testified after the trial that they were not sworn. That cannot be done by way of amendment of the record."

In *Hubbard v. People* (1902) 197 Ill. 15, 68 N. E. 1076, the record failed to show that the jury was impaneled, that defendant was present at the time when the verdict was returned or at the time sentence was pronounced, or that the jury was kept in the charge of a sworn officer. At a subsequent term of the court, on the affidavit of the shorthand reporter, the record was amended to show these facts. The supreme court held that stenographic notes of a shorthand reporter were not such a memorial paper, note, or memorandum as the law contemplates shall be used as a basis from which to make an order amending a record nunc pro tunc. The court said: "The record in a criminal case may be amended after the term at which it is made has elapsed, by an order of court entered nunc pro tunc, when by reason of a clerical misprision it does not speak the truth. *Kennedy v. People* (1867) 44 Ill. 283; *Phillips v. Peo-*

*ple* (1878) 88 Ill. 160; *Gore v. People* (1896) 162 Ill. 259, 44 N. E. 500; *Knefel v. People* (1900) 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388. The amendment must, however, be based upon some official or quasi official note, or memorandum, or memorial paper remaining in the files of the case or upon the records of the court, and a fact proposed to be incorporated into a record to supply an omission cannot rest in the recollection of the judge or other person, or be based upon ex parte affidavits or testimony after the event has transpired. . . . The statute does not make it the duty of the shorthand reporter to keep bench notes for the judge, or memoranda from which the clerk of the court may subsequently write up the record. The stenographic notes of the shorthand reporter were not, therefore, such a memorial paper, note, or memorandum as the law contemplates shall be used as a basis from which to make an order amending a record nunc pro tunc. The ex parte affidavits of the reporter, accompanied by excerpts from his stenographic notes and of the clerk of the circuit court, were not sufficient upon which to base said nunc pro tunc order. They were of no more force for the purpose for which they were used than would have been the affidavits of bystanders who had taken notes of the various steps pursued in the trial of the case, or who had been present and observed the course of procedure during the trial."

In *Quigg v. People* (1904) 211 Ill. 17, 71 N. E. 886, wherein the record in a criminal case showed proper arraignment and plea, it was held that affidavits contradicting the record in this particular were properly refused.

In *Nagel v. People* (1907) 229 Ill. 598, 82 N. E. 315, the record failed to show the impaneling of the grand jury or the return of the indictment into court as required by law. After the term at which the trial took place the record was amended to show these facts. On appeal it was held that it would be presumed that minutes of the judge or clerk existed on which to base the amendment and that the action of the lower court was correct.

In *People v. Powers* (1916) 200 Ill.



App. 536, the record on appeal did not show that the bill of exceptions was presented to the court in term time. The defendant in error filed affidavits setting up a version of the facts in the court below concerning the presentation and signing of said bill of exceptions. The state's attorney filed counter affidavits tending to show an entirely different state of facts concerning the presentation and signing of said bill of exceptions. The supreme court refused to consider the affidavits for the purpose of amending the record, saying: "By many decisions it has been settled that in a reviewing tribunal in this state the record of the court below imports verity, and cannot be contradicted by affidavits, nor can any deficiency therein be supplied by affidavits filed in such reviewing court. If the record filed is incorrect, or omits necessary matter supposed to have occurred in the court below, the record can only be corrected by an application to the court below in term time, and the court below has jurisdiction to hear and determine the matter at a later term, if there exists anything in the record to amend by."

But see *Kennedy v. People* (Ill.) supra, wherein the clerk, in writing the record showing the return of the indictment into court, made a mistake in the title of the offense with which the defendant was charged. The court said: "If such a mistake was made, the court below has the power to permit the record to be amended, upon a proper application by the people."

So, in *Phillips v. People* (1878) 88 Ill. 160, the supreme court sustained the power of the circuit court at a subsequent term, and while the prosecution was still pending, to amend nunc pro tunc the record made by the clerk at a previous term, so as to make it appear that at the time of a former trial upon the same indictment the prisoner had not entered a plea of not guilty.

In *May v. People* (1879) 92 Ill. 343, an indictment was found at the October term of the circuit court. The trial was had at the subsequent May term of the court. After the rendition of the verdict, the state's attorney moved for an order to have the clerk

enter nunc pro tunc the return of the indictment into open court, the record up to the time of the motion not showing that the indictment was ever returned into open court as it is required by law to show. On the oral testimony of the foreman of the grand jury, who was introduced as a witness, of the return of the indictment into open court, the court granted the motion, and the record was accordingly amended so as to show that the indictment was brought into open court. The supreme court sustained the action of the trial court in allowing the amendment.

In *Conn v. Doyle* (1810) 2 Bibb (Ky.) 248, when the judgment was rendered an entry was made for granting an appeal to the "plaintiff," on his giving bond and security. At the next term an entry was made amending that of the former term, so as to grant the appeal to the defendant, instead of to the plaintiff. This amendment of the record of the court was made from the recollection of the court and the clerk that the defendant had prayed the appeal, and that the entry was made by the mistake of the clerk. The court of appeals denied the trial court's power so to amend its record, saying: "During the term, the court has power to alter or amend the record according to the truth of the case, but after the term expires the court ceases to have such power, except in cases of clerical misprision; and even in those it is an inviolable rule that no amendment can be made unless there is something in the record to amend by."

In *McQuillen v. State* (1847) 8 Smedes & M. (Miss.) 587, the record did not show that the accused had ever pleaded to the indictment, and at a subsequent term of the court the clerk made an entry to the effect that the accused was arraigned at the previous term and pleaded not guilty. It was held that it was incompetent for the clerk, at a subsequent term, to make an entry of what had transpired at the preceding term.

In *McCarthy v. State* (1879) 56 Miss. 294, the prisoner was indicted for an assault and battery with intent to kill and murder. The jury returned a ver-

dict in the following words: "We, the jury, find the prisoner guilty as charged in the indictment, and recommend him to the mercy of the court." The clerk in entering this verdict entered it thus: "We, the jury, find the prisoner guilty of assault and battery, and recommend him to the mercy of the court." At a subsequent term of the court the district attorney made a motion to amend the entry on the minutes, and for a proper entry *nunc pro tunc* of the verdict as returned by the jury. On the hearing of this motion there was admitted in evidence, against the objection of the prisoner, the written memorandum of the verdict, and the oral testimony of the clerk to the effect that it was the true verdict brought in by the jury, and that it had been by him read aloud to them, and by them declared in open court to be their verdict, and that its entry on the minutes in the form there found was a clerical misprision on his part. The supreme court said: "This testimony was improperly admitted. It is the settled doctrine of this court that no correction of the record can take place after the term, except where the record itself affords the means of correction, or except where expressly allowed by statute."

In *State v. Clark* (1853) 18 Mo. 432, the clerk did not mark on the indictment the time of its filing, as required by law. At a subsequent term of the court the circuit attorney, in the presence of the court, by reference to the minutes of the proceedings of the court, made up the record of the previous term, reciting, among other things, that on Tuesday, the second day of the term, the following proceedings were had: "The grand jury returned into court the following true bills of indictment" (naming the one under which defendant was convicted). The supreme court held that the failure of the clerk to make proper and formal entries on the records of the court was properly supplied by having such entries made by a *nunc pro tunc* order at a subsequent term.

In *State v. Jeffers* (1877) 64 Mo. 376, the defendant was indicted for murder. The record showed that the defendant was duly arraigned and

pleaded "Not guilty," and the trial of the cause commenced and continued, when it was finally submitted to the jury and they retired to consider their verdict. At a subsequent term of the court a motion was filed on the part of the state asking the court to make an order requiring the clerk to amend the record and enter an order *nunc pro tunc*, showing that the jury had been discharged, being unable to agree upon a verdict, and the continuance of the cause. The only evidence offered in support of the motion for correcting and perfecting the record was the affidavit of the clerk of the court and prosecuting attorney, in which they state that the next day after the jury had retired to consider their verdict, they came into court and, in the presence of the accused and his counsel, announced that they were unable to make a verdict, and thereupon they were discharged by the court, and the cause was continued, and defendant remanded to jail—all which the clerk omitted to record. The motion was sustained, to which action of the court defendant excepted. On appeal the supreme court reversed the action of the trial court, and stated the controlling principles as follows: "When a clerk omits to make an entry which was ordered to be made, or makes a different entry from that which was ordered, the court may, at a subsequent term, amend the record so as to make it conform to the truth, provided some entry, either in the minutes kept by the judge or clerk, or some paper filed in the cause and sustaining them, shows the facts from which the amendment can be made. *Dunn v. Raley* (1874) 58 Mo. 134. The power possessed by courts to make *nunc pro tunc* entries in a cause after the end of a term does not authorize the entry of an order which ought to have been made, but only those which were actually made at the time. Evidence aliunde cannot be resorted to for such purpose. To allow such entries to be made on facts resting in the mere memory of witnesses, and their statements as to what occurred, would be to establish a rule which would breed the utmost confusion and uncertainty, and make courts of rec-

ord everything except what the law intends them to be. Neither can such entry be made after the end of the term, upon the knowledge of the judge himself. During the term, which is in legal estimation but one day, everything is in fieri, and during that time the judge, of his own knowledge, may enter any judgment which has been pronounced. *State v. Harrison* (1837) 10 Yerg. (Tenn.) 542. Inasmuch as the record was attempted to be amended upon the statement of witnesses and the knowledge of the judge, after the end of the term, the motion of plaintiff for a nunc pro tunc entry ought to have been overruled."

In *State v. Feeley* (1905) 194 Mo. 300, 3 L.R.A. (N.S.) 351, 112 Am. St. Rep. 511, 92 S. W. 663, the record filed in the supreme court failed to show that any complaint was made of the action of the court in giving the instructions. By stipulation between counsel for the defendant and the state, filed in the supreme court, it was shown that the point on the action of the court in giving the instructions on behalf of the state was duly raised. In reference to this attempt to correct the record, the court said: "It may not be out of place to say here that no record, after being lodged with the clerk of this court, can be changed without the permission of the court, duly entered of record at the time."

In *State v. Gartrell* (1903) 171 Mo. 489, 71 S. W. 1045, the bill of exceptions did not disclose a motion by the defendant for a continuance or an exception to the order overruling it. At a subsequent term of the trial court, on agreement of counsel for the defendant and the attorney general, leave was granted to amend the bill of exceptions, and a bill was filed containing the motion and affidavits for a continuance, the order of record overruling same, and then a recital that defendant duly excepted to the action of the court in denying said application, and, so made up, was signed by the judge, and certified to the supreme court, and lodged in the office of the clerk of said court. The court said: "It is the settled law of this state that during the whole of

the term in which any judicial act is done, the proceedings are considered in fieri, and this applies even to adjourned sessions of the same term, and the record remains, so to speak, in the breast of the judge or judges of the court, and hence is subject to amendment or alteration as he or they may direct; but after the lapse of the term, or its final adjournment, the judge has not power to change the record further than by nunc pro tunc entries to make the record speak the exact truth of that which actually did occur during the term, and then only when there is sufficient record or minutes of the judge or clerk to authorize such amendment, as it has been repeatedly ruled by the court that such corrections cannot be made 'from outside evidence or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered.'"

In *State v. Eaton* (1905) 191 Mo. 151, 89 S. W. 949, the record on appeal did not show that an order of the court extending the time for filing a bill of exceptions had been entered of record within the time originally allowed for the filing of the bill, as was required by law. Thereupon, on the first day of the term of the supreme court, the defendant by his counsel moved the court to correct the record, wherein the same related to the order of the judge extending the time for the filing of the bill of exceptions, so as to show the cause of the delay. This motion was supported by affidavits tending to establish the cause of the delay. The court said: "We have no power to alter or correct the records of the circuit court. In proper cases and upon sufficient data we may order the circuit court to conform its judgments to the judgment of this court, but it has been ruled that, notwithstanding an appeal is pending in this court from the judgment of the circuit court, that court still retains full power and jurisdiction over its own records, and might by proper entries nunc pro tunc cause the same to speak the truth, where by inadvertence or misprision of its clerk it had not done so; but it is elementary that this court could not cause the record

of the circuit court to be corrected by an entry *nunc pro tunc*, and this is what we are asked to do by this motion."

In *State v. Libby* (1907) 203 Mo. 596, 102 S. W. 641, the record disclosed that the appellant failed to preserve by bill of exceptions any exception to the action of the court in overruling his motion for a new trial. It was suggested that the bill of exceptions might be amended by agreement between the prosecuting attorney and the counsel for the appellant, and there was on file before the court letters from defendant's counsel and from the prosecuting attorney and the judge who tried the case, suggesting the amendment. The court said: "It is sufficient to say of this suggestion that a bill of exceptions filed and made a part of the record cannot be amended by consent. Such bill of exceptions, when filed in the circuit court of Laclede county, became as much a part of the record proper of that court as any other entry made upon the records by the clerk of the court during any term of such court, and such bill of exceptions can only be changed or amended by a *nunc pro tunc* entry correcting such record, and the rule is well settled that, in order to justify the making of a *nunc pro tunc* entry correcting or amending a record, the record must in some way show, either from the judge's minutes, the clerk's entries, or some paper in the cause, the facts authorizing such entries. No such entries can be made from the memory of the judge, nor on parol proof derived from other sources."

In *Dietz v. State* (1875) 43 Tex. 371, there was no venue proved according to the statement of facts in the record. Long after the case had been filed in the supreme court, certificates of the district attorney and presiding judge that certain witnesses did prove on the trial that the facts occurred in McLennan county were made and filed in the district court, and certified by the district clerk and sent up to the supreme court. The latter court refused to notice the papers filed for the purpose of supplementing the record.

In *Hill v. State* (1878) 4 Tex. App. 559, the district court permitted the

record to be amended by directing the filing of the judge's charge at a subsequent term of the court, and after an appeal had been taken to the appellate court, so as to give it effect as if filed at the time of the trial. The appellate court said: "Amendments of this character are permissible under the law, and have been recognized by this court if made at the proper time and in the proper manner, and it is not perceived why omissions of the kind here mentioned should not be supplied, or erroneous entries corrected, so as to conform the record to the facts as they really exist, so that the record shall speak the exact truth in every particular. Yet, whether this may be done in the trial court whilst the case is pending and undetermined in an appellate tribunal, or not, is quite a different question, and one upon which the cases we have seen shed but an obscure light. We are of opinion that by the provisions of our own Code the point must be determined against the right to amend the record pending an appeal."

In *Knight v. State* (1879) 7 Tex. App. 206, after the case was removed to the supreme court by appeal, the district court ordered that the clerk should correct the minutes of the court in the cause so as to show that the defendant, when on trial, pleaded not guilty as charged. The appellate court said: "This order the court had no authority to make, . . . for the reason that by the appeal and the filing of the record in this court the jurisdiction of the district court was at an end. . . . It may be supposed that the minutes of the court were under the control of the court, and subject to correction at any time before the adjournment for the term, which is ordinarily the case; but this power ceases whenever an appeal in a case of felony has been taken in the manner required by law, and the transcript has been filed here."

In *Gerard v. State* (1881) 10 Tex. App. 690, the record on appeal showed the names of but eleven jurors. After the perfection of the appeal, and after the jurisdiction had attached on appeal, the trial court attempted to correct the record so as to make it show

the names of all twelve of the jurors. The appellate court held that after jurisdiction had attached on appeal the trial court could make no further orders in the case.

In *Belcher v. State* (1895) 35 Tex. Crim. Rep. 168, 82 S. W. 770, the original statement of facts failed to disclose the venue of the offense. After the expiration of the term the trial judge, of his own motion, filed a supplemental statement of facts showing the venue. On appeal, the supreme court said: "The only question for our consideration is whether or not the court, after the expiration of the term, is authorized to add to or amend the statement of facts already filed and a part of the record of the case. In our opinion he could not, and therefore the motion of the appellant to strike said supplemental statement of facts from the record in this case must be sustained."

In *Sullenger v. State* (1916) 79 Tex. Crim. Rep. 98, 182 S. W. 1140, the state sought to have the supreme court postpone a rehearing in order to enable it to make a motion in the trial court to amend a bill of exceptions by adding thereto the testimony of a juror on his voir dire examination, so as to show the action of the court in holding him qualified to have been proper, and thereby prevent a reversal. The court, in refusing the postponement, said: "It is true that during the term of court at which a conviction is had, upon the proper motion and service thereof, the court, having the proceedings and the judgment still in his control, can make the record and every part thereof 'speak the truth; . . . ' but this must be while the trial court has jurisdiction and control over its orders and the papers in the cause."

But see *Burnett v. State* (1855) 14 Tex. 455, 65 Am. Dec. 131, wherein the record did not recite that the indictment was returned into open court by the grand jury. At a subsequent term the record was amended by a nunc pro tunc order of the court so as to show the return of the indictment into court by the grand jury. The supreme court said: "We do not doubt that it was competent for the court to make the

order as well in this as in any other case where there is evidence sufficient to warrant the making of such order. Every court has a right to judge of its own records and minutes; and if it appear satisfactorily to them that an order was actually made at a former term, and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records as of the term when it was made."

In *Vestal v. State* (1878) 3 Tex. App. 648, an attempt was made to show by parol evidence that on the first indictment the defendant was placed on trial and called to answer an indictment for a misdemeanor. The record was not only silent in that regard, but by the recitals contained therein actually contradicted, as far as it went, the facts thus sought to be established by the evidence adduced. The appellate court said: "There is no doubt but that a record in a criminal case may be supplied or amended by a proceeding had directly for that purpose; and, even in as important and solemn a matter as a final judgment in a case of murder, the rule is that where there has been a failure or omission to enter it at the proper time the judgment may be rendered nunc pro tunc at a term subsequent to the trial. *Smith v. State* (1876) 1 Tex. App. 408. . . . But we take it that no record in a criminal case can be amended or supplied except by a proceeding having that object in view."

In *Craddock v. State* (1881) 15 Tex. App. 641, the appeal was dismissed because no recognizance appeared in the record. At a subsequent term of the court the appellant, by his sworn petition, showed to the court that owing to the destruction of the original record in the court below, and by means of unauthorized proceedings in that court at the instance of the county attorney, a pretended substitution of the destroyed record was effected without notice to him, the appellant; that the transcript acted on by the court at its former term was a transcript of such substituted record; and that the original record showed, and a proper substitute for it would show, that a proper recognizance for his appeal was entered into by him, the

appellant. On this showing, the court being satisfied of its truth, awarded a rehearing of the cause at the next term of the court.

In *Com. v. Cawood* (1826) 2 Va. Cas. 527, the clerk of the circuit court omitted to enter on the order book that the grand jury, at the last term of that court, had found an indictment against the defendant and others to be "a true bill." The circuit court adjourned the question, whether the omission could be supplied at a subsequent term of the court on the testimony of the clerk, of the judge, of the grand jurors, and others who were present at the trial, to the general court for a decision. The general court said: "The next question is whether this omission of the grand jury can now be supplied, and whether the record can be amended in this particular. A view of the decisions in this country and in England, referred to by the counsel, leads us to the conclusion that, during the term, the records are in the breast of the court, and that amendments may be made in the proceedings of the court; but that, after the term has passed, no amendments can be made, except of mere clerical misprisions; that this is not a misprision of that kind; that, the term having passed, there is nothing to amend by except the memory of the judge, of the clerk, of the grand jurors, and others; and that it cannot be amended."

In *Powell v. Com.* (1854) 11 Gratt. (Va.) 822, the accused was indicted for forgery, tried, and convicted. After the expiration of the term at which he was convicted, he applied to the judge of the circuit court, in vacation, to amend the record, and the judge made an order directing that the record should be amended so as to show that on the arraignment of the prisoner for the offense of which he was convicted he moved the court, through his counsel, to quash the indictment and each count thereof, and that this motion was overruled, but was omitted to be entered on the record. The supreme court held that the circuit court had no authority to allow the amendment, saying: "I am . . . of opinion that no such amendment of the record as that attempted

to be made in this case by the action of the judge in vacation, on the 11th of May, 1854, is within the scope of [the] provision. It was intended to authorize amendments in support of a judgment, in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or upon proofs aliunde. Nor was the application in this case to amend the judgment, nor was it designed to aid the judgment when made. It was an application to introduce something into the record as part thereof, not before found therein, depending on the recollection of the judge, or upon proofs to be submitted to him; and its object was to provide a means of reversing the judgment, not of sustaining it. The construction given by the English courts to the statutes of amendment required that there should be something to amend by. *Tidd*, Pr. 246, 247; *Com. v. Winstons* (1827) 5 Rand. (Va.) 546, opinion of Judge Green. And such is, I think, the plain meaning of the provision in question in our statute. And if no amendment can be made in the record of a judgment after the term except under the statute, or in the few cases allowed by the common law, of which this is not one, the amendment attempted to be made in this case must be disregarded."

In *Barnes v. Com.* (1895) 92 Va. 794, 23 S. E. 784, the record did not show that sixteen jurors free from exception were selected for the trial of the case, or that at every adjournment the jury was put in charge of a sworn officer, or that the jury was in the custody of a sworn officer when considering the verdict, or that the jury was polled as required by law. After the term was passed at which the trial was had, it was attempted, on the personal knowledge of the judge, and the records of the court as they then stood, to amend the record so as to make it show the facts omitted from the record by the inadvertence of the clerk. The supreme court refused to allow the amendment, saying: "It has been correctly observed

that the judge, during the term, is a living record, and therefore during that period of time he may alter and supply from his own memory any order, judgment, or decree which has been pronounced, and this because, having made them himself, he is presumed to retain them in his recollection. But at common law, after the term has elapsed, the judge has no such power, because it is supposed there will be a period at which a judge will cease to retain in his memory the things which have been ordered and adjudged, and that period, it is well conceived, may be the end of the term, and he will then be apt to dismiss from his thoughts the things which have been previously passing in them. It is indeed a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined and properly checked by law. . . . Whether the authority of the courts in this state to amend its records after the term at which a final judgment has been entered be derived solely from our statute, or from both the common law and the statute, it is clear that under our statutes, decisions, and practice, whatever may be the rule in other jurisdictions, they can only make amendments in cases in which there is something in the record by which they can be safely made, and that amendments cannot be made upon the individual recollection of the judge, or upon proofs aliunde. There is nothing in the record in this case, as certified by the clerk of the county court, by which the court of that county could amend it in any of the particulars in which it is sought to have it amended, and if the court attempted to amend it it would be upon the judge's own personal recollection, or upon proofs aliunde. This, we have seen, cannot be done."

In *Wright v. Com.* (1911) 111 Va. 873, 69 S. E. 956, it appeared from the record that an order was entered by the court in term time, allowing the prisoner sixty days from the adjournment of the court within which to file his bill of exceptions, but it wholly failed to show that the sixty days were agreed on and entered of record by consent of the parties, as required by law. This was a vital requirement of the statute, and to meet the difficulty thus plainly confronting him, the prisoner, by counsel, procured from the judge of the circuit court a vacation order purporting to amend the final order in the case to show that the sixty days given the plaintiff in error to file his bill of exceptions was agreed on and entered of record by consent of parties. The supreme court held that the circuit court had no power to amend its final order in this particular after the adjournment of the term at which the same was entered, saying: "During the term of a court at which a judicial act is done, the record remains in the breast of the court, and may be altered or amended; but after the adjournment of the term amendments can only be made in cases in which there is something in the record by which they can be safely made. Amendments cannot be made after the adjournment of the term, upon the individual recollection of the judge, or upon evidence aliunde. It is manifest that there is nothing in the record for this attempted amendment to rest upon. The application was to introduce something into the record as part thereof, not before found therein, depending solely upon the individual recollection of the judge. This cannot be done. The amendment attempted to be made must, therefore, be disregarded. *Barnes v. Com.* (Va.) *supra*."

B. R.

**EX PARTE ISAAC MURRAY et al.**  
**STATE OF SOUTH CAROLINA, Appt.**

*South Carolina Supreme Court — July 15, 1910.*

(— S. C. —, 99 S. E. 798.)

**Appeal — right of state — extradition proceedings.**

1. The state may appeal from an order releasing persons from arrest under the governor's warrant in extradition proceedings.

[See note on this question beginning on page 1156.]

**— time — failure to serve notice of order.**

2. A statutory provision giving appellant ten days in which to serve notice of appeal after service upon him of written notice of the granting of the order from which the appeal is taken does not limit the time for appeal to ten days from the granting of the order if written notice is not served.

**Extradition — necessity of reciting indictment.**

3. The governor's warrant for arrest in extradition proceedings need not set forth or recite the affidavit or indictment upon which it is issued.

[See 11 R. C. L. 747.]

**— sufficiency of warrant — assumption of court.**

4. The court must presume, until the contrary is made to appear, that the showing upon which the governor issued his warrant for arrest in extradition proceedings was legally sufficient.

**Governor — presumption as to regularity of acts.**

5. The court must presume that the chief executive of the state will perform his duty according to law.

[See 10 R. C. L. 880.]

**Arrest — warrant — information and belief.**

6. An affidavit for arrest for burglary in extradition proceedings is fatally defective which swears to the facts on the best of affiant's knowledge, information, and belief, without stating what facts were within his knowledge and what were stated on information and belief, and without setting forth the sources of information or grounds of belief.

[See 11 R. C. L. 743.]

**Appeal — erroneous ground for order — affirmance.**

7. An order discharging persons arrested in extradition proceedings will be sustained on appeal if the affidavit upon which the governor acted was insufficient in law to authorize issuing the warrant, although the order was granted upon an erroneous reason.

[See 2 R. C. L. 189.]

(Watts, J., dissents.)

**APPEAL** by the state from an order of the General Sessions Circuit Court for Sumter County (Townsend, J.) in favor of relators in a habeas corpus proceeding to secure their discharge from custody to which they had been committed for the crime of burglary. *Appeal dismissed.*

The facts are stated in the opinion of the court.

Mr. Morris C. Lumpkin, Assistant Attorney General, for the State.

Messrs. L. D. Jennings, A. S. Harby, and John H. Clifton, for respondents:

Whether or not the prisoner is substantially charged with crime by affidavit or indictment in the demanding state is a question of law, open to judicial inquiry on the face of the papers, and the proper method to in-

augurate this judicial inquiry is by writ of habeas corpus.

Dennison v. Christian, 72 Neb. 703, 117 Am. St. Rep. 817, 101 N. W. 1045; Barranger v. Baum, 103 Ga. 465, 68 Am. St. Rep. 122, 30 S. E. 524; Roberts v. Reilly, 116 U. S. 95, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; Munsey v. Clough, 196 U. S. 369, 49 L. ed. 516, 25 Sup. Ct. Rep. 282; Hyatt v. New York, 188



U. S. 708, 47 L. ed. 660, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, 11 R. C. L. 748; Re Waterman, 29 Nev. 288, 11 L.R.A. (N.S.) 424, 89 Pac. 291, 13 Ann. Cas. 926.

The mandate of the governor, no other papers being before the court, did not show that the respondents were substantially charged with treason, felony, or other crime, by indictment or affidavit sworn to before the magistrate.

11 R. C. L. 748; Ex parte Dawson, 28 C. C. A. 354, 49 U. S. App. 674, 83 Fed. 306; Ex parte Stanley, 25 Tex. App. 372, 8 Am. St. Rep. 440, 8 S. W. 645, 7 Am. Crim. Rep. 213; Re Waterman, 29 Nev. 288, 11 L.R.A. (N.S.) 426, 89 Pac. 291, 13 Ann. Cas. 926; Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

The affidavit accompanying the requisition of the governor of Georgia was insufficient, and constituted no affidavit.

Ex parte Massee, 95 S. C. 323, 46 L.R.A. (N.S.) 781, 79 S. E. 97; Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608; Hecht v. Friesleben, 28 S. C. 181, 5 S. E. 475; Burmester v. Moseley, 33 S. C. 251, 11 S. E. 786; Addison v. Sujette, 50 S. C. 201, 27 S. E. 631; Wando Phosphate Co. v. Rosenberg, 31 S. C. 307, 9 S. E. 969; Sharp v. Palmer, 31 S. C. 447, 10 S. E. 98.

**Hydrick, J.**, delivered the opinion of the court:

Upon the requisition of the governor of the state of Georgia and certain documents attached thereto which were duly authenticated, his excellency, the governor of this state, issued his warrant for the arrest and delivery of the respondents to the agent of the state of Georgia, to be carried to that state for trial on the charge of burglary. The governor's warrant recites: "Whereas a requisition has this day been received from his excellency, the governor of Georgia, for the rendition of Isaac Murray and Christian Harris, who stand charged with the crime of burglary in said state, and who have escaped therefrom and

5 A.L.R.—73.

taken refuge in the state of South Carolina, now, therefore," etc.

Then follows the warrant in usual form. There was nothing attached to the warrant, and no recital therein, to show upon what it was issued, whether upon indictment, affidavit, or whether the supporting matter had been duly authenticated.

Having been arrested upon this warrant, respondents sued out a writ of habeas corpus before Judge Townsend, who heard the return thereto on March 25th last, the same day that it was issued. The time of the hearing was advanced by request of the agent of Georgia, with consent of respondents. But before proceeding with the hearing, his Honor sent for the solicitor of the third circuit, who appeared and represented the state. On hearing the return, his Honor discharged respondents, holding that the warrant was insufficient to authorize their retention or extradition, because there was no copy or other evidence of their indictment, or of an affidavit charging them with an extraditable offense, attached to the warrant. Thereafter, on April 3d, by direction of the governor, the attorney general moved his Honor to rescind his orders of March 25th, on the ground, among others, that the governor's warrant was sufficient, and moved also that the hearing be opened, in order that the state might introduce in support of the warrant the record of the proceedings upon which the governor issued it. The motion was refused in a formal order, no reason being assigned. These proceedings were all at chambers. On April 8th, more than ten days after respondents had been released, the attorney general served notice of appeal by the state; and on May 21st moved this court for leave to docket the appeal and have the same heard at the term then in session. It was thereupon ordered that the case be submitted on printed arguments; that respondents have leave to move to dismiss the appeal, on the ground that the state of South Carolina has no appealable interest

in the matter, and on the further ground that the notice of appeal was not served within the time required by law; and it was further ordered that, in the event this court should consider the merits, and conclude that Judge Townsend was in error in holding the governor's warrant insufficient, respondents should have leave to sustain his order on additional grounds, to be made in the record for appeal. Both sides asked that such additional sustaining grounds be considered, as that would obviate the necessity of the new proceeding, if respondents should again be arrested; and, for that purpose, the entire showing upon which the governor issued his warrant was set out in the record.

The motion to dismiss must be refused. The state has a legal interest

**Appeal—right of state—extradition proceedings.**

in the proceeding, and has the right to appeal from the order in question. In issuing the warrant of extradition, the governor acts for the state in the discharge of its duty to a sister state, under the Constitution and laws of the United States, with respect to the extradition of fugitives from justice; and therefore the state has the right to question the validity of an order which interferes with its chief executive in the discharge of that duty.

The notice of appeal was in time. Appeals from final decisions in habeas corpus are governed by the rules regulating appeals in civil cases. Crim. Code, § 134. In civil cases, appellant has ten days after service upon him of written notice of the granting of an order within which to serve his notice of appeal, where such order is granted at chambers. Code Civ. Proc. § 384. As no

**—time—failure to serve notice of order.**

written notice of the filing of the order was served, the notice of appeal was in time.

It may be conceded that the weight of authority elsewhere supports the contention of respondents that the warrant of extradition should set forth or recite the affidavit or indictment upon which it is

issued, and should recite that the same was duly authenticated. 11 R. C. L. 747. But this court has held that the act of Congress does not require it, and therefore it is not a necessary prerequisite to the validity of the warrant. *Ex parte Moscato*, 44 S. C. 337, 22 S. E. 308. Under

**Extradition—necessity of reciting indictment.**

that case, we must hold that the government's warrant was at least prima facie sufficient. Clearly so, if it had contained the recitals stated. *Hyatt v. New York*, 188 U. S. 691, 711, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311. The courts must presume, at least until the contrary is made to appear, that the showing upon which the

**—sufficiency of warrant—assumption of court.**

governor acted in issuing his warrant was legally sufficient. It is argued, however, that, unless the indictment or affidavit be attached to the warrant, the person arrested would have no way of knowing the cause of his arrest and detention, since he would have no way of compelling the governor to allow him to inspect the originals, or to produce them, or to furnish copies of them. This argument assumes the possibility of capricious or arbitrary action on the part of the governor, which a due respect to a co-ordinate department of the government requires the court to reject.

The court must presume that the chief executive of the state will perform his duty according to law; and, as the sufficiency of the showing upon which he issues his warrant for extradition is jurisdictional and a judicial question, and therefore subject to review by the court, the court would not be warranted to assume even the possibility of the governor's refusing to accord to any citizen a right to which he is entitled under the law. The refusal of a right so vital to the liberty of a citizen would be deemed sufficient to rebut the prima facie sufficiency of the warrant, and jus-

**Governor—presumption as to regularity of acts.**

tify the court in holding it insufficient.

This brings us to the consideration of the ground upon which we are asked to sustain Judge Townsend's order, to wit, that the affidavit upon which the governor's warrant was issued was insufficient in law. The affidavit is sufficient in substance to charge respondents with the crime of burglary; but it is fatally defective in form, in that the

Arrest-warrant—information and belief.

facts set forth are sworn to "to the best of his (affiant's) knowledge, information, and belief," without stating what facts were within his knowledge, and what were stated upon his information and belief, and without setting forth the sources of his information or grounds of his belief. Under such an affidavit, a citizen might be deprived of his liberty, and carried to a distant state, where he has neither friends nor property, and where even his good name would not avail him, upon the belief of the affiant, which, when sifted, would amount to nothing but a mere suspicion. The law requires that at least probable cause shall be made out. It need not be stated with technical accuracy. It is enough if it be stated substantially, so as to lead a fair and reasonable mind to conclude that a *prima facie* case of guilt has been made out. This must appear before the governor is authorized to issue his warrant. *Roberts v. Reilly*, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291.

We must not be understood as holding that the affiant must have actual knowledge of the facts constituting the offense, or of any of them. An affidavit based upon information and belief is deemed sufficient, if the facts stated make out a probable case, and if the sources of information and grounds of belief are stated. Unless this is done, the accused is not legally charged with having committed a crime.

In *Rice v. Ames*, 180 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 407, 12 Am. Crim. Rep. 356, the court said: "The first as-

signment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by § 5270 of the Revised Statutes, Comp. Stat. § 10,110, 3 Fed. Stat. Anno. 2d ed. p. 265. The first two complaints, which were dismissed, as well as the first count of the complaint, under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. . . . A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor" (citing authorities).

See also 11 R. C. L. 743, and cases cited in notes; also note in 3 Fed. Stat. Anno. 2d ed. p. 292.

While the order appealed from was granted upon an erroneous ground, it must be sustained upon the ground that the affidavit upon which the governor's warrant was issued was insufficient in law to authorize its issuance. The appeal is therefore dismissed.

Appeal—erroneous ground for order—affirmance.

Appeal dismissed.

Gary, Ch. J., and Fraser and Gage, JJ., concur.

Watts, J., dissenting:

I dissent. After the governor acts and grants requisition the courts cannot question the validity of his acts.

## ANNOTATION.

**Right to appeal from order releasing one in extradition proceedings.**

The few cases which have passed on the question whether there is a right of appeal from an order releasing a person sought to be extradited hold, with one exception, that such a right exists. *Ornelas v. Ruiz* (1896) 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *State ex rel. Bond v. Langum* (1917) 135 Minn. 320, 160 N. W. 858. And see the reported case (*Ex PARTE MURRAY*, ante, 1152). See also the Alabama statute referred to in *State v. Berkstresser* (1903) 137 Ala. 109, 34 So. 686.

The reason for the rule was well set out in *State ex rel. Bond v. Langum* (Minn.) supra, wherein the court said: "The statute (Gen. Stat. 1913, §§ 8311 and 8312) gives the right of any party aggrieved to appeal from the final order in a habeas corpus proceeding in the same manner as other appeals are taken from the district court; and the appeal is to be heard and judgment rendered in this court the same as if the writ had originally issued here. If the judgment on appeal is contrary to the judgment below, the latter is necessarily reversed and set aside. It cannot be that the court below can render the right of appeal nugatory by omitting or refusing to grant a stay pending the appeal. That relator has been wrongfully discharged from the custody of respondent does not prevent the latter from again apprehending him under the warrant already in his hands."

In *Ornelas v. Ruiz* (U. S.) supra, it appeared that the Mexican consul applied for the extradition of three persons charged with murder, arson, robbery, and kidnapping. The United States circuit court commissioner found that the evidence was sufficient to warrant a commitment for extradition. The United States district judge released the accused on habeas corpus, holding that the offenses charged were political. It was held that the Mexican consul had a right of appeal from that discharge. The court said: "The official character of this officer must

be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf."

There is a right of appeal from an order releasing the accused in extradition proceedings notwithstanding no stay was obtained in the lower court. *State ex rel. Bond v. Langum* (Minn.) supra. In that case it appeared that the governor of Illinois issued a requisition to the governor of Minnesota for one Bond, who had been indicted for larceny. The governor of Minnesota issued a warrant directing the sheriff to surrender Bond to the agent of Illinois. Bond was taken into custody, but, by a writ of habeas corpus in the state and Federal courts, prevented extradition. On a hearing, Bond was discharged and the sheriff appealed. There was a motion to dismiss the appeal on the ground that there was no stay in the lower court, that there was nothing before the court, and that the accused could not be again apprehended. This motion was denied, the court saying that the statutes give the right of appeal from a final order in habeas corpus, and the appeal is heard in the supreme court the same as if the writ had issued there. So that the lower court cannot render the appeal void by omitting or refusing to grant a stay pending the appeal.

However, it has been held in Indiana that no appeal lies by the state to the supreme court from the ruling of a judge discharging a prisoner held in custody on extradition proceedings. *State v. Morgan* (1869) 31 Ind. 66. In that case it appeared that under a warrant issued by the governor of Indiana, on the requisition of the governor of New York, the prisoner was brought before a judge of the court of common pleas. He was discharged from arrest and the state appealed to the supreme court. It was held that the appeal could not be entertained.

The reason for the rule in *State v. Morgan* seems to be that, since the statute "to regulate the arrest and surrender of fugitives from justice

from other states and territories" makes no provision for a review in the supreme court, there can be no right of appeal. M. J. Q.

## PITTSBURGH & WEST VIRGINIA GAS COMPANY

v.

J. W. ANKROM et al., Appts.

*West Virginia Supreme Court of Appeals—November 15, 1913.*

(— W. Va. —, 97 S. E. 593.)

### Mines — oil and gas lease — bankruptcy.

1. Where a tract of land, subject to an oil and gas lease, is subdivided in a proceeding in bankruptcy, and such subdivisions sold separately by the trustee to different purchasers, the purchaser of each subdivision takes the same subject to such oil and gas lease; and should the lessee in such oil and gas lease thereafter produce oil or gas from such tract of land the royalties will be payable to the owner of the subdivision upon which the wells are drilled from which such production is had.

[See note on this question beginning on page 1162.]

### — partition — royalties.

2. Where, in such a case, a contention is made by the owners of subdivisions other than the one upon which oil or gas is produced that they are entitled to participate in the royalties arising from such production, and the owner of the tract upon which such production is had claims the entire royalties, the lessee, being an innocent

stakeholder in relation to such royalties, and not being advised as to the proper person, or persons, to receive the same, may, upon a bill filed showing that he does not collude with any of the parties, have all of the interested parties interpleaded, and the adverse claims to such royalties determined.

[See 15 R. C. L. 222, 231.]

Headnotes by RITZ, J.

(Poffenbarger, P., and Williams, J., dissent.)

APPEAL by defendants from a decree of the Circuit Court for Ritchie County settling and determining the rights of the parties in certain oil and gas royalties. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. M. K. Duty, for appellants:

The oil and gas are a common interest of all the defendants, and should be divided among them, after the same come to the surface, without regard to what point on the land under lease they come to the surface.

*Wettengel v. Gormley*, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 984, 18 Mor. Min. Rep. 93; *Hall v. Vernon*, 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764.

Messrs. Adams & Cooper, for appellee Gas Company:

The bill contains all the essential averments of a bill of interpleader.

*Hechmer v. Gilligan*, 28 W. Va. 750; *Dickeschied v. Exchange Bank*, 28 W. Va. 345; *Runkle v. Runkle*, 112 Va. 788, 72 S. E. 695; *Shaw v. Coster*, 35 Am. Dec. 690, and note, 8 Paige, 339; 1 Hogg, Eq. Principles, pp. 218-222; *Connecticut Mut. L. Ins. Co. v. Tucker*, 91 Am. St. Rep. 593, note; *Chartiers Oil Co. v. Moore*, 56 W. Va. 540, 49 S. E. 449.

The doubt as to who is entitled to the debt or fund in controversy may exist as a question of law or of fact.

1 Hogg, Eq. Principles, p. 221, § 144; *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991.

Where there is no controversy as to the plaintiff's liability for the whole debt or fund claimed, but a question exists whether all of it shall be paid to one claimant, or part to him and the rest to others, or conflicting claims are made to parts of the same debt or fund so that in the aggregate they exceed the whole thereof, the case is a proper one for interpleader.

*Shaw v. Coster*, 35 Am. Dec. 700, note; *Ireland v. Kelly*, 60 N. J. Eq. 308, 40 Atl. 51; *Rymer v. South Penn Oil Co.* 54 W. Va. 530, 46 S. E. 559.

The cause and all questions arising being fully presented by the bill and answers, and no dispute existing as to the facts, the court properly decided the whole controversy as between the defendants, without directing an issue or reference.

*Shaw v. Coster*, 35 Am. Dec. 709, note; *Dickeschied v. Exchange Bank*, 28 W. Va. 347; 23 Cyc. 32.

The plaintiff, being free of collusion or other misconduct, was properly decreed its costs out of the fund.

*Swiger v. Hayman*, 56 W. Va. 123, 107 Am. St. Rep. 899, 48 S. E. 839, 3 Ann. Cas. 1030; *Dickeschied v. Exchange Bank*, 28 W. Va. 345.

*Mr. G. W. Farr*, for appellee Collins:

In an interpleader suit plaintiff must show clear title in self to maintain suit.

*Dickeschied v. Exchange Bank*, 28 W. Va. 345; *Hechmer v. Gilligan*, 28 W. Va. 750.

Creed Collins had made the bank his agent to receive rentals and royalties, and plaintiff was only interested in paying to this agent.

*Friend v. Malory*, 52 W. Va. 54, 43 S. E. 114.

There being no exception or reservation in either of appellants' deeds, they are limited to boundary in each as to holdings.

*Chapman v. Charter*, 46 W. Va. 778, 34 S. E. 768; 2 Devlin, Deeds, §§ 1000, 1006; 2 Pom. Eq. Jur. § 802; *Garrett v. South Penn Oil Co.* 66 W. Va. 593, 66 S. E. 741; *Haymond v. Camden*, 22 W. Va. 182.

Parties to suits who file answer are bound by admissions in answer.

*Shirley v. Long*, 6 Rand. (Va.) 764; *Fleming v. Holt*, 12 W. Va. 144.

A purchaser in bankruptcy proceedings of land becomes a quasi party, and bound by the decree confirming deed to purchaser, and the decree in the bankruptcy court cannot be collaterally assailed.

*Trumbo v. Fulk*, 103 Va. 73, 48 S. E. 525; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

*Mr. R. G. Altizer* also for appellee.

*Ritz, J.*, delivered the opinion of the court:

Creed Collins, being the owner of two tracts of land containing 2,172 acres and 135 acres, respectively, leased the same to J. F. Donaldson, his heirs, personal representatives, and assigns, for the purpose of producing therefrom the oil and gas contained thereunder. There was reserved in the lease one eighth of all the oil produced from the premises and a certain compensation to be paid for each gas well drilled thereon, and the lessee covenanted to complete a well within two months from the date of said lease, or to pay quarterly in advance the sum of \$576.75 until the completion of a well. Before operations were begun under the lease Collins was adjudicated a bankrupt, and these tracts of land were divided into a number of small tracts by the Federal district court, and sold to various purchasers by the trustee in bankruptcy. These sales were confirmed and the respective parcels conveyed to the purchasers thereof by the trustee. No mention is made in any of these deeds of the fact that the whole tract of land is subject to the oil and gas lease aforesaid. This lease was duly recorded in the office of the clerk of the county court prior to the sales which were made by the trustee in bankruptcy. Plaintiff is the assignee of J. F. Donaldson, and while a well was not completed on the premises within two months, as provided in the lease, the same was kept alive by the prompt payment of the delay rentals. The plaintiff finally completed a well upon one of the subdivisions, being the one purchased by the defendant G. A. Riggs from the trustee in bankruptcy. Upon the completion of this well the defendant G. A. Riggs claimed the whole of the royalty. The owners of the other subdivisions, with the exception of the defendant W. J. Collins, contested his right to

have all of such royalties, and contended that inasmuch as the lease covered the whole tract of land, the royalties must be divided among the owners of the subdivisions of said tract in the proportion that the areas of their respective tracts bear to the area of the whole tract. The parties were unable to reach a settlement among themselves, and the plaintiff, not being advised as to who is the proper party, or parties, to receive such royalties, brought this bill impleading the owners of all the respective subdivisions, to the end that the controversy might be judicially determined.

Two reasons are assigned for a reversal of the decree of the lower court. It is first insisted that the bill is not sufficient in its allegations for a bill of interpleader. The bill alleges the facts as above stated. It further alleges that the plaintiff does not collude with any of the parties. It is true, the lease provides for the payment of the royalties direct to the lessor, or for their deposit in the First National Bank of Pennsboro to the credit of the lessor, and it is contended that the lessee, the plaintiff herein, should pay these royalties into the First National Bank of Pennsboro, and that the First National Bank of Pennsboro is the proper party to file a bill of interpleader for the purpose of determining to whom they should be paid. This contention is not tenable, inasmuch as, by the terms of the lease, before payment can be made to the First National Bank of Pennsboro, it must be ascertained to whose credit the money should be therein deposited, and that is the very purpose of this suit. The allegation of the bill is that the plaintiff has endeavored to get an adjustment of the respective claims of the parties with a view of determining to whose

**Mines—oil and gas lease—bankruptcy.**

credit to deposit these funds, but has been unable to do so. We think the case presented is a typical one for the filing of a bill of interpleader.

It is next contended that the

court below erred in holding, upon the facts above stated, that the owner of each subdivision is entitled to receive all of the royalties for oil or gas produced from his parcel of land, it being the contention that by executing the lease on this land Collins in effect segregated the mineral oil and gas, and that the effect of the purchase by these parties from the trustee in bankruptcy was to purchase a particular parcel of the land, but as to the oil and gas their purchase amounted to an undivided interest therein, and that such royalties must be divided among the owners of the respective subdivisions in the proportion that the area of each subdivision bears to the area of the whole tract. It is argued that the effect of the decision of the lower court would be to permit the development of one of these subdivisions, and the extraction therefrom, not only of the oil underlying such subdivision, but of the oil underlying adjacent subdivisions, without making any compensation therefor, and that the owners of such adjacent subdivisions would be powerless to protect themselves because, under the decisions of this court in the cases of *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662, and *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961, the lessee would have the right to develop the whole of the tract of land and keep the lease alive as to the whole thereof by drilling a well on any one of the subdivisions. On the other hand, it is insisted that when the defendants purchased from the trustee in bankruptcy, no reference being made to the lease then existing on the tract of land, they acquired every interest that the bankrupt had, and this must be conceded to be true. What, then, was the interest purchased by each of these defendants? The oil and gas lease, it must be borne in mind, did not pass title to anything to the lessee. It simply conferred the privilege of going upon the land and exploring for oil and gas, and removing the

same if discovered. Then, at the time of the sale of these respective tracts of land by the trustee, each of the purchasers acquired everything that Collins had theretofore owned in the respective tracts so purchased, including all oil and gas. Oil and gas are minerals, and so long as they are in place they belong to the owner of the land under which they lie, and the right also belongs to that owner of the land to explore for them and extract them therefrom. If they escape from his premises to the premises of another before he has captured them, they no longer are his property; and vice versa, if by exploration upon his premises oil escapes thereto from the premises of an adjoining owner it thereby becomes his property. From this it necessarily follows that when these defendants

—partition—  
royalties.

purchased their respective parcels of land from the trustee in bankruptcy they bought all of the estate therein, subject only to the right of the plaintiff herein to explore for and produce the oil and gas. This right which is conferred upon the lessee is exactly the same that would have existed in these purchasers had there been no lease, from which it necessarily follows that the owner of each subdivision is entitled to the royalties on all of the oil produced from wells drilled on his subdivision. It is true, this may result in hardship for the reasons above stated, but these are matters which could have been overcome by the purchasers at the time of the sale by the trustee in bankruptcy. To hold that the royalties must be divided among the several owners, as is contended for by the appellant, might also result in serious hardship. It would, no doubt, result in some of the defendants receiving part of the royalties for oil which was extracted from lands at a distance of more than a mile from the lands owned by them, and which could by no stretch of imagination

be taken to have been produced from their lands.

Our view is supported by the case of *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 663. In that case the owner of two adjoining tracts of land, containing respectively 40 and 60 acres, leased them for oil and gas purposes. He subsequently conveyed the 40-acre tract to the defendant Ullery, and the 60-acre tract to a man by the name of Shoop. A well was drilled upon the 40-acre tract which produced gas. Ullery, the owner of this 40-acre tract, claimed the compensation provided to be paid for a gas well, and Shoop, the owner of the 60-acre tract, also claimed an interest in this royalty. An action was brought by Ullery to recover from the gas company the rentals provided to be paid. It will be seen from this statement that that case was exactly in point with the case we have here. The very learned and philosophical Chief Justice Burket delivered the opinion of the court in that case, which opinion fully supports our conclusion in this case. In the case of *Osborn v. Arkansas Territorial Oil & Gas Co.* 103 Ark. 175, 146 S. W. 122, an exactly analogous case was presented to the supreme court of Arkansas for decision. T. N. Sloat, being the owner of a tract of 80 acres of land, executed an oil and gas lease thereon. After the execution of said lease and before the production of oil and gas he conveyed 40 acres off said tract to another, and subsequently conveyed to the trustees of a church a tract of  $\frac{1}{2}$  acre from the remaining 40 acres. The lessee, acting under the original lease executed by Sloat, drilled a well upon the half-acre tract conveyed to the church trustees, and upon the question being submitted to the Arkansas supreme court as to whether all of these royalties should be paid to the church trustees, or whether they should be divided between the owners of the 80 acres of land in the proportion in which they were interested therein, it was held



that the church trustees were entitled to the whole thereof. In this connection, the following quotation from the opinion of the court in that case is instructive: "We are of the opinion that the fact that the lease was executed before the conveyance to the trustees of the church did not alter or lessen their right of ownership of the gas, which was a part of the realty granted to them. As was said in the case of Northwestern Ohio Natural Gas Co. v. Ullery, *supra*: 'The fact that oil and gas are vagrant and transitory in their nature does not prevent their adhering to and becoming a part of the land while passing from one tract to another, and while so in one tract they are a part of that tract and belong to the owner thereof until they escape from such tract, and, if brought to the surface before such escape, they become personal property belonging to the owner of the land. It therefore irresistibly follows that the oil or gas taken from the well on a particular tract of land belongs to the owner of that tract, even though the contract under which the well was drilled included other tracts of land. Because the contract of production may have included two or more tracts of land, such contract cannot have the force of taking from the owner of one tract the oil or gas adhering to such tract for the time being, and bestowing it upon the owner of another tract, where it may never have been.'"

In the case of Fairbanks v. Warrum, 56 Ind. App. 337, 104 N. E. 983, 1141, an exactly similar question was before that court. Noble Warrum was the owner of two tracts of land containing 15 acres and 353 acres, respectively, and he executed an oil and gas lease covering both of them. Subsequently he sold and conveyed the 15-acre tract and 58 acres off the other tract. A well was drilled under the lease upon the 353-acre tract, but not upon that part thereof included in the 58 acres conveyed away. The grantees in the deed from Noble Warrum, convey-

ing the 15 acres and the 58 acres above referred to, contended that they were entitled to receive part of the royalties from this well. This contention was not sustained by the court, but on the contrary it was held that the royalties belonged to the party upon whose land the well was drilled. The reasoning of the courts in these cases commends itself to our judgment, and we believe entirely justifies the conclusion which we have reached in this case. It is true that the supreme court of Pennsylvania in the case of Wetengel v. Gormley, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93, which was again reviewed in 184 Pa. 354, 39 Atl. 57, 19 Mor. Min. Rep. 213, comes to an exactly opposite conclusion from that reached by us upon an entirely analogous state of facts. We have carefully considered those opinions and they fail to convince us of the correctness of that court's conclusion. We are satisfied that the purchasers at the sale made by the trustee in bankruptcy took every estate there was in the parcel of land purchased by them respectively, including the oil and gas underlying the same, or which might be captured by development upon the tract of land so purchased, whether such development was made under the lease now held by the plaintiff or otherwise.

I am not unmindful of the fact that the above views are inconsistent with some expressions contained in the opinion in the case of Lynch v. Davis, 79 W. Va. 437, L.R.A.1917F, 566, 92 S. E. 427. Upon a consideration of that opinion I find that there are expressions contained in it which were not at all necessary for the decision of that case. The controlling fact in that case was that the separate owners of the several adjoining tracts of land combined them themselves for the purpose of oil and gas production. The tracts of land were small; they lay contiguous to each other; and it may be well assumed that the oil and gas could be produced there-

from more economically if the whole acreage was treated as one tract than if each tract was leased separately. In fact, it could not well be held otherwise than that the purpose of those parties was to treat their oil and gas as held by them in common. They combined their holdings under a single description, and so far as the lease goes there is but one tract of land to be dealt with. The case of *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087, is very similar in its facts to the case of *Lynch v. Davis*. In that case the owners of two adjoining tracts of land, for the purpose of having the mineral asphalt mined therefrom, combined them and leased them as a single tract, and the court held that by thus doing they in effect made themselves tenants in common in such mineral. That is the effect of the holding in *Lynch v. Davis* and the only effect which should be given to the opinion in that case. Confining the language used in the opinion in that case within these limitations, it is not inconsistent with the opinion we entertain in the present case, and

correctly solves the questions there involved. Any expressions of opinion in the case of *Lynch v. Davis* in conflict with the views expressed in this opinion are disapproved.

The case of *Campbell v. Lynch*, 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, seems to be at variance with the conclusion here reached. In that case I filed a dissenting opinion expressing the views I then entertained regarding the questions there involved, in which Judge Miller joined. We still adhere to the views expressed in that dissent, and think the case of *Campbell v. Lynch* should be overruled, but Judge Lynch, who concurs with us in this opinion, is of the opinion that the facts in that case distinguish it from this case, and does not think that the views here expressed result in overruling that decision.

We find no error in the decree of the Circuit Court, and the same is affirmed.

**Poffenbarger, P., and Williams, J.,** dissenting:

For reasons stated in *Campbell v. Lynch*, 81 Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, we dissent.

### ANNOTATION.

#### **Respective rights of owners of different parcels into which land subject to an oil and gas lease has been subdivided.**

- I. Sale of portion of tract, 1162.
- II. Partition of land, 1165.

##### *I. Sale of portion of tract.*

The few cases which have considered the matter are, in harmony in holding that where the lessor of land for oil and gas, subsequently to the execution of the lease but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas is thereafter produced under the lease from some portion of the leased premises, the royalty therefrom belongs to the owner of the particular tract upon which the well is located, and the owner or owners of other por-

tions of the leased premises have no interest therein. *Osborn v. Arkansas Territorial Oil & Gas Co.* (1912) 103 Ark. 175, 146 S. W. 122; *Fairbanks v. Warrum* (1913) 56 Ind. App. 337, 104 N. E. 983, 1141; *Northwestern Ohio Natural Gas Co. v. Ullery* (1903) 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647; *Kimbly v. Luckey* (1919) — Okla. —, 179 Pac. 928.

And this is also true where land which has been leased for the production of oil and gas is subsequently subdivided and sold by the trustee in bankruptcy of the owner to different purchasers, and in such case each purchaser is entitled to a royalty from any well or wells thereafter located upon the portion of the premises he

purchased. *PITTSBURGH & W. V. GAS Co. v. ANKROM*, ante, 1157.

In *Osborn v. Arkansas Territorial Oil & Gas Co.* (Ark.) supra, the lessor in an oil and gas lease covering 80 acres sold 40 acres thereof, and the purchaser subsequently sold  $\frac{1}{2}$  acre from his purchase; neither of the grantors made any reservation in the deed of any rights under the lease. A gas well having subsequently been drilled upon this  $\frac{1}{2}$ -acre lot, the purchaser was held entitled to the entire royalty from the well. The court said that "the right to such rentals was separate in each owner of the respective tracts, and was not in common. Because the lease covered the entire tract, this did not make the lease an entirety as to the several parts of the land that were thereafter purchased and acquired by different owners. Each purchaser from the lessor obtained and owned the gas in that part of the land bought by him, and was entitled to the rentals arising therefrom, and none other. The respective parties have no special equities in these rentals springing from the fact that the lease covered the entire tract. The lessee had the right to explore the land for oil and gas, and after its discovery to mine it; and its only obligation thereunder was to pay the rental therefor to the owner thereof. The amount of the rental was fixed at the rate of \$50 per year for each gas well actually utilized. The amount of the rent was not entire, but divisible according to the number of the gas wells actually sunk and operated. The gas obtained from each well was owned by the owner of the tract of land upon which it was sunk, and under the lease the rental therefor was disconnected with the remainder of the land covered by the lease. The contending parties, therefore, have each a legal right to the rentals for the gas which they respectively own by reason of their ownership of the respective tracts. The tracts are owned separately and not in common by the parties, and therefore each party owns respectively the gas discovered and captured on their respective tracts, and do not own the gas

in common. It follows that the parties are entitled respectively to the whole rental of the gas mined on the tract of land owned by each of them."

In *Fairbanks v. Warrum* (1913) 56 Ind. App. 337, 104 N. E. 983, 1141, supra, it is held that the grantee for life of a portion of the tract of land which was under a lease for oil and gas is entitled to receive the rentals for wells on the land conveyed to him, existing at the time of the conveyance or subsequently drilled thereon.

In *Northwestern Ohio Natural Gas Co. v. Ullery* (1903) 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647, supra, it is said that, where land is subdivided and sold to different purchasers who take subject to and oil or gas lease covering the entire tract, "the oil or gas taken from a well on a particular tract of land belongs to the owner of that tract, even though the contract under which the well was drilled included other tracts of land. Because the contract of production may have included two or more tracts of land, such contract cannot have the force of taking from the owner of one tract the oil or gas adhering to such tract for the time being, and bestowing it upon the owner of another tract where it may never have been. As oil and gas are migratory in character no one can tell from whence they came, or whither they are going, and they must, therefore, belong to him upon whose lands they are captured. No one else can have any ownership in them, and a man can be awarded only that which he owns."

In *Kimbley v. Luckey* (1919) — Okla. —, 179 Pac. 928, supra, the lessor of a tract of land for oil and gas subsequently sold a portion of the tract; the sale was prior to the drilling of any wells under the lease; thereafter wells were drilled on the land retained by the original lessor. It was held that he was entitled to the entire royalties therefrom as against the purchaser of a portion of the tract. The court said that "whatever there was underneath the surface of the earth, whether oil or gas or other valuable or precious minerals, passed to the purchaser by the deed of Jan-

uary 19, 1916. When executed and delivered by the Luckeys, their interest therein was completely extinguished. But the making of the deed in no wise affected Lambert's rights under his lease, as the deed itself, in the covenants of warranty, especially excepted the oil and gas lease. Lambert could, as formerly, keep the leases in force for a time either by the payment of periodical rentals, or by development work. Oil and gas are minerals, and, so long as they remain in place in mother earth, belong to the owner of the land under which they are found, and of course, in the absence of a contract with another, such owner has the right to explore for oil and gas on his lands, and, when found, to remove the same. If because of their transitory nature they escape from his premises to the premises of another before being reduced to possession, they are no longer his property. When the Luckeys' grantees acquired the 40-acre tract purchased by them, it was subject only to the rights of the lessee to explore for, and, if found, to produce and remove therefrom, the oil and gas."

In *Northwestern Ohio Natural Gas Co. v. Ullery* (Ohio) *supra*, in denying the contention that since the lessee contracted with but one man he cannot be compelled to deal severally with many, and hence the lease is indivisible and the royalty due thereunder must be paid to subsequent purchasers jointly, the court pointed out that the lease ran to the heirs and assigns of the lessor, and these words mean the heirs and assigns as to each tract separately, rather than heirs and assigns as to both jointly.

In *Kimbly v. Luckey* (Okla.) *supra*, it is said that "while the leases do not expressly state that the land may be subdivided, a subdivision may be fairly implied because of the provisions extending the conditions and agreements to the heirs, executors, administrators, successors, and assigns of both parties. The plaintiffs in error are the 'assigns' of the 40-acre tract purchased by them. The argument sometimes urged that, the lease

being indivisible, the lessee will not be subjected to the inconvenience of dealing with separate owners, is, in such case, neither convincing nor sound. The rights of the owners are rested upon a more stable foundation than the mere convenience of a lessee, and particularly where the claim is made, not by the lessee, but by one who is seeking to profit by it. The common-law rule of the apportionment of rents in agricultural leases, where the lessor sells a portion of the leased premises to a stranger, and, as here, apportionment is not provided for by contract, has no place in the case under consideration, if, indeed, it has in our jurisprudence in respect to oil and gas leases. We know, as a matter of common knowledge, that it has been the general, if not universal, custom in this state, from the first discovery of oil and gas, for the royalty to be paid the owner of the lands on which the wells were located, and from which production was had. To apply the common-law rule of apportionment of rents to such class of cases would be destructive of titles, at least of such titles as had been acquired by purchase, and would work interminable confusion and bring about an almost endless amount of litigation, and that in cases where the parties had, from the earliest days of the business, in good faith made land ownership the basis of title to production. The oil and gas under the 160 acres of land belonged to the Luckeys, subject only to the license or lease, so-called, held by Lambert, to explore for oil and gas and produce the same when discovered. When there was carved out of this tract and conveyed to Alexander and his cotenants a portion of the lands, they pro tanto succeeded to the interest of the Luckeys, not only in the fee, but in the oil and gas produced on the 40-acre tract. But they acquired no additional or greater interest by their purchase. The deed did not include or influence the residue of the tract, and consequently did not affect the qualified ownership in and to the oil and gas under the remainder of the tract. Such qualified ownership re-

mained in the Luckeys. Had neither of them theretofore executed the Lambert lease, they would have had a right to drill on the residue of the tract for oil and gas, and to possess themselves of such oil and gas as were produced therefrom."

## *II. Partition of land.*

In *Campbell v. Lynch* (1917) 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, and in *Wettengel v. Gormley* (1898) 184 Pa. 354, 39 Atl. 57, 19 Mor. Min. Rep. 213, it is held that where land under a gas and oil lease is partitioned among the heirs of the lessor before any wells have been drilled under the lease, and thereafter producing wells are developed upon some of the tracts, although such tracts are held in severalty by the heirs, nevertheless the royalty, from the product of the wells is owned in common by all of the heirs, and it is to be divided among them proportionately, regardless of the location of the wells. In reaching this conclusion in *Wettengel v. Gormley* the court said that, "as between themselves, the division of the surface was absolute; but as to the holder of the leasehold, each took the part devised to him, subject to the common burden which had been put upon the entire body of the land as a single undivided tract containing 600 acres, more or less. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of the 600 acres, and not to the owner of any subdivision of it. But, as we have seen, the royalties were personal. They were not disposed of by Gormley's will. They were not even referred to in it. The Intestate Laws must in such case be looked to for the disposition of this very considerable part of his estate. The children hold together all the acreage that is covered by the lease, and each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or hundred acres the wells may be situated. The royalties are not payable by the acre, nor by the farm into

which the surface may be divided, but upon the total production, wherever within the 600 acres the production may take place."

In *Campbell v. Lynch* (W. Va.) supra, in holding that, where land subject to an oil and gas lease is partitioned among the heirs of the lessor and wells are subsequently drilled upon the premises, the royalties due thereon are the joint property of the heirs as a whole, the court said: "No court has ever been able to lay its finger on any flaw in the reasoning of the opinion in *Wettengel v. Gormley* (1894) 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93, nor to demonstrate inapplicability of the legal principles under which the court disposed of it. The only objection urged against it, namely, that the oil and gas are legally parts of the land, wherefore assignment thereof otherwise than by deed is either legally impossible, or cannot be deemed to have been within the intention of the parties, or that the lease is not operative until oil is produced, just which is not exactly stated, has been overruled or rejected by this court in *Lynch v. Davis* (1917) 79 W. Va. 437, L.R.A.1917F, 566, 92 S. E. 427. Of course the oil and gas adhere to the land and are parts of it until severed. Until severance takes place, the lessee has no title. On severance and not earlier the royalty is payable. Then the oil or gas, as the case may be, is personal property, for alienation or disposition of which no deed or other solemn instrument of conveyance is necessary. It is personal property in the hands of the lessee, and he has bound himself to deliver a portion of it, called royalty, to the lessor as rent in kind, for occupation, use, and operation of the lessor's mines. The royalty is a rent susceptible of division and disposition, as if it were rent payable in money. That is the holding in *Wettengel v. Gormley* and *Lynch v. Davis*. Existence of the relation of landlord and tenant between the lessor and lessee in a lease of this character is the uniform holding of this court. Likewise the royalty has been declared to be not the

land nor the oil in place, but the usufruct, the rent return from the oil mine in the land. Though the lease does not actually pass title to the oil or gas, it confers right to take it, and the parts of the divided tract go into the hands of their owners subject to that right, whether they are acquired by deed, will, or a decree of partition. The Ohio, Indiana, and Arkansas cases relied upon seem to treat the royalty as oil in place. One unsatisfactory feature of the opinions in those cases is the lack of a definition of the royalty. In all of them it is completely ignored."

In *Lynch v. Davis* (W. Va.) *supra*, it appeared that the heirs of the owner of land partitioned the same in kind among themselves, divided it into equal parcels, one of which was assigned to each heir, and deeds were executed carrying out the assignment; subsequently part of the heirs executed an oil and gas lease of the tracts owned by them, describing the land as a single parcel without anything to indicate any holding of any part of it in severalty; the lease in all respects treated the land as if it were owned by the heirs jointly and had never been partitioned among them. Under these circumstances it was held that, where a well was drilled upon one of the tracts and oil produced in paying quantities, the royalty therefrom should be equally divided among the different heirs. The court refers with approval to *Wettengel v. Gormley* (1894) 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93, and said that that case involved the exact question presented to it in this regard. However, a vital distinction is to be noted, in that the *Wettengel* Case involved the partition of land among the heirs which was subject to an oil or gas lease executed by their ancestors, while the *Lynch* Case involved a division of the royalty under an oil and gas lease executed by the heirs after the land had been partitioned. In other words, in the latter case there were presented the rights of the owners of different tracts of land who executed a joint lease thereof for the production of oil and gas.

In the reported case (*PITTSBURGH & W. V. GAS CO. v. ANKROM*, ante, 1157), it is held that the purchasers of a portion of land at a sale by a trustee in bankruptcy, who purchased subject to a lease covering the entire tract, each had the right to the royalty from the product of any well on the particular portion of the premises he had purchased. In so holding, the court distinguishes *Campbell v. Lynch* (1917) 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, apparently on the ground that that case involved the partition of land among the heirs of the owner. The writer of the opinion and one of the other justices of the court in *PITTSBURGH & W. V. GAS CO. v. ANKROM* were in favor of overruling *Campbell v. Lynch* (W. Va.) *supra*. One judge who concurred in that opinion took the view that the two cases were distinguishable; and as two judges dissented to the general holding, the view that *Campbell v. Lynch* was overruled did not receive the support of the majority of the court.

In *Northwestern Ohio Natural Gas Co. v. Ullery* (1903) 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647, *supra*, the court, in referring to the *Wettengel* Case, said: "We have several times had occasion to carefully examine and consider that case, and it has always failed to receive the approval of our judgment; and upon a reconsideration here, it again fails to convince us of its soundness. And the reconsideration of the same principle in the same case in *Wettengel v. Gormley* (1898) 184 Pa. 354, 39 Atl. 1118, fails to strengthen the original case. Those cases were between devisees, and the question as between the lessee and purchasers from the lessor was not involved, and therefore the principle of those cases is not directly applicable here. But even if it were we do not regard it as sound."

In *Cochran v. Gulf Ref. Co.* (1916) 139 La. 1010, 72 So. 720, it appeared that the heirs divided land subject to an oil or gas lease among themselves, and some of them subsequently sold portions of their tracts to third persons. It was held that the lease was

an indivisible contract, and, the heirs of the lessor having divided the property and disposed of a part of it, part of them cannot thereafter maintain an action to dissolve the lease as to all of the land or to dissolve the contract as to that portion of the land retained by them. The court said: "When the plaintiffs and their two sisters accepted the succession of their mother unconditionally and without the benefit of inventory, the entire tract of land was subject to the indivisible contract of lease. By dividing the land into four lots, they could not affect the rights of the lessee on the entire tract. As was said in the case of *Murray v. Barnhart* (1906) 117 La. 1023, 42 So. 489, the grantee's obligation to drill a well was indivisible in its nature, and the grantor's corresponding obligation to deliver the land was likewise indivisible; if the obligation of one of the parties to a contract is to be fulfilled entirely, the obligation of the other contracting party must likewise be fulfilled in whole. The plaintiff, Mrs. Parrott, sold the 6-acre tract from the 75 which she had acquired in the partition, to William Claiborne. . . . The grantee then had the right to drill a well on any part of the entire tract described in the lease at any time before the 21st of June, 1912, and one of the wells was drilled on the 6 acres sold to William Claiborne. The royalty was paid to him on the 17th of April, 1912, and again on the 7th of April, 1913. William Claiborne and two of the four heirs of John H. Harris and his wife are not parties to this suit. Hence the contract of lease cannot, in this suit, be annulled as to the portion of the land owned by them. It is well settled that where a party to an indivisible contract has, by his disposition of a part of the property subject to the contract, rendered it impossible for him to accomplish the resolatory condition and restore matters to the same situation as though the contract had not been made, he cannot maintain an action against the

other party to the contract to dissolve it."

In *Gulf Ref. Co. v. Hayne* (1915) 138 La. 555, L.R.A.1916D, 1154, 70 So. 509, Ann. Cas. 1917D, 130, it is held that neither the lessee in an oil and gas lease of the lessor's interest in the contract of land, nor the lessor, is entitled to compel the co-owners of the land to partition the same, since a partition implies equality, and where equality cannot be had by a partition in kind, it must be by licitation, otherwise there might be a most serious loss to the heirs or some of the co-owners, for a division of the tract of land into different parts, and awarding one part to each owner might result in some of them obtaining royalties from wells on their respective portions, while no wells would be developed on tracts owned by other heirs.

In *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (1908) 48 Tex. Civ. App. 555, 107 S. W. 609, it is held that, where the lessee in an oil and gas lease participated in a partition of the leased premises among the heirs and recognized their several ownership his conduct changed the character of his holding from that of lessee from the joint owners of the latter tract to lessee from each owner of the respective tracts, and that hence it became his duty to deal fairly with the different owners in the development of the tracts of land.

While not within the scope of the note a case of some interest upon this point is *Stevenson v. Yoho* (1907) 63 W. Va. 144, 59 S. E. 954, which holds that where land was partitioned by parol between the heirs, and subsequently one of the heirs conveyed a portion of the oil and gas in the land owned and controlled by him, this conveyance passed title to the land acquired by the grantor by the parol partition, and that the subsequent grantee obtained no rights in the oil in land conveyed by the parol partition to another heir.

A. G. S.

JOHN H. MCCLURE, Doing Business as the McClure Contracting Company, Respt.,

v.

VILLAGE OF BROWNS VALLEY, Appt.

*Minnesota Supreme Court — July 25, 1919.*

(— Minn. —, 173 N. W. 672.)

**Witness — value — president of corporation as owner.**

1. The president of a village council, having no special or intimate knowledge of the nature or quality of the materials entering into the construction of a bridge owned by the village, does not come within the rule that the owner of the property may testify to its value.

[See note on this question beginning on page 1171.]

**Appeal — refusal of instruction — error.**

2. Error cannot be predicated upon the court's refusal to give a requested instruction containing a correct abstract statement of law which is not applicable to any of the issues in the case.

[See 2 R. C. L. 261.]

**Bridge — failure to test — effect.**

3. Gen. Stat. 1913, § 2600, relating to the strength of public bridges, does not prevent a bridge builder from recovering the contract price of a bridge which has not been submitted to the test referred to in the statute, but

which has supported a weight four times as great as that required by the specifications and three times as great as that required by the statute.

**Evidence — sufficiency — performance of contract.**

4. The evidence required the court to submit to the jury the question of whether there had been a substantial performance of the contract to build the bridge, under the rule that ordinarily the question of substantial performance is one for the jury, and justified the jury in finding that there had been such performance.

Headnotes by LEES, C.

APPEAL by defendant from an order of the District Court for Traverse County (Flaherty, J.) denying a motion for new trial after verdict in favor of plaintiff in an action brought to recover the contract price for the construction of a bridge. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. D. J. Leary, Charles E. Houston, and James B. Ormond, for appellant:

In the making of contracts, it is a general and fundamental principle of law that all persons contracting with a municipality must, at their peril, inquire into the power of the corporation or its officer to make the contract.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; Sandeen v. Ramsey County, 109 Minn. 505, 124 N. W. 243; Basshor v. St. Paul, 26 Minn. 110, 1 N. W. 810; Horn v. St. Paul, 80 Minn. 369, 83 N. W. 388.

The law of the place where the contract is entered into at the time of making the same is as much a part of the

contract as though it were expressed therein.

9 Cyc. 582; Gerner v. Church, 43 Neb. 690, 62 N. W. 51.

There was no such substantial performance of the contract as to bring the plaintiff within the meaning and protection of the rule of "substantial performance" as laid down by the court.

Cornish, C. & G. Co. v. Antrim Co-op. Dairy Asso. 82 Minn. 215, 84 N. W. 724; Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; Anderson v. Pringle, 79 Minn. 433, 82 N. W. 682; Lynes v. Holl, 60 Minn. 532, 63 N. W. 108; Winona v. Minnesota R. Constr. Co. 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; Bixby v. Wilkinson, 25 Minn. 481.



**Messrs. Murphy & Anderson, for respondent:**

There can be no question as to what the law is, especially in so far as this case is concerned, since the instruction of the court to the jury being unchallenged, the law as given by the court to the jury is the law under the facts in this case.

Quinn v. St. Paul Boiler & Mfg. Co. 128 Minn. 270, 150 N. W. 919; Smith v. Pearson, 44 Minn. 397, 46 N. W. 849; Bergh v. Sloan, 53 Minn. 116, 54 N. W. 943; Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Kleis v. Travelers Ins. Co. 118 Minn. 422, 136 N. W. 1101; Bertram v. Bemidji Brewing Co. 123 Minn. 76, 142 N. W. 1045, 4 N. C. C. A. 764; Carson v. Dawson, 129 Minn. 453, 152 N. W. 842; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.

In order for defendant to obtain judgment notwithstanding the verdict, it must have based its motion therefor in the court below.

Netzer v. Crookston, 66 Minn. 356, 68 N. W. 1099; Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366; Kernan v. St. Paul City R. Co. 64 Minn. 312, 67 N. W. 71; Crane v. Knauf, 65 Minn. 447, 68 N. W. 79.

A new trial should be granted only in case of manifest injustice. Every doubt should be resolved in favor of the verdict.

Rheiner v. Stillwater Street R. & Transfer Co. 29 Minn. 147, 12 N. W. 449; Johnson v. Winona & St. P. R. Co. 11 Minn. 296, Gil. 204, 88 Am. Dec. 83, 4 Am. Neg. Cas. 204.

It is the general rule that whether or not there has been a substantial performance of a contract is a question of fact for the jury.

5 Cyc. 104; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; Johnson v. Fehsefeldt, 106 Minn. 202, 20 L.R.A.(N.S.) 1069, 118 N. W. 797; Brown v. Hall, 121 Minn. 61, 140 N. W. 128; Snider v. Peters Home Bldg. Co. 139 Minn. 413, 167 N. W. 108; Olmstead v. Beale, 19 Pick. 528; Woodward v. Fuller, 80 N. Y. 312.

Plaintiff cannot now be precluded from recovering because defendant's plans were defective.

MacKnight Flintic Stone Co. v. New York, 160 N. Y. 72, 54 N. E. 661; Stanley Scandinavian Evangelical Lutheran Cong. v. La Crosse Steel Roofing & Corrugating Co. 148 Wis. 261, 134 N. W. 351.

5 A.L.R.—74.

Lees, C., filed the following opinion:

This action was brought to recover the contract price of a bridge. Plaintiff had a verdict. A new trial was denied, and defendant appeals.

On June 25, 1915, the parties to this action executed a contract whereby plaintiff undertook to construct a concrete bridge over the Minnesota river, in accordance with plans and specifications which defendant had procured, and which, by reference, were made part of the contract. He also undertook to provide a temporary bridge over the river while the new bridge was under construction, and to remove an old bridge which the new one replaced. Defendant agreed to pay him therefor \$2,748 and the cost of the temporary bridge, plus 10 per cent, such cost not to exceed \$150.

The complaint alleged performance of the contract on plaintiff's part and a refusal by defendant to pay him anything. It also alleged that the actual cost of the temporary bridge was \$146, and that extra labor and materials were furnished during the progress of the work, of the value of \$146. Judgment for \$3,040 and interest was demanded.

The answer denied performance of the contract, alleged that a bridge was built, but not such a bridge as the contract called for, in that it was defectively constructed and was unsafe for ordinary traffic; admitted that a temporary bridge was built by plaintiff, but denied that it cost more than \$25; and denied the furnishing of any extra labor or materials. It also pleaded, as a counterclaim, carelessness on plaintiff's part in taking down the old bridge and his conversion of part of it, to defendant's damage in the sum of \$500. There were other counterclaims, but they were eliminated from the case and need not be referred to. The verdict was for \$2,653, with interest from the date of the completion of the bridge. We take up the questions raised in the order in which they were presented in the argument.

1. The president of the village council was called as a witness for defendant, and over objection testified that the value of the old bridge, when plaintiff removed it, was \$500. Later on this testimony was stricken out on plaintiff's motion, on the theory that the witness had no qualifications which made him com-

**Witness—  
value—president  
of corporation  
as owner.**

petent to testify to the value of the old bridge. There was no error in this. The witness was an attorney at law, without special knowledge of the value of the materials entering into the construction of bridges. The rule that the owner of property may testify to its value has no application. The bridge was owned by the village. Its president represented it, but was not shown to have any more intimate knowledge of the nature and quality of the materials in the bridge than any other inhabitant of the village. Such intimate knowledge furnishes the only basis for the rule. *Derby v. Gallup*, 5 Minn. 119, Gil. 85; *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198.

2. The court was requested to instruct the jury that persons dealing with a municipality are chargeable with notice of its powers and the powers of its officers. The instruction was not given, and error is assigned on that score. As an abstract statement of the law there was no fault in the requested in-

**Appeal—refusal  
of instruction—  
error.**

struction, but it had no application to the issues in the case, and hence the court was not required to give it. The village had power to make the contract with plaintiff, and its officers had power to execute it in its behalf. There is no question in the case of the usurpation of power on the part of the village officials, and no claim that the legitimate powers of the village were transcended.

3. Section 2600, Gen. Stat. 1913, reads as follows: "All bridges hereafter constructed on any public street or highway in any county,

township, town or village, in the state of Minnesota, shall be of sufficient strength to support, with perfect safety, any wagon, engine or other vehicle with a weight of 20 tons on two axles with 10-foot centers, with not to exceed three fourths of said weight concentrated on one axle, when driven at a speed of not to exceed 3 miles an hour; nothing herein contained shall apply to any automobile."

The court was asked to instruct the jury that "plaintiff was charged with notice of what the law [§ 2600] required with reference to the bridge in question." This instruction was not given. In denying the motion for a new trial, the court held that the statute did not forbid the making of a bridge contract which failed to provide for a test of the strength of the bridge as directed by the statute, or the maintenance of an action on such a contract for the recovery of the contract price. We find it unnecessary to consider whether this is a correct interpretation of the statute, for it conclusively appears that

**Bridge—failure  
to test—effect.**

the bridge was so constructed that it supported a weight of over 60 tons. Its strength was four times as great as that required by the specifications, and three times as great as that required by the statute; hence defendant was in no position to contend that the statute had not been complied with, and no possible prejudice could result from the court's refusal to give the requested instruction.

4. The weight of the argument is directed to the sufficiency of the evidence to sustain the verdict. It appears that the bridge sags perceptibly. When the concrete was poured in the forms for the girders, they settled 2 or 3 inches, and jackscrews were used in an attempt to bring them back to a level. There is an excessive camber or upward curve in one of the girders. There are numerous cracks and holes in the concrete, and the reinforcing

rods are exposed in places. The concrete is not of the same color, and the bridge presents a rough appearance, displeasing to the eye.

It appears, however, that it has been in constant use since it was completed in September, 1915. Its strength has been tested by running three steam tractor engines upon it at the same time. Their combined weight, with that of the water and coal carried, was over 60 tons. The bridge stood the test. The specifications only required it to be strong enough to carry a 15-ton engine of the ordinary type used by threshers.

The bridge was not constructed in strict accordance with the plans and specifications. Few concrete bridges are. The court submitted the case to the jury on the theory that plaintiff might recover if he had substantially performed his contract. If he had so performed, the jury were told to make an allowance out of the contract price to cover the cost of remedying defects and omissions. The law was laid down in accordance with the principles stated in *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, to which this court has repeatedly given its approval. *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Blakely v. J. Neils Lumber Co.* 121 Minn. 280, 141 N. W. 179; *Snider v. Peters Home Bldg. Co.* 139 Minn. 413, 167 N. W. 108. Ordinarily the question of whether

plaintiff has substantially performed a building contract upon which he sues is a question for the jury. *Brown v.*

*Hall*, 121 Minn. 61, 140 N. W. 128; *Snider v. Peters Home Bldg. Co.* supra. The instructions to the jury were clear and comprehensive, and no exception was taken to them. The jury gave plaintiff \$387 less than he claimed. In denying the motion for a new trial, the learned district judge said: "The case was fairly tried to a good, intelligent jury, who evidently found in favor of defendant on every question submitted to it, except that there was a substantial performance of the contract, and they must have made a very liberal allowance to defendant for imperfect work."

We have been impressed by a careful reading of the record with the conviction that the bridge is safe enough for every kind of traffic it will have to sustain, and that the chief complaint which the village may justly make rests on the unsightly appearance the bridge presents. It is evident that it bears the marks of poor workmanship and is not a municipal ornament, but neither the contract nor the specifications require it to conform to any given standard of appearance.

We find no error in the record; hence the order denying a new trial must be and hereby is affirmed.

## ANNOTATION.

**Public or corporate officer as within rule that owner of property may testify to value thereof.**

Although the precise point appears to have been adjudicated in but one instance other than the reported case (*McCLURE v. BROWNS VALLEY*, ante, 1168) it seems that the rule which permits an owner of property to testify as to its value does not include an officer of a corporation, either public or private.

In *Omaha Loan & Trust Co. v. Douglas County* (1901) 62 Neb. 1, 86 N.

W. 936, the plaintiff corporation attempted to prove by its president the value of land alleged to be damaged by the regrading of a street. The proposed testimony was excluded on the ground that the witness had not shown himself qualified to testify as to its value, the court saying: "It is claimed that he should be treated as the owner of the property and presumed to know its value, because he

is the president of the corporation purchasing it at the foreclosure sale. He, as the president of the company, is not an owner of property belonging to the corporation in the sense of the word when applied to an individual owner. An officer of a corporation may have no greater personal knowledge of the value of its property than an entire stranger. The question would depend on the nature of his duties in relation to the corporation and his means of acquiring knowledge of the value of the property inquired about. In this case there is no presumption in his favor, as in the case of an individual owning property, and nothing to show that the witness's knowledge was such as qualified him to testify as to the value because of his knowledge of values generally in that vicinity. . . . The relation of the witness to the property does not bring him within the rule of qualification to testify to the value of the land, as the owner."

In the reported case (*McCLURE v. BROWNS VALLEY*), it is held that the president of a village council is not, by reason of his official position, permitted to give opinion testimony as to the value of village property, and that the rule that the owner of property may testify to its value has no application. The logic of this decision is obvious, since the reason for permitting an owner of property to testify as to its value is not because he is the owner, but that, being the owner, he is presumed to have special knowledge of the value of his own property. Where, however, the owner is a cor-

poration, it would seem that the reason fails, and with it the rule itself. In this connection in *Crich v. Williamsburg City F. Ins. Co.* (1891) 45 Minn. 441, 48 N. W. 198, cited in the reported case (*McCLURE v. BROWNS VALLEY*), a case involving testimony by an individual owner, it was said: "In some cases the bare ownership of property may constitute very little, if any, qualification, while in others it may involve an intimate knowledge of the premises, cost, and condition of improvements made by him as owner, and the nature and quality of the materials entering into them. It is desirable in practice that the examination should elicit with more or less particularity the facts forming the basis of the opinion of the witness."

In *Omaha Beverage Co. v. Temp Brew Co.* (1919) — Iowa, —, 171 N. W. 704, the president of the defendant company was permitted to testify as to the market value of a beverage produced by the plaintiff, but the evidence was admitted on the ground that the witness had special knowledge as to the value of certain cereals which composed the beverage.

In *White v. Jones* (1903) 79 App. Div. 373, 12 N. Y. Anno. Cas. 277, 79 N. Y. Supp. 583, an official of a corporation was held to be competent to testify as to the value of certain tangible property as well as of the good will of a firm which had merged with the corporation. The foundation for his testimony, however, was laid in his expert knowledge of the business when it was absorbed by the corporation.

W. M. C.

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CHARLES F. ROBERTS et al.

v.

JAMES CORSON et al.

*New Hampshire Supreme Court — May 6, 1919.*

(— N. H. —, 107 Atl. 625.)

**Charity — gift for members of lodge.**

1. A gift for the benefit of the needy members of a particular lodge is a charitable or public trust.

[See note on this question beginning on page 1175.]

**Trust — charitable — validity.**

2. A trust for the benefit of needy members of a particular lodge is legal and enforceable.

[See 5 R. C. L. 310.]

**— who may administer.**

3. The administration of a trust may be committed to either a corporation or a voluntary association.

[See 5 R. C. L. 316, 317.]

**— incompetency of trustee — effect.**

4. If the trustee nominated by the creator of a trust is found to be incompetent to administer it, the fund must be turned over to a trustee appointed by the court.

[See 5 R. C. L. 315.]

**TRANSFER** by the Superior Court for Strafford County (Branch, J.) for the determination by the full bench of a bill filed for the cancellation of a deed, removal of the cloud from the records caused by such deed, and an order to turn over the undistributed balance in the hands of the defendant executor, in property included in the residuary clause of the will of Lewis W. Tebbetts, deceased. *Case discharged.*

The provision in controversy is as follows: "All the rest, residue, and remainder of my estate, real, personal, or mixed, I give, bequeath, and devise to Humane Lodge, No. 21, of Ancient Free and Accepted Masons of said Rochester, to be used by it as it shall determine best in each case for the benefit of its members who may be in want or distress from any cause whatsoever, physical or financial."

**Mr. Henry D. Yeaton, for plaintiffs:**

The trust must fail because the purposes named by the testator will not support a public charitable trust.

Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; Stratton v. Physio-Medical College, 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874; Fernald v. First Church, 77 N. H. 108, 88 Atl. 705; Keene v. Eastman, 75 N. H. 191, 72 Atl. 213; Gagnon v. Wellman, 78 N. H. 327, 99 Atl. 786.

A gift to a charitable or religious organization, without more, is in trust for the purpose of the organization.

Glover v. Baker, 76 N. H. 393, 83 Atl. 916; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

The defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential features of a public charity.

Donohugh's Appeal, 86 Pa. 306; Babb v. Reed, 5 Rawle, 157, 28 Am. Dec. 650; Thomson v. Norris, 20 N. J. Eq. 524; Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369; Old South Soc. v. Crocker, 119 Mass. 1, 20 Am. Rep. 299; Atty. Gen. v. Meeting-House, 3 Gray, 50; Parker v. May, 5 Cush. 336; 5 Am. & Eng. Enc. Law, 2d ed. 895; Bullard v. Chandler, 149 Mass. 532, 5 L.R.A. 104, 21 N. E. 951; Doyle v. Whalen, 87 Me. 414, 31 L.R.A. 118, 32 Atl. 1022; Philadelphia v. Masonic Home, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; Gorman

v. Russell, 14 Cal. 536; Saltonstall v. Sanders, 11 Allen, 468; Hennepin County v. Brotherhood of Gethsemane, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; Morning Star Lodge v. Hayslip, 23 Ohio St. 144; Humphries v. Little Sisters of the Poor, 29 Ohio St. 201; Swift v. Beneficial Soc. 73 Pa. 362; Delaware County Institute v. Delaware County, 94 Pa. 163; Thomas v. Ellmaker, 1 Pars. Sel. Eq. Cas. 98; Morrow v. Smith, 145 Iowa, 514, 26 L.R.A. (N.S.) 696, Ann. Cas. 1912A, 1183; Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; Little v. Newburyport, 210 Mass. 414, 96 N. E. 1032, Ann. Cas. 1912D, 425.

**Messrs. Snow, Snow, & Cooper, for defendants Corson et al.:**

The plaintiffs claim as heirs at law and next of kin. As such, however, they have no visitatorial authority unless created by the will itself.

Glover v. Baker, 76 N. H. 393, 83 Atl. 916; Mackenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A. (N.S.) 227, 61 Atl. 1027; Dartmouth College v. Woodward, 4 Wheat. 518, 673, 674, 4 L. ed. 629, 668.

Their bill fails, therefore, unless the gift which the testator there intended to make cannot be carried out because impossible or illegal.

Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219; Wentworth v. Wentworth, 77 N. H. 400, 92 Atl. 733.

The intention of a testator shall be

effectuated if it can be, consistently with the rules of law.

*Lear v. Manser*, 114 Me. 342, 96 Atl. 240; *Smart v. Durham*, 77 N. H. 56, 86 Atl. 821; *Wentworth v. Wentworth*, and *Hayward v. Spaulding*, *supra*; *Frost v. Wingate*, 73 N. H. 535, 64 Atl. 19; *Gagnon v. Wellman*, 78 N. H. 327, 99 Atl. 786.

The devise and bequest here made can be sustained either as a gift absolute or as a charitable trust.

*Danbury Cornet Band v. Bean*, 54 N. H. 525; *Marston v. Durgin*, 54 N. H. 347; *Parker v. Cowell*, 16 N. H. 149; *King v. Parker*, 9 Cush. 71; 19 *Harvard L. Rev.* 202; *Babb v. Reed*, 5 Rawle, 151, 28 Am. Dec. 650; *Byam v. Bickford*, 140 Mass. 31, 2 N. E. 687; *Guild v. Allen*, 28 R. I. 430, 67 Atl. 855; *Pom. Eq. Jur.* § 987; *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706; *Webster v. Sughrow*, 69 N. H. 380, 48 L.R.A. 100, 45 Atl. 139; *Carter v. Whitcomb*, 74 N. H. 482, 17 L.R.A. (N.S.) 733, 69 Atl. 779; *Doyle v. Whalen*, 87 Me. 414, 31 L.R.A. 118, 32 Atl. 1022; *Webber Hospital Asso. v. McKenzie*, 104 Me. 320, 71 Atl. 1032; *Old South Soc. v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638; *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900; *Minns v. Billings*, 183 Mass. 126, 5 L.R.A. (N.S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593; *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604; *Masonic Education & Charity Trust v. Boston*, 201 Mass. 320, 87 N. E. 602.

The trustee named, the defendant lodge, can act. The fact that it is an unincorporated association is not fatal.

28 Am. & Eng. Enc. Law, 2d ed. 956; *King v. Parker*, 9 Cush. 71; *Tucker v. Seaman's Aid Soc.* 7 Met. 188; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; *Atty. Gen. v. Goodell*, 180 Mass. 538, 62 N. E. 962; *Adams v. Page*, 76 N. H. 96, 79 Atl. 837; *Hayward v. Spaulding*, 75 N. H. 92, 71 Atl. 219; *Keene v. Eastman*, 75 N. H. 191, 72 Atl. 213.

Where the will by its language, either express or implied, exempts the trustee from giving bond, bond is not required.

*Re Lowell*, 22 Pick. 215; *Boston v. Doyle*, 184 Mass. 373, 68 N. E. 851;

*Parker v. Cowell*, 16 N. H. 149; *Hayes v. Hayes*, 48 N. H. 219; *Bean v. Christian Church*, 61 N. H. 260; *Fernald v. First Church*, 77 N. H. 108, 88 Atl. 705.

*Mr. William Wright* in propria persona.

*Mr. Oscar L. Young*, Attorney General, for the State.

*Young, J.*, delivered the opinion of the court:

If the words of the residuary clause are given their ordinary meaning, the testator intended to create a trust for the benefit of those who may become members of Humane Lodge; that is, he intended to create a trust for the benefit of a definite section of the public. <sup>Charity—gift for members of lodge.</sup>

A gift of this kind constitutes what is commonly known as a charitable or public trust. *Glover v. Baker*, 76 N. H. 393, 417, 83 Atl. 916; *Haynes v. Carr*, 70 N. H. 463, 482, 49 Atl. 638; *Jackson v. Phillips*, 14 Allen, 539; *Hoeffler v. Clogan*, 63 Am. St. Rep. 241, Note 249, 171 Ill. 462, 40 L.R.A. 730, 49 N. E. 527, 11 C. J. 301.

If the purpose such a trust is intended to effectuate is legal, and the persons for whose benefit it is established can be ascertained, it is the duty of the court to enforce it. *Fernald v. First Church*, 77 N. H. 108, 88 Atl. 705; *French v. Lawrence*, 76 N. H. 234, 81 Atl. 705; *Adams v. Page*, 76 N. H. 96, 79 Atl. 837. It is immaterial, in so far as the validity of such a request is concerned, how large or how small a section of the public it is intended to benefit. That is, whether it is intended to benefit every living human being (*Glover v. Baker*, 76 N. H. 393, 417, 83 Atl. 916), or whether its scope is limited to the poor and needy of New Hampshire (*Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638); the sick of Franklin and vicinity (*Adams v. Page*, 76 N. H. 96, 79 Atl. 837), or to indigent and distressed Masons, their widows and orphans (*Duke v. Fuller*, 9 N.

H. 536, 32 Am. Dec. 392). The bequest in question, therefore, constitutes a valid public trust for the purpose for which it was created, is legal, and it is possible to ascertain those it is intended to benefit.

The person who establishes such a trust may intrust its administration to a corporation (Chapin v. School Dist. 35 N. H. 445); to a voluntary association (Parker v. Cowell, 16 N. H. 149, 11 C. J. 339); or to trustees appointed by the probate court (Pub. Stat. chap. 198; Straw's Petition, 78 N. H. 506,

102 Atl. 628). It will be unnecessary therefore to consider whether Humane Lodge is a corporation or a voluntary association. In either case it will be the duty of the executor to turn over the property passing under the residuary clause to the lodge unless the court finds that administering the trust is inconsistent with the purpose for which the lodge was established. If that is found, the executor will turn the property over to whomsoever the probate court appoints to administer the trust.

Case discharged.

## ANNOTATION.

### Gift to fraternal order as valid charitable gift.

#### Generally.

Although the authorities are not in entire harmony, it may be stated as a general rule that a gift to a fraternal order will be upheld as a valid charitable gift.

United States.—Hopkins v. Grimshaw (1897) 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401.

California.—Re Willey (1900) 128 Cal. 1, 56 Pac. 550, 60 Pac. 471.

Indiana.—Cruse v. Axtell (1875) 50 Ind. 49.

Maine.—Everett v. Carr (1871) 59 Me. 325.

Massachusetts.—Coe v. Washington Mills (1889) 149 Mass. 543, 21 N. E. 966; Minns v. Billings (1903) 183 Mass. 126, 5 L.R.A. (N.S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593; Masonic Educational & Charity Trust v. Boston (1909) 201 Mass. 320, 87 N. E. 602.

New Hampshire.—See the reported case (ROBERTS v. CORSON, ante, 1172).

New York.—Vander Volgen v. Yates (1848) 3 Barb. Ch. 242, affirmed in (1853) 9 N. Y. 219.

Rhode Island.—Mason v. Perry (1901) 22 R. I. 475, 48 Atl. 671.

Tennessee.—Heiskell v. Chickasaw Lodge (1889) 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825.

England.—Spiller v. Maude (1864) L. R. 32 Ch. Div. 158, note; Pease v.

Pattinson (1885) L. R. 32 Ch. Div. 154, 55 L. J. Ch. N. S. 617, 54 L. T. N. S. 209.

Contrary to the rule laid down in the majority of cases, it has been held that a fraternal order is not a charitable institution, and that a gift to it is not a charitable use.

Thus, in Babb v. Reed (1835) 5 Rawle (Pa.) 151, 28 Am. Dec. 650, it was held that a lodge of Odd Fellows, being an association for the purposes of mutual benevolence among its members only, is not an association for charitable uses, and hence a bequest to its building fund is not a charitable gift. The court said: "Its objects are stated to be the employment of its funds in purposes of mutual benevolence amongst its members and their families; but these cannot be deemed charitable uses under the common law of Pennsylvania or the Statute of 43 Elizabeth."

Similarly, in Swift v. Beneficial Soc. (1873) 73 Pa. 362, it was held that a bequest to a beneficial society whose benevolences and benefits were confined exclusively to contributing members of the association is not to a charitable use.

In Crim v. Williamson (1912) 180 Ala. 179, 60 So. 293, it appeared that

a bequest was given to a Masonic lodge in trust for charitable purposes, the preference as to the recipients being Masonic widows and orphans, but the trustees were not restricted to such charities, and discretion was permitted them in aiding worthy objects of charity. It was held that this clause of the will was void, the court saying: "While it expresses a preference for widows and orphans of Masons, it does not confine the bequest to this clause, but gives the trustees an unbridled discretion to devote the fund to 'worthy objects of charity,' thus vesting in them the sole power to determine who or what may be worthy objects of charity, and without restriction or limitation as to individuals, class, condition, or location. In every state in the Union, including Alabama, where the *cy près* doctrine is not recognized, it is the settled law that although the particular individuals who are to benefit by the charity need not be specified still the object of the charity must be named or described. The want of a trustee will not defeat the charity, but the object of the charity must be ascertained, else the court would have to substitute its own selected charity, or permit the trustee to select the charity, which the law does not authorize."

#### Illustrations.

A devise to a Masonic lodge for the purpose of erecting a lodge building is a devise for charitable uses, and it is not necessary that the lodge should be a corporation to enable it to become a beneficiary under the will. *Cruse v. Axtell* (1875) 50 Ind. 49, wherein the court said: "If it was a quasi corporation, or a corporation de facto, or an organization of persons having a name by which they could be identified, it is sufficient for that purpose."

In *Minns v. Billings* (1903) 183 Mass. 126, 5 L.R.A.(N.S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593, it was held that a bequest to the trustees of the permanent fund of the Franklin Typographical Society of Boston was a gift to a public charity, the funds of the association being derived from

gifts and bequests, and "provided for the purpose of paying a death benefit and giving charitable assistance to sick, disabled, or dependent members of the Franklin Typographical Society, Boston, Massachusetts, an incorporated mutual benefit association, their widows and orphans, and otherwise assisting needy persons in any way connected with the printing business, said fund being entirely within the control of its trustees, and solely applicable to such purposes."

In *Masonic Education & Charity Trust v. Boston* (1909) 201 Mass. 320, 87 N. E. 602, it was held that a fund given to a Masonic lodge to be invested, and, when a certain amount had accumulated, to be used for the establishment and maintenance of a home for indigent and needy Masons in Boston and its vicinity, was a charitable gift, the court saying: "This bequest is made expressly for the benefit of indigent and needy Masons within a designated territory, by making provision for their relief and comfortable support at a home to be erected when the fund, with accumulations, should be sufficient, and which should bear the testator's name. The object to be accomplished being purely charitable, and the number to be benefited indefinite, even if the gift is limited to a class, these features are sufficient in law to constitute the gift a public charity."

In *Heiskell v. Chickasaw Lodge* (1889) 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825, it was held that a bequest to a lodge of Odd Fellows, "to be used by said lodge for the benefit of the widows and orphans," was a valid charitable gift, though the lodge was unincorporated, the beneficiaries being definitely indicated and embracing "a certain and continuing class, always capable of identification."

In *Vander Volgen v. Yates* (1848) 3 Barb. Ch. (N. Y.) 242, affirmed in (1853) 9 N. Y. 219, it was held that a Masonic lodge could take the beneficial interest in a deed of trust as a charitable use, although not entitled to hold the legal estate.

In *Everett v. Carr* (1871) 59 Me. 325, a bequest to a Masonic lodge was



held valid as being to a recognized institution of charity and benevolence. It was said by the court: "The Masonic lodges to which legacies are given are incorporations created for specific purposes, 'with power to sue and be sued, to have a common seal and to change the same, to make any by-laws for the management of their affairs, not repugnant to the laws of this state nor ancient Masonic usages; to take and hold for charitable and benevolent uses,' real and personal estate to a certain value, exceeding the legacies in this will, 'and to give and grant, or bargain and sell, the same, with all the privileges usually granted to other societies instituted for purposes of charity and benevolence.' Being existent corporations, competent to take, a legacy may be given to them equally as to individuals. If made to them, it would be in aid of the object of their creation. If the legacies had been to them by name and nothing more, no objection could be taken to validity. The allegation in the will, 'for charitable purposes,' is merely a reiteration of the alleged purposes of their corporate existence. Merely stating the object of the donor to be coincident with the purposes for which the donee exists cannot defeat the gift. Accordingly, legacies to Masonic lodges have been upheld by repeated decisions of courts of the highest respectability."

But in *Bangor v. Rising Virtue Lodge* (1882) 73 Me. 428, 40 Am. Rep. 369, it was held that a bequest which was used to erect a building partly for lodge and partly for business purposes was not a charitable gift. Distinguishing *Everett v. Carr* (Me.) *supra*, the court said: "All that was decided was that 'incorporated Masonic lodges might receive in trust property devised for charitable purposes.' They could hold property as trustees, as towns, or individuals can, but that does not make the towns, lodges, or individuals public charitable institutions within the statute. They are corporations established for other purposes, and holding specified property for certain purposes.' They hold as corporations their own prop-

erty in their own right, for such purposes as the law permits; and trust property in trust, as other trustees. In the will of Dwinel there were legacies to Everett and others, 'in trust, to be used solely and purely for charitable purposes.' Neither devise altered the relations of the devisees, so as to make either the lodges or the individual trustees thereby 'charitable institutions,' and therefore to be exempted from taxation. The only question then was whether the lodge could take as trustee. That it does charitable acts is not to be questioned, but if charity was not the primary and exclusive object of its existence, and it was not purely a benevolent charitable institution, the purpose and objects of its existence remaining unchanged, the receiving a devise as trustee would not make it a public charitable institution under the statute, when without and before such devise it was not, any more than a bequest to a town for literary purposes would make such town a literary institution. The town can hold a devise for literary purposes as trustee, precisely as a lodge can for benevolent purposes, without the one being a literary or the other a benevolent institution, within the purview of the statute."

A fraternal order, even though it is not a charitable institution, may be a trustee for a charitable purpose. *Re Wiley* (1900) 128 Cal. 1, 60 Pac. 471. In that case, it was contended on behalf of heirs that the provisions in a will for the payment of certain sums to certain lodges were invalid because the lodges were not charitable bodies, and because they were not bound to use the bequests for charitable purposes. The court held that it was not necessary to determine whether a Masonic body is a charitable institution; for it is not necessary that a trustee for charitable purposes should be itself a charitable institution. "It is sufficient," said the court, "if a bequest be for a charitable purpose. In each of the instances the bequest is made to the Masonic body for the use of the widows' and orphans' fund of said lodge, or chapter, or commandery.

This is a compliance with the legal essence of a valid charity; that is, that it is public, and is vague and uncertain as to the individuals to be benefited or relieved." And see to the same effect the reported case (*ROBERTS v. CORSON*, ante, 1172).

In *Hopkins v. Grimshaw* (1897) 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401, it appeared that a parcel of land was conveyed to three persons in trust for the Union Beneficial Society, an unincorporated association for the mutual aid of its members in case of sickness, and for their burial in case of death. The land was used by the society for a burial ground for nearly forty years, and then, by order of the board of health, ceased to be so used, the bodies being exhumed and removed to other cemeteries. In an action by the heirs of the original grantor to recover the fee, it was said: "The conveyance now in question, made to private persons as trustees, was expressed to be 'for the sole use and benefit of the Union Beneficial Society of the city of Washington as aforesaid, for a burial ground, and for no other purpose whatever.' The articles of association of that society appear to have contemplated the burial of none but its own members; and the usage which early sprang up, of permitting the interment in its burial ground of other inhabitants of the District of Columbia upon the payment of certain fees, appears to have been adopted, not from any charitable motive, but as a source of private profit to the members of the association. It may be doubted whether, in the absence of express statute, the burial ground of such a society can be held to be a public charitable use. See *King v. Parker* (1851) 9 Cush. (Mass.) 71; *Donnelly v. Boston Catholic Cemetery Asso.* (1888) 146 Mass. 163, 15 N. E. 505; *Anonymous* (1745) 3 Atk. 277, 26 Eng. Reprint, 962; *Pease v. Pattinson* (1885) L. R. 32 Ch. Div. (Eng.) 154, 55 L. J. Ch. N. S. 617, 54 L. T. N. S. 209; *Cunnack v. Edwards* [1896] 2 Ch. (Eng.) 679, 65 L. J. Ch. N. S. 801, 75 L. T. N. S. 122, 45 Week. Rep. 99; *Re Buck* [1896] 2 Ch. (Eng.) 727, 65 L. J. Ch. N. S. 881, 75 L. T.

N. S. 312, 45 Week. Rep. 106, 60 J. P. 775. If it be assumed, however, as most favorable to the defendant, that this deed created a charitable trust, it was not a grant indicating a general charitable purpose and pointing out the mode of carrying that purpose into effect, thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose. *Church of Jesus Christ of L. D. S. v. United States* (1890) 136 U. S. 1, 51-60, 34 L. ed. 478, 493-497, 10 Sup. Ct. Rep. 792; *Jackson v. Phillips* (1867) 14 Allen (Mass.) 539. But the trust was restricted in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt), 'and for no other purpose whatever.' The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved."

In *Coe v. Washington Mills* (1889) 149 Mass. 548, 21 N. E. 966, it appeared that the Washington Mills Relief Society was a voluntary association formed for the purpose of extending aid to the sick and those who were disabled by accident, its membership being limited to the employees of the Washington Mills corporation, which contributed to a fund also made up by assessment on the members. It was held not to be a public charitable institution, although, on dissolution, it was said by the court: "If the corporation had contributed the whole of the funds, not as a public charity, but for the support of this particular society during its life, it would seem to be very clear that at the death of the society the accumulated fund ought to go to it by way of a resulting trust."

See also *Mason v. Perry* (1901) 22 R. I. 475, 48 Atl. 671, wherein it appeared that a bequest was given in trust, the income to be expended annually "for the relief of needy members of said Mount Vernon lodge, or, preferably, for the general purposes of the lodge, including now and then, if desired, an appropriation for proper forms of entertainment for the mem-

bers of the lodge." Considering the first clause, the court said: "That the first object thus specified is a charitable one will hardly admit of doubt, and had the testator stopped there, or had fixed the amount to be thus used, we see no reason why such trust would not have been a valid and enforceable one. It would clearly have been one of the classes of trusts which are under the special control of a court of equity." Considering the second clause of the bequest, however, the court said: "If in the case at bar the bequest had been made to the lodge for its general purposes, and no trust in perpetuity had been created, it would doubtless have been a valid bequest, as the testator had the right to bestow his absolute benefactions as he pleased. He also had the right to make a bequest to said lodge in trust for charitable purposes. But . . . the giving to said lodge of a devise as trustee did not have the effect of changing the purposes of the lodge into a charitable institution. It therefore became necessary, in order to create a valid trust in perpetuity, that the bequest should be made for purposes which were clearly charitable. . . . It is well settled that in order to create a valid charitable trust in perpetuity the language employed must require the fund to be expended for charitable purposes only. And it must not be left in the discretion of the trustee to spend the money for a charitable or a noncharitable purpose. In other words, the devotion of the fund to charity must be clear and certain. . . . As the law will not permit property to be perpetually tied up for other than charitable uses, and as the testator has inseparably mingled with his gift for charitable

uses a gift for uses which are clearly not charitable, we feel compelled to hold the entire bequest invalid."

In England, it has been held that a Miners' Relief Fund Friendly Society was a charity, and funds raised for the relief of the sufferers of an accident were to be considered as charitable gifts. *Pease v. Pattinson* (1885) L. R. 32 Ch. Div. (Eng.) 154, 55 L. J. Ch. N. S. 617, 54 L. T. N. S. 209.

See also *Spiller v. Maude* (1864) L. R. 32 Ch. Div. (Eng.) 158, note, wherein it was held that the York Theatrical Fund Society for the relief of the indigent actors and their families was a charitable institution, and that a fund raised by subscription and gift was valid as a charitable use.

Compare *Re Clark* (1875) L. R. 1 Ch. Div. (Eng.) 497, wherein it was held that a fraternal order was not a charitable institution and a bequest to it was invalid as creating a perpetuity. In that case it appeared that the testator bequeathed a sum of money to the Ringwood Friendly Society, whose members by subscription and fines provided a fund to be distributed for their mutual benefit in case of sickness or old age. The poverty of the member at the time of his sickness or old age was not required to entitle him to an allowance, and it was held that the gift was not a charitable one, the court saying: "It appears to me that the society was not a charitable institution. The legacy, when paid, augmented the society's funds; but such funds not being, as I consider, funds clothed with a charitable trust, their character was not wholly, nor, I think, to the extent of the addition, varied by such addition."

W. M. C.

KIDDER EQUITY EXCHANGE, Respt.,  
v.

GUS N. NORMAN, Appt.

*South Dakota Supreme Court — August 15, 1919.*

(— S. D. —, 173 N. W. 728.)

**Partnership — sale of good will — authority of partner.**

1. An attempt by one member of a partnership engaged in buying grain at a particular place to sell the good will of the business, with the elevator which he owns individually, without authority of his copartner, is without effect where, by statute, one partner has no authority to dispose of the good will of a partnership business unless his copartner has abandoned the business to him, or is incapable of acting.

[See note on this question beginning on page 1182.]

**Contract — restraint of trade — agreement not to engage in business.**

2. A contract not to engage in a particular business in a particular place is invalid when not connected

with the sale of the good will of a business.

[See note in 3 A.L.R. 250; 6 R. C. L. 793.]

**APPEAL** by defendant from a judgment of the Circuit Court for Marshall County (Bouck, J.) in favor of plaintiff, and from an order denying a new trial, in an action brought to enjoin defendant from engaging in the business of grain dealer in a certain town. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Frank McNulty, for appellant:

While defendant signed the name of the partnership to the agreement he had no authority to do so, and the signature was not the signature of the copartnership and not binding on the copartnership.

*North Star Boot & Shoe Co. v. Stebins*, 2 S. D. 74, 48 N. W. 833; *Prescott v. Bidwell*, 18 S. D. 64, 99 N. W. 98; *Jensen v. Wiersma*, — Iowa, —, 4 A.L.R. 298, 170 N. W. 780.

Messrs. Campbell & Walton, for respondent:

The contract prepared by defendant and signed by him in the name of "Norman & Johnson Grain Company," containing a stipulation to the effect that the company agrees not to enter into the business of buying or selling grain at Kidder, was not admissible in evidence.

*McQueen v. Bank of Edgemont*, 20 S. D. 378, 107 N. W. 208; *Rhomberg v. Bender*, 28 S. D. 609, 134 N. W. 805.

The contract was limited as to place. *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576.

Good will is intangible, and can only pass when accompanied by a sale of tangible property. It is, generally

speaking, an incident of the locality or place of business, and not of the stock of merchandise.

*Rawson v. Pratt*, 91 Ind. 9; *M'Farland v. Stewart*, 2 Watts, 111, 26 Am. Dec. 109.

Where a partner has sold his interest in a partnership business, including his interest in the good will, the law will not permit him to violate the conditions of his contract.

30 Cyc. 605; 12 R. C. L. 993; *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707; *Jensen v. Wiersma*, — Iowa, —, 4 A.L.R. 298, 170 N. W. 780; *Re Lentz*, 97 Fed. 486.

**Whiting, J.**, delivered the opinion of the court:

This action was brought to enjoin defendant from engaging in the business of grain dealer at Kidder, South Dakota. Judgment was for plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

The facts are undisputed. Defendant, together with one Johnson, under the firm name and style of Norman & Johnson Grain Com-

pany, was engaged in the business of buying grain at Kidder. Plaintiff, desiring to purchase an elevator at the said town, entered into negotiations with defendant for the purchase of the elevator wherein the above partnership was doing business, supposing the said elevator to be the property of such copartnership. Norman had charge of the business at Kidder. Johnson resided at and had charge of a similar business for said firm at another town. The firm had in all some four places of business at as many different towns. Plaintiff and defendant entered into an agreement, of which a memorandum was made, which memorandum was dated July 31, 1917. The substance of such memorandum was that the party of the first part, the Norman & Johnson Grain Company, agreed to sell their elevator at Kidder, South Dakota, for \$6,500, and agreed not to enter into the buying or selling of grain in Kidder, and plaintiff agreed to pay the above amount for the elevator on or before August 4, 1917. This memorandum was signed on the part of the first party as follows: "Norman & Johnson Grain Company, by G. N. Norman, Mgr." Plaintiff had prepared a bill of sale in which the copartnership was named as grantor, which bill of sale described the said elevator and contained a clause to the effect that the grantors conveyed the good will of their business and agreed not to engage in the buying and selling of grain in and around Kidder, South Dakota. When this bill of sale was presented to Norman for signature, he advised plaintiff that the elevator was not the property of the partnership, but was his sole and separate property, and that therefore he could not sign the bill of sale as prepared. A new bill of sale was then prepared by Norman, which in no manner referred to the copartnership, except that in designating said elevator it was referred

to as the "Norman & Johnson Grain Company." In this bill of sale there was included the following: "As a further consideration for the sale and purchase of the above-described property, the parties of the first part individually hereby agree not to engage in the buying and selling of grain in and around Kidder, South Dakota. It being agreed that all the parties of the first part hereby sell the good will of the business as well as the described property."

The above-quoted words were in substance identical with the corresponding part of the unexecuted bill of sale. While Johnson was advised by Norman that he had contracted to sell the elevator, he never was advised of, and he never knew of or gave any authority for, the sale of the business or its good will, and he never authorized an agreement not to engage in the business of buying grain at Kidder. The partnership, by Norman, afterwards entered upon the business of buying and selling grain at Kidder.

We think it perfectly clear that the trial court was in error. The memorandum and the unexecuted bill of sale were absolutely immaterial. Plaintiff knew what the true situation was before it closed the deal and took the bill of sale. The rule is that contracts in restraint of business are void as against public policy. Rev. Code 1919, § 898. An exception is made in the case of a sale of the good will of a business. In such case there can be a valid agreement not to engage in the same business; such agreement limited as to time and place. Rev. Code 1919, § 899. One partner, as such, has no authority to dispose of the good will of a partnership business unless his copartners have abandoned the business to him, or are incapable of acting. Rev. Code 1919, § 1313. Johnson had not abandoned the business; neither was he incapable of acting. Therefore, if the bill of sale was subject to a construction

holding it to attempt to transfer the good will in the partnership business, it was in that respect void.

**Partnership—  
sale of good will  
—authority of  
partner.**

There can be no good will in a building; hence Norman had no good will which he, as an individual, could sell. The good will which is property, and therefore subject to sale, is the "good will of a business." Rev. Code 1919, § 253. No "good will of a business" having

been sold, the attempted agreement not to engage in business was invalid, just as much as it would have been invalid if some person other than Norman, or some firm or corporation in which Norman had no interest, had been occupying this elevator at the time Norman gave the bill of sale.

**Contract—  
restraint of  
trade—agree-  
ment not to  
engage in  
business.**

The judgment and order appealed from are reversed.

## ANNOTATION.

### Power of partner to dispose of good will of business.

#### I. Majority rule:

##### a. In absence of statute:

1. In general, 1182.

2. Sale by survivor, 1183.

##### b. Under statute, 1183.

#### II. Minority rule, 1184.

##### I. Majority rule.

##### a. In absence of statute.

##### 1. In general.

By the weight of authority, a single member of a partnership has no power to transfer the good will of the firm without the consent of the other members, where the others are capable of acting and have not abandoned their partnership rights. *Moore v. Rawson* (1904) 185 Mass. 264, 70 N. E. 64; *Griffith v. Kirley* (1905) 189 Mass. 522, 76 N. E. 201; *Cassidy v. Metcalf* (1876) 1 Mo. App. 593 (reversed on other grounds (1877) 66 Mo. 519); *Caswell v. Hazard* (1890) 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707; *Robertson v. Quiddington* (1860) 28 Beav. 529, 54 Eng. Reprint, 469.

In *Griffith v. Kirley* (1905) 189 Mass. 522, 76 N. E. 201, it appeared that a partnership was formed by three persons, one of whom owned the building and land where the business was conducted. The others gave their notes to pay for their share in the business. Before the last payment was made by the other partners, the one owning the land and buildings conveyed them to another, who was secretly his agent, together with the good will which was attached to the business in that place.

It was held that a court of equity would treat the title of the property as in the partnership, and the conveying partner was required to account to the members of the partnership for the value of the good will.

In *Moore v. Rawson* (1904) 185 Mass. 264, 70 N. E. 64, the case was decided on other grounds, but the principle was stated that in a suit by retiring partners against the remaining partners for an accounting, the remaining partners must account for the good will if they had transferred the firm property and name to another.

In *Cassidy v. Metcalf* (1876) 1 Mo. App. 593, reversed on other grounds in (1877) 66 Mo. 519, wherein suit was brought to reform a contract of one member of a partnership, so as to show that, instead of a one-fourth interest, one fourth of the good will was sold, the court, in denying relief on the facts, said that a one-fourth interest in the good will of a firm "probably" cannot be sold.

In *Caswell v. Hazard* (1890) 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707, the plaintiffs brought an action to stop the use of a firm name by the defendants. The court stated that the plaintiffs acquired no individual right to the firm good will, through a purchase by one of them of the good will from one of the former partners at the time he retired, and that no exclusive right to the good will could be acquired by anything short of a conveyance by all of the other partners.

In *Robertson v. Quiddington* (1860) 28 Beav. 529, 54 Eng. Reprint, 469, it appeared that a member of a partnership willed his interest in the good will in the partnership to a third person. On the death of the testator his interest was assigned to the remaining partner. In an action by the legatee to recover for the interest in the good will given to him by testator, it was held that he could not recover.

## 2. Sale by survivor.

On the dissolution of a firm by death, the good will of the firm is a part of the firm assets, and it has been held that, in the absence of an agreement to the contrary between the partners, the survivor has the right to sell the good will as part of the firm assets. *Hutchinson v. Nay* (1905) 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974. In *Smith v. Everett* (1859) 27 Beav. 446, 54 Eng. Reprint, 175, 29 L. J. Ch. N. S. 236, 5 Jur. N. S. 1332, 7 Week. Rep. 605, 19 Eng. Rul. Cas. 649, wherein it appeared that the surviving partner in a banking business sold the business to other parties, he was required to account to the executor of the deceased partner.

Where it appeared that the survivors, with the consent of the administratrix of the deceased partner, conveyed the property of the partnership, it was held that the good will of the firm was conveyed also, nothing to the contrary being said, and that the survivor would not have to account for the value of the good will. *Didlake v. Roden Grocery Co.* (1909) 160 Ala. 484, 22 L.R.A. (N.S.) 907, 49 So. 384, 18 Ann. Cas. 430.

In *Tennant v. Dunlop* (1899) 97 Va. 234, 33 S. E. 620, wherein it appeared that the surviving partner bought the good will of the firm, the court said, in reference to the right of the partner to dispose of the good will of the partnership, that such good will could be sold, but should be accounted for as in the case of other partnership property.

In *Dyer v. Shove* (1897) 20 R. I. 259, 38 Atl. 498, it was held that the good will was not sold, but it was impliedly

held that it might have been sold for the benefit of all the partners.

In *Musselman's Appeal* (1869) 62 Pa. 81, 1 Am. Rep. 382, the right of a partner, after winding up the affairs of a partnership, to sell the good will of a partnership, was not directly raised, but the court said that if he did sell it he must account to the other partners for their share.

The fact that the survivor has conducted the business and used the good will for a long time seems, in England, to have no effect on the right of the deceased partner's estate to recover. In *Broughton v. Broughton* (1875) 44 L. J. Ch. N. S. (Eng.) 526, 23 Week. Rep. 970, an action by the administrator of the estate of a deceased partner to recover the value of the good will of the firm, it appeared that the survivor of the firm had conducted the business for eight years. It was held that the administrator might recover.

But in *Hutchinson v. Nay* (1905) 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974, it appeared that a surviving partner continued in the business of the old firm, at the same place, dealing with the same customers, for a period of two years, and then sold the good will of the business. It was held that the good will disposed of was his good will, and not that of the old firm, and he was under no duty to account for the proceeds to the executor or administrator of the deceased partner's estate.

## b. Under statute.

In at least two jurisdictions it is expressly provided by statute that an individual party cannot sell the firm good will in the absence of the consent of the other partner. *Kelly v. Pierce* (1907) 16 N. D. 234, 12 L.R.A. (N.S.) 180, 112 N. W. 995; *Griffing v. Dunn* (1909) 28 S. D. 141, 120 N. W. 890, 20 Ann. Cas. 579. And see the reported case (*KIDDER EQUITY EXCH. v. NORMAN*, ante, 1180).

In *Griffing v. Dunn* (S. D.) supra, it appeared that a partnership sold its stock in trade to the plaintiff and afterwards re-engaged in the same business. The plaintiff brought an action for damages on the ground that the defendants had agreed not to enter

the same business again, and had sold their good will. The defendants in their answer stated that if there was such an agreement entered into it was not done by all the partners, and therefore was not binding on the firm. The following sections of the Revised Civil Code were applied: Sec. 1277, providing that every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void; § 1278, providing that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein;" and § 1741, providing as follows: "A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting: . . . (2) To dispose of the good will of the business." The court held that, in the absence of any claim that the other partners were incapable of acting or had abandoned the business to the partner making the conveyance, the claim would not be allowed.

In *Kelly v. Pierce* (N. D.) *supra*, it appeared that a livery stable business was sold by the plaintiffs, who were partners, to the defendants. The plaintiffs sued on notes given in payment for the business and for damages. The defendants contended that the plaintiffs had failed to execute to them a bond not to engage in the same business. There had been some talk of the execution of such a bond before the sale, by one of the plaintiffs and the defendants, but the sale was consummated by the other partner. The court found that the existence of such an agreement was not proven, and held that even if the partner actually making the sale had made the agreement it would not be binding on the partnership, since it is prohibited by the express provision of a statute (Rev. Code 1905, § 5836) providing that one

partner has no power to convey the good will of a firm.

In the reported case (*KIDDER EQUITY EXCH. v. NORMAN*, ante, 1180), it appeared that one of the partners, who carried on part of the business of the partnership in an elevator which he owned individually, conveyed the elevator together with the good will of the partnership to a third person, and also agreed on the part of the partnership that they would not engage again in the business in the neighborhood of the elevator sold. In an action to enjoin the operating of the elevator by the third person it was held that, under the express provision of the statute (Rev. Code 1919, § 1313) that there can be no sale of partnership good will by one partner unless the other is incapable of acting, or has abandoned the business to him, the individual partner had no power to convey the partnership good will in the elevator business.

#### II. *Minority rule.*

It has been held in two cases that an individual partner may convey for the benefit of the partnership, the good will of the firm. However neither of the cases is from a court of last resort, and can scarcely be said to establish the rule, even in the jurisdictions wherein it was rendered. *Gewirtz v. Abraham* (1912) 171 Ill. App. 433; *Moreau v. Edwards* (1875) 2 Tenn. Ch. 347.

In *Gewirtz v. Abraham* (Ill.) *supra*, it appeared that a partner made an agreement with the defendant not to sell the firm product in a certain section of the city, and also to convey the partnership good will in that section. The partnership did re-engage in business in the section mentioned in the contract, and the plaintiff sued to recover the consideration paid. The defendants claimed that the contract was not made with the consent and knowledge of both parties, and was therefore invalid. The court held that the defense was without merit, and that for the purpose of the transaction in question the partner had full power to bind the firm.

In *Moreau v. Edwards* (Tenn.) *supra*, the plaintiff brought a bill in



equity to enjoin the defendant from conducting business in the same neighborhood with a partnership establishment which had been previously sold to the plaintiff, together with the good will, by one of the partners. The plaintiff sought to have added to the contract, on the grounds of mistake,

the agreement not to enter into the same business. The court held that the addition could not be made, and stated further that a partner had the power to convey the good will of a firm, but no power to bind the other partner not to continue in the same business.  
R. R. R.

COUNTRY CLUB, Plff. in Err.,  
v.  
STATE OF TEXAS.

*Texas Supreme Court — June 25, 1910.*

(— Tex. —, 214 S. W. 296.)

**Injunction — against dispensing of liquor by club.**

1. The dispensing of liquor by a golf club to its members and guests for their enjoyment and convenience is not so far ultra vires that injunction will lie against it.

[See note on this question beginning on page 1192.]

**Intoxicating liquors — dispensing by club — penalty.**

2. The dispensing of liquors without profit by a club organized in good faith to maintain a golf course, to its mem-

bers and guests, is not within a statute forbidding the sale of liquor without license.

[See 15 R. C. L. 354.]

(Hawkins, J., dissents.)

**ERROR** to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming in part a judgment of the District Court for Travis County (Wilcox, J.) in favor of the state in a suit to enjoin defendant from dispensing intoxicating liquors to its members and others, and from using its assets for other purposes than maintaining a golf club. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Thelbert Martin and Lightfoot, Brady, & Robertson, for plaintiff in error:

Defendant being a bona fide social club, situated in a city where liquor may be lawfully sold, organized for purposes permitted and sanctioned by law, and selling liquors to its members and not to the general public, as a mere incident to its organization and without profit, is not a person, under the laws of this state, engaged in the occupation or business of selling intoxicating liquors, and is not embraced in the general language of selling, or engaged in the business of selling, intoxicating liquors, contained in the License Liquor Act.

5 A.L.R.—75.

State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; State v. Duke, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; Adams v. State, 66 Tex. Crim. Rep. 220, 145 S. W. 940; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; Cassidy v. State, 58 Tex. Crim. Rep. 454, 126 S. W. 600; 10 Cyc. 1097; Northside R. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; Moriarty v. State, 122 Tenn. 440, 25 L.R.A. (N.S.) 1252, 124 S. W. 1016; 11 Am. & Eng. Enc. Law, 727; Black, Intoxicating Liquors, § 142, p. 185; 1 Cook, Corp. § 8, p. 11; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Hermitage Club v.

Shelton, 104 Tenn. 101, 56 S. W. 838; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298.

Defendant has not violated the Penal Code, in laboring, and obliging its employees to labor, on Sundays.

Benson v. State, 47 Tex. Crim. Rep. 609, 85 S. W. 800; Moss v. State, — Tex. Crim. Rep. —, 84 S. W. 1065.

Defendant should not be enjoined from selling liquors to its members, upon the ground that such sale is a franchise to be enjoyed only by those to whom such privilege is granted by the laws of this state.

10 Cyc. 1907; 1 Woollen & T. Intoxicating Liquors, § 323; State v. Duke, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; Adams v. State, 66 Tex. Crim. Rep. 220, 145 S. W. 940; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; Moriarty v. State, 122 Tenn. 440, 25 L.R.A. (N.S.) 1252, 124 S. W. 1016; 11 Am. & Eng. Enc. Law, 727; Black, Intoxicating Liquors, § 142, p. 185; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Hermitage Club v. Shelton, 104 Tenn. 101, 56 S. W. 838; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298.

Messrs. B. F. Looney, Attorney General, and W. A. Keeling and C. M. Cureton, Assistant Attorneys General, for the State:

The dispensing of intoxicating liquors by defendant constituted a diversion or misuse of the funds of the corporation, and an abuse of its corporate franchise.

Gulf, C. & S. F. R. Co. v. Morris, 67 Tex. 699, 4 S. W. 156; Ft. Worth Street R. Co. v. Rosedale Street R. Co. 68 Tex. 176, 4 S. W. 534; Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 173, 11 S. W. 1078; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 839; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L.R.A. 802, 24 S. W. 16; Rue v. Missouri P. R. Co. 74 Tex. 479, 15 Am. St. Rep. 852, 8 S. W. 533; Thomas v. West Jersey R. Co. 101 U. S. 81, 25 L. ed. 951.

A corporation has the implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred, which powers are such as are usually incidental in practice to the prosecution of its business, but no more.

Northside R. Co. v. Worthington, 88

Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; Indianola v. Gulf, W. T. & P. R. Co. 56 Tex. 594; 7 Am. & Eng. Enc. Law, 700; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9; Buffett v. Troy & B. R. Co. 40 N. Y. 176.

The right to sell intoxicating liquors is a franchise and special privilege, to be exercised only in compliance with the laws of the state governing retail liquor dealers, and the action of defendant in establishing a buffet and selling intoxicating liquors to its members is the usurpation of a franchise not granted to or permitted to be exercised by a corporation.

Joyce, Franchises, §§ 2; 21 pp. 5, 64; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; State ex rel. Atty. Gen. v. Topeka, 30 Kan. 653, 2 Pac. 587; Crown Point v. Warner, 3 Hill, 157; New York v. Mason; 4 E. D. Smith, 147; Miller v. Com. 112 Ky. 404, 65 S. W. 829; Uniontown v. State, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320; State v. Wilburn, — Ala. —, 39 So. 816; Black, Intoxicating Liquors, § 115, p. 153; Fleming v. Texas Loan Agency, 87 Tex. 238, 26 L.R.A. 250, 27 S. W. 126; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; People ex rel. Beltner v. Riverside, 66 Cal. 288, 5 Pac. 350; South-Western R. Co. v. Paulk, 24 Ga. 356.

Defendant was a merchant, grocer, or dealer in goods, wares, and merchandise within the meaning of the Penal Code, and was therefore prohibited from keeping open its place of business on Sundays.

Egan v. State, — Tex. Crim. Rep. —, 68 S. W. 273; Hofheintz v. State, 45 Tex. Crim. Rep. 117, 74 S. W. 310; United States v. Giller, 54 Fed. 656; New Orleans v. Le Blanc, 34 La. Ann. 596; Overall v. Bezeau, 37 Mich. 506; United States v. Allen, 38 Fed. 736; Krnavek v. State, 38 Tex. Crim. Rep. 44, 41 S. W. 612; Adams v. State, 66 Tex. Crim. Rep. 220, 145 S. W. 940; Feige v. State, 49 Tex. Crim. Rep. 513, 95 S. W. 506; Finn v. State, 38 Tex. Crim. Rep. 75, 41 S. W. 1102; Beauvoir Club v. State, 148 Ala. 643, 121 Am. St. Rep. 84, 42 So. 1040; State v. Lockyear, 95 N. C. 633, 59 Am. Rep. 287; State v. Mercer, 32 Iowa, 405; Marmont v. State, 48 Ind. 24, 1 Am. Crim. Rep. 447; Martin v. State, 59 Ala. 34, 3 Am. Crim. Rep. 287; Kentucky Club v. Louisville, 92 Ky. 309, 17 S. W. 743;

Mohrman v. State, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143.

Defendant, in obliging its employees and workmen to sell and dispense intoxicating liquors and to operate its pool and billiard tables, is obliging them to work on Sunday in violation of the law, as to themselves and as to it.

Benson v. State, 47 Tex. Crim. Rep. 609, 85 S. W. 800; *Ex parte Wright*, 56 Tex. Crim. Rep. 505, 120 S. W. 868; *Ex parte Axsom*, 63 Tex. Crim. Rep. 627, 40 L.R.A. (N.S.) 179, 141 S. W. 793, Ann. Cas. 1913D, 794; *Ex parte Kennedy*, 42 Tex. Crim. Rep. 148, 51 L.R.A. 270, 58 S. W. 129; *McCain v. State*, 2 Ga. App. 389, 58 S. E. 550; *Cortesy v. Territory*, 6 N. M. 682, 19 L.R.A. 352, 30 Pac. 947; 37 Cyc. 540; *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207; *Bohl v. State*, 3 Tex. App. 683.

Defendant had no right to own and operate its pool and billiard tables, and should be enjoined from so doing.

State ex rel. Wear v. Business Men's Club, 178 Mo. App. 548, 163 S. W. 908; *Smith v. Wortham*, 106 Tex. 106, 157 S. W. 740; *Wirth v. Calhoun*, 64 Neb. 316, 89 N. W. 785; *White v. Western Assur. Co.* 52 Minn. 352, 54 N. W. 195; *Smith v. State*, 17 Tex. 191; *Squier v. State*, 66 Ind. 317; *Sikes v. State*, 67 Ala. 77; *State v. Miller*, 68 Conn. 373, 36 Atl. 795; *Ramsey v. Todd*, 95 Tex. 614, 93 Am. St. Rep. 875, 69 S. W. 133; *Johnston v. Townsend*, 103 Tex. 122, 124 S. W. 417.

Greenwood, J., delivered the opinion of the court:

The state of Texas, defendant in error, brought this suit to enjoin the Country Club, plaintiff in error, from dispensing intoxicating liquors to its members and others, and from using its assets for any other purpose than maintaining a golf club.

The case was tried on an agreed statement of facts, showing in substance that the club was incorporated in good faith, to support and maintain a golf club and other innocent sports in connection therewith; that the club owned a clubhouse and golf course, worth some \$35,000, all of which were used exclusively by the members of the club and their guests; that the club maintained a buffet, for the purpose of selling and dispensing intoxicat-

ing liquors to its members and their guests only, not for the purpose of profit and not in the way of trade or business; that the club was not maintained as a device or scheme to evade any liquor or license laws of the state or of any subdivision thereof; that the dispensation and sale of liquor to members and guests of the club were merely incidental to its lawful corporate purposes and for the enjoyment and convenience of the club members and guests; that the club premises were not within local option territory, nor situated where the sale of intoxicating liquors was forbidden by any state or municipal law.

The Honorable C. A. Wilcox, before whom the case was tried, held that all the issues presented by the suit had already been settled and adjudicated in Texas, against the state, save the state's right to enjoin the club from dispensing liquor on election days, and judgment was therefore rendered denying the state the relief it sought, save that the state was granted an injunction restraining the club from dispensing liquors on election days.

The court of civil appeals concluded that the issues involved "have never been decided in this state," that sales of liquors by the Country Club to its members and guests violated article 611 of the Penal Code, and that in dispensing liquors to its members and guests the club usurped a franchise not granted by its charter. Thereupon judgment was rendered by the court of civil appeals perpetually enjoining plaintiff in error from dispensing intoxicating liquors to its members and from investing any portion of its funds in such liquors.

We think it is plain, as held by the honorable presiding judge in the district court, that the law, as settled by the decisions of this court and of the court of criminal appeals, on the agreed facts, denied the award to the state of any further relief than was granted by the judgment entered in the district court.

The main contention of the state, which was sustained by the court of civil appeals, is that the dispensing of intoxicating liquors by plaintiff in error to its members and guests constitutes a "sale," within the meaning of § 4 of the act approved April 17, 1909 (Acts 31st Leg. [1st Ex. Sess.] chap. 17) regulating the sale of intoxicating liquors, said section now being article 611 of the Penal Code, and reading as follows: "No person shall, directly or indirectly, sell spirituous or vinous liquors, capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail liquor dealer. Any person who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not to exceed six months."

More than twenty years ago this court determined that a club dispensing intoxicating liquors to mem-

**Intoxicating  
liquors—dis-  
pensing by club  
—penalty.**

bers and guests, in good faith, was not engaged in the business of selling such liquors. The following excerpts from the carefully considered opinion of Judge Brown leave no room for dispute here, to wit:

"The statute under which the state claims that the Austin Club is subject to an occupation tax reads as follows:

"Hereafter there shall be levied upon and collected from any person, firm or association of persons engaged in the business of selling spirituous, vinous, or malt liquors, or medicated bitters, an annual tax upon every such occupation or separate establishment, as follows: For selling spirituous, vinous or malt liquors or medicated bitters, in quantities of less than one quart, three hundred dollars.' Sayles's Statutes, art. 3226. . . .

"The question presented is: Was the Austin Club, in dispensing to its

members and their guests liquors in the manner stated, engaged in the 'business of selling spirituous, vinous, or malt liquors,' within the meaning and intent of article 3226a, as above quoted? . . .

"Clubs like this have been formed and maintained in many of the states, and in some of them the question now before the court has been adjudicated, upon which there is likewise a conflict of authority. But we believe that the decided weight of authority upon this question supports the conclusion arrived at by the court of criminal appeals in the case of Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835, to the extent that the club was not engaged in the business of selling spirituous liquors. . . .

"The conditions of the bond requiring obligor to keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, together with the provisions of the statute defining what are open and quiet houses, and the further provision requiring the posting of the license in a public place, indicates that the legislature intended that the business of selling spirituous, vinous, or malt liquor should be conducted in a public place, open to all persons to enter therein and, to the observation of those passing by such place, and guarding against all of those things which would be calculated to lure the unsuspecting into such places, or to offend or corrupt those who might visit them. These provisions are inconsistent with the idea that the legislature was attempting to regulate the dispensing of liquors in the private manner shown by the facts of this case; but it shows that the business, as expressed in the article quoted, was intended to be a business conducted in a public manner and in a place to which the public would have free access, as stated above. We think that this tends very strongly to support the position taken by the appellee in this case that the language of the stat-

ute does not embrace the business transacted by this club. . . .

"If we should hold that a club such as this, transacting its business in the manner that this did, was engaged in the business of selling spirituous liquors by retail, we would in effect hold that the place where such club's business was being transacted was a house for the retail of spirituous liquors, and would be in direct conflict with the highest court in criminal matters in this state. . . .

"We therefore, for these reasons and upon the authorities cited, answer that the Austin Club, in the transactions stated by the court of civil appeals, conducted in the manner therein stated, was not engaged in the business of selling spirituous, vinous, and malt liquors and medicated bitters."

State v. Austin Club, 89 Tex. 24, 28, 30 L.R.A. 500, 33 S. W. 115, 117.

Afterwards, the court of civil appeals of the fifth supreme judicial district certified to this court the question as to whether the state had been properly denied an injunction against the Dallas Golf and Country Club, on facts which cannot be distinguished in any material particular from those contained in the agreed statement in this case, with respect to dispensing intoxicating liquors, and further certified to this court the question as to whether the dispensing of intoxicating liquors by that club to its members and their invited guests constituted a "sale" within the meaning of article 359 of the Penal Code as amended in 1907 (Acts 30th Leg. chap. 132), wherein a "disorderly house" was defined to include "any house in which spirituous, vinous or malt liquors are sold or kept for sale without first having obtained a license under the laws of this state to retail such liquors."

In 1911, this court answered, in a most elaborate opinion by Associate Justice Ramsey, in which Chief Justice Brown and Judge Williams concurred when delivered, and in which Chief Justice Brown and Judge Dib-

rell concurred on rehearing, that the injunction was properly denied, and that the dispensing of intoxicating liquors by that club was not a sale within the meaning of amended article 359.

The court most properly held that in order to determine the state's right to an injunction, on other grounds than that the Dallas Golf and Country Club was "engaged in the business of selling intoxicating liquors," it must decide whether any other provisions of the law, save amended article 359, entitled the state to the injunction which it sought. Among the other provisions of the law carefully examined and considered by the court was § 4 of the act approved April 17, 1909, later article 611 of the Penal Code, with respect to which the conclusion was announced that while it might, if it stood alone, be sufficient to include within its terms a club in good faith dispensing liquors to its members and guests, yet, when interpreted in the light of the decisions, it could not and did not include such a club, under the fair and just construction of its terms which the law not only sanctioned but required. State v. Duke, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

After expressly stating that nothing contained in the Acts of 1909, 1907, or 1893, should change the rule announced in the Austin Club Case, the opinion states:

"In that case, Judge Brown in distinct and emphatic terms announced that the provisions of the then law as to open houses were not applicable to such clubs, and that such clubs could not under the terms of the then law secure license, and in terms called attention to the fact that 'if the legislature intended to prohibit this class of business, if it be termed a business, it might easily have done so in plain and unambiguous language, as it has done with reference to the prohibited sales above stated.' The decision in that case has been known to the profession and people of this state for more than sixteen years. A

similar rule of construction has obtained and been in force in the court of criminal appeals of this state for even a longer period. The rule comes to us with the weight of the greatest names that ever added luster to the annals of any time. We are not at liberty to depart from it except on such compulsion of reason as can furnish no answer. It is, too, an elementary rule without exception that statutes like this, penal in their character, must and should be strictly construed. The very first article of our Penal Code provides that 'the design of enacting this Code is to define in plain language every offense against the laws of this state, and to affix to each offense its proper punishment.' In view of the many changes wrought in our Local Option Law, and in our system of taxation and regulation of the liquor traffic, questions which have been in the public mind for many years, it would have seemed, having in mind the significant words of Judge Brown, that if it had been the purpose of the lawmaking body to have instituted a rule under which clubs such as this should be taxed or punished for furnishing, as a mere incident of their organization, liquors to their members, such legislative intent would have found expression in clear and unambiguous terms. Not only has a different rule from that contended for by the state for all these years obtained, 'without variableness or shadow of turning,' in the courts of this state, but the same rule has been accepted and acted upon by our people, and also recognized by those whose personal and official duty, concern, and office it is to construe such statutes and to aid in the enforcement of the law.

"We have therefore a condition in which there is not only a concurrence of judgment by the two courts of last resort in this state, but the acceptance and acquiescence in this conclusion by the legal department of the state government, with reference to and on the faith of which clubs similar to the one

here sought to be enjoined have been in operation in the principal cities of Texas for many years. As we have seen, they can only be enjoined under conditions and on evidence under which they could be convicted and branded as criminals. To constitute a crime the offense must be defined in plain language. The law is not designed to entrap our citizens in veiled language of uncertain meaning. To do so would be as odious and hateful as the conduct of the tyrant of the ancient world, who bulletined his decrees beyond his subject's sight and yet punished for their infraction. We therefore do not doubt that, before we would be authorized to reverse these settled rules of construction of the courts of this state, go counter to the universal and accepted practice permitted and sanctioned by law, we should indeed feel that authority so to do ought, clearly and undeniably, to be found in the enactments of our legislature. That the provisions of our Liquor Laws are not, in their intent and provisions as to open houses and otherwise, applicable to clubs, is as true now as it was when this court announced its decision in the Austin Club Case, and that if it had been intended to reach such clubs it was as essential to do so in plain and unambiguous language as it was when Judge Brown so declared in that case." *State v. Duke*, 104 Tex. 375-377, 137 S. W. 664.

Among the final conclusions in the Duke Case were the following:

"That a bona fide club, situated in a precinct, city, or town where liquor may be lawfully sold, organized for purposes permitted and sanctioned by law, which as a mere incident to its organization, and without profit, furnishes liquor to its members and not to the public generally, is not a person, under the laws of this state, engaged in the occupation or business of selling intoxicating liquors.

"That while each individual act of such a club, in territory where the sale of liquor is prohibited by

law, is a sale, that in territory where such sale is not unlawful, the method in question of furnishing liquors to the members of such club is not embraced in the general language of selling or engaging in the business of selling intoxicating liquors.

"That in respect to clubs not organized in good faith for purposes authorized by law, but merely as shifts, shields, or subterfuges, such sales would not be permitted, and under such circumstances they would and should be held to be disorderly houses and subject to all the pains and penalties of the law." 104 Tex. 377.

At the end of the opinion in the Duke Case, it is expressly declared to be "an authoritative decision," in which have been included all the sources of the law on which it was based, both in statutes and in decisions.

In 1911, the steward of the Pastime Driving and Athletic Club was charged with unlawfully selling liquor, without license, and the facts with respect to the club's method of dispensing liquors were substantially the same as in this case. In rejecting the contention that in dispensing such liquors there was any violation of the law, the court of criminal appeals, in an opinion of Judge Harper, in which Judges Davidson and Prendergast concurred, said:

"This brings us to the second proposition: Was defendant, or the Pastime Driving and Athletic Club, in making such sales, guilty of violating the law which prohibits the sale of intoxicating liquors by anyone without first obtaining a license so to do? . . .

"Were this an original proposition, in view of the authorities from many other states cited in the brief for the state, we perhaps might arrive at a conclusion that it was intended to prohibit clubs from thus selling; but in view of the fact that the legislature was aware that clubs of this character were selling liquors to their members in

this state without paying the tax, under the authority of Koenig and Austin Club Cases, for us to put such a construction on this statute would not be authorized; there is no provision in the law whereby these clubs or corporations can obtain a license to thus sell or dispense liquor to their members, and we cannot say that the legislature intended such a radical change in the construction of the law, when no more express terms were used to accomplish this purpose than are used in this statute." *Adams v. State*, 66 Tex. Crim. Rep. 225, 145 S. W. 942.

After announcing the familiar rule that when a legislature re-enacts a statute it must intend that it be given the construction previously put upon it by the highest courts, the opinion in the *Adams Case* continues: "Many other authorities might be cited in this and other states so holding, and in applying this well-known rule of construction to this statute, in the light of the decisions of this court and of the supreme court on this question, no such construction should be placed on this statute as would prohibit clubs from thus dispensing or selling liquors to their members." 66 Tex. Crim. Rep. 227.

Having determined that plaintiff in error might lawfully dispense liquor to its members and guests, under the agreed facts in this case, we have no difficulty in concluding that the state was not entitled to restrain plaintiff in error from dispensing same on the ground that this was without its corporate powers.

*Injunction—  
against dispensing  
of liquor by  
club.*

This court has approved the declaration that "a railroad company may establish and maintain refreshment houses along its line for the accommodation of its passengers." *Northside R. Co. v. Worthington*, 88 Tex. 569, 53 Am. St. Rep. 778, 30 S. W. 1055.

If that be true of a railroad corporation, how can it be doubted that a golf club may provide refresh-

ments, such as are usual, "for the enjoyment and convenience of the club members and their guests?"

Under the admitted facts in this case, the act of dispensing lawful refreshments was authorized by the rule that "a corporation may transact all such matters as, being ancillary to its primary business or main enterprise, are transacted by ordinary individuals under similar circumstances." *Green's Brice, Ultra Vires*, 65.

"Corporations may transact, in addition to their main undertaking, all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of the former." *Green's Brice, Ultra Vires*, 86; 10 Cyc. 1097.

Under the opinion in the *Duke Case*, as well as under the opinions of the court of criminal appeals, sales of intoxicating liquors by clubs to members and guests were de-

clared violations of the criminal law, save when made at a time and in territory wherein such sales were not unlawful; and the opinion and decision in this case go no further than to determine that, on the agreed facts as presented in the trial court, the proper judgment was there rendered, and the only judgment which could be rightly rendered without disregarding the decisions of this court and of the court of criminal appeals.

It is our duty to declare the law, not as we might think it should be, but as it is, since the power to legislate has not been conferred on this court.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the District Court be affirmed.

**Hawkins, J., dissents.**

## ANNOTATION.

### Dispensing liquor as within charter power of club.

Apparently there is but one case in addition to the reported case (*COUNTRY CLUB v. STATE*, ante, 1185) passing directly on the implied charter power of an incorporated social club to dispense intoxicating liquors. The holding in this case is directly opposed to that of the reported case, the court taking the view that the dispensing of liquors by a social club is not a necessary incident to the main purposes for which the club was incorporated. *State ex rel. Harvey v. Missouri Athletic Club* (1914) 261 Mo. 576, L.R.A. 1915C, 876, 170 S. W. 904, Ann. Cas. 1916D, 931.

In that case a proceeding in the nature of a quo warranto was brought for the purpose of forfeiting the charters of two clubs because of their alleged misuse and abuse of their franchises in selling intoxicating liquors. The respondent clubs were incorporated under a statute providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations. They contended that

they possessed an implied power under their charters to dispense liquors. It was held that as it is impossible under the law for an incorporated social club to procure a license, and as the sale of liquor is a limited privilege, no implied power exists authorizing corporations of this character to dispense liquors. Furthermore the court said that, as all sales by the respondents were unlawful, the principle applied that no implied power can exist to do an unlawful act. In commenting on the dispensing of liquors as being incidental to the main purposes of social clubs, the court said: "To render respondents' contention applicable it must be further assumed that the sale of liquors, concretely stated, is related to either benevolence, religion, science, or education, or that it is incident to one of such objects,—a rather unusual relationship, to say the least."

It has been held that a fair association, incorporated for the purpose of



the promotion, development, and encouragement of agricultural pursuits, and the maintenance of facilities for games and athletic sports of various description, holding a fair for a short period of time once each year, has no implied power under its charter to sell intoxicating liquors as being reasonably incident to the main purposes of its incorporation. Lebanon Valley

Fair Asso.'s License (1917) 67 Pa. Super. Ct. 315.

It is to be noted that the holding of the reported case (*COUNTRY CLUB v. STATE*, ante, 1185) finds implied support in the considerable number of cases which hold that the dispensing of liquor by a social club to its members is not a sale for which a license is required. W. F. F.

LOS ANGELES INVESTMENT COMPANY, Appt.,  
v.  
HOME SAVINGS BANK of Los Angeles, Respt.

*California Supreme Court (Dept. No. 1)—June 19, 1919.*

(— Cal. —, 182 Pac. 293.)

**Bank — effect of notice in pass book.**

1. The mere printing in a bank pass book of a provision, among many others, releasing the bank from liability in case complaint is not made of forged indorsements within ten days after return of vouchers, does not bind the depositor unless he is required to sign it or his attention is particularly called to it.

[See note on this question beginning on page 1203.]

**— duty to depositor.**

2. The undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order.

[See 3 R. C. L. 540.]

**— payment — on forged indorsement — effect.**

3. A bank has no right to charge against its depositor's account a check drawn to order and paid on a forged indorsement.

[See 3 R. C. L. 542.]

**— effect of absence of negligence.**

4. Want of negligence on the part of the bank will not entitle it to charge against its depositor's account a check paid on a forged indorsement of the payee.

[See 3 R. C. L. 542.]

**Check — fictitious payee — knowledge of maker.**

5. A check is not drawn to a fictitious payee so as to be payable to bearer if the drawer did not know it to be so drawn, but believed the payee designated to be an existing person.

[See 5 R. C. L. 498.]

**— whose intention governs.**

6. The intention of the officer executing the checks, and not of the clerk

making out requisitions for checks of a corporation, must determine whether or not they were issued to fictitious payees.

[See 5 R. C. L. 497.]

**Notice — to corporation — power of clerk.**

7. A corporation is not, in issuing checks purporting to be in payment of claims against it, bound by the guilty knowledge of the clerk making out the requisitions that the payees are fictitious.

[See 7 R. C. L. 657.]

**Appeal — conclusiveness of finding — absence of conflict.**

8. The question of the maker's negligence with respect to checks so as to absolve the bank from liability for paying them on forged indorsements is not one of fact, the finding upon which by the trial court is binding on appeal, if the evidence is without conflict and negligence cannot be reasonably inferred from the probative facts in the case.

**Check — negligence of corporation — reliance on heads of departments.**

9. A corporation is not negligent in

drawing checks in reliance upon requisitions of the heads of departments, without investigating as to whether or not the claims were fraudulent.

**Bank — paying on forged indorsements — effect of negligence of maker.**

10. Negligence of a corporation in drawing checks will not absolve the bank from liability for paying them on forged indorsements.

[See 5 R. C. L. 542.]

**— duty of depositor to examine indorsements.**

11. A depositor is not bound to examine the indorsements on returned checks, and is therefore not chargeable with negligence in failing to discover that they are forged.

[See 3 R. C. L. 535.]

**Account stated — opening for mistake.**

12. An account stated between a bank and its depositor may be opened for mistake shown.

[See 3 R. C. L. 532.]

**Bank — return of checks.**

13. A depositor need not return to the bank checks paid on forged indorsements in order to hold it liable thereon, if its attitude after receiving notice of the claim shows that tender of the checks would have been an idle ceremony.

**Appeal — raising question for first time.**

14. A bank sued for the amount of checks paid on forged indorsements cannot raise for the first time on appeal the objection that the checks were not returned to it.

[See 2 R. C. L. 69 et seq.]

**APPEAL** by plaintiff from a judgment of the Superior Court for Los Angeles County (Taft, J.) in favor of defendant in an action brought to recover the amount of checks drawn by plaintiff upon its deposit account with the defendant bank, and paid by the bank on forged indorsements. *Reversed.*

The material facts appear in the opinion of the court.

Messrs. Flint & Jutten and L. W. Jutten for appellant.

Messrs. Herbert J. Goudge, Charles L. Chandler, and Goudge, Robinson, & Hughes, for respondent:

The findings are binding on appeal.

Northwestern Portland Cement Co. v. Atlantic Portland Cement Co. 174 Cal. 308, 163 Pac. 47; Huston v. Anderson, 145 Cal. 320, 78 Pac. 626; Dallman v. Frank, 1 Cal. App. 541, 82 Pac. 564; Domico v. Cassassa, 101 Cal. 413, 35 Pac. 1024; Warner v. F. Thomas Parisian Dyeing & C. Works, 105 Cal. 411, 38 Pac. 960.

Defendant was not negligent in paying the checks.

Snyder v. Corn Exch. Bank, 221 Pa. 599, 128 Am. St. Rep. 780, 70 Atl. 876.

Emory's knowledge that the payee was fictitious was chargeable to the plaintiff, although he took personal benefit from the fraud.

Williams v. Hasshagen, 166 Cal. 393, 137 Pac. 9; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 596, 35 N. E. 982.

Plaintiff through its department manager, Emory, was identifying these payees at the bank, and defendant therefore should not be held liable.

London L. Ins. Co. v. Molson's Bank, 5 Ont. Rep. 407; Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 97 N. W. 380; Crocker-Woolworth

Nat. Bank v. Nevada Bank, 139 Cal. 564, 63 L.R.A. 245, 96 Am. St. Rep. 169, 73 Pac. 456; Israel v. State Nat. Bank, 124 La. 885, 50 So. 783; Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 22 L.R.A. (N.S.) 250, 87 N. E. 470.

The negligence of plaintiff, extending through the entire transaction, is the proximate cause of the loss.

Otis Elevator Co. v. First Nat. Bank, 163 Cal. 81, 41 L.R.A. (N.S.) 529, 124 Pac. 704; Timbel v. Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. Supp. 500; Kelley v. Planters & M. Nat. Bank, — Tex. Civ. App. —, 135 S. W. 1142; Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462.

Plaintiff was bound to discover and report the forged indorsements.

Cosgrove v. Provident Inst. for Sav. 64 N. J. L. 653, 46 Atl. 618; Gifford v. Rutland Sav. Bank, 63 Vt. 108, 11 L.R.A. 794, 25 Am. St. Rep. 744, 21 Atl. 340; Ferguson v. Harlem Sav. Bank, 43 Misc. 10, 86 N. Y. Supp. 825; Dana v. National Bank, 132 Mass. 156; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 115, 29 L. ed. 811, 818, 6 Sup. Ct. Rep. 657; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Janin v. London & S. F. Bank, 92 Cal. 24, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; Critten

v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969.

The return to defendant of the forged checks was necessary as the basis of plaintiff's right of action.

Redington v. Woods, 45 Cal. 427, 13 Am. Rep. 190; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 343, 6 L. ed. 334, 337; Gloucester Bank v. Salem Bank, 17 Mass. 42; Third Nat. Bank v. Allen, 59 Mo. 310.

When a person accepts and uses a bank book with knowledge of the regulations printed therein affecting his contractual relations with the bank, he is bound by such regulations even though they are not signed by him.

Gifford v. Rutland Sav. Bank, 63 Vt. 198, 11 L.R.A. 794, 25 Am. St. Rep. 744, 21 Atl. 340; Ladd v. Augusta Bank, 96 Me. 510, 58 L.R.A. 280, 52 Atl. 1012; Langdale v. Citizens Bank, 121 Ga. 105, 69 L.R.A. 341, 104 Am. St. Rep. 94, 48 S. E. 708, 2 Ann. Cas. 257, 17 Am. Neg. Rep. 37; Chase v. Waterbury Sav. Bank, 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg. Rep. 186; Ferguson v. Harlem Sav. Bank, 43 Misc. 10, 86 N. Y. Supp. 825; Dinini v. Mechanics' Sav. Bank, 85 Conn. 225, 82 Atl. 580; Burrill v. Dollar Sav. Bank, 92 Pa. 184, 37 Am. Rep. 669; Ackenhausen v. People's Sav. Bank, 110 Mich. 175, 33 L.R.A. 408, 64 Am. St. Rep. 338, 68 N. W. 118; Morse, Banks & Bkg. 5th ed. § 620.

Olney, J., delivered the opinion of the court:

This is an action to recover \$16,-009.20, the aggregate of certain checks drawn by the plaintiff upon its deposit account with the defendant bank and paid by the latter on forged indorsements. The defendant had judgment in the court below, and the plaintiff appeals.

The material facts are not in dispute, and are these:

The plaintiff is a large concern in Los Angeles, engaged in many lines of the real estate business. Among other activities, it acted as a solicitor and broker of fire insurance, and had a separate department for attending to this class of business. The manager of this department was one F. R. Emory. As might be supposed, the business of the department required the constant making of disbursements, which

were made by check. Emory had no authority to sign checks, and the method of obtaining them was for the insurance department to prepare a demand or requisition for the payment, showing what it was for and to whom it was to be made. This requisition was then transmitted to the accounting department, where it was examined and, if found correct, approved and entered on the plaintiff's books. A check in accordance with the demand was then prepared and presented with the approved demand to the officers authorized to sign checks. Upon being signed, it was returned to the insurance department for delivery to the party to whom payment was to be made. So far as appears, there would seem to be no substantial difference between the system adopted by the plaintiff for the signing of checks and making of disbursements and those followed by most large concerns.

Beginning with February 17, 1914, and ending September 11, 1915, Emory prepared a series of some twenty demands on behalf of his department for checks in payment of ostensible claims against the company which did not in fact exist. Several of the demands gave a purely fictitious name as the name of the party to be paid. In the other cases the name of a person known to Emory was used, but such person had nothing whatever to do with the matter, was utterly ignorant of it, and Emory had no intention of making any payment to him. The demands in some cases appeared to be for return of premiums. In the other and the majority of cases they appeared to be in settlement with an agent for premiums collected by the company.

Checks were signed by the officers of the company in accordance with these demands and returned to Emory for delivery to the ostensible payees. Upon their receipt, Emory indorsed them in the name of the ostensible payees, then indorsed his own name, and secured their payment, in most cases by direct pre-

sentation to the defendant, and in other cases through other banks.

In addition to the twenty checks so signed upon false demands, there was one check signed upon a bona fide demand and in favor of a genuine payee, which Emory, instead of delivering, realized upon in similar fashion by forging the payee's indorsement.

During the period between the first and the last of these checks, the bank sent the usual bank statement with canceled checks to the plaintiff every half month; the statement specifying that claims or exceptions must be made within ten days or the account would be considered correct.

The general rule must be conceded that the undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order. If it pays out money on a check drawn to order, as were the checks in this case, upon a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and, in the absence of anything further, has no right to charge such payment against the depositor's account.

**Bank—duty to depositor.**

**—payment—on forged indorsement—effect.**

To escape from the operation of this elementary rule, the bank advances five defenses:

First, that it was not negligent in paying on the forged indorsements.

Second, that the checks were drawn to fictitious payees and were therefore, in effect, payable to bearer, with the result that the payments to Emory, who was the bearer, were in accord with the terms of the depositor's order.

Third, that the depositor was guilty of negligence which induced or contributed to the payments, and therefore was estopped from insisting on the responsibility of the bank.

Fourth, that the rendition of the half-monthly statements to the plaintiff and the latter's failure to

object thereto constituted a stated account between the parties which could not be gone behind.

Fifth, that the plaintiff had not offered to return the checks in question, and this was a condition precedent to its rights of recovery.

In regard to the first defense, want of negligence on the part of the bank, it is evident on very slight consideration that it is wholly immaterial whether the bank was negligent or not in paying on the forged indorsements. The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith. Its undertaking and obligation are absolute that it will pay only in that manner. If we have the simple case of a payment on a forged indorsement without anything further, it makes no difference how careful the bank was in making payment or how impossible of detection the forgery was. That is a risk which the bank and not the depositor assumes. 3 R. C. L. p. 542; 1 Morse, Banks & Bkg. § 474; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 38, 41 L.R.A. (N.S.) 529, 124 Pac. 704.

**—effect of absence of negligence.**

As to the second defense, it is true that paper drawn to the order of a fictitious payee is payable to bearer, and if the checks here are of that character the bank was justified in paying them. But it is also true that paper is not considered as drawn to a fictitious payee where the maker did not know it to be so drawn, but believed the payee designated to be an existing person. 8 C. J. 179; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131.

**Check—fictitious payee—knowledge of maker.**

It is also true that the payee named in several of the checks had no existence save in the mind of Emory, and that the payees named in all of the others with one exception,—that prepared on a bona fide demand,—were persons to whom Emory did not intend the checks to come. As to Emory, the payees,

(— Cal., 182 Pac. 293.)

with the single exception noted, were all fictitious. The question is: Were they fictitious as to the plaintiff company?

The answer to this question obviously depends upon whether Emory's intention that the checks be made payable to persons who were not to receive the paper, who were nonexistent so far as the checks were concerned, is attributable to the company. The bank's counsel in their brief say: "But appellant did intend something when it issued the checks. What was it? It intended that the money be paid to the person to whom Emory intended it to be paid—and the money was so paid."

This is the very crux of the matter. But is it true? Plainly it is not. Emory did not execute the checks on behalf of the company. It

is the intention of the officers who did that must be taken

to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself. They intended to pay money to what they believed to be existent persons, and, this being so, the checks cannot be considered as made to fictitious payees.

Nor is the company bound by the guilty knowledge of Emory. That knowledge was adverse to his company and such as in the nature of things he would not communicate to it. It is elementary that a principal will not be charged with knowledge of an agent under such circumstances. *Henry v. Allen*, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355; *United Secur. L. Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97. This, of course, is very different from an agent binding his principal by acts done within the scope of his authority, although

done with knowledge and intent adverse to his principal; and we have no intention of saying that an agent may not bind his principal under such circumstances. It may well be that in this case, if Emory had had authority to draw checks, and had drawn these particular ones making them payable to fictitious payees, his intent in this respect would in legal effect, as to third persons, be the intent of the company, although such intent was adverse to the company and part of a scheme to defraud it. But charging a principal with knowledge merely because such knowledge is possessed by an agent, and charging him with acts done by the agent within the scope of his authority, are not the same thing, and it is only in the latter case that the principal may be bound by the uncommunicated information or intent of the agent when such information or intent is hostile to the principal. The point in this case is that the checks were not executed by the guilty agent; we are not concerned with an act done by him within the scope of his authority, and therefore his guilty intent and knowledge are not the intent and knowledge of his principal. The intent and knowledge of the principal was, as we have said, that of the officers who drew the checks, and they were wholly innocent of any intention of drawing checks to fictitious payees.

There is eminent authority to sustain the foregoing views. In *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371, the facts and contentions are practically identical with those of the case at bar. One Bedell, an employee of the plaintiffs and in charge of their real estate department, secured from time to time checks of the plaintiffs with which to pay parties whom Bedell represented were borrowing money from or through the plaintiffs. Some of these alleged borrowers were real persons, who were not, however, borrowing any money and to whom Bedell had no intention of

Notice—to corporation—power of clerk.

delivering the checks. Others were nonexistent persons. The checks were in each case made payable to the order of the alleged borrower. Bedell, on receiving the checks, forged the names of the ostensible payees, and had the checks presented to the defendant bank on whom they were drawn, which paid them. The amount involved was very large, and the case was elaborately presented and argued by eminent counsel. In reply to the contention that the checks were payable to fictitious persons and therefore to bearer, the court said (126 N. Y. 330):

"It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person and negotiated by the maker has the same validity 'as against the maker and all persons having knowledge of the facts, as if payable to bearer.' 1 Rev. Stat. 768, § 5.

"We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. *Irving Nat. Bank v. Alley*, 79 N. Y. 536; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 108, s. c. on appeal, L. R. 23 Q. B. Div. 243, 58 L. J. Q. B. N. S. 357, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866, 7 *Railway and Corporation Law Journal*, 114; *Gibson v. Minet*, 1 H. Bl. 569, 126 Eng. Reprint, 326, 3 T. R. 481, 100 Eng.

Reprint, 689, 2 Bro. P. C. 48, 1 Eng. Reprint, 784, 1 Revised Rep. 754.

"The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons, entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the check to a real payee therein named and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named; and that plaintiffs gave no authority to Bedell to indorse the name of the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks or to put them in circulation,—dispose of this question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged.

"Bedell, of course, knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Cave v. Cave*, L. R. 15 Ch. Div. 643, 644, 49 L. J. Ch. N. S. 505, 42 L. T. N. S. 730, 28 Week. Rep. 793."

Identical facts and contentions also appear in *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 408, 22 L.R.A.(N.S.) 250, 87 N. E. 740. Upon the point under immediate discussion the court said: "The question arises whether the making of a check payable to a fictitious or nonexisting person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment by the defendant. We are of opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine indorsement. In some respects it would be more difficult to deceive a bank in this particular, as against vigilant investigation, if the payee was fictitious than if he were real. In some respects it might be less difficult. We know of no decision that has recognized a difference in law between the two cases. It has been held that there is no difference. *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866."

To the same effect is *United States v. National Bank*, 123 C. C. A. 501, 205 Fed. 433.

The bank's counsel rely largely to sustain their position upon two decisions, *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 596, 35 N. E. 982; and *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 128 Am. St. Rep. 780, 70 Atl. 876. The facts in these two cases were much the same as those in the case at bar, with a very important exception, viz., that the dishonest employee had authority to draw checks and did himself draw the very checks in question. In both cases the decision is put upon this ground, and on this ground distinguished from *Shipman v. Bank of State*, supra.

As to the third defense, that the plaintiff was guilty of negligence which induced or contributed to the payment of the checks by the bank,

the only negligence claimed is in the officers of the plaintiff signing the checks on the false demands or requisitions of Emory, and in the failure of the plaintiff to discover the forgeries more promptly. The lower court found such negligence, and it is urged upon us that the question, being one of fact, is concluded on appeal by such finding. This is not true, of course, if there is no conflict in the evidence (and there is none), and the

Appeal—  
conclusiveness  
of finding—  
absence of  
conflict.

conclusion of negligence is one which cannot reasonably be drawn from the probative facts put in evidence. We are much inclined to the opinion that negligence cannot be reasonably inferred from the probative facts in this case. The company had rather an elaborate system of approving, checking, and entering demands before checks were drawn to pay them. It was, as we have said, very similar to the systems found in other large corporations. Complaint is chiefly made that the company relied upon the honesty of its heads of departments and the regularity on their face of the demands or requisitions which such heads approved, and made no investigation to determine whether such demands were

Check—negligence of corporation—reliance on heads of departments.

fraudulent or not. But trust must be placed in someone (*Kohn v. Sacramento Electric, Gas & R. Co.* 168 Cal. 1, 141 Pac. 626; *The Yamato v. Bank of Southern California*, 170 Cal. 351, 149 Pac. 826), and necessarily in heads of departments. If trusting them in regard to demands for checks for disbursements regular upon their face is negligence, so it would be negligence to trust them in a hundred other ways in which it is within their power to defraud their employer. Business could not be conducted on any such basis. It is impossible for any large concern to investigate minutely in advance every demand for disbursement necessary for it to make in its daily

business. The delay and expense of so doing would be too great.

But however this may be, even if the company were guilty of negligence in signing the checks upon the fraudulent demands of Emory, it is plain that such negligence did not contribute to or induce the acceptance by the banks of the forged indorsements. The forgery of the indorsements was entirely distinct from the issuance

**Bank—paying on forged indorsements—effect of negligence of maker.**

of the checks on false demands, and there was no relation between them.

This is clearly shown by the fact that Emory could just as easily have forged indorsements on and secured the payment of checks issued on genuine demands, and in fact did so in one instance.

This point also is discussed in *Jordan Marsh Co. v. National Shawmut Bank*, *supra*, and the matter is there summed up as follows (201 Mass. 408): "But the whole duty of seeing whether there is a forgery of such an indorsement upon any check rests primarily upon the banker. The drawer of the check has nothing to do with that. Ordinarily he makes no representation that has any relation to it. In the case just supposed he made no representation in regard to it. The checks payable to the order of A. L. Sefton, which she did not indorse, were wrongly paid, and the defendant's liability for payment is like that for the payment of any other check bearing such a forged indorsement. The plaintiff had nothing to do with the payment, or with the defendant's performance or nonperformance of its duty to see that payment was made to the right person. There are many cases that illustrate the rule that negligence of the maker is immaterial unless it is of a kind that directly and proximately affects the conduct of the banker in the performance of his duties. [Citing many cases.]"

The other particular in which it is claimed that the plaintiff was negligent is, as we have said, that the

plaintiff did not examine more carefully the canceled checks as they were returned to it, and discover the forgeries earlier. The plaintiff did indeed make some examination of the returned checks to see that the indorsements were regular. But a depositor is not bound to examine the indorsements on returned checks. He <sup>—duty of depositor to examine indorsements.</sup> is bound within a reasonable time to

ascertain the genuineness of the checks themselves (*Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100); but, as to indorsements, the rule and its reason are correctly stated in *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. "The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. *Weisser v. Dennison*, 10 N. Y. 68, 61 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501; *First Nat. Bank v. Whitman*, 94 U. S. 347, 24 L. ed. 231; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 107, 29 L. ed. 811, 6 Sup. Ct. Rep. 657."

See also *Jordan Marsh Co. v. National Shawmut Bank*, *supra*; *United Secur. L. Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; *Guaranty State*



Bank & T. Co. v. Lively, — Tex. Civ. App. —, 149 S. W. 211; Masonic Benefit Asso. v. First State Bank, 99 Miss. 610, 55 So. 408.

As to the fourth ground of defense, that there was an account stated between the parties by reason of the rendition of semimonthly statements by the bank to the plaintiff and no objection made by the plaintiff, it is the rule that an account stated may be opened for fraud or mistake shown. The mis-

Account stated—  
opening for  
mistake.

take in this case is plain, and the rule is as applicable to

an account stated between a bank and a depositor as to any other. Shipman v. Bank of State, Jordan Marsh Co. v. National Shawmut Bank, and Janin v. London & S. F. Bank, supra; 3 R. C. L. 532.

A further question, however, presents itself upon this point. In the front of the pass book used by the plaintiff up to June, 1914, is a printed statement headed "Agreement with Depositor," and reading as follows (the italics are ours):

"In accepting this pass book it is understood that the Globe Savings Bank, in receiving notes, drafts, and checks on points other than Los Angeles, either for collection or credit, shall transmit the same in the usual manner for collection, either to the bank on which the same are drawn, or to such bank or persons as it may deem reliable, with the express understanding that the same is done solely for account and convenience of the depositor, and that the Globe Savings Bank shall in no way be liable for default of any such bank, person, or subagents, or for loss in transit, or for any other cause whatever, until the proceeds in actual money shall come into its possession.

"It is also further expressly agreed and declared that it is a condition upon which the Globe Savings Bank accepts the deposits of, pays the checks of, and does business for the depositor herein named that whenever this book may be written up by the said bank and returned to

5 A.L.R.—76.

said depositor with checks drawn by said depositor on, and paid by, said bank, and other vouchers, by personal delivery, messenger, mail, or otherwise, said depositor shall, within ten days after receipt thereof, make such examination of the account and the returned vouchers and checks as will satisfy him (or her) of their correctness, genuineness, and regularity, both as to face and *indorsements*, and that a failure by said depositor to report in writing anything to the contrary to said bank within ten days after such delivery, shall be deemed positive and conclusive evidence that the examination, as above, has been made by said depositor, and that the account and checks and vouchers have been found correct in all the particulars above indicated, and that after the said ten days shall have elapsed without objection or notice to the said bank of errors or omissions, the said depositor shall not have the right as against the said bank to question or dispute the genuineness, regularity, or correctness of the said account, vouchers, or checks, or any of them, concerning the amount thereof, or the signatures or other writing on the face of said checks, or the *indorsements*, or other writings on the back thereof."

This statement is not signed by the plaintiff, nor is there any showing that it was called to the plaintiff's attention or wittingly agreed to by it. It is just the character of thing that the average man would not trouble to read, or, reading, would fail to appreciate the significance of the inclusion in it of "*indorsements*," and the fact that it very materially changed the usual obligation of a bank to its depositors. There is no reason, so far as we know, why a depositor may not make such an agreement if he deliberately chooses to do so, unreasonable as it is. But it is evident that the statement comes in the category of "traps for the unwary," and before such statement can be given effect as a contract binding upon the depositor and changing in a substan-

tial particular the relation which presumably he thought he was entering into, it must appear affirmatively that he consented and agreed

**Bank—effect of  
notice in  
pass book.**

to it either by being required to sign it or by having his attention particularly called to it. It is not sufficient merely that it appear in the front of the pass book. The case is not one in which the party must know that he is accepting a contract, as where he is accepting an insurance policy, and should therefore realize the necessity of acquainting himself with its terms. For this reason it does not come within the principle of such cases as *Madsen v. Maryland Casualty Co.* 168 Cal. 204, 142 Pac. 51. It is more nearly analogous to the case of special conditions or limitations printed on the back of a railroad ticket. It is also to be noted that probably the pass book never came to the attention of any responsible officer of the plaintiff authorized to make contracts. The actual handling of the pass book and the making of deposits are ordinarily, in the case of large concerns, intrusted to some subordinate. The case comes within the principles discussed on pages 260 to 263 of 9 Cyc., and is not distinguishable from *Neuman v. National Shoe & Leather Exch.* 26 Misc. 388, 56 N. Y. Supp. 193, and *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175, 33 L.R.A. 408, 64 Am. St. Rep. 338, 68 N. W. 118.

In order for the bank to avail itself of the statement as a contract made by the plaintiff, it was necessary for the bank to prove that the statement had been called to the attention of some responsible officer of the company. Without this it cannot be fairly said that it was accepted or consented to by the company, and nothing of this sort appears.

We are not unaware of the numerous authorities holding that a rule or regulation printed in a savings bank pass book accepted by the depositor is binding upon him.

Practically all, if not all, of these cases, however, are cases wherein either the circumstances were such that the consent of the depositor to the by-law reasonably appeared, or the bank was a mutual one, the members of which were the depositors, who as members were bound by the bank's rules. In practically all of them also the rule involved was a reasonable and customary one, which presumably the depositor would be aware of as an ordinary incident of the relation of savings depositor and bank. The matter is discussed at some length in *Ackenhausen v. People's Sav. Bank*, supra, and with that discussion we agree.

The fifth and last point of the respondent is that the checks were not tendered back to the bank before the commencement of the action. The facts regarding this are that immediately upon the discovery of the forgeries the plaintiff notified the bank in writing of that fact and that it held the bank responsible. Copies of the checks were attached to the notice. The complaint alleges a demand by the plaintiff for the amount of the checks and a refusal by the bank. This allegation is admitted by the answer. The answer also denies liability and sets up other affirmative defenses, but contains nothing whatever relative to any failure by the plaintiff to tender the checks. Apparently, the point was not brought up in any manner at the trial, although at the opening of the trial the question of a demand by the plaintiff was discussed, and the bank's counsel admitted that such demand had been made. The first reference to the nonreturn of the checks is in the findings, which contain a finding that the plaintiff has not returned or offered to return them. The conclusions of law contained in the findings, however, show that the decision for the defendant was not placed on this ground. So far as the record shows, we believe it is a fair conclusion that the bank's position from the time it was notified of the forgeries has been one (*Koln v. Sacramento*

(— Cal. —, 182 Pac. 293.)

Electric, Gas & R. Co. 168 Cal. 1, 141 Pac. 626; The Yamato v. Bank of Southern California, 170 Cal. 351, 149 Pac. 826), where a tender of the checks would have been an idle ceremony, not changing in the slightest the existing positions of the parties, and therefore not required (38 Cyc. 135).

If, however, the record is not sufficient to justify an affirmative conclusion as to the bank's position from the time demand was made upon it, the bank cannot rely, upon appeal, upon the insufficiency of the record in this respect. It is clear that the point was not made at the trial, that the cause was tried on other issues entirely and as if this point were not present, and that the necessity of proving either tender or an excuse for it was not brought to the plaintiff's attention. Such a point, which the plaintiff might, and in this case in all probability could,

have met by sufficient evidence if objection to its recovery had been made on this ground at the trial, cannot be raised for the first time on appeal. Bank of Stockton v. Howland, 42 Cal. 129; Richey v. Haley, 138 Cal. 441, 71 Pac. 499.

Appeal—raising question for first time.

We have discussed this point as if a tender of the checks by the plaintiff to the bank were in fact necessary unless excused or waived. Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190, would seem so to hold. There is, however, strong authority to the contrary (see United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433, supra, and cases there cited), and we do not desire to be considered as conceding that a tender was in fact necessary.

Judgment reversed.

We concur: Shaw, J.: Lawlor, J.

Petition for rehearing denied, July 17, 1919.

## ANNOTATION.

### Printed statement of rules in pass book as affecting rights of bank and depositor.

#### I. Introductory, 1203.

#### II. Printing of rules in pass book as notice to depositor:

- a. Majority doctrine, 1203.
- b. Minority doctrine, 1205.

#### I. Introductory.

This note is confined to a discussion of the effect, as between bank and depositor, of the printing in the pass book issued to the depositor of rules of the bank. It does not include cases wherein the binding effect of the rules on the depositor is due to the fact that he has signed or otherwise expressly accepted them, although they may also be inserted in the pass book. This limitation on the scope of the note is especially to be borne in mind in connection with the subdivision discussing the validity of rules, no full discussion of the validity of the rules of savings banks being therein attempted.

#### III. Validity of rule, 1205.

#### IV. Effect of negligence of bank, 1206.

#### V. Effect of negligence of depositor, 1212.

#### II. Printing of rules in pass book as notice to depositor.

##### a. Majority doctrine.

By the weight of authority if a depositor accepts and retains a pass book wherein are printed rules of the bank respecting the repayment of the deposit he is deemed to acquiesce therein, and they become a part of the contract between the bank and the depositor.

Connecticut.—Chase v. Waterbury Sav. Bank (1904) 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg. Rep. 186.

Maine.—Ladd v. Augusta Sav. Bank (1902) 96 Me. 510, 58 L.R.A. 288, 52 Atl. 1012.

Massachusetts.—Wall v. Provident Inst. for Sav. (1863) 6 Allen, 320.

**New Hampshire.**—*Heath v. Portsmouth Sav. Bank* (1865) 46 N. H. 78, 88 Am. Dec. 194.

**New Jersey.**—*Cosgrove v. Provident Inst. for Sav.* (1899) 64 N. J. L. 653, 46 Atl. 617.

**New York.**—*Schoenwald v. Metropolitan Sav. Bank* (1874) 57 N. Y. 418; *Ferguson v. Harlem Sav. Bank* (1904) 43 Misc. 10, 86 N. Y. Supp. 825.

**Pennsylvania.**—*Burrill v. Dollar Sav. Bank* (1879) 92 Pa. 134, 37 Am. Rep. 669.

**Vermont.**—*Gifford v. Rutland Sav. Bank* (1890) 63 Vt. 108, 11 L.R.A. 794, 25 Am. St. Rep. 744, 21 Atl. 340.

**Wisconsin.**—*Wegner v. Second Ward Sav. Bank* (1890) 76 Wis. 242, 44 N. W. 1096.

"We must take the clause in the deposit book to have been made part of the contract between the plaintiff and the defendant." *Heath v. Portsmouth Sav. Bank* (N. H.) *supra*.

In *Chase v. Waterbury Sav. Bank* (Conn.) *supra*, it was said: "By accepting from the bank and using, as she did, the deposit book in which articles 13 and 15 of the by-laws were printed, the plaintiff assented to these regulations, and they became a part of the contract of deposit for the protection of the bank and the depositor, and were binding alike upon both."

In *Cosgrove v. Provident Inst. for Sav.* (N. J.) *supra*, it was said: "The plaintiffs, by accepting the deposit book with this by-law printed upon it, had become chargeable with knowledge of its provisions, and as they made no objection to such provisions they are presumed to have assented to them, and the by-law therefore became a part of the contract between the parties."

In *Schoenwald v. Metropolitan Sav. Bank* (N. Y.) *supra*, it appeared that the depositor was unable to read or write the English language in which the rules in her pass book were written. The court, however, said: "We must assume, as was assumed on the trial, that she did understand the nature and effect of her contract with the defendant."

In *Burrill v. Dollar Sav. Bank* (Pa.) *supra*, the inability of the depositor

to read or write was held not to affect the rule, the court saying: "Savings banks like the defendant in error are really charities for the benefit of the poor. With many thousands of depositors they can only save themselves from imposition and loss by rules strictly enforced. The rule under which the defendants claim protection is a very reasonable one, and necessary for their safety. The fact that the plaintiff was illiterate, and could not read the rules in the bank book delivered to him, made no difference. He ought to have requested it to be read to him. Common prudence required this precaution."

In *Ladd v. Augusta Sav. Bank* (Me.) *supra*, it appeared that certain rules of a savings bank were printed in the pass book, among others a rule that the depositor should sign the rules "and thereby agree to be bound by them." Holding a depositor to be bound by the rules printed in the book, though he never signed any agreement to be bound thereby, the court said: "One method certainly of obtaining and showing the depositor's agreement to be bound by the rules and regulations of the bank was to have him sign a contract to that effect, but this was not the only way. If a depositor in a savings bank receives from the bank a bank book containing rules, regulations, and conditions which affect his contractual relations with the bank and its liability to him, clearly printed therein, and reads them so that he knows of their existence, and continues to leave his deposit in the bank and to make additional deposits and to hold the bank book as his voucher, he must be presumed to have agreed to be bound by them, so that they will become a part of his contract with the bank."

To the same effect, in *Gifford v. Rutland Sav. Bank* (Vt.) *supra*, the court said: "Now we discover nothing upon the face of this transaction that shows that it was the intention of these parties that plaintiff should be deemed to assent to the by-laws only by subscribing his name to said book; but quite the contrary appears. Both parties knew that plaintiff had not signed

said book, but yet they continued to occupy to each other the relation that the deposits created, and presumably with the mutual intention that all the rights and incidents of that relation should attach to it, as it is not to be presumed that they or either of them expected or intended that the noncompliance with one by-law should nullify the whole, but rather that the matter should stand as though that by-law did not exist. Hence, by receiving and holding the deposit book as his voucher against the bank, with the by-laws printed in it, of which the case shows he had actual knowledge, and continuing his relation of depositor, he must be taken thereby to have assented to the by-laws, save the one that he knew was not complied with, and to have agreed to them as a part of the contract of deposit."

*b. Minority doctrine.*

In at least two jurisdictions it is held that to make rules printed in a savings bank pass book binding on the depositor they must be called to his attention and assented to by him. *Ackenhausen v. People's Sav. Bank* (1896) 110 Mich. 175, 33 L.R.A. 408, 64 Am. St. Rep. 338, 68 N. W. 118. And see the reported case (*LOS ANGELES INVEST. CO. v. HOME SAV. BANK*, ante, 1193).

In *Ackenhausen v. People's Sav. Bank* (Mich.) supra, the court held, with respect to a by-law relieving the bank of responsibility in case of payment to a person wrongfully in possession of the pass book, that the mere printing of the by-law in the book did not bind the depositor. The court said: "We think the requirement of the statute that the deposits shall be paid to the depositor or his legal representatives cannot be changed by a by-law, unless the attention of the depositor is called to the by-law, and he assents thereto, actually or impliedly."

*III. Validity of rules.*

It is uniformly held that rules of a savings bank printed in the pass book issued to a depositor and acquiesced in by him, to the effect that the pass book is the sole evidence of the right

to withdraw the money deposited, and that a payment to a person presenting the book shall be effectual to discharge the bank, are reasonable and valid. *Chase v. Waterbury Sav. Bank* (1904) 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg. Rep. 186; *Ladd v. Augusta Sav. Bank* (1902) 96 Me. 510, 58 L.R.A. 288, 52 Atl. 1012; *Donlan v. Provident Inst. for Sav.* (1879) 127 Mass. 183, 34 Am. Rep. 358; *Cosgrove v. Provident Inst. for Sav.* (1899) 64 N. J. L. 653, 46 Atl. 617; *Warhus v. Bowery Sav. Bank* (1860) 21 N. Y. 543; *Kelly v. Emigrant Industrial Sav. Bank* (1867) 2 Daly (N. Y.) 227; *Burrill v. Dollar Sav. Bank* (1879) 92 Pa. 134, 37 Am. Rep. 669.

See also the following subdivision of this note for cases wherein the validity of such rules is assumed and their effect discussed.

A rule that payment will not be made except on production of the pass book is reasonable. *Warhus v. Bowery Sav. Bank* (1860) 21 N. Y. 543.

In *Kelly v. Emigrant Industrial Sav. Bank* (1867) 2 Daly (N. Y.) 227, it was said: "I think the agreement on the part of the plaintiff with the defendants was that payments to persons producing the pass books should be valid payments to discharge them (12th section, 'By-laws of the Business of the Bank'). If it was not an agreement it was a regulation, of which, being printed in a pass book, he must be charged with notice, and subjected to the duty of giving notice to them promptly of the loss of the book."

In *Donlan v. Provident Inst. for Sav.* (1879) 127 Mass. 183, 34 Am. Rep. 358, the court sustained the validity of by-laws providing that "the institution will not be responsible for loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment," and that it "does not undertake to be answerable for the consequences of any mistake as to identity, if it pays to a wrong party upon the bank book being presented." In that case it was said: "The regulations adopted appear to be

reasonable and proper, with reference to the peculiar business for which such corporations are chartered, and the bank had authority under the laws of this commonwealth to make them."

#### IV. *Effect of negligence of bank.*

The fact that a bank has printed in the pass book issued to a depositor a rule to the effect that payment shall be made to the person presenting the book does not relieve it of the duty to exercise care in making payments, and where payment is made to a person wrongfully in possession of the pass book the bank is liable if under all the circumstances of the case it was negligent in making the payment without further inquiry or precaution. *Chase v. Waterbury Sav. Bank* (1904) 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg. Rep. 186; *Ladd v. Augusta Sav. Bank* (1902) 96 Me. 510, 58 L.R.A. 288, 52 Atl. 1012; *Cosgrove v. Provident Inst. for Sav.* (1899) 64 N. J. L. 653, 46 Atl. 617; *Schoenwald v. Metropolitan Sav. Bank* (1874) 57 N. Y. 418; *Appleby v. Erie County Sav. Bank* (1875) 62 N. Y. 12; *Allen v. Williamsburgh Sav. Bank* (1877) 69 N. Y. 314; *Kummel v. Germania Sav. Bank* (1891) 127 N. Y. 488, 13 L.R.A. 786, 28 N. E. 398; *Saling v. German Sav. Bank* (1889) 15 Daly, 386, 7 N. Y. Supp. 642; *Tobin v. Manhattan Sav. Inst.* (1893) 6 Misc. 110, 26 N. Y. Supp. 14; *Abramowitz v. Citizens' Sav. Bank* (1896) 17 Misc. 297, 40 N. Y. Supp. 385; *Cornell v. Emigrant Industrial Sav. Bank* (1887) 9 N. Y. S. R. 72; *Wall v. Emigrant Industrial Sav. Bank* (1892) 64 Hun, 249, 19 N. Y. Supp. 194; *Geitelsohn v. Citizens' Sav. Bank* (1896) 17 Misc. 574, 40 N. Y. Supp. 662; *Israel v. Bowery Sav. Bank* (1881) 9 Daly (N. Y.) 507; *Gifford v. Rutland Sav. Bank* (1890) 63 Vt. 108, 11 L.R.A. 794, 25 Am. St. Rep. 744, 21 Atl. 340; *Wegner v. Second Ward Sav. Bank* (1890) 76 Wis. 242, 44 N. W. 1096.

As to the duty of inquiry devolving on the bank, the court in *Cornell v. Emigrant Industrial Sav. Bank* (1887) 9 N. Y. S. R. 72, said: "In this case there is no evidence whatever of any effort on the part of the bank to ascertain whether the person presenting

the book was entitled to its custody. No question seems to have been asked, notwithstanding that the teller was requested to prepare the draft, which he did. It may be said that there were no circumstances attending the application calculated to excite the suspicion of the teller, and that this relieved the bank officers from any imputation of negligence. But this does not seem to be a proper response to the accusation. The bank assumed the obligation of ordinary care, and must employ it in all cases where a demand is made. The test could be made by an examination of the signature if the depositor is able to write, or an interrogation as to the number of the book, or as to the residence and antecedents of the person presenting the draft, which would perhaps be a sufficient compliance with the obligation they have assumed, if nothing suspicious appeared as the result of such examination."

The burden is on the depositor to show negligence. *Israel v. Bowery Sav. Bank* (1881) 9 Daly (N. Y.) 507.

In *Eaves v. People's Sav. Bank* (1858) 27 Conn. 229, 71 Am. Dec. 59, it appeared that the following rule was printed in the pass book: "Payment on deposits shall be made only to the depositor or to his or her order, or to the depositor's legal representative, on the presentation of the depositor's book." The bank paid to a person who had stolen the book and forged an order. It was held that the bank was liable, the forged order being in order and the rule not permitting payment on the book. The court said, obiter: "Had the book contained this further notice that the presentation of the book shall be taken to be full authority for paying the money, the defendants would have had a good defense, for it might be reasonably held in that case that the bank insisted upon this as a condition of receiving the deposit."

In *Chase v. Waterbury Sav. Bank* (Conn.) *supra*, there was involved a rule which the court said was probably adopted in view of the ruling in the *Eaves Case*, and which provided as follows: "This bank will not be responsible to any depositor, or to his

heirs or assigns, for any fraud that may be practised upon any of the officers of this institution by forged signatures, or by presenting a depositor's book, and drawing money without the knowledge or consent of the owner. And all entries of money paid, made in the depositor's book by an officer of the institution, shall be deemed good and valid evidence of money paid, and shall exonerate this bank from any liability on account of any fraud practised in drawing the money of any depositor." As to the effect of that rule it was said: "By its provisions the bank was not relieved from its duty to exercise ordinary care to prevent payment to the wrong person, even though such person presented a deposit book; and in accepting this regulation the depositor agreed to bear the loss of a payment to the wrong person presenting the deposit book, only to the extent that the bank acted reasonably." It was accordingly held that it was a question for the jury whether the bank was negligent in not preserving the signatures of its depositors for comparison or issuing a new pass book to a person other than the depositor, and in not detecting the fact that a bond presented to secure the issue of the new pass book was forged.

In *Kimins v. Boston Five Cents Sav. Bank* (1885) 141 Mass. 33, 55 Am. Rep. 441, 6 N. E. 242, it was held that the depositor was not charged with notice of a similar amendment, and under the original by-law, which was similar to that involved in the *Eaves Case*, it was held that the bank was liable for a payment on a forged order.

In *Ladd v. Augusta Sav. Bank* (1902) 96 Me. 510, 58 L.R.A. 288, 52 Atl. 1012, wherein it appeared that payment was made without question to a person presenting the pass book, the court said: "We do not think that under these circumstances the officers of the defendant bank exercised reasonable care in taking such precautions as would be likely to prevent a mistake of this kind and in making the payment of this sum of money to a person not entitled to it. The only proof of identity required was the pos-

session of the plaintiff's bank book, but this is something so easily lost, and the possession of it may be so easily obtained by a person not entitled to it, that a bank of the size of this one, where only a small proportion of its depositors could be personally known to the officers of the institution, should take some further precaution to prevent mistake and loss. One that suggests itself as simple and inexpensive, but as quite effectual, owing to the well-known peculiarities and characteristics of every person's handwriting, is to preserve in some convenient place, for reference, a signature of the depositor, when the depositor can write; and to obtain from any person unknown to the officers, who claims to be a depositor, his signature for comparison with the genuine one on file in the bank. In our opinion, the officers of this bank, with its large deposits and numerous depositors, were negligent in not having some such means at hand to aid in the identification of its depositors and to prevent false impersonations by swindlers. It is no answer that the first deposit was sent by mail or by messenger, because it is perfectly easy to obtain by mail the signature of all depositors who can write, even if they do not come personally to the bank. And if, for any reason, this cannot be done, then other proof of identity should be required besides the possession of the book, even if the depositor is put to some inconvenience."

On the other hand, in *Levy v. Franklin Sav. Bank* (1874) 117 Mass. 448, involving a by-law which provided that "in all cases a payment upon presentation of a deposit book shall be a discharge to the corporation for the amount paid, the court said: "The bank is obliged to deal with a very large number of depositors, most of whom must be strangers to its officers. They are unable to identify the persons of the depositors, and it is equally impossible that they should know their handwriting. The danger of fraud, by payments upon forged orders accompanied by the book, may be as great as by payments to persons who falsely personate the depositor and

present the book. In either case, we think the purpose of the by-law was to authorize the bank to rely upon the presentation of the book as its security against fraud."

In *Cosgrove v. Provident Inst. for Sav.* (1899) 64 N. J. L. 653, 46 Atl. 617, it was held that the insertion in a pass book of a rule that "all payments made to persons who present the pass book shall be valid payments to discharge the bank and its officers" did not relieve the bank from the duty to use due care in making payment. The rule was, however, held to dispense with the necessity of identification in the absence of carelessness or bad faith, the court saying: "By the true construction of this by-law the bank is not compelled to pay any person, not even the depositor himself, unless the bank book is produced (provided, of course, it is not lost or destroyed); but a payment made by it in good faith and in the exercise of due care to any person who produces the pass book operates to discharge the bank, without regard to whether or not such person is entitled to draw the money. Accepting this as the true construction of the by-law, the suggestion is made that it is unreasonably harsh upon the depositor, and, for this reason, should not be sustained. We cannot accept this suggestion as sound. This bank has many thousands of depositors. It is impossible that its officers or clerks should personally know more than a small proportion of the whole number. It is apparent that if strict proof of the identity of each depositor was required whenever he should seek to draw out a portion of his deposit, great inconvenience would be caused to them. To obviate the necessity of such a practice, and at the same time to protect from depredation the common fund of the depositor which constitutes the sole capital of the corporation, some such rule as that presented by the case before us is required."

In *Goldrick v. Bristol County Sav. Bank* (1877) 123 Mass. 320, with respect to a by-law providing that if a depositor does not give notice of the loss of his pass book "the institution

will not be responsible for any loss sustained," it was said: "The plain object of this by-law was to exonerate the bank from loss occasioned by the inability of its officers to identify the depositor, and to throw upon the depositor the risk of keeping his book safely."

See to the same effect *Donlan v. Provident Inst. for Sav.* (1879) 127 Mass. 183, 34 Am. Rep. 358, wherein it appeared that, after the death of a depositor, payment was made to a person who impersonated him and presented the book.

In *Gifford v. Rutland Sav. Bank* (1890) 63 Vt. 108, 11 L.R.A. 794, 25 Am. St. Rep. 744, 21 Atl. 340, it was held that there was no negligence in making payment to a person presenting the pass book. It appeared that the deposit was made by mail and the depositor was unknown at the bank. The person presenting the book answered correctly a question as to the manner in which the deposit was made. The court said that in the absence of suspicious circumstances the bank was not bound to require identification, and that the fact that the person presenting the book signed the depositor's name awkwardly was not such a circumstance.

In *Wegner v. Second Ward Sav. Bank* (1870) 76 Wis. 242, 44 N. W. 1096, it appeared that the following rule was printed in the pass book: "Seventh. Written notice of the loss of the deposit book must be promptly given to the bank by or on behalf of the depositor, and if not so given the bank will not be responsible for payments made to any party presenting such book, other than the depositor, it being impossible for the officers of the bank to know or identify every depositor." The deposit was paid to a stranger who had stolen the pass book. Without setting out the facts putting the bank on inquiry the court held that negligence was, under the evidence, a question for the jury.

In *Wall v. Emigrant Industrial Sav. Bank* (1892) 64 Hun, 249, 19 N. Y. Supp. 194, it was held that a finding of due care was required by the following testimony of the teller, which



was uncontradicted: "The pass book came to me in the regular course, with a draft ticket in it, signed James Wall; it had been presented at the other window before it came to me, and upon its arrival at my window I took the ticket out of the book, and, either at that time or a minute or two afterwards, I ran my eye over the account to see if there was money enough in it to pay the demand. . . . I then took the draft ticket signed James Wall over to this book, which lay a little at my right on a desk, and compared the signatures. I then asked the person who presented the book, and who was in the line, what his name was: He said 'James Wall;' I then asked him what county in Ireland he was born in, and he said 'County Louth;' I asked him what ship he came over in, and he said 'The Somerset;' I asked him his mother's maiden name, and he said 'Ann Levins.' Then, upon the strength of the comparison and those answers, I paid him the money after asking him how much he wanted." Upon cross-examination, he testified that there were some slight discrepancies between the signatures upon the signature book of the bank and the ticket presented by the person attempting to draw the money, and he stated that this put him on his guard, and it was for that reason that he asked the questions, though, as he stated, he thought, upon comparing the signatures, that it was Wall's, although there were one or two slight changes; that eleven years had elapsed, and that this, among persons not accustomed to write frequently, makes a difference in the regularity of the signature.

In *Geitelsohn v. Citizens Sav. Bank* (1896) 17 Misc. 574, 40 N. Y. Supp. 662, reversing (1896) 17 Misc. 57, 39 N. Y. Supp. 840, it appeared that a rule printed in the pass book was to the effect that all payments made to persons producing the pass book "shall be valid payments to discharge the bank." It appeared that the entire amount of a deposit, \$980, was paid to a person presenting the pass book, without requiring identification. It appeared, however, that the person making the withdrawal answered correctly ques-

tions as to the residence, occupation, parentage, etc., of the depositor. The court held that a verdict for the bank should have been directed.

But in *Abramowitz v. Citizens' Sav. Bank* (1896) 17 Misc. 297, 40 N. Y. Supp. 385, the court rested the facts and its conclusion as follows: "The only evidence in the case tending to show the amount of care taken by the defendant in paying out the money was that of the witness Saylor, the teller of the defendant, who testified that he had asked the person who drew the money, when she told her age, whether she was married or single, her name, her husband's name, and where she was born; and the answers given by her tallied with the answers given to these questions by plaintiff at the time when she became a depositor with the defendant. On cross-examination he testified: 'I did not ask her whether or not she was a depositor; I simply asked her her name, how much money she wanted.' Under these circumstances it cannot be said that the jury were not justified in saying that the defendant did not exercise reasonable care and diligence."

In *Ferguson v. Harlem Sav. Bank* (1904) 43 Misc. 10, 86 N. Y. Supp. 825, it appeared that the following by-law was printed in the pass book: "Although the bank will endeavor to prevent fraud and imposition, yet all the payments to persons presenting the pass book issued by it shall be valid payments to discharge the bank." The bank was held not to be negligent in paying on a forged order, the court saying: "Notwithstanding this special contract, the defendant was bound to exercise ordinary care and diligence, to avoid a payment to the wrong person; and, upon proof of failure to exercise such care and diligence, the defendant still remains liable. *Appleby v. Erie County Sav. Bank* (1875) 62 N. Y. 12. The vital question in the case, therefore, is whether the evidence was sufficient to warrant the submission of the case to the jury upon the question whether the defendant had exercised due care and diligence. The testimony of the officer of the bank who made the payment shows

that a few slight irregularities in the signature aroused his suspicion; that he thereupon asked all the test questions requisite for identification; that the person applying for the payment, with the pass book in his possession, and claiming to be the plaintiff, correctly answered each and every one of the said test questions; and that thereupon the payment was made. Under these circumstances, the defendant had a right to rely upon the appearances thus presented, and to make the payment called for."

In *Schoenwald v. Metropolitan Sav. Bank* (1874) 57 N. Y. 418, it appeared that a savings bank paid the amount of a deposit to a person who presented the book and a forged order. A rule printed in the pass book provided that "all payments made to persons producing the deposit book shall be deemed to be good and valid payments to depositors." The court said: "I do not discover that the bank can be properly charged with any want of diligence or any omission of duty in making the payment which provokes this controversy. It was made to a person having possession of the pass book; and by the contract it was agreed that 'all payments made to persons producing the deposit books shall be deemed good and valid payments to depositors, respectively.' In addition, the party receiving the money presented what purported to be the written order of the plaintiff; and I do not discover that there was anything in the nature of the transaction to indicate that the order was a forgery, as, upon somewhat questionable evidence, the jury have found."

But in *Appleby v. Erie County Sav. Bank* (N. Y.) supra, it appeared that a rule printed in the pass book provided as follows: "Although the bank will endeavor to prevent fraud upon its depositors, yet all payments to persons producing the pass books issued by the bank shall be valid payments to discharge the bank." Payment was made to a person who produced the pass book and a forged order. The signature of the depositor was on file in the bank and was compared with the order. The court said: "If, by a

regulation designed to prevent fraud upon depositors, which by the rules the bank promised to 'endeavor' to do, a fact or circumstance is brought to the knowledge of the officers, which is calculated to and ought to excite the suspicion and inquiry of an ordinarily careful person, it is clearly the duty of the officers to institute such inquiry, and a failure to do so is negligence for which the bank would be liable, and such, I understand, is the doctrine of the cases cited by the defendant. The officers of these institutions are held to the exercise of reasonable care and diligence. *Sullivan v. Lewiston Inst. of Sav.* (1868) 56 Me. 507, 96 Am. Dec. 500; *Eaves v. People's Sav. Bank* (1858) 27 Conn. 229, 71 Am. Dec. 59; *Heath v. Portsmouth Sav. Bank* (1865) 46 N. H. 78, 88 Am. Dec. 194. In this case if the two signatures were so dissimilar as, when compared, the discrepancy would be easily and readily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence which should have been passed upon by the jury. It would not be evidence of negligence if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the discrepancy was one as to which competent persons might honestly differ in opinion."

In *Saling v. German Sav. Bank* (1889) 15 Daly, 386, 7 N. Y. Supp. 642, the court followed the *Appleby Case*, and held that a question for the jury as to negligence was presented by evidence stated by the court as follows: "An officer of the bank whose duty it was to examine the signatures upon draft checks admitted that after making such comparison he could readily distinguish such genuine signatures from the forgeries. This witness further says that when the man Schwartz presented himself to draw money he does not think he asked him (Schwartz) any of the questions as to the birthplace, age, etc., which facts are always set opposite a person's name when he opens an account, for future identification; that the sig-

nature was such a good imitation that the witness did not think he could possibly be mistaken; and that, moreover, he was frequently so busy that he did not have time to ask the questions. The witness further said that, on account of the rush of business, if a signature presented 'is a tolerably good signature, we have it paid without asking any questions.'

In *Allen v. Williamsburgh Sav. Bank* (1877) 69 N. Y. 314, the facts and the holding were the same as in the *Appleby Case*. Commenting on the *Schoenwald Case* (N. Y.) *supra*, the court said: "I do not say that the result reached by the learned commissioner was not a correct one upon the facts of that case, which appear much stronger to sustain him in the appeal book than in the report in 57 N. Y. But with the reasoning as above noticed I cannot agree. The officers of savings banks, acting under rules such as those shown to us in this case, are bound to the exercise of care and diligence, up to the mark which is fixed for the bank by those rules. When a person of one sex produces the deposit box issued to one of another sex, it should arrest the attention and excite inquiry. It will be entirely incompatible with a pretense of good faith, or of the use of best efforts to prevent fraud, to assert that a payment in such case was believed to be to the depositor personally, and to take shelter behind the clause in the rules that a payment to the person producing the book shall be deemed good and valid. payment to the person producing the book of a man, without an assignment, without proof of delivery, without an order, or letter of administration or testamentary, and merely upon the production of the book, is negligence too gross to be justified or excused. The defendant perceived this, and required an order for the money. It did not rely upon the possession of the book. The inquiry then is, Was there anything in the appearance of the order which should have excited the suspicion of the officers of the defendant and incited to further effort to prevent a fraud? Or rather, on this branch of the case, the question is

narrower than that, and is, Was there in the signature such want of likeness to the signature of the plaintiff in the signature book as made it a question proper to be submitted to the jury?"

On similar facts, it was said in *Tobin v. Manhattan Sav. Inst.* (1893) 6 Misc. 110, 26 N. Y. Supp. 14: "Both Bird, the teller, and Stiles, the secretary, of the bank, and witnesses for it, admitted on cross-examination that there was 'marked' and 'striking' dissimilarity between plaintiff's signature in the bank's signature book and the signature to the disputed draft; and the testimony of both witnesses developed the fact, in the presence of the jury, that the discrepancies were readily discernible upon comparison. Whether or not the discrepancies were casually discernible, or required more than ordinary application for detection, was eminently a question of fact to be determined by the jury from the evidence and an inspection of the several signatures; and, if they concluded that the discrepancies were obvious to casual or ordinary examination, they might still further conclude that if the teller had compared the signatures he would have detected the discrepancies, and that thus there would have been excited within him sufficient suspicion to have induced him to use greater caution before accepting or paying the disputed draft, or that, having failed to observe the discrepancies, he did not avail himself of the ordinary caution of comparing the several signatures, and so was remiss in the observance of ordinary care. Though the trial judge might have differed, upon an inspection of the several signatures, from the subsequent conclusions of the jury, the evidence required submission to them, if it was legitimately susceptible of conflicting views."

In *Kummel v. Germania Sav. Bank* (1891) 127 N. Y. 488, 13 L.R.A. 786, 28 N. E. 398, it appeared that the following rules were posted on the pass book: "Payments shall not be made unless the depositor shall call for and receive the same in person or by an attorney duly constituted by writing,

signed and acknowledged. When the payment is made the pass book must be produced. When the entire deposit is withdrawn the pass book must be surrendered. . . . The bank will not be responsible to any depositor for any fraud committed on the officers in producing the pass book and drawing money without the knowledge or consent of the owner." Payment was made on a forged order. The court said: "The pass book of a savings bank cannot be regarded as negotiable, and its possession does not constitute proof of a right to draw money thereon. The book imports a liability of the bank to the depositor for the amount of moneys entered therein as deposited, and an agreement to repay at such time and in such manner as he shall direct. Assuming that the by-laws printed in the book are binding upon the depositor and constitute a contract between the parties, we still think that the duty devolves upon the officers of the bank to exercise care and diligence in order that their depositors may be protected from fraud and larceny. The defendant, by its by-law to which we have called attention, has undertaken with the plaintiff that payments shall not be made unless he shall call for the same in person or by an attorney duly constituted by writing, signed and acknowledged. Here is a positive and direct agreement which would absolutely protect the plaintiff from losses of this character. This agreement, however, must be considered as modified by that which follows, to the effect that the bank will not be responsible for fraud committed on its officers in producing the pass book and drawing money without the knowledge or consent of the owner, but this modification does not permit the officers to carelessly shut their eyes and pay to any person presenting the pass book, but, on the contrary, they owe the depositor active vigilance in order to detect fraud and forgery."

*V. Effect of negligence of depositor.*

In *Chase v. Waterbury Sav. Bank* (1904) 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg.

Rep. 186, it was held that a depositor was not negligent in leaving her pass book in a locked drawer in a bookcase in her residence, and further that if she was negligent she was not thereby estopped to contend that the bank was negligent in making payment on a forged order.

In *Wegner v. Second Ward Sav. Bank* (1890) 76 Wis. 242, 44 N. W. 1096, the court held that the depositor was not negligent in failing to give notice of the loss of the book, the court stating the facts as follows: "The only ground on which negligence could be imputed to the plaintiff was his failure to promptly give the bank notice of the loss of the pass book. But, under the circumstances, no negligence could be predicated on that ground. The plaintiff was shot and seriously wounded by Ebersen, either accidentally or intentionally, on Sunday afternoon. Ebersen was the man who stole the pass book and drew the money. The plaintiff remained in the barn where he was shot until the evening of that day, when, by the advice of the physician who had been called, he was removed to the hospital. The next morning he endeavored to communicate with his friends, and have someone look after his valuables, including the pass book. But it was not ascertained that the pass book had been stolen until after the bank had paid the money on the forenoon of the next day after he was shot. Such being the undisputed facts, there was no ground upon which negligence in failing to give the bank notice of the loss of the pass book could possibly be predicated."

In *Kelly v. Emigrant Industrial Sav. Bank* (1867) 2 Daly (N. Y.) 227, wherein payment was made to a person who had stolen the pass book and forged an order, the court said: "It does not appear in this case that the payment was made upon the draft alone, or that the draft was regarded as of any importance. If we give to the regulation just referred to the weight which it seems entitled to, then the draft was really of little importance, inasmuch as the person who presented it had the pass book, and

that was the voucher upon which the bank was justified in acting. The result of these views is that the plaintiff

loses his money by negligence. He should have advised the bank at once of his loss."  
M. J. Q.

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DAVIS KRAUSS et al., Plffs. in Err.,  
v.  
JAMES M. POTTS.

*Oklahoma Supreme Court—April 11, 1916.*

(53 Okla. 379, 156 Pac. 1162.)

**Tender — sufficiency — knowledge of creditor.**

1. Where the amount due is within the exclusive knowledge of the creditor and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender nevertheless will be good.

[See note on this question beginning on page 1226.]

**Judgment — law of case — former appeal.**

2. An opinion handed down in a case which is remanded for further proceedings becomes the law of the case.

[See 2 R. C. L. 223-226; see note in 1 A.L.R. 1267.]

**Tender — effect on interest.**

3. The tender of a less sum than is actually due will not prevent the running of interest thereafter on the whole principal, as though tender had been made.

[See 15 R. C. L. 33.]

**— of less than due — failure to demand disclosure.**

4. One seeking to redeem mortgaged property from a purchaser the bona fides of whom he attacks, and denies liability to compensate him for outlays upon the property without demanding of him a disclosure of the amount due, cannot avoid liability for interest on the whole debt in case the purchaser is found to be entitled to such compensation, on the theory that his tender was sufficient, although not including the amount of such expenditures because the purchaser did not disclose them.

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Headnotes 1-3 by KANE, Ch. J.

**ERROR** to the District Court for Tillman County (Mathews, J.) to review a judgment in favor of defendant in an action brought to have a certain deed absolute declared a mortgage, and for other relief. *Affirmed.* The facts are stated in the opinion of the court.

Mr. George T. Webster for plaintiffs in error.

Messrs. H. P. McGuire and John E. Williams, for defendant in error:

Plaintiff's tender should have been as broad as his obligation.

38 Cyc. 138; 21 Enc. Pl. & Pr. 563; Hart v. Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715; Dorsey v. Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296; Hampton v. Sneckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704.

Kane, Ch. J., delivered the opinion of the court:

This cause was before this court upon its merits in *Krauss v. Potts*, 38 Okla. 674, 135 Pac. 362, where the facts will be found fully stated.

On the former trial the court below found Potts to be an innocent purchaser of the land in controversy, and upon that ground entered judgment in his favor as against

the Krausses, although it found in favor of them upon their contention that the instrument executed by them, purporting to be an absolute conveyance of said real estate to one Hetzel, must be deemed to be a mortgage. This court did not disturb the finding of the trial court that Potts was an innocent purchaser, but held that certain local statutes which are set out in the opinion abridge in this jurisdiction the protection ordinarily extended to an innocent purchaser for value, to the amount of his outlay, with interest, and reversed the cause "with instructions to grant a new trial and proceed in accordance with this opinion."

Upon trial had pursuant to the direction of the supreme court the trial court found the actual outlay of Potts to be as follows: Two thousand, one hundred and twenty-four dollars, the purchase price paid by him to Eva M. Hetzel, with interest thereon at 6 per cent per annum from March 16, 1908, to March 21, 1914; \$2,376, this being the amount of a mortgage placed on the lands by the Hetzels, which was paid by Potts, with interest thereon at the rate of 6 per cent per annum from March 16, 1908; \$257, and interest at 6 per cent from the date of the payment of each year's taxes, as found by the court in its 9th finding of fact; that said Potts had paid by improvements upon said land the following: In April, 1908, \$10; in April, 1908, \$25; and in November, 1908, \$5, for which he was entitled to credit.

The court further found that the plaintiffs were entitled to an accounting by the said Potts for the rental of said land for the time that the same was occupied by the said Potts, at the rate of \$240 per year, with interest thereon at the rate of 6 per cent per annum, as shown by paragraph 8 of the findings of fact herein, being a total of \$1,742, including principal and interest to March 21, 1914; that the plaintiffs were entitled to judgment for the possession of the land in controver-

sy, and that defendant Potts was entitled to a judgment against said land in the sum of \$6,554.22, less the sum of \$1,742, being a total of \$4,812.22, with interest thereon at the rate of 6 per cent per annum from date of judgment, and a decree directing said land to be sold for the payment of the amount due the said Potts, unless the plaintiffs should pay the said Potts the said amount within sixty days from the date of judgment.

Upon judgment and decree being entered in pursuance of the foregoing findings, counsel for plaintiffs presented the following motion:

"Come now the plaintiffs and move the court to vacate, set aside, and hold for naught that part of the judgment and decree wherein it is adjudged that the defendant James M. Potts have a lien upon the land described herein as set forth in the decree, for the reason that said sum so found due the defendant is contrary to law and not supported by the evidence, and that in lieu thereof a judgment be entered in favor of said defendant in the sum of \$3,427.67, the same to be a first lien upon the property involved herein,"—which motion was overruled by the court. Thereupon counsel for plaintiffs filed a motion for new trial, wherein the following assignments raise the only question presented for review to this court, to wit:

"(3) That the court erred in allowing defendant the sum of \$2,124, as the amount he paid Eva M. Hetzel, and giving him credit for interest thereon from March 16, 1908.

"(4) That the court erred in allowing defendant interest upon \$2,124 outlay, or purchase money.

"(5) That the court erred in charging interest upon the \$2,200 Mary K. Hammond mortgage to plaintiff and compounding interest upon interest."

From the foregoing assignments of error it is apparent that the only question now left open for review is whether the trial court erred in allowing interest on the several

items of outlay found to exist in favor of Potts. It has already been settled by this court in its former opinion in *Krauss v. Potts*, supra, that Potts as an innocent purchaser was entitled to the amount of his outlay with interest. This, we take

Judgment—  
law of case—  
former appeal.

it, must be considered as the law of the case. An opinion handed down in a case which is remanded for further proceedings becomes the law of the case. *Richardson v. Penny*, 10 Okla. 32, 61 Pac. 584; *Oklahoma City Electric, Gas & Power Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758.

To avoid the force of this decision, however, counsel for plaintiffs in error in their brief say: "Eighteen hundred dollars was the sum borrowed by Krauss and wife on the land December 10, 1906; they did not offer to pay it until October 26, 1909, when they filed their petition to redeem, etc., and then tendered into court said sum and interest, making their tender in words as follows: 'That said sum of money thus borrowed from George J. Hetzel has never been paid, but these plaintiffs have at all times been ready and willing to pay the same, and now offer to bring into court said sum with the interest that may be due thereon, to be paid to whomsoever this court may decree it to belong.' . . . Potts refused this tender, refused to disclose his outlay, on the first trial took advantage of the favorable decision in his behalf by the trial judge, and when he learned that this judgment of the trial court was erroneous, he changed front, and on March 21, 1914, for the first time, he pleads his outlay, and asks for his equitable lien on the land and interest from date of outlay. Why did he not enter this defense in the first instance? The statute gives him the right to have made the same answer on October 26, 1914."

From this excerpt from the brief of counsel, it is apparent that their contention is that Potts waived the

right to receive interest upon his outlay by refusing to accept the \$1,800 tendered to him as above set out. We are of the opinion that the rule invoked is not applicable to the situation presented by the record before us. Assuming that the allegation from the petition of plaintiffs above set out is sufficient to show a valid tender for \$1,800, plaintiffs still would not be entitled to prevail. The rule is that "a tender made after action has been commenced, in order to bar the recovery of subsequent interest and costs, must be of such sum as will cover the amount due, with interest to the date of the tender and such costs as have accrued in the action up to that time." 38 Cyc. 138.

The action was commenced originally by the plaintiffs upon the theory that the instrument executed by them to the Hetzels, whilst in form a deed, was in fact a mortgage, and that Potts purchased the land from the Hetzels with full notice of the fraud they were attempting to practise upon their apparent grantor. Potts answered that he was an innocent purchaser, and that he was entitled to protection as such. This the plaintiffs denied. It developed that Potts was an innocent purchaser, but that by virtue of a certain local statute he was not entitled to the protection ordinarily extended to an innocent purchaser for value; that under the statute he was only entitled to protection to the extent of his outlay with interest. Now, if we assume that the parties were equally bound to know their respective rights in the premises at the time the suit was originally commenced, then the plaintiffs would have been required to tender to Potts the amount of his outlay, with legal interest thereon up to the time of the tender. In other words, their tender should have been as broad as their obligation. The tender of a less sum than is actually due will not prevent the run-

Tender—effect  
on interest.

ning of interest thereafter on the whole principal, as though tender had been made. 22 Cyc. 1557. Obviously, at that time plaintiffs were of the opinion that they were under no obligation to pay Potts for any outlay he may have incurred. Plaintiffs now contend that Potts should have disclosed his outlay. This does not seem to be the rule. On the contrary, "where the amount due is within the exclusive knowledge of the creditor, and the creditor on demand neglects, or refuses, to indicate the correct amount

—sufficiency—  
knowledge  
of creditor. that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender, nevertheless, will be good." 38 Cyc. 138.

Plaintiffs not only failed to make demand upon the defendant, with the view of ascertaining the correct

amount due, but they took a position which would have made a disclosure on defendant's part absolutely useless. As no item of outlay made by Potts, as found by the trial court, is disputed, it follows from what we have already said that the court did not err in allowing interest on such items.

The judgment of the court below must, therefore, be affirmed.

All the Justices concur.

#### NOTE.

The question considered in the reported case (*KRAUSS v. POTTS*, ante, 1218), as to the insufficiency of the amount offered as affecting a tender, is the subject of an annotation following *GRAVES v. BURCH*, post, 1226.

### CORA V. GRAVES et al., Plffs. in Err.,

v.

### I. L. BURCH.

*Wyoming Supreme Court—June 8, 1919.*

(— Wyo. —, 181 Pac. 354.)

#### Mortgage — complicated computation — effect of inadequate tender — attorneys' fees.

1. That the amount tendered in settlement of a mortgage was slightly less than was in fact due does not prevent disallowance of attorneys' fees, if defendant relied on plaintiff's statement of the amount due, and the determination of the actual amount due was complicated because of the way payments had been made.

[See note on this question beginning on page 1226.]

—assurance to mortgagor — immediate suit to foreclose.

2. A mere assurance by the holder of an overdue mortgage that the mortgagor need not worry about making payment, since the mortgagee does not need the money, is not sufficient to prevent immediate suit to foreclose without demand for payment.

[See 19 R. C. L. 523.]

—demand — attorneys' fees.

3. Previous demand is not necessary to a recovery of attorneys' fees provided by a mortgage in case of foreclosure.

Attorney — provision for fees in mortgage — equitable control.

4. Attorneys' fees provided for in a mortgage are within the equitable control of the court, to allow only such sum as may be reasonable.

[See 19 R. C. L. 569.]

—disallowance by court.

5. Attorneys' fees provided for in a mortgage may be disallowed by the court if recovery is inequitable or unconscionable.

Mortgage — attorneys' fees — lulling mortgagor into inaction.

6. A mortgagee who lulls the mort-

—of less than  
due—failure  
to demand  
disclosure.



gagor into inaction by assurances that he does not need the money, upon notice that the mortgagor will secure it and pay him, cannot recover the attorneys' fees provided for in the mortgage if he immediately begins the foreclosure proceedings without notice to the mortgagor.

[See 19 R. C. L. 569, 570.]

**Bills and notes — purchaser of overdue instruments — equity.**

7. The purchaser of an overdue note secured by mortgage takes it subject to the equities between the original parties.

[See 19 R. C. L. 357.]

**Mortgage — disallowance of attorneys' fees.**

8. Attorneys' fees provided by a

mortgage will not be allowed upon foreclosure where the mortgagor was lulled into inaction by assurances of the mortgagee, who immediately assigned to a stranger who secured the mortgage to aid in settling another matter, and brought suit immediately without demand or notice to the mortgagor, and the total amount due except attorneys' fees was immediately paid into court.

— interest on amount tendered.

9. Interest will not be allowed against defendant in a foreclosure suit, upon the amount tendered and deposited in court.

[See 15 R. C. L. 35.]

**ERROR** to the District Court for Fremont County (Winter, J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note, and for the foreclosure of a mortgage. *Remanded with directions to modify judgment.*

The facts are stated in the opinion of the court.

**Mr. E. H. Fourn,** for plaintiffs in error:

The penalty of an attorney's fee cannot be inflicted until a demand has been made.

*Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 404; *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755; *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032; *Drake v. Pueblo Nat. Bank*, 44 Colo. 49, 96 Pac. 999.

**Mr. John J. Spriggs,** for defendant in error:

A tender which does not include attorneys' fees after the conditions providing therefor become operative should be rejected.

*First Nat. Bank v. Howard*, — Okla. —, 158 Pac. 927; *Bovee v. Helland*, 52 Mont. 151, 156 Pac. 417; *Continental Gin Co. v. Sullivan*, 48 Okla. 332, 150 Pac. 209; *Baker Gin Co. v. N. S. Sherman Mach. & Iron Works*, 31 Okla. 484, 122 Pac. 235.

**Potter, J.,** delivered the opinion of the court:

This is an action upon a promissory note and real estate mortgage securing the same, executed by the plaintiffs in error, Cora V. Graves and Karl De F. Graves, to one John Findlay, and assigned to the defendant in error, I. L. Burch, to recover judgment upon the note for 5 A.L.R.—77.

an unpaid balance due thereon and for the foreclosure of the mortgage. The note and mortgage were assigned to Burch on March 10, 1916, and the action was commenced on the following day, March 11, 1916, and there was indorsed on the summons, as demanded by the praecipe, the following: "Civil action for the recovery of money only. Amount claimed, \$314.46, and mortgage foreclosure, for which plaintiff will take judgment if defendant fails to answer."

As set out in the petition and shown by the evidence, the note was dated October 4, 1910, and was given for the sum of \$800, with interest at the rate of 10 per cent per annum from date until paid, payable by monthly instalments of \$20 each until the principal sum and interest shall be fully paid. It expressly provides that the monthly payments shall be applied, first to payment of accrued interest, and the balance upon the principal. It contains, also, the following provisions: "In case payment shall not be made at the times and as herein provided, we further promise and agree to pay costs of collection, in-

cluding the further and additional amount of \$100 on said principal sum of this note for attorneys' fee, and if any suit or foreclosure proceedings be commenced for the collection of any amount unpaid on this note, said fees shall be added to and included in any judgment hereon. And the makers of this note hereby waive presentation for payment, notice of nonpayment, and jointly and severally consent that time of payment may be extended without notice thereof."

The mortgage also contains a provision for \$100 attorney, solicitor, and counsel fees to be retained out of money arising from the sale of the property authorized thereby upon default in payment of principal or interest, or any part thereof, and that in any proceeding in equity to foreclose the mortgage said solicitor fees shall be taxed as costs in said action.

The petition alleges a large number of payments indorsed on the note, and the dates thereof, respectively, commencing with October 31, 1910, as the date of the first payment of \$20, and ending with the payment of a like sum on October 12, 1915; said last payment being indorsed as the payment due for February, 1914. Judgment was prayed for \$174.21, the balance due upon the principal of the note, \$37 interest due at the date of commencing the action, \$3.25 for insurance premium paid, and the further sum of \$100 for attorneys' fees, and for the sale of the mortgaged premises to satisfy the same. It will be noticed that the total of the sums stated is \$314.46, the amount indorsed upon the summons, and that, omitting the attorney fee and insurance premium, the amount claimed would be \$211.21.

The answer, filed April 7, 1916, admits the execution of the note and mortgage, and alleges that after the note became due, and before it was assigned to plaintiff, the defendants obtained an extension of time for the payment of the bal-

ance due; that the payee Findlay told them that no advantage would be taken of them, or expense incurred, and that they might have additional time to pay the balance, and that relying on that promise and in consideration thereof, the defendants "made additional payments as they could;" that defendants were not notified of the assignment, and no demand for payment was made upon either of them, prior to commencing the action; that the plaintiff knew the note was past due when assigned to him; that the assignment was a breach of faith and a fraud upon defendants; that on March 28, 1916, the defendants tendered to plaintiff the sum of \$225, being the amount due upon the note, with court costs to that date, which tender was refused by the plaintiff, and that the defendants tender said sum into court, being all that is due at the time of filing the answer; that the commencement of suit without demand or notice is "vexatious, unconscionable, and inequitable, and the defendant [plaintiff] ought not to be permitted to obtain any judgment for costs or attorneys' fees against the defendant." We do not find any reply to the answer in the record.

The evidence shows that on the same day that the answer was filed the sum of \$225 was deposited with the clerk of court by counsel for defendants, "as tender to I. L. Burch by Cora V. Graves, to remain in court for claim on note, interest, and costs to March 28, 1916." On the trial the plaintiff testified that there had been an error in the calculation of the interest due on the note, and that the amount actually due for interest when suit was commenced was \$72, instead of \$37, as alleged in the petition; but he also testified that the amount of principal and interest then due was \$237.42. The court found that the amount then due was \$237.21, and the record shows that during the trial "plaintiff having testified . . . that the sum of \$12 was due in addition to the amount claimed

in his petition, the defendants thereupon tendered and paid to the clerk said sum of \$12."

Judgment was rendered for the sum of \$351.38, the total of the following items: Two hundred and thirty-seven dollars and 20 cents, principal and interest due at the commencement of the action, \$14.18, interest on said sum to December 16, 1916, the date of the judgment, and \$100 attorneys' fees, together with the costs of the action, taxed at \$7.65—and a sale of the mortgaged premises was ordered to satisfy the judgment debt, with interest, costs, and expenses and costs of sale. On the date of the judgment also an order staying execution pending appeal was entered, providing "that if defendants leave the money which is now in the hands of the clerk of this court, to be tendered and paid upon any judgment which may be rendered or sustained in said cause," and shall give a bond, as provided by law, in the sum of \$250, execution shall be stayed pending the appeal; and it appears that a bond was given and approved, as provided in said order, on December 23, 1916.

When it appeared by the evidence that an error had been made in alleging the amount of interest due, plaintiff's counsel moved to amend the petition accordingly, and a motion to amend so as to correctly allege the amount of the interest had been filed on May 6, 1916. There does not appear to have been any order made upon either of these motions; but the court, no doubt, considered the petition as amended, without formal order to that effect, since the judgment included a greater amount of interest than the sum alleged, and when the motion was renewed before the close of the testimony the court stated: "We will proceed. It can be done any time before judgment, or even after judgment."

The fact that \$225 was tendered to plaintiff on March 28, 1916, seems to be admitted, by the failure to file a reply denying the

amount of such tender in the answer. But we think the evidence as to the tender is sufficient to show that said amount was tendered, and that it was intended to fully cover the amount claimed by the petition and summons, with costs up to that time, except the attorneys' fee claimed; and the fact that it was so intended was explained at the time and understood by the plaintiff, the defendant in error here. The latter testified as to the tender, in substance, that all that he claimed at the time, except for attorneys' fees, was tendered; but he could not recall the amount, and that he refused it for the reason that it did not include attorneys' fees. There was no evidence of the amount of the court costs at the time of the tender, probably for the reason that no contention was made that the tender was insufficient to cover the same in addition to principal, interest, and insurance then claimed, and that the parties understood it to be sufficient for that purpose. But it appears to have been sufficient, excluding the amount claimed for attorneys' fees, for the judgment shows that up to the conclusion of the trial the costs were only \$7.65. Thus the sum of \$225 tendered exceeded the amount claimed by the petition and summons for principal, interest, insurance, and the court costs up to the time of the judgment, and it was also sufficient to include the interest to the time of the tender, though nothing seems to have been said about that at the time. But it was not sufficient, and was not intended, to cover any claim or allowance for an attorneys' fee.

When the parties entered upon the trial, therefore, the only matter in controversy was the right to recover attorneys' fees, and the only contention by plaintiffs in error here is that it was error to allow such fees; that contention being based upon the fact that the debtors were not notified of the assignment, and no demand was made upon them before suit was brought.

and the fact testified to by Mrs. Graves that after the debt was due, and a short time before the assignment of the note and mortgage, Mr. Findlay told her that he did not need the money and that she need not worry about it at all. Mrs. Graves's testimony as to that matter, after stating that she had a conversation with Mr. Findlay after the note was due and shortly before suit was brought, is as follows:

I called him up on the phone and asked him if I should get this money for him. I told him I would borrow it for him. I told him Mr. Graves was out of work; payments were behind. . . . He said that he didn't need the money, and that I needn't worry myself in the least about it.

Q. Did he tell you you could have all the time you needed to pay it?

A. Yes.

Q. Did he say he wouldn't urge you, or bring suit against you—give you to understand that?

A. Yes; he just said I needn't worry in the least about it, he wasn't needing money.

Q. Did you rely on that?

A. I certainly did.

Q. For that reason you didn't borrow money and pay it?

A. No; but I did go and see about borrowing money. They told me, if I needed money, Mr. Findlay pressed me, I could have it.

This evidence does not show a definite extension of the time of payment, nor any consideration necessary to a valid and binding extension suspending the right to maintain an action upon the note or mortgage. 2 Jones, Mortg. 7th ed. § 1190; 1 Wiltsie, Mortg. Foreclosure, § 467. And, the debt being due and unpaid, no previous demand

Mortgage—  
insurance to  
mortgagor—  
immediate  
suit to foreclose.

was necessary to authorize a suit to recover the principal and interest due and to foreclose the mortgage to satisfy the same. 3 Jones, Mortg. § 1471; 1 Wiltsie, Mortg. Foreclosure, § 49; Henry v. Hodge, 171 Ill. App. 10; Walter v.

Dickson, 175 Pa. 204, 34 Atl. 646. Nor, as a general rule, is a previous demand necessary to a recovery of attorneys' fees provided for in the <sup>—demand—</sup>note or mortgage, <sup>attorneys' fees.</sup> where the right to sue thereon has accrued. Walter v. Dickson, supra; Warwick Iron Co. v. Morton, 148 Pa. 72, 23 Atl. 1065; Wienke v. Smith, — Cal. —, 176 Pac. 42.

But, by the great weight of authority, a provision for attorneys' fees in a note or mortgage is a contract of indemnity only—in the nature of a penalty, as distinguished from liquidated damages—to compensate the payee or holder for an expense which he has necessarily incurred or become liable for, through some default of the maker or mortgagor; and such fees, even where there is a stipulation for the recovery of a certain or stated amount, are within

the equitable control of the court, to allow only such sum <sup>Attorney—  
provision for  
fees in mort-  
gage—equitable  
control.</sup> as may be reasonable.

3 R. C. L. 896; 8 C. J. 1101; 27 Cyc. 1785, 1786; 3 Jones, Mortg. 7th ed. § 1606; Florence Oil & Ref. Co. v. Hiawatha Gas, Oil, & Ref. Co. 55 Colo. 378, 135 Pac. 454; Mechanics' American Nat. Bank v. Coleman, 122 C. C. A. 338, 204 Fed. 24; Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457; Coley v. Coley, 94 S. C. 386, 77 S. E. 49; Colley v. Summers Parrott Hardware Co. 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375; Triplett v. Second Nat. Bank, 121 Va. 189, 92 S. E. 897; Jarvis v. Stoffal, 54 Pa. Super. Ct. 362; Reed v. Catlin, 49 Wis. 686, 6 N. W. 326. The general principle, under a provision for a certain amount, is well stated by Judge Gabbert in the Colorado case cited, as follows: "We think the correct construction of such a stipulation, which has been announced in many cases, is that a provision for a fixed amount for attorneys' fees is an agreement to indemnify the holder against the expenses incurred in the employing of an attorney for the enforcement

of collection when the maker fails to keep his agreement, and that when the question is properly raised, regarding the reasonableness of a stipulated amount, the holder can only recover such part thereof as will reimburse him for the reasonable and necessary attorneys' fees he has been compelled to pay, or has become liable for, in enforcing collection of the note"

And in the exercise of such control and a sound discretion such fees may be disallowed altogether, under circumstances rendering their recovery inequitable or unconscionable. 8 C. J. 1100, § 1434; Reed v. Catlin, 49 Wis. 686, 6 N. W. 326; Williams v. Williams, 117 Wis. 125, 94 N. W. 25; Castle v. Castle, 78 Mich. 298, 44 N. W. 378; Lewis v. Germania Sav. Bank, 96 Pa. 86; Moore's Appeal, 110 Pa. 433, 1 Atl. 593; Lindley v. Ross, 137 Pa. 629, 20 Atl. 944; National Sav. Fund & Bldg. Asso. v. Waters, 141 Pa. 498, 21 Atl. 666; Taylor v. King, 97 S. C. 477, 81 S. E. 172; Barron v. Thompson, — S. C. — 97 S. E. 840; Scott v. Carl, 24 Pa. Super. Ct. 460; Haynes v. Halverton, 51 Tex. Civ. App. 228, 111 S. W. 166; Mechanics' American Nat. Bank v. Coleman, 122 C. C. A. 338; 204 Fed. 24; Fourth Nat. Bank v. Stahlman, 132 Tenn. 367, L.R.A.1916A, 568, 178 S. W. 942; Enid Conservative Invest. Co. v. Porter, 45 Okla. 406, 145 Pac. 805.

In Lewis v. Germania Sav. Bank, 96 Pa. 86, a defense was interposed that there had been an agreement extending the time for payment, and it was also claimed that because of the agreement to give further time the plaintiff was not entitled to recover attorneys' fees. After stating that there was nothing substantial in the alleged agreement to give further time, for the reason that no sufficient consideration for such agreement was disclosed, the court referred to the objection to the recovery of attorneys' fees as the only matter about which there could be any doubt, and stat-

ed the fact upon which the objection was based and the principle to be applied as follows: "It is alleged by the plaintiff in error that prior to June 4th he called at the bank and offered to pay the interest falling due on that day, and also the principal debt, but was informed by the proper officer of the bank, that 'they did not need the money, and to let it stand until the Butler county matter was disposed of,' etc., and that shortly afterwards, without making any request or demand for payment of principal or interest, suit was brought on the mortgage. It is contended that under the circumstances detailed in the affidavits of defense, as to the agreement to give further time, the plaintiff below was not entitled to recover attorneys' commissions. We think this would be so if the defendant, even after suit was brought, had been reasonably prompt in paying or tendering payment of the debt and interest secured by the mortgage. In Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457, it is held that, while stipulations for the payment of attorneys' commissions in mortgages and other securities are valid, they are, nevertheless, subject to the equitable control of the court, and will be enforced only to the extent of compensating the plaintiff for reasonable and necessary expenses of collection. Applying this doctrine to the case of a debtor who has been misled by his creditors and thrown off his guard in the manner the plaintiff in error alleges he was, it would not be an unreasonable exercise of the equitable power of the court to refuse any allowance for attorneys' commissions; but, to justify such action on the part of the court, the defendant should attest his sincerity and good faith by promptly paying or tendering the amount of debt and interest, exclusive of commissions."

And because there had not been a tender in that case of the amount of the debt and interest, but the defendant undertook to defend against a part of the plaintiff's

claim, and failed to pay or tender the residue, it was held that he was not entitled to equitable relief from the stipulation for attorneys' commissions. In *Moore's Appeal*, 110 Pa. 433, 1 Atl. 593, judgment had been entered upon a judgment note before it fell due, and the plaintiff, upon the maturity of the note, refused a tender of the full amount due, excluding attorneys' commissions. While the case is not in point on the facts, it is important because of a reference in the opinion to a former case, apparently not published in the official reports. The court said: "To permit such a practice as this, where the defendant offers to pay all that is due at the maturity of the obligation, would be sanctioning an intolerable and unreasonable oppression. . . . We said in *Imler v. Imler*, 94 Pa., on page 375: 'It was never intended, nor can we permit such a clause to be used, to compel a debtor to pay attorneys' commissions where the latter does not dispute the claim and pays at maturity.' In *Johnson v. Marsh*, 42 Phila. Leg. Int. 92, we refused to allow commissions even after execution issued, because there was no satisfactory evidence of a demand for payment before entering judgment, although the debt had passed maturity."

It was explained in *Imler v. Imler* that the intention of stipulations for attorneys' fees in instruments for the payment of money is that the creditor shall be indemnified for his reasonable counsel fees, where it becomes necessary to employ counsel to collect the money. In a later case in the same court (*Lindley v. Ross*, 137 Pa. 629, 20 Atl. 944), where the fees were disallowed, it appeared that there had been some negotiation between the parties for making a partial payment before the entry of judgment authorized by the note, and the defendants claimed that the plaintiff had agreed when the money was borrowed that judgment should not be entered until they had notice and an opportunity to pay, if pay-

ment was required. Whether the fact of such agreement was established or not does not clearly appear; but the trial court held that demand was necessary before entry of judgment to authorize a recovery of the commissions, and that conclusion, upon the facts of the case, was sustained by the supreme court, that court saying: "We think the learned judge below was right in holding, under the facts of this case, that there must be a demand and refusal to pay, before the defendants in the judgment can be subjected to the payment of attorneys' commissions. This was the rule laid down in *Johnson v. Marsh*, 21 W. N. C. 570, where it was said: 'In the absence of satisfactory evidence of a demand for payment before entering the judgment and issuing the execution, we think the necessity of resorting to the services of an attorney for collecting the money does not appear, and, without proof of such necessity, the defendants ought not to be subjected to the payment of the commissions.'"

In *National Sav. Fund & Bldg. Asso. v. Waters*, 141 Pa. 498, 21 Atl. 666, it appeared that the mortgage debtor, upon receiving information that the mortgage was due and that payment had been demanded, requested a statement of the amount due, and was given such a statement, concluding with the words, "Good only until September 11, 1890," and that, relying upon said words, the debtor, on the date stated, paid the amount of the debt, with interest, taking a receipt therefor, reciting that the costs were to be adjudicated between the parties. It was held that the trial court properly entered judgment for the office costs only, excluding attorney's commission, the court saying: "The services of the latter were not needed for the collection of the money. Indeed, no object is apparent for issuing the scire facias upon the mortgage, except to create a plausible pretext for a charge of attorney's commissions. Under the

statement furnished by the plaintiff company to the defendants, on August 30th, the latter were entitled, under any fair and reasonable construction thereof, to pay the money at any time on or before September 11th. The issuing of a scire facias between those dates, so far as we can gather from the record, was unnecessary, as well as a breach of faith. It certainly does not entitle the plaintiff to claim an attorney's commission."

The facts in the Wisconsin case of *Williams v. Williams*, 117 Wis. 125, 94 N. W. 25, were that the action to foreclose a mortgage was commenced on January 29, 1902, and on the following day the defendant deposited in court an amount sufficient to pay the amount demanded, excluding costs and solicitor's fee, and moved to dismiss without costs, alleging that on January 28th the mortgage was recorded in the name of and belonged to the plaintiff's attorney, on which day defendant's attorney offered to pay the same to said holder, and upon it appearing that the latter was attempting to evade a payment, defendant tendered the full amount of the mortgage, with interest, which the said holder absolutely refused to receive, or to receive any sum whatever in payment, and that said holder then immediately transferred the mortgage to plaintiff and brought suit upon it. It was asserted, also, in support of the motion to dismiss, that the refusal of payment when tendered, and the immediate commencement of the suit, was intended to harass and distress the defendant, and impose unnecessary costs and expenses. The amount deposited in court was ordered to be paid to plaintiff in full of the amount due on the mortgage, and the cause was dismissed, without costs to either party. That action of the trial court was affirmed on appeal, the supreme court saying: "The record, however, presents no attempt to set up the previous tender of the mortgage debt as a defense to the action, but merely an appeal to the

court to dismiss the action because continuance of the litigation would be wholly needless, the defendants having performed all that plaintiff sought to enforce by her suit, namely, paid the full amount demanded by the complaint. That courts have inherent power to protect themselves against fictitious and futile litigation is unquestionable [citing cases]. . . . Appellant further urges, however, that she was entitled to the costs already incurred; and, since the deposit of money and motion to dismiss were predicated upon assumption that she was within her strict right in commencing action, that contention might be unanswerable in action at law, where costs are matter of strict statutory right. This, however, is a suit in equity, wherein allowance of costs is discretionary, at least upon dismissal. . . . In the present case we are satisfied that the conduct of plaintiff and her attorney was such as to fully justify the withholding of costs from her. Confessedly the amount due upon the mortgage was offered her attorney before suit, when he apparently owned it; and he was notified that pay was ready at any time, whether a legal tender was made or not. His only excuse for nonacceptance was that he was engaged in preparing a lengthy bill of exceptions and could not spare the time to look up the mortgage; yet he did take time immediately, not only to find it, but to formally transfer it to plaintiff, and to prepare the voluminous complaint and other papers necessary for commencing this foreclosure action, which he caused to be served with all haste, instead of notifying defendants' attorney that he would accept payment. The only motive conceivable for such conduct is not one which commends itself to courts of equity or invites their favors."

It appeared in the Texas case cited (*Haynes v. Halverson*), which was a suit upon vendor's lien notes, that the defendant had gone to plaintiff's office to pay before suit was brought, but found that the latter was out

of the state; that he then went to the office of another party, understanding that the latter was collecting money for the plaintiff, who told the defendant that he did not have the notes for collection, or in his possession, and knew nothing about them; and defendant testified that he had been ready and willing to pay the notes when presented, but did not learn of the plaintiff's return until the suit was commenced, and that on the next day he went to the plaintiff, offering to pay the notes and interest, but the same was refused, unless attorneys' fees were also paid; the plaintiff also telling the defendant that he had sued him without giving him notice for the reason that the defendant had testified against him in a certain suit. On appearance day the defendant again tendered the principal and interest. It was held that the recovery of the stipulated attorneys' fees was properly denied.

In the South Carolina case of *Baron v. Thompson*, — S. C. —, 97 S. E. 840, it appeared that a second note and mortgage had been executed and delivered, to take the place of a note and mortgage previously executed, but the receivers of the payee corporation, finding the first note and mortgage among the papers of the corporation, brought suit to foreclose that mortgage, and, upon being apprized of the fact that a second note and mortgage had been given to take it up, agreed to and did deliver up the first for cancellation, so as to permit another loan to be made to pay off the second, according to an arrangement made with the bank to which said second note and mortgage had been assigned. But shortly after that the receivers and their attorney paid said note and mortgage off at the bank with receivership funds, and then refused to accept payment from the defendant, unless he would pay attorneys' fees. Defendant, refusing to pay such fees, tendered the amount due in full settlement, which was refused, and foreclosure proceedings were brought on the

note and mortgage so acquired by the receivers. The amount of the tender was then paid into court. It was held upon such facts that there was no necessity for the suit and that plaintiffs were not entitled to attorneys' fees.

Now, in the case at bar, it is clear that Mrs. Graves was lulled into a sense of security by Mr. Findlay's stating to her, when she was proposing to borrow the money to pay the debt, that he was not needing the money and she need not worry about it at all, and that her inaction in the matter, beyond ascertaining that she could obtain the money, if needed, was caused thereby; and we think she had a right to believe from what Findlay said that no suit would be brought, or legal proceedings taken to collect the note or foreclose the mortgage, without further notice giving an opportunity for payment. Had Findlay remained the owner

**Mortgage—  
attorneys' fees—  
lulling mortgagor into  
inaction.**

of the note and mortgage, and brought the suit when it was brought, without previous demand or notice, it would certainly have been a breach of faith on his part; and as the mortgage is not a negotiable instrument, and the note was overdue when purchased by the plaintiff, the latter took them subject to all equities existing at the time of the assignment, if not, indeed, at the time the defendants thereafter learned of the assignment. *Castle v. Castle*, 78 Mich. 298, 44 N. W. 378.

**Bills and notes—  
purchaser of  
overdue instru-  
ments—equity.**

But it further appears that the recovery of this debt was not the sole object of the suit, for, as shown by the plaintiff's testimony, it was brought to compel a settlement, also, of another matter between the plaintiff and Mr. Graves. Explaining his purpose in buying the note and mortgage and bringing suit, the plaintiff testified that he had a note against Mr. Graves upon which he had secured a judgment; that Graves had filed a petition in bank-



ruptcy to evade that note; that on the basis of certain statements of Graves to the referee in bankruptcy "we claimed an interest on this property, and so I, in order to eliminate anyone else having an interest in the property, except me and the people that own it, I bought that note and mortgage, so that when it came to any proceedings in the matter there would be no one else it would be necessary to call upon at all;" that it was done so that he might be in a position to know the interest of Mr. Graves in this property, and how he acquired that interest; and he testified directly that the note was bought to compel a settlement of the other matter, and that the suit was brought to compel a settlement of both matters. He testified, also, that after the suit was brought he had a conversation with defendants, in which he proposed a settlement of both matters, and on his own responsibility, but without authority of his attorney, told them that if both matters were settled as proposed the total attorneys' fees would be only \$50.

The note and mortgage are signed by both Mr. and Mrs. Graves, but the latter's name is first signed to both, and the parties executing the mortgage are described therein as follows: "Cora V. Graves, and Karl De F. Graves, her husband,"—seeming to indicate that Mrs. Graves is the principal debtor, and at least the record owner of the property. A sufficient amount having been promptly tendered after suit was brought to cover all that was claimed by the petition and summons and the costs and interest up to the time of the tender, excluding attorneys' fees, and the tender having been kept good by a deposit of the amount with the clerk of the court, we are

Mortgage—  
disallowance  
of attorneys'  
fees.

of the opinion that  
the allowance of any  
amount for attor-  
neys' fees is inequi-

table, and that it was error to include any amount therefor in the

judgment. The defendants did not then know of the mistake in the amount of the interest due, but relied upon the averment of the petition as to the amount. The computation of interest because of the many monthly payments, some of which were not made promptly, was a complicated matter, and the mistake shown by the evidence was not chargeable to the defendants. Mrs. Graves testified that she had been informed before suit, at or about the time of her conversation with Mr. Findlay, that the balance of principal due was \$171, or \$174, but that she did not know the amount of the interest. When it appeared that a mistake had been made, an additional amount, supposed to be sufficient to cover the difference, was tendered, and also deposited with the clerk. That tender and deposit seems to have

—complicated  
computation—  
effect of inade-  
quate tender—  
attorneys' fees.

lacked 21 cents to make it cover the exact amount of the difference, for the amount shown to have been due of principal and interest, upon curing the mistake in interest, was \$237.21, but that it was not sufficient does not appear to have been suggested upon the trial. By the judgment, interest was allowed upon the entire amount due at the commencement of the action to the date of judgment. The defendant should not be required to pay interest upon the amount originally tendered and deposited in court, viz., \$225.

—interest  
on amount  
tendered.

The cause will be remanded, with directions to modify the judgment, by excluding the amount of the attorneys' fees allowed thereby, and that portion of the interest allowed from the commencement of the action equaling the interest upon the sum of \$225, the amount of the original tender.

Beard, Ch. J., concurs.

Blydenburgh, J., being ill, did not participate in the decision.

# ANNOTATION.

## Tender as affected by insufficiency of amount offered.

- I. Scope, 1226.
- II. Generally, 1226.
- III. Omission of particular items, 1228.
- IV. Purposes for which tender is insufficient, 1230.
- V. Effect of mistake or lack of knowledge of true amount, 1232.
- VI. Trivial deficiencies, 1234.

### I. Scope.

This note does not embrace questions as to the amount which should have been tendered or the items which should have been included in particular cases. It only includes questions as to the effect of tendering a less amount than that which should have been tendered. For example, it does not embrace questions as to the creditor's right to interest, costs, or attorneys' fees, but only questions as to the effect of failing to include such items, assuming that the creditor is entitled thereto. Questions as to the right of the debtor to make a partial payment or the effect of a tender of a sum as a partial payment, and questions as to the right of the debtor to deduct a set-off and tender the balance, have also been excluded.

### II. Generally.

As a general rule, a tender must include everything to which the creditor is entitled, and a tender of any less sum is nugatory and ineffective as a tender.

**United States.** — *Colby v. Reed* (1879) 99 U. S. 560, 25 L. ed. 484; *Lilienthal v. McCormick* (1902) 54 C. C. A. 475, 117 Fed. 89; *Leitch v. Union R. Transp. Co.* (1875) 7 Chicago Leg. News, 291, Fed. Cas. No. 8,224; *Hus v. Kempf* (1879) 10 Ben. 231, Fed. Cas. No. 6,943; *L'Homme-dieu v. The H. L. Dayton* (1889) 38 Fed. 926.

**Alabama.** — *Smith v. Anders* (1852) 21 Ala. 783; *McCalley v. Otey* (1893) 103 Ala. 469, 15 So. 945; *Ebersole v. Addington* (1908) 156 Ala. 575, 46 So. 849.

**California.** — *San Pedro Lumber Co. v. Reynolds* (1896) 111 Cal. 588, 44

Pac. 309; *Colton v. Oakland Bank* (1902) 137 Cal. 376, 70 Pac. 225; *Rauer's Law & Collection Co. v. Sheridan-Proctor Co.* (1919) — Cal. App. —, 181 Pac. 71.

**Connecticut.** — *People's Sav. Bank v. Norwalk* (1888) 56 Conn. 547, 16 Atl. 257.

**Florida.** — *Chandler v. Wright* (1878) 16 Fla. 510.

**Georgia.** — *Lamar v. Sheppard* (1890) 84 Ga. 561, 10 S. E. 1084; *Smith v. Pilcher* (1908) 130 Ga. 350, 60 S. E. 1000; *Wiggins v. Sheppard* (1916) 145 Ga. 835, 90 S. E. 56.

**Illinois.** — *Sweetland v. Tuthill* (1870) 54 Ill. 215; *Cheney v. Roodhouse* (1890) 135 Ill. 257, 25 N. E. 1019, reversing (1889) 32 Ill. App. 49; *McDaniel v. Upton* (1891) 45 Ill. App. 151; *Rogers Grain Co. v. Jansen* (1904) 117 Ill. App. 137; *O'Meara v. Cardiff Coal Co.* (1910) 154 Ill. App. 321.

**Indiana.** — *Bailey v. Troxell* (1873) 43 Ind. 432; *Rose v. Duncan* (1874) 49 Ind. 269; *Duckwall v. Jones* (1901) 156 Ind. 682, 58 N. E. 1055, affirmed on rehearing in (1900) 156 Ind. 686, 60 N. E. 797; *Chicago & S. E. R. Co. v. Woodard* (1902) 159 Ind. 541, 65 N. E. 577; *Coulter v. Clark* (1891) 2 Ind. App. 512, 28 N. E. 723; *Rouyer v. Miller* (1896) 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

**Iowa.** — *Freeman v. Fleming* (1857) 5 Iowa, 460; *Brandt v. Chicago, R. I. & P. R. Co.* (1868) 26 Iowa, 114; *Helphrey v. Chicago & R. I. R. Co.* (1870) 29 Iowa, 480; *Barnes v. Greene* (1870) 30 Iowa, 114; *McWhirter v. Crawford* (1897) 104 Iowa, 550, 72 N. W. 505, 73 N. W. 1021; *Wood v. Howland* (1904) 127 Iowa, 394, 101 N. W. 756; *Sansone v. Crocker* (1919) — Iowa, —, 170 N. W. 796.

**Kansas.** — *Sanford v. Bartholomew* (1885) 33 Kan. 38, 5 Pac. 429.

**Kentucky.** — *Haddix v. Wilson* (1868) 3 Bush, 523; *Samuels v. Simmons* (1901) 22 Ky. L. Rep. 1586, 60 S. W. 937.

**Louisiana.** — *Benton v. Roberts*

(1847) 2 La. Ann. 243; Louisiana Molasses Co. v. Le Sassier (1900) 52 La. Ann. 2070, 28 So. 217, 223; Briede v. Babst (1912) 131 La. 159, 59 So. 106.

**Maine.**—Marshall v. Wing (1862) 50 Me. 62; Rolfe v. Patrons' Androscoggin Mut. F. Ins. Co. (1909) 106 Me. 345, 76 Atl. 879.

**Maryland.**—McNiece v. Eliason (1893) 78 Md. 168, 27 Atl. 940.

**Massachusetts.**—Boyden v. Moore (1809) 5 Mass. 365; Whipple v. Newton (1835) 17 Pick. 168; Emerson v. White (1858) 10 Gray, 351; Weld v. Eliot Five Cents Sav. Bank (1893) 158 Mass. 339, 33 N. E. 519; Chapin v. Chapin (1894) — Mass. —, 36 N. E. 746.

**Michigan.**—Thurber v. Jewett (1854) 3 Mich. 295; Shutes v. Woodward (1885) 57 Mich. 213, 23 N. W. 775; Emerson v. Kinne (1896) 110 Mich. 678, 68 N. W. 982; Zells v. Stockwell (1912) 171 Mich. 268, 137 N. W. 67; Jones v. Berkey (1914) 181 Mich. 472, 148 N. W. 375.

**Minnesota.**—Dickerson v. Hayes (1879) 26 Minn. 100, 1 N. W. 834; Moore v. Norman (1890) 43 Minn. 428, 9 L.R.A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; Bank of Benson v. Hove (1890) 45 Minn. 40, 47 N. W. 449; Mjones v. Yellow Medicine County Bank (1891) 45 Minn. 335, 47 N. W. 1072; Seeger v. Smith (1898) 74 Minn. 279, 77 N. W. 3; Spoon v. Frambach (1901) 83 Minn. 301, 86 N. W. 106; Kingsley v. Anderson (1908) 103 Minn. 510, 115 N. W. 642, 116 N. W. 112.

**Mississippi.**—Collier v. White (1889) 67 Miss. 133, 6 So. 618.

**Nebraska.**—McEldon v. Patton (1903) 4 Neb. (Unof.) 259, 93 N. W. 938.

**New Hampshire.**—Thurston v. Blaisdell (1836) 8 N. H. 367.

**New Jersey.**—Shotwell v. Dennman (1793) 1 N. J. L. 174; Wright v. Behrens (1877) 39 N. J. L. 413; Keiler v. Bunn (1915) 84 N. J. Eq. 519, 94 Atl. 402.

**New York.**—Hunter v. Le Conte (1827) 6 Cow. 728; Farr v. Smith (1832) 9 Wend. 338, 24 Am. Dec. 162; Retan v. Drew (1838) 19 Wend. 304; Graham v. Linden (1872) 50 N. Y.

547; Tuthill v. Morris (1880) 81 N. Y. 94; Equitable Life Assur. Soc. v. Von Glahn (1887) 107 N. Y. 637, 13 N. E. 793; Mitchell v. Cook (1859) 29 Barb. 243; Woodworth v. Morris (1870) 56 Barb. 97; Eaton v. Wells (1880) 22 Hun, 123, affirmed in (1880) 82 N. Y. 576; Re Wallace (1889) 24 N. Y. S. R. 405, 5 N. Y. Supp. 31; Rockefeller v. Weiderwax (1849) 3 How. Pr. 382; People v. Banker (1852) 8 How. Pr. 258; Bernstein v. Levy (1901) 34 Misc. 772, 68 N. Y. Supp. 833; Globe Soap Co. v. Liss (1901) 36 Misc. 199, 78 N. Y. Supp. 153; James Reilly's Sons Co. v. Aaron (1904) 86 N. Y. Supp. 732; Wicks v. London & L. F. Ins. Co. (1905) 111 N. Y. Supp. 65; Margolis v. Wittman (1918) 169 N. Y. Supp. 573; Linker v. Folz (1918) 170 N. Y. Supp. 436.

**North Dakota.**—Ryding v. Hanson (1915) 30 N. D. 99, 152 N. W. 120.

**Ohio.**—Burt v. Dodge (1844) 13 Ohio, 131; Hoppe & S. Bottling Co. v. Sacks (1895) 11 Ohio C. C. 3, 5 Ohio C. D. 306; Smith v. Merchants' & F. Bank (1897) 14 Ohio C. C. 199, 8 Ohio C. D. 176.

**Oklahoma.**—Bell v. Riggs (1912) 34 Okla. 834, 41 L.R.A. (N.S.) 111, 127 Pac. 427; KRAUSS v. PORTS (reported herewith) ante, 1213; First Nat. Bank v. Howard (1916) — Okla. —, 158 Pac. 927.

**Oregon.**—Kelsay v. Taylor (1910) 56 Or. 13, 107 Pac. 609.

**Pennsylvania.**—McDowell v. Glass (1835) 4 Watts, 389; Pershing v. Feinberg (1902) 203 Pa. 144, 52 Atl. 22; McKibbin v. Peters (1897) 19 Pa. Co. Ct. 36, affirmed in (1898) 185 Pa. 518, 40 Atl. 288.

**South Carolina.**—Hinchy v. Foster (1826) 14 S. C. L. (3 M'Cord) 428; Baker v. Gasque (1848) 34 S. C. L. (3 Strobb.) 25; McClendon v. Wells (1883) 20 S. C. 514.

**South Dakota.**—Juckett v. Fargo Mercantile Co. (1905) 19 S. D. 150, 102 N. W. 604.

**Texas.**—Henry v. Sansom (1896) — Tex. Civ. App. —, 36 S. W. 122; San Antonio v. Campbell (1900) — Tex. Civ. App. —, 56 S. W. 130; Bolton v. G. C. Gifford & Co. (1907) 45 Tex. Civ. App. 140, 100 S. W. 210; Schwant-

kowsky v. Dykowsky (1910) — Tex. Civ. App. —, 132 S. W. 373; Dawson v. Falfurrias State Bank (1915) — Tex. Civ. App. —, 181 S. W. 553; California State L. Ins. Co. v. Elliott (1917) — Tex. Civ. App. —, 193 S. W. 1096; Barreda v. Merchants' Nat. Bank (1918) — Tex. Civ. App. —, 206 S. W. 726; Tucker v. McCullough (1919) — Tex. Civ. App. —, 209 S. W. 236.

Vermont.—Cree v. Lord (1853) 25 Vt. 498; Smith v. Wilbur (1861) 35 Vt. 133; Patnote v. Sanders (1868) 41 Vt. 66, 98 Am. Dec. 564; Willey v. Laraway (1892) 64 Vt. 566, 25 Atl. 435.

Virginia.—Shobe v. Carr (1811) 3 Munf. 10.

Wyoming. — Francis v. Brown (1914) 22 Wyo. 528, 145 Pac. 750.

England. — Astley v. Reynolds (1732) 2 Strange, 915, 93 Eng. Reprint, 939.

Canada.—British Columbia Land & Invest. Agency v. Ishitaka (1911) 45 Can. S. C. 302; Bauld v. Fraser (1901) 34 N. S. 178.

And see also Cotton v. Godwin (1840) 7 Mees. & W. 147, 151 Eng. Reprint, 715, 9 Dowl. P. C. 763, 10 L. J. Exch. N. S. 243; Hesketh v. Fawcett (1843) 12 L. J. Exch. N. S. 326, 11 Mees. & W. 356, 152 Eng. Reprint, 841, 2 Dowl. N. S. 827; Dixon v. Clark (1848) 5 C. B. 365, 136 Eng. Reprint, 919, 5 Dowl. & L. 155, 16 L. J. C. P. N. S. 237; Hardingham v. Allen (1848) 5 C. B. 793, 136 Eng. Reprint, 1091, 17 L. J. C. P. N. S. 198, 12 Jur. 584; Searles v. Sadgrove (1855) 5 El. & Bl. 639, 119 Eng. Reprint, 618, 25 L. J. Q. B. N. S. 15, 4 Week. Rep. 53, though the theory of some, at least, of these cases, seems to be as stated in Dixon v. Clark (1848) 5 C. B. 365, 136 Eng. Reprint, 919, 5 Dowl. & L. 155, 16 L. J. C. P. N. S. 237, that after a demand of the whole sum originally due is made and refused the subsequent tender of part of it is bad, notwithstanding that by part payment, or by other means, the debt may have been reduced in the interim to the sum tendered.

### III. Omission of particular items.

Thus, if the amount of the tend-

er does not include the interest, or all of the interest to which the creditor is entitled, it is bad.

United States. — Hus v. Kempf (1879) 10 Ben. 231, Fed. Cas. No. 6,943.

Alabama.—Smith v. Anders (1852) 21 Ala. 783.

California.—Rauer's Law & Collection Co. v. Sheridan-Proctor Co. (1919) — Cal. App. —, 181 Pac. 71.

Connecticut.—People's Sav. Bank v. Norwalk (1888) 56 Conn. 547, 16 Atl. 257.

Florida. — Chandler v. Wright (1878) 16 Fla. 510.

Georgia. — Wiggins v. Sheppard (1916) 145 Ga. 835, 90 S. E. 56.

Indiana.—Rose v. Duncan (1874) 49 Ind. 269; Chicago & S. E. R. Co. v. Woodard (1902) 159 Ind. 541, 65 N. E. 577.

Massachusetts.—Weld v. Eliot Five Cents Sav. Bank (1893) 158 Mass. 339, 33 N. E. 519.

New York. — Tuthill v. Morris (1880) 81 N. Y. 94; Woodworth v. Morris (1870) 56 Barb. 97; Re Wallace (1889) 24 N. Y. S. R. 405, 5 N. Y. Supp. 31; Bernstein v. Levy (1901) 34 Misc. 772, 68 N. Y. Supp. 833; Globe Soap Co. v. Liss (1901) 36 Misc. 199, 73 N. Y. Supp. 153; James Reilly's Sons Co. v. Aaron (1904) 86 N. Y. Supp. 732.

Ohio.—Smith v. Merchants' & F. Bank (1897) 14 Ohio C. C. 199, 8 Ohio C. D. 176.

South Carolina. — McClendon v. Wells (1883) 20 S. C. 514.

Texas.—Schwantkowsky v. Dykowsky (1910) — Tex. Civ. App. —, 132 S. W. 373; California State L. Ins. Co. v. Elliott (1917) — Tex. Civ. App. —, 193 S. W. 1096; Barreda v. Merchant's Nat. Bank (1918) — Tex. Civ. App. —, 206 S. W. 726.

So, if the creditor has become entitled to costs by reason of the commencement of an action or other proceeding, a tender not including such costs, or not including the full amount of costs, is insufficient.

United States. — Colby v. Reed (1879) 99 U. S. 560, 25 L. ed. 484;

**Hus v. Kempf** (1879) 10 Ben. 231, Fed. Cas. No. 6,943.

**Alabama.**—**Smith v. Anders** (1852) 21 Ala. 783.

**Illinois.** — **Sweetland v. Tuthill** (1870) 54 Ill. 215; **McDaniel v. Upton** (1891) 45 Ill. App. 151; **Rogers Grain Co. v. Jansen** (1904) 117 Ill. App. 137; **O'Meara v. Cardiff Coal Co.** (1910) 154 Ill. App. 321.

**Indiana.**—**Duckwall v. Jones** (1901) 156 Ind. 682, 58 N. E. 1055, affirmed on rehearing (1901) 156 Ind. 686, 60 N. E. 797.

**Iowa.**—**Freeman v. Fleming** (1857) 5 Iowa, 460; **Barnes v. Greene** (1870) 30 Iowa, 114; **Sansone v. Crocker** (1919) — Iowa, —, 170 N. W. 796.

**Kentucky.** — **Samuels v. Simmons** (1901) 22 Ky. L. Rep. 1586, 60 S. W. 937.

**Louisiana.**—**Briede v. Babst** (1912) 131 La. 159, 59 So. 106.

**Maine.**—**Marshall v. Wing** (1862) 50 Me. 62.

**Maryland.** — **McNiece v. Eliason** (1893) 78 Md. 168, 27 Atl. 940.

**Massachusetts.**—**Whipple v. Newton** (1835) 17 Pick. 168; **Emerson v. White** (1858) 10 Gray, 351.

**Michigan.** — **Thurber v. Jewett** (1854) 3 Mich. 295.

**Minnesota.** — **Bank of Benson v. Hove** (1890) 45 Minn. 40, 47 N. W. 449; **Seeger v. Smith** (1898) 74 Minn. 279, 77 N. W. 3.

**Mississippi.** — **Collier v. White** (1889) 67 Miss. 133, 6 So. 618.

**Nebraska.** — **McEldon v. Patton** (1903) 4 Neb. (Unof.) 259, 93 N. W. 938.

**New Hampshire.** — **Thurston v. Blaisdell** (1836) 8 N. H. 367.

**New Jersey.** — **Wright v. Behrens** (1877) 39 N. J. L. 413; **Keiler v. Bunn** (1915) 84 N. J. Eq. 519, 94 Atl. 402.

**New York.**—**Hunter v. Le Conte** (1827) 6 Cow. 728; **Farr v. Smith** (1832) 9 Wend. 338, 24 Am. Dec. 162; **Retan v. Drew** (1838) 19 Wend. 304; **Tuthill v. Morris** (1880) 81 N. Y. 94; **Eaton v. Wells** (1880) 22 Hun, 123, affirmed in (1880) 82 N. Y. 576; **Rockefeller v. Weiderwax** (1849) 3 How. Pr. 382; **People v. Banker** (1852) 8 How. Pr. 258; **Bernstein v. Levy** (1901) 34 Misc. 772, 68 N. Y. Supp.

833; **Globe Soap Co. v. Liss** (1901) 36 Misc. 199, 73 N. Y. Supp. 153; **James Reilly's Sons Co. v. Aaron** (1904) 86 N. Y. Supp. 732; **Linker v. Folz** (1918) 170 N. Y. Supp. 436.

**North Dakota.**—**Ryding v. Hanson** (1915) 30 N. D. 99, 152 N. W. 120.

**Ohio.** — **Burt v. Dodge** (1844) 13 Ohio, 131.

**Oregon.**—**Kelsay v. Taylor** (1910) 56 Or. 13, 107 Pac. 609.

**Pennsylvania.**—**M'Dowell v. Glass** (1835) 4 Watts, 389.

**South Carolina.**—**Hinchy v. Foster** (1826) 14 S. C. L. (3 M'Cord) 428; **McClendon v. Wells** (1884) 20 S. C. 514.

**Texas.**—**Dawson v. Falfurrias State Bank** (1915) — Tex. Civ. App. —, 181 S. W. 553.

**Vermont.**—**Cree v. Lord** (1853) 25 Vt. 498; **Smith v. Wilbur** (1862) 35 Vt. 133; **Willey v. Laraway** (1892) 64 Vt. 566, 25 Atl. 435.

In **Whipple v. Newton** (1835) 17 Pick. (Mass.) 168, where separate actions were brought against the maker and indorser of a note, a payment into court by the indorser and an offer to pay the costs of the action against the maker were held insufficient where there was no offer to pay the costs of the other action against him as indorser.

And if a creditor has become entitled to attorney's fees, stipulated for in the contract, a failure to include such fees renders the tender bad. **Duckwall v. Jones** (1901) 156 Ind. 682, 58 N. E. 1055, affirmed on rehearing (1901) 156 Ind. 686, 60 N. E. 797; **Chicago & S. E. R. Co. v. Woodward** (1902) 159 Ind. 541, 65 N. E. 577; **Rouyer v. Miller** (1896) 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674; **Briede v. Babst** (1912) 131 La. 159, 59 So. 106; **Mjones v. Yellow Medicine County Bank** (1891) 45 Minn. 335, 47 N. W. 1072; **First Nat. Bank v. Howard** (1916) — Okla. —, 158 Pac. 927; **Bolton v. Gifford** (1907) 45 Tex. Civ. App. 140, 100 S. W. 210; **Dawson v. Falfurrias State Bank** (1915) — Tex. Civ. App. —, 181 S. W. 553.

And tenders have been held insuffi-

cient because of the omission of the following items:

—an amount equal to 10 per cent of the purchase price of property sold under foreclosure of a deed of trust, which, by statute, was required to be added to the purchase price before the purchaser should be required to reconvey, *Smith v. Anders* (1852) 21 Ala. 783;

—the premium of 10 per cent required to be paid by one redeeming from a tax sale, *Lamar v. Sheppard* (1890) 84 Ga. 561, 10 S. E. 1084;

—the amount of a mortgage on land which the purchaser making the tender had agreed to assume and pay, but which the vendor had paid on the purchaser's failure to do so, *Wood v. Howland* (1904) 127 Iowa, 394, 101 N. W. 756;

—the expense of harvesting a crop of wheat by a mortgagee who had taken possession, *Shutes v. Woodard* (1885) 57 Mich. 213, 23 N. W. 775;

—expenses incurred by a vendor of land as a result of the vendee's default, by reason of the vendor's consequent inability to comply with his contract with a third person, *Jones v. Berkey* (1914) 181 Mich. 472, 148 N. W. 375;

—expenses incurred by a mortgagee in exercising a power of sale, such as the cost of setting up a notice of sale by the printer, *Mjones v. Yellow Medicine County Bank* (1891) 45 Minn. 335, 47 N. W. 1072;

—exchange, which the maker of a note agreed to pay, *Kingsley v. Anderson* (1908) 103 Minn. 510, 115 N. W. 642, 116 N. W. 112;

—expenses incurred by a mortgagee in paying taxes in the mortgaged property, which the mortgagor had failed to pay, *Equitable Life Assur. Soc. v. Von Glahn* (1887) 107 N. Y. 637, 13 N. E. 793;

—expenses incident to placing trespassing cows in the public pound, *Ryding v. Hanson* (1915) 30 N. D. 99, 152 N. W. 120;

—expenses in keeping mortgaged animals after a seizure by the mortgagee, *McClendon v. Wells* (1884) 20 S. C. 514.

#### IV. *Purposes for which tender is insufficient.*

A tender of less than the full amount due will not stop the running of interest.

**Alabama.**—*McCalley v. Otey* (1893) 103 Ala. 469, 15 So. 945.

**Illinois.**—*Cheney v. Roodhouse* (1890) 135 Ill. 257, 25 N. E. 1019, reversing (1889) 32 Ill. App. 49.

**Indiana.**—*Chicago & S. E. R. Co. v. Woodard* (1902) 159 Ind. 541, 65 N. E. 577; *Coulter v. Clark* (1891) 2 Ind. App. 512, 28 N. E. 723.

**Iowa.**—*Brandt v. Chicago, R. I. & P. R. Co.* (1868) 26 Iowa, 114.

**Massachusetts.**—*Chapin v. Chapin* (1894) — Mass. —, 36 N. E. 746.

**Ohio.**—*Hoppe & S. Bottling Co. v. Sacks* (1896) 11 Ohio C. C. 3, 5 Ohio C. D. 306.

**Oklahoma.**—*KRAUSS v. POTTS* (reported herewith) ante, 1213.

**Texas.**—*Henry v. Sansom* (1896) — Tex. Civ. App. —, 36 S. W. 122; *San Antonio v. Campbell* (1900) — Tex. Civ. App. —, 56 S. W. 130; *Barreda v. Merchants' Nat. Bank* (1918) — Tex. Civ. App. —, 206 S. W. 726.

**Virginia.**—*Shobe v. Carr* (1811) 3 Munf. 10.

And such a tender will not prevent a recovery of costs or attorneys' fees, or entitle the party making the tender to costs, or require the attorney's fee to be computed on the balance above the amount of the tender.

**Georgia.**—*Smith v. Pilcher* (1908) 130 Ga. 350, 60 S. E. 1000.

**Illinois.**—*Sweetland v. Tuthill* (1870) 54 Ill. 215.

**Indiana.**—*Chicago & S. E. R. Co. v. Woodard* (1902) 159 Ind. 541, 65 N. E. 577.

**Louisiana.**—*Louisiana Molasses Co. v. Le Sassier* (1900) 52 La. Ann. 2070, 28 So. 217, 28 So. 223.

**Mississippi.**—*Collier v. White* (1889) 67 Miss. 133, 6 So. 618.

**Nebraska.**—*McEldon v. Patton* (1903) 4 Neb. (Unof.) 259, 93 N. W. 938.

**New York.**—*Globe Soap Co. v. Liss* (1901) 36 Misc. 199, 73 N. Y. Supp. 153; *James Reilly's Sons Co. v. Aaron* (1904) 86 N. Y. Supp. 732.

**Ohio.** — *Burt v. Dodge* (1844) 13 Ohio, 131.

**Texas.**—*Barreda v. Merchants' Nat. Bank* (1918) — *Tex. Civ. App.* —, 206 S. W. 726.

And such a tender will not extinguish the lien of a mortgage. *Thurber v. Jewett* (1854) 3 Mich. 295; *Moore v. Norman* (1890) 43 Minn. 428, 9 L.R.A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; *Bank of Benson v. Hove* (1890) 45 Minn. 40, 47 N. W. 449; *Kingsley v. Anderson* (1908) 103 Minn. 510, 115 N. W. 642, 116 N. W. 112; *Graham v. Linden* (1872) 50 N. Y. 547; *Tuthill v. Morris* (1880) 81 N. Y. 94; *Mitchell v. Cook* (1859) 29 Barb. (N. Y.) 243; *First Nat. Bank v. Howard* (1916) — *Okla.* —, 158 Pac. 927.

Such a tender, the court said in *Kingsley v. Anderson* (1908) 103 Minn. 510, 115 N. W. 642, *supra*, might have been sufficient as a basis of an action to redeem, but where it is sought to discharge the lien by a tender, the law properly requires an exact tender.

Such a tender is insufficient to limit the recovery of double damages, under a statute giving such damages for failure to pay a claim, to double the amount of the difference between the amount of the claim and the amount of the tender (*Brandt v. Chicago, R. I. & P. R. Co.* (1868) 26 Iowa, 114); to entitle a purchaser of land to maintain an action against the vendor to compel delivery of a deed (*Sanford v. Bartholomew* (1885) 33 Kan. 38, 5 Pac. 429; *Tucker v. McCullough* (1919) — *Tex. Civ. App.* —, 209 S. W. 236); to effect a redemption from a foreclosure sale and annul the sale or pass the title to the redemptioner (*Dickerson v. Hayes* (1879) 26 Minn. 100, 1 N. W. 834); to entitle a mortgagor to enjoin a foreclosure sale (*Mjones v. Yellow Medicine County Bank* (1891) 45 Minn. 335, 47 N. W. 1072); to bar further proceedings under a statute authorizing defendant to tender to plaintiff's attorney the amount of the debt and costs, and providing that such tender should bar any further proceeding (*Thurston v. Blaisdell* (1836) 8 N. H. 367); to render a dis-

trepreneur unlawful (*Hunter v. Le Conte* (1827) 6 Cow. (N. Y.) 728); to prevent a foreclosure of a mortgage (*Equitable Life Assur. Soc. v. Von Glahn* (1887) 107 N. Y. 637, 13 N. E. 793); to entitle a pledgee of stock to a return of the stock (*Woodworth v. Morris* (1870) 56 Barb. (N. Y.) 97); to prevent a forfeiture for non-payment of rent (*Pershing v. Feinberg* (1902) 203 Pa. 144, 52 Atl. 22); to extinguish ground rents (*McKibbin v. Peters* (1897) 19 Pa. Co. Ct. 36, affirmed in (1898) 185 Pa. 518, 40 Atl. 288); or to entitle an owner of land subject to a vendor's lien, to a release of a part of the land from the lien, as provided in the deed reserving the lien (*California State L. Ins. Co. v. Elliott* (1917) — *Tex. Civ. App.* —, 193 S. W. 1096).

A tender which does not include costs to which the creditor is entitled does not amount to an offer to confess judgment. *Samuels v. Simmons* (1901) 22 Ky. L. Rep. 1586, 60 S. W. 937; *M'Dowell v. Glass* (1835) 4 Watts (Pa.) 389.

A tender of the amount of a loan to the borrower was insufficient to make the mortgage executed to secure the loan a binding obligation on the borrower, where the lender deducted interest which was not then due. *Bell v. Riggs* (1912) 34 Okla. 834, 41 L.R.A. (N.S.) 1111, 127 Pac. 427.

An offer of \$10 is not a due offer of payment of a debt of nearly \$20,000 within a statute providing that an obligation for the payment of money is extinguished by a due offer of payment kept good as therein provided, and therefore where the creditor had sold collateral security, applied the proceeds on the debt, and assigned the balance of the debt, and was claiming that nothing was due it, such tender did not extinguish the debt so as to render the sale of the collateral a conversion, though the creditor did not state any amount which it claimed to be due, as required by a statute providing that one objecting to the amount of a tender must state the amount which he requires. *Colton v. Oakland Bank of Savings* (1902) 137 Cal. 376, 70 Pac. 225.

*V. Effect of mistake or lack of knowledge of true amount.*

Ordinarily, it is immaterial that the party making the tender did not know the correct amount or believed that the amount tendered by him was sufficient. He acts at his peril, and must see to it that the amount tendered is large enough. Any mistake in this respect is his own misfortune.

United States. — *Lilienthal v. McCormick* (1902) 54 C. C. A. 475, 117 Fed. 89.

Iowa.—*Brandt v. Chicago, R. I. & P. R. Co.* (1868) 26 Iowa, 114; *Helphrey v. Chicago & R. I. R. Co.* (1870) 29 Iowa, 480; *Wood v. Howland* (1904) 127 Iowa, 394, 101 N. W. 756.

New Jersey.—*Shotwell v. Dennman* (1793) 1 N. J. L. 174.

Oklahoma.—*KRAUSS v. POTTS* (reported herewith) ante, 1213.

Texas.—*Barreda v. Merchant's Nat. Bank* (1918) — Tex. Civ. App. —, 206 S. W. 726; *Tucker v. McCullough* (1919) — Tex. Civ. App. —, 209 S. W. 236.

Vermont.—*Smith v. Wilbur* (1862) 35 Vt. 133; *Patnote v. Sanders* (1868) 41 Vt. 66, 98 Am. Dec. 564; *Willey v. Laraway* (1892) 64 Vt. 566, 25 Atl. 435.

England. — *Astley v. Reynolds* (1731) 2 Strange, 915, 93 Eng. Reprint, 939.

Thus, where a railroad company tendered a person whose stock was killed by it, \$22.50, but the jury found the value of the stock to be \$25, the court, in an action for double damages, approved the refusal of an instruction that if the tender was made and kept good in good faith, and upon a reasonable belief that such tender was the full value of the stock, then, though the tender was less, in the jury's judgment, than the true value, plaintiff would only be entitled to interest and to a double recovery on the difference between the tender and the true value; and approved an instruction that plaintiff was entitled to recover double the value of the stock unless defendant paid or tendered their value. The court said: "A party to whom a sum of money is due may properly refuse to receive the same

in parcels; he has the right to the whole, and the party bound to pay cannot require him to accept a part.

. . . So also is a debtor, whether upon contract or for injuries resulting from the negligence of railway companies, bound at his peril to tender enough to discharge his whole single liability, and if he does not he will derive no advantage from his tender [citing authorities]. The fact that the statute under which this action is brought fixes no preliminary tribunal or means for ascertaining the value of the stock killed presents no reason for a judicial enlargement of the statute by construction, or for exempting this defendant from the ordinary obligation resting upon all debtors, to wit, that of ascertaining at their peril, and tendering, the full amount which they justly owe." *Brandt v. Chicago, R. I. & P. R. Co.* (1868) 26 Iowa, 114.

In a similar action, where the jury found the value of the stock to be \$60, and the company had only tendered \$55, the court held that evidence that it in good faith tendered what was believed to be the value of the stock, as far as could be ascertained by due inquiry in the neighborhood, was properly excluded. The court said: "In no other case can a party obtain the benefit of a tender unless he offers enough. We can conceive of no reason for exempting defendant from a rule so just and necessary. If a party tender less than is due his creditor, he does so at his peril." *Helphrey v. Chicago & R. I. R. Co.* (1870) 29 Iowa, 480.

And a tender of \$27.50, by a party who intended to tender \$37.50, could not have the effect of a tender of the larger amount. *Patnote v. Sanders* (1868) 41 Vt. 66, 98 Am. Dec. 564.

In *Barreda v. Merchants' Nat. Bank* (1918) — Tex. Civ. App. —, 206 S. W. 726, where defendant claimed that he had tendered the amount which, with the knowledge he had, he believed to be due and had good reason to believe due, the court said: "It was not a question of what appellant believed to be due, but did he tender the amount really due on the note? Unless he



did, he is in no position to complain when he is compelled to pay interest and attorneys' fees on the actual amount due. The theory advanced by appellant would revolutionize the law as to tender, and make the collection of interest and attorneys' fees dependent on what a debtor believed he owed, regardless of the true amount shown to be due and claimed by the creditor. If a debtor tenders a less amount than the actual debt, he does it at his peril, no matter how well informed the creditor may be as to the true amount."

And the fact that the creditor did not disclose the amount claimed by him did not affect the rule where the debtor made no demand upon him with a view to ascertaining the amount of his claim. *KRAUSS v. POTTS* (reported herewith) ante, 1213.

And in *Willey v. Laraway* (1892) 64 Vt. 566, 25 Atl. 435, a tender which did not include the full amount of costs to which plaintiff was entitled was held insufficient, though plaintiff refused to tell defendant the amount of his costs, where the costs were not such as were peculiarly within plaintiff's knowledge.

And see *Rouyer v. Miller* (1896) 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674, where, in holding a tender insufficient because it did not include the amount of an attorney's fee, the court held that it was the duty of the debtor to make inquiry as to the amount of such fee.

So, the fact that plaintiff did not inform defendant that he had subpoenaed certain witnesses did not relieve him of tendering their fees, where he knew that suit had been brought and some cost incurred, and he made no inquiry of plaintiff as to his costs. *Smith v. Wilbur* (1862) 35 Vt. 133.

But where the required amount is within the exclusive knowledge of the creditor, and he fails or refuses to give the debtor the necessary information to enable him to make a sufficient tender, a tender of the amount which the debtor in good faith believed to be due will not be held insufficient, though the amount is less than is in fact due. *Shannon v. Howard Mut. Bldg. Asso.* (1872) 36 Md. 383; *Nelson*

*v. Robson* (1871) 17 Minn. 284, Gil. 260; *KRAUSS v. POTTS* (reported herewith) ante, 1213; *Re Hardaker* (1903) 7 Terr. L. R. (Can.) 151; and see also *Bender v. Bean* (1889) 52 Ark. 132, 12 S. W. 180, 241, and *Rouyer v. Miller* (1896) 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

Thus, in *Shannon v. Howard Mut. Bldg. Asso.* (Md.) supra, the court said that if a borrower from a building association did not know the precise amount required for a release, and sought to ascertain such amount in a reasonable way from the company, and the officers of the company in charge of the books and entries showing the state of the account could have furnished the proper information, but refused or omitted to do so without justifiable excuse, an application to be released and an offer to pay in good faith, with the ability to pay whatever might be due, would have constituted a sufficient tender, at least in equity, where, the court said, the formality necessary at law was not required. The tender was, however, held not proved.

And where wheat was delivered as collateral security for advances, and at the time a tender was made on behalf of the pledgeor the amount of the advances, interest, charges, and expenses to which the pledgee was entitled were unknown to the pledgeor, and were within the exclusive knowledge of the pledgee, who refused to communicate the amount and refused unconditionally to receive the amount tendered, or any amount, on the ground that he owned the wheat, it was held in *Nelson v. Robson* (1871) 17 Minn. 284, Gil. 260, that although the amount tendered was less than that to which the pledgee was entitled, the evidence tended to show a waiver of the actual production of the correct amount.

And where a tender of \$100 was just 87 cents short of the amount required to redeem from a tax sale, and the purchaser refused to disclose the amount required, and part of the items could have been ascertained from no other source, the tender was held sufficient to prevent a confirmation of the sale.

Re Hardaker (1903) 7 Terr. L. R. (Can.) 151.

So, in *Bender v. Bean* (1889) 52 Ark. 132, 12 S. W. 180, 241, it was intimated that a tender to redeem from a tax sale was sufficient, though not including an amount adequate to cover improvements by the tax purchaser for which he was entitled to compensation, the court saying that a tender of the exact amount in such a case would in many cases be impracticable, and that if the sum offered was inadequate the inadequacy should be objected to, and the correct amount indicated. The tender before suit was, however, held insufficient on other grounds, but an implied offer in the bill to pay the amount which the law allowed was held sufficient to terminate the tax purchaser's estate.

And in *Rouyer v. Miller* (1896) 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 474, the court, though holding a tender insufficient because it did not include attorneys' fees, and though holding that it was the duty of the debtor to make inquiry as to the amount of such fees, added that if the creditor should refuse information on this point, or if the debtor should be ignorant of the employment of the attorney, or if the tender should be refused upon other grounds, and the debtor thereby misled, the court would doubtless protect him.

In California, and formerly in Iowa, and possibly in other states, a statute requires the person to whom a tender is made, to the amount of which he objects, to specify the amount which he requires. *Shafer v. Willis* (1899) 124 Cal. 36, 56 Pac. 635; *Barnes v. Greene* (1870) 30 Iowa, 114; *McWhirter v. Crawford* (1898) 104 Iowa, 550, 72 N. W. 505, 73 N. W. 1021.

Where a vendor wrongfully destroyed the contract of sale with the indorsements thereon constituting the evidence of the payments which had been made, and did not, in his answer to a bill to compel a conveyance, state the true amount unpaid and offer to convey on payment of such amount, but alleged that there was due an amount largely in excess of the true amount unpaid, and denied the com-

plainant's right to any relief whatever, it was held that a tender of the amount which the purchaser believed to be the true amount, and an offer in the bill to pay whatever the court found to be due, were sufficient to entitle him to maintain a bill, though the tender was only of \$1,500, and the amount still due was \$3,300. *Downing v. Plate* (1878) 90 Ill. 268.

Where a holder of a deed as security prepared a statement of the amount due, a tender of such amount extinguished his rights as mortgagee, though it was less than the amount afterwards found to be due him. *McLaughlin v. Tompkins* (1916) 44 N. B. 249, 31 D. L. R. 320.

And in *GRAVES v. BURCH* (reported herewith) ante, 1216, a tender sufficient to cover all that was claimed by the petition in a suit to foreclose a mortgage, with interest and costs up to that time, but excluding an attorneys' fee which the creditor was not then entitled to recover, when kept good, was held sufficient to prevent any recovery of attorneys' fees, though the tender was not in fact sufficient to cover the amount to which the creditor was entitled, a mistake having been made in computing the interest, which was a complicated matter because of the many monthly payments.

#### VI. *Trivial deficiencies.*

Ordinarily the fact that the deficiency in the amount of a tender is small is immaterial, at least if the amount is large enough to be discharged by the current coin of the country.

California.—*Rauer's Law & Collection Co. v. Sheridan-Proctor Co.* (1919) — Cal. App. —, 181 Pac. 71.

Louisiana.—*Louisiana Molasses Co. v. Le Sassier* (1900) 52 La. Ann. 2070, 28 So. 217, 223.

Maine.—*Rolfe v. Patrons' Androscoggin Mut. F. Ins. Co.* (1909) 106 Me. 345, 76 Atl. 879.

Massachusetts.—*Boyden v. Moore* (1809) 5 Mass. 365.

New Jersey.—*Wright v. Behrens* (1877) 89 N. J. L. 413; *Keller v. Bunn* (1915) 84 N. J. Eq. 519, 94 Atl. 402.

Oklahoma.—*Bell v. Riggs* (1912) 34

Okla. 834, 41 L.R.A.(N.S.) 1111, 127 Pac. 427.

Texas.—California State L. Ins. Co. v. Elliott (1917) — Tex. Civ. App. —, 193 S. W. 1096.

In *Boyden v. Moore* (Mass.) *supra*, defendant deposited in court an amount which the trial judge computed to be short only 14 cents on defendant's theory, but which by a true computation was 41 cents short. The court held that it was error to tell the jury that if, upon calculation, they should find that the money paid into court did not fully pay "every cent" which was due, yet if they were satisfied that the defense was just, though a small balance was still due, if the balance appeared to them a mere trifle, their verdict ought to be for the defendant. Chief Justice Parsons said: "The defendant cannot lawfully withhold from the plaintiff any money due to him, however small the sum; and if the defendant intended to tender as much money as the plaintiff could claim, but made a mistake in her calculation, she must suffer for her own mistake, and not the plaintiff, although the injury to him may be very small and such as most men would disregard.

. . . That the law will not regard trifles is, when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest, there may and probably must arise fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. In making payments it is sometimes not possible, from the value and division of the current coin, to make the exact sum; if the payment be made as nearly as it can conveniently be made, the fractional part of a small coin may be neglected; it is a trifle. But the present case is not one of these trifles. A man may sue and recover on a note given for 40 cents; also on a larger note where 40 cents remain unpaid. It is, therefore, our opinion that the jury ought to have been directed to calculate the interest on the second note, and, deducting the payments if a balance remained unpaid, to find that balance for the plaintiff. If any sum large enough to be discharged in the

current coin of the country is a trifle which, although due, the jury are not obliged by law to award to the plaintiff, the creditor, it will be difficult to draw a line and say how large a sum must be not to be a trifle."

In *Wright v. Behrens* (1877) 39 N. J. L. 413, where the amount paid into court by defendant fell short at least 70 cents of being sufficient to cover the debt and costs to which plaintiff would have been entitled, the court said: "In the case now under consideration, the deficiency is very insignificant, but the defendant has no right to withhold anything due to the plaintiff, however small. This is not a case in which the maxim, 'De minimis non curat lex,' applies. The plaintiff was entitled to exact the full amount due him, and the offer of a less sum would not support the plea of tender."

In *Bell v. Riggs* (1912) 34 Okla. 834, 41 L.R.A.(N.S.) 1111, 127 Pac. 427, a lender, in tendering to the borrower \$1,184.44 as the net proceeds of the loan, deducted \$5.46 as interest which would have been due on the first day of the following month. The tender was held insufficient to make a mortgage executed to secure the loan a binding obligation. The court said: "Five dollars, forty-six cents, is not a large sum, but it might be worth a great deal under some circumstances. Riggs and wife were as much entitled to the \$5.46 withheld for the two weeks next following the alleged tender as they were to any other part of the loan. The fact that the amount withheld was small does not affect the question [citing cases]. A tender to be good must be of the entire sum due."

In *Rauer's Law & Collection Co. v. Sheridan Proctor Co.* (1919) — Cal. App. —, 181 Pac. 71, a deposit of the amount of a judgment with the clerk of the court, even if otherwise good as a tender, was held unavailing as such where a "small amount of interest" which had accrued on the judgment was not included, the court saying that nothing short of the full amount due the creditor was sufficient.

In *Louisiana Molasses Co. v. Le Sasser* (1900) 52 La. Ann. 2070, 28 So.

317, the court rejected the claim that, — the amount which plaintiff in a *concurso* (interpleader) failed to deposit being small as compared with the amount actually deposited, the deficiency did not justify a recovery of costs to the date when the deficiency was supplied by depositing the whole amount due. The court said that it devolved upon plaintiff to tender the whole amount, and that, having failed in that, the costs were due, and that an amount as large as plaintiff failed to tender did not, under the circumstances of the failure, come within the maxim, "*De minimis non curat lex.*" The amount involved was between \$2,600 and \$2,700, and from one part of the opinion the deficiency would seem to have been \$23, but other parts of the opinion seem to render the amount of the deficiency uncertain.

In *Rolfe v. Patrons' Androscoggin Mut. F. Ins. Co.* (1909) 106 Me. 345, 76 Atl. 879, a tender of \$584.23, where the amount due on a fire insurance policy was \$584.32, was held insufficient to constitute a good tender. The court said that though the difference was small plaintiff was entitled to it.

In *City Bank v. Cutter* (1826) 3 Pick. (Mass.) 414, a tender of the amount of the note on the day after it was due was held insufficient, but it cannot be told from the opinion whether this was on the ground, as stated in the syllabus, that there was no tender of the interest for that one day, or on some other ground.

See also the following cases, in which the amount of the deficiency was actually or relatively small, though there was no discussion of the point under consideration:

*People's Sav. Bank v. Norwalk* (1888) 56 Conn. 547, 16 Atl. 257, where a tender of \$50,000, the principal of a number of bonds, was treated as insufficient because it did not include the interest thereon for one day (\$9.72).

*Kingsley v. Anderson* (1908) 103 Minn. 510, 115 N. W. 642, 116 N. W. 112, where a tender of \$535.10, 45 cents less than was due, was held insufficient to discharge the lien of a mortgage.

*Woodworth v. Morris* (1870) 56 Barb. (N. Y.) 97, where there was a sale of stock with an agreement to return if the money was repaid within ten days, and a tender the day after the ten days expired was apparently treated as insufficient because it did not include interest for that one day.

*Smith v. Merchants' & F. Bank* (1897) 14 Ohio C. C. 199, 8 Ohio C. D. 176, in which a tender of payment of a note seems to have been held insufficient because the amount tendered did not include interest for the three days of grace, amounting to 33 cents.

*McKibbin v. Peters* (1897) 19 Pa. Co. Ct. 36, affirmed in (1898) 185 Pa. 518, 40 Atl. 288, where a tender of \$11,000 for the purpose of extinguishing ground rents was held ineffective because the amount required for that purpose was \$11,009.53.

*Cree v. Lord* (1853) 25 Vt. 498, where a tender for the purpose of redeeming from a mortgage which had been foreclosed was held insufficient because it did not include costs amounting to \$2.02.

*Willey v. Laraway* (1893) 64 Vt. 566, 25 Atl. 435, in which a tender which was 13 cents less than the damages and costs to which plaintiff was entitled was held insufficient.

But a tender of a semiannual payment of ground rent was sufficient though it did not include interest thereon for nine days, amounting to about one and one-fourth (1 $\frac{1}{4}$ ) cents. *Milligan v. Marshall* (1909) 38 Pa. Super. Ct. 60. The court said: "If the question turned alone on the item of interest alleged to be claimed, we would hold that the demand of 1 $\frac{1}{4}$  cents, even as interest, was too small and trifling an item with which to vex the courts. The smallest coin known as current money could not be used to make payment of the disputed item."

In *Matzger v. Page* (1911) 62 Wash. 170, 113 Pac. 254, a tender of the interest due on a mortgage three days after it became due was held sufficient to prevent the mortgagee from declaring the whole sum due, though it did not include interest on such interest for such three days. The court said

that the law did not concern itself with trifles. The contract rate of interest was 8 per cent, but even at 6 per cent, which seems to be the legal rate in Washington, the interest for such three days would have amounted to 20 cents, which seems to be a larger sum than any other court has disregarded as a trifle.

In *GRAVES v. BURCH* (reported herewith) ante, 1216, where there was a

tender and payment into court of the amount claimed by the creditor, excluding attorneys' fees, but pending the suit the creditor discovered that he had not claimed as much as was due, whereupon a further payment into court was made which lacked 21 cents of being sufficient, the court ignores this deficiency, but apparently on the ground that it was not suggested at the trial. A. McT.

GEORGE KLEIN, Appt.,

v.

IDDO BEETEN et al., Respts.

*Wisconsin Supreme Court—May 27, 1919.*

169  
(— Wis. 365, 172 N. W. 736.)

**Evidence — sufficient to submit to jury.**

1. An action for injury to a passenger in an automobile through the overturning of the car cannot be submitted to the jury where there is nothing to show whether the accident was caused by negligent driving or the blowing out of a tire.

[See note on this question beginning on page 1240.]

— *res ipsa loquitur* — statement of doctrine.

2. The doctrine of *res ipsa loquitur* is that when both the apparatus and the operation of it are within the control of defendant, and the accident is one which ordinarily could not happen except by reason either of defects in the apparatus or negligence in the operation, a presumption of one or the other arises from the happening of the accident sufficient to justify a verdict against defendant.

[See 20 R. C. L. 187.]

— **judicial notice — effect of blow-out of tire.**

3. The court will not take judicial notice of the fact that a blow-out of the front tire of a Ford automobile running at 15 miles per hour cannot cause the car to leave a perfectly smooth roadway and plunge into the ditch at the side of the road.

[See 2 R. C. L. 1201; 15 R. C. L. 1104.]

— **sufficiency of maxim.**

4. The maxim, "*Res ipsa loquitur*," will carry a case to the jury only where

the circumstances leave no room for a different presumption than that raised by the maxim.

— **materiality.**

5. Upon the question of negligence in the operation of an automobile to the injury of a passenger, a question to defendant on cross-examination as to admissions in regard to his method of operating the car is immaterial.

— **admissions — admissibility.**

6. Admissions made by defendant in a civil action may be shown in evidence without laying a foundation in the nature of impeachment.

**Appeal — rejection of evidence — non-prejudicial error.**

7. Rejection of evidence of defendant as to admissions with respect to his method of driving, in an action to hold him liable for injury to a passenger by the overturning of an automobile, is nonprejudicial where he had already denied the facts assumed in the question and the persons to whom the admission is alleged to have been made were not questioned with regard to it.

[See 2 R. C. L. 255.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Walworth County (Thompson, J.) in favor of defendants in an action brought to recover damages for the death of plaintiff's son, alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Michael Levin and Glicksman, Gold, & Corrigan, for appellant: Imputed negligence, even as against a third person, does not apply as to an infant.

Hampel v. Detroit, G. R. & W. R. Co. 138 Mich. 1, 110 Am. St. Rep. 275, 100 N. W. 1002, 17 Am. Neg. Rep. 84; Hupfer v. National Distilling Co. 114 Wis. 279, 90 N. W. 191.

The driver of the car was negligent.

Cummings v. National Furnace Co. 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Quass v. Milwaukee Gaslight Co. 168 Wis. 575, 170 N. W. 943; Meyers v. Tri State Automobile Co. 121 Minn. 68, 44 L.R.A.(N.S.) 113, 140 N. W. 184.

Mr. Joseph G. Konop also for appellant.

Messrs. E. L. Von Suessmilch, and Jeffris, Mouat, Oestreich, Avery, & Wood for respondents.

Owen, J., delivered the opinion of the court:

The defendants are copartners operating a meat market in the city of Sharon. On the morning of August 10, 1916, the defendant Iddo Beeten delivered some meat at a farmhouse some distance from Sharon with a Ford automobile. Plaintiff's son, Edward Klein, about fifteen years of age, asked and was permitted to ride with him on the trip. While returning, and while on a perfectly smooth turnpike road, the width of the roadway being close to 30 feet, the automobile suddenly turned to the left, ran into the gutter, striking with the front wheels against the outside banks thereof, and causing the overturning of the automobile. The boy was caught under the car and killed. The complaint alleges that "said defendant so carelessly and negligently managed and operated said automobile, without maintaining the proper outlook and at an excessive rate of speed, and so carelessly and negligently managed same as to lose control thereof and run into a ditch on the roadway where the said

defendant was driving said automobile, causing said automobile to turn over, thereby throwing the said plaintiff's son in such a manner that the running board of said automobile fell on said plaintiff's son's neck, which caused the said plaintiff's son's death instantly."

There is no direct evidence in the case showing that the defendant Iddo Beeten was driving at a high or unlawful rate of speed, or that he was guilty of other negligence. The defendant Beeten was unable to give any explanation of the cause of the accident, other than that the automobile suddenly sheered to the left and went into the gutter. He could assign no reason for its so doing. Something happened so suddenly that he did not know what it was. The car was righted and run to town on its own power. The fenders were bent, and the wind shield was broken. The left-hand front tire was deflated. Otherwise, the car was in good condition.

The foregoing are about all the tangible facts disclosed by the evidence. Plaintiff claims that the doctrine of *res ipsa loquitur* is applicable to the situation, and that the case should have been submitted to the jury. This doctrine may be stated to be that, when both the apparatus and the operation of it are within the control of the defendant, and the accident is one which ordinarily could not happen except by reason either of defect in the apparatus or negligence in the operation, a presumption of one or the other arises sufficient, from the happening of the accident, to justify a verdict against the defendant. Liability in this case is not predicated upon any defect of the automobile. Liability is predicated solely upon the negligent operation of the car. The facts proved are that an acci-

Evidence—*res ipsa loquitur*—statement of doctrine.

dent happened at a place where the road was smooth and in good order. Plaintiff contends that proof of this fact raises an inference of negligence in the operation of the car. When the car was righted, after the accident, the left-hand front tire was found to be deflated by reason of a blow-out of the inner tube. It is not at all beyond the realm of possibility that the accident might have happened by reason of this blow-out. It is claimed on the part of the plaintiff that a blow-out could not have caused the accident unless the car was going at an excessive rate of speed. There is no proof of that fact in the record, and we cannot take judicial

—judicial notice  
—effect of blow-  
out of tire.

notice that a blow-out of the front tire of a Ford automobile, running at 15 miles an hour, could not produce an accident such as this. It is familiar knowledge that the blow-out of the front tire of an automobile is a dangerous occurrence, the degree of danger, of course, depending upon the rate of speed, and, we apprehend, somewhat upon the character of the car. So we have here evidence showing simply an accident. Granting that the accident might have been the result of negligent operation of the car, the evidence certainly discloses a possibility that the accident might have been the result of the blow-out.

In *Musbach v. Wisconsin Chair Co.* 108 Wis. 69, 84 N. W. 39, an explosion occurred, injuring plaintiff, and the question was whether the explosion occurred by reason of a defect in a gas pipe or by the negligence of a coemployee in permitting a slight flow of gasoline from a burner after it was extinguished. There was evidence showing that it might have resulted from either. The court said: "But, conceding the possibility that either such defect or negligence of Wolf was the efficient cause, choice between them could only have been based upon conjecture or guess. There was absolutely no evidence even tending to prove that the gas which exploded

came from the basement, and not from Wolf's burner. The submission to a jury of such choice has been universally condemned, and by no court more vigorously than by this."

This language is peculiarly applicable to the situation here presented. The jury could have done no more than guess as to whether the accident was the result of care-  
less and negligent  
operation of the car or of the blow-out. Verdicts cannot rest upon guess or conjecture. It is the duty of the plaintiff to prove negligence affirmatively; and, while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies.

—sufficient to  
submit to jury.

—sufficiency  
of maxim.

When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails, and it cannot be invoked. *Quass v. Milwaukee Gaslight Co.* 168 Wis. 575, 170 N. W. 942.

The plaintiff also sets up a cause of action based on the theory that the deceased boy was unlawfully employed in running errands for the defendants, and that he was so engaged at the time of the accident. There is no proof whatever to the effect that he was in the employ of the defendants, or engaged in rendering any service for them at the time, and the action cannot be sustained on that theory.

Appellant claims error because an objection was sustained to the following question propounded to the defendant Beeten upon cross-examination:

Q. Isn't it a fact that you told Mr. Vierck, Mr. Young, and several others that you reached over to put up the wind shield in order to protect the children as far as possible, and you were guiding the car with one hand, and in doing so you ran into the ditch?

We do not appreciate the materiality of this question. If intended as a basis for impeachment, it was unnecessary as well as too indefinite. If Mr. Beeten had made any admissions, they could be shown without laying a foundation in the nature of impeachment. Besides, Mr. Beeten had just denied the fact assumed in

—materiality.

—admissions—  
admissibility.

the question. Mr. Vierck and Mr. Young both testified as witnesses in behalf of plaintiff, and they were not questioned with reference to any such admission on the part of Mr. Beeten. The rejection of the evidence could not have been prejudicial, even if the ruling was erroneous. Judgment affirmed.

Appeal—  
rejection of  
evidence—  
nonprejudicial  
error.

## ANNOTATION.

### *Res ipsa loquitur* as applied to automobile accidents.

- I. In general, 1240.
- II. Where machine leaves highway and causes injury or damage, 1240.
- III. Where automobile runs into pedestrian, 1242.
- IV. Where one vehicle runs into another, 1243.

- V. Where automobile starts from unknown cause, 1244.
- VI. Where vehicle is struck by another vehicle and thrown against a third, 1246.
- VII. Where automobile skids and causes injury or damage, 1246.

The question of the applicability of *res ipsa loquitur* doctrine where person or vehicle is struck by street car is covered in the annotation to *Busch v. Los Angeles R. Co.* 2 A.L.R. 1607.

As to injury by road vehicle to person on sidewalk, see annotation to *Brown v. Des Moines Bottling Works*, 1 A.L.R. 835.

#### *I. In general.*

At some point between those cases in which the mere happening of an accident is shown, and those in which, in addition, there is specific evidence, circumstantial or otherwise, of negligence, the border line of the doctrine of *res ipsa loquitur* runs. Because of the haziness of this line it is difficult, in many instances, to say whether or not the case was one in which the doctrine was considered or intended to be given effect. For this reason, and because of the possible injustice to the courts and confusion which might otherwise arise, this note is confined to cases in which the doctrine was expressly stated to be involved, or in which, although there was no reference to it as such, the facts clearly show it to be within the rule.

Cases have also been excluded which

merely pass upon the question whether a *prima facie* case is made out by showing a violation of statutes and ordinances regulating speed, lights, etc., none of which refer to the doctrine under consideration as applicable.

The doctrine of *res ipsa loquitur* has been stated to be that when the thing which causes an accident is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care by the defendant, so that under such circumstances proof of the happening of the event raises a presumption of the defendant's negligence and casts upon him the burden of showing that ordinary care was used. *Bauhofer v. Crawford* (1911) 16 Cal. App. 676, 117 Pac. 934.

#### *II. Where machine leaves highway and causes injury or damage.*

It will be observed that in the reported case (*KLEIN v. BEETEN*, ante, 1237) the court stated that it is only where the circumstances leave no room



for a different presumption that the doctrine of *res ipsa loquitur* applies, and that it was there held inapplicable where the evidence merely disclosed that while the plaintiff's intestate was riding in the defendant's automobile on a perfectly smooth road the machine suddenly turned and ran into the gutter, overturned, and killed the plaintiff's intestate, and that the car was found to be in good condition aside from the fact that one of the front tires was deflated.

In *Jacob v. Ivins* (1918) 162 C. C. A. 501, 250 Fed. 431, affirming (1917) 245 Fed. 892, where it was shown that the plaintiff, as she was approaching an intersection of streets on the sidewalk, was knocked down and injured by the defendant's automobile, which in making a turn mounted the curb, pushed a stone carriage block some distance, struck the plaintiff, and overturned, it was held that these facts were sufficient to carry the case to the jury. The court said: "We do not decide that they justify the application of the doctrine, '*Res ipsa loquitur*.'" It is fairly common knowledge that an automobile sometimes gets out of control without the driver's fault; but without more the jury would have been at liberty to draw the inference of negligence." With respect to the doctrine of *res ipsa loquitur* the court, in the opinion affirmed, said: "The quoted phrase has two meanings. It is used to voice the rule of law that the mere fact of damage justifies the conclusion of legal injury through and by an allowed presumption of negligence on the part of the defendants. The same phrase is used, however, to express the thought that, the fact of damage having been inflicted as it was inflicted, the attending circumstances justify the inference of fact that it was the result of negligence. The phrase was employed in this case in this latter sense. As automobiles ordinarily travel on the part of the street within the curbs assigned to vehicular traffic, the mere fact that one was being run upon the sidewalk to the hurt of a pedestrian lawfully there would justify the fact inference, in the first instance, that the injury had been

negligently inflicted. If, therefore, the plaintiff in this case had confined her testimony and other evidence to the fact that she had been struck while upon the sidewalk, by the defendant's automobile, this would have been evidence from which the jury could have found negligence, and the defendants would have been called upon to supply the exculpatory facts, which would rebut or deny the inference otherwise to be drawn. The plaintiff, however, did not content herself with such proofs, but made part of her case in chief the testimony of the driver of the automobile to the effect that the presence of the car on the sidewalk was due to the fact that the movement of the car was beyond his control, because the steering gear would not work. The testimony of this witness, however, disclosed the fact of his knowledge of the condition of the car, and thus fairly raised the question of his exercise of due care in his operation of the car, which he knew was or might become beyond his control, to the hurt of some traveler upon the highway. The jury were in consequence instructed that they might view the case as one justifying the inference of negligence, in the absence of the exculpatory facts, but that the exculpation would exonerate the defendants from legal responsibility for the damages, unless negligence of the defendants which brought about the damage was disclosed in presenting the exculpatory facts. The real issue as presented to the jury was, in consequence, the question of whether the defendants had been guilty of negligence in the operation of the defendants' car, as its operation was disclosed by the driver. We are unconvinced of any error in making this feature of the case to turn upon the issue as above defined."

The doctrine of *res ipsa loquitur* was held applicable in *Brown v. Des Moines Steam Bottling Works* (1916) 174 Iowa, 715, 1 A.L.R. 835, 156 N. W. 829, where it appeared that the defendant's heavy auto truck was suddenly diverted without warning from the street onto the sidewalk, and struck one standing thereon, it being

held that this was prima facie evidence of negligence.

In *Massachusetts Bonding & Ins. Co. v. Park* (1917) 197 Mich. 142, 163 N. W. 891, however, where there was evidence that the defendant was driving his automobile and struck a plate glass window in a store, there was held to be nothing on which to predicate negligence, the court stating that the mere happening of an accident, or proof of injury resulting therefrom, raises no presumption of negligence.

### III. Where automobile runs into pedestrian.

It has been held that the mere fact that an automobile collides with a pedestrian does not raise a presumption that the driver was negligent. *Millsaps v. Brogdon* (1911) 97 Ark. 469, 32 L.R.A. (N.S.) 1177, 134 S. W. 632; *Barger v. Bissell* (1915) 188 Mich. 366, 154 N. W. 107; *Dudley v. Raymond* (1911) 148 App. Div. 886, 133 N. Y. Supp. 17.

And a demurrer to the evidence was held properly sustained in *Winter v. Van Blarcom* (1914) 258 Mo. 418, 167 S. W. 498, where there was evidence merely that the plaintiff, a boy, had been running behind a street car, and suddenly started to run to the curb, and was almost immediately struck by the defendant's automobile, the speed of which was not shown, the court stating that the mere fact that the plaintiff was struck by the automobile was not a sufficient showing to prove that the injury was caused by the negligence of the defendant.

And in *Seaman v. Mott* (1908) 127 App. Div. 18, 110 N. Y. Supp. 1040, it was held that the plaintiff was not entitled to have the question of the defendant's negligence submitted to the jury where his testimony was that upon leaving the curb he looked for possible perils; that he neither saw nor heard the defendant's automobile and did not hear any bell; that he proceeded about 10 feet, heard shouting, turned his head, and saw the automobile, which was upon him and ran him down. The court here said that the plaintiff did not testify to any fact which permitted the inference that the chauffeur was inattentive or that

he drove recklessly, or as to the speed of the car, but rested his case upon the proposition that he came in contact with the moving car and was injured by it.

And the record in *Vannett v. Cole* (1919) — N. D. —, 170 N. W. 663, was held to disclose no evidence upon which the doctrine of *res ipsa loquitur* might be applied, it appearing therefrom that the plaintiff, while proceeding over a crosswalk, of which there was an unobstructed view, was struck, and knocked down and injured, by the defendant's automobile, which was not exceeding a speed of 4 miles an hour. The court remarked that there was no presumption of negligence on the part of the driver arising from the mere fact that the plaintiff was run down and injured on a public street.

But the evidence in *Miller v. New York Taxicab Co.* (1910) 120 N. Y. Supp. 899, was held to make a prima facie case, where there was testimony by the plaintiff and other witnesses who were with her that they were crossing the street on a crosswalk, and that they looked up and down the street, but saw no automobile until the moment that the defendant's automobile struck the plaintiff.

And the evidence in *Spina v. New York Transp. Co.* (1905) 96 N. Y. Supp. 270, was held to support a verdict for the plaintiff where the injured person testified that he was going north on the left side of a street; that he looked east but did not see any wagons; and that he had taken three steps into the street to cross at an intersection when he was struck by the defendant's automobile, which he did not see until it struck him, and which other witnesses testified came south along the right side of the intersecting street and swung in a westerly direction into the street on which the injured person was traveling.

In *Grudberg v. Ehret* (1913) 79 Misc. 627, 140 N. Y. Supp. 379, where the plaintiff's evidence showed that he went to the assistance of another boy who was on the defendant's automobile, and assisted him in pulling out his foot, which had become caught, and that after having freed his friend

he jumped off the automobile, which had stopped, but that just as he did so the car was started without warning and backed up a hill a distance of 5 feet, running over the plaintiff, the unexplained sudden starting of the automobile without any warning was held to call at least for some explanation on the part of the defendant, and it was held to be error to dismiss the plaintiff's complaint at the close of his evidence.

*IV. Where one vehicle runs into another.*

In *Bauhofer v. Crawford* (1911) 16 Cal. App. 676, 117 Pac. 931, the case was held to come within the operation of the doctrine under consideration, it appearing that the automobile ran into the plaintiff's wagon, which was standing on the left side of the street for the purpose of delivering milk while under the management of the defendant; that the accident occurred about 8 o'clock in the evening, at a point where there were abundant street lights; that the plaintiff's vehicle had a light burning on the rear, and that the defendant drove his automobile at from 10 to 15 miles an hour, and attempted to pass the plaintiff's wagon on the right instead of on the left, where there was sufficient room; and that he collided with the standing wagon, as there was not room enough on the right side to pass it, and that the plaintiff was thrown down and injured. The court in this case stated that it was unlike the case of a runaway horse in charge, or not, of his driver, causing an injury, for in such a case it was as reasonable to infer that it was the negligence of a stranger as to assume that it was that of the driver which caused the horse to run away, and that in cases of that kind the *res ipsa loquitur* could not be invoked.

And in *Whitwell v. Wolf* (1914) 127 Minn. 529, 149 N. W. 299, in an action to recover damages for the death of a horse alleged to have been caused by the defendant's negligent management of his automobile, where the plaintiff testified that he left his horse tied to a hitching post at the curb on the east side of a street running north and south, the animal facing north;

that an automobile was standing a few feet farther north on the opposite side of the street; that some fifteen minutes later he discovered that his horse had been so badly injured by the defendant's automobile that it had to be killed,—it was held that under the doctrine of *res ipsa loquitur* the burden of explaining that the accident did not occur from want of care then devolved upon the defendant.

And the questions of the defendant's negligence and plaintiff's contributory negligence were held to be for the jury in *Harris v. Burns* (1912) 133 N. Y. Supp. 418, where the plaintiff testified that his automobile was standing in front of his office, and that the defendant's wagon backed in near plaintiff's automobile to unload some merchandise, and that the driver while in the act of driving away, turned into the automobile and damaged it.

In *Diamond v. Weyerhaeuser* (1918) — Cal. —, 174 Pac. 38, in which the plaintiff's evidence went no further than to show that there was a collision between her wagon and the defendant's automobile, the burden of proof was held to be on the plaintiff, and it was held that negligence was not to be inferred from the mere fact of the injury.

And in *Presser v. Dougherty* (1913) 239 Pa. 312, 86 Atl. 854, there was held to be no evidence that the injuries to the plaintiff were due to the defendant's negligence where it was shown merely that the plaintiff, while riding a bicycle on the wrong side of the street, was struck by the defendant's automobile proceeding in the opposite direction, there being no evidence that the machine was being run at an unsafe speed, or that it was recklessly driven.

In *Salminen v. Ross* (1911) 185 Fed. 997, affirmed on other grounds in (1911) 112 C. C. A. 148, 191 Fed. 504, uncontradicted testimony of plaintiff that while driving on the right-hand side of a wide road she was overtaken by an automobile which struck the hind wheel of her wagon was held to establish a clear case of negligence.

And in *Heath v. Cook* (1907) — R. I. —, 68 Atl. 427, it was held that the

jury properly found the defendant guilty of negligence where he drove his automobile up behind the plaintiff, who was proceeding in the same direction on a bicycle, and, according to the preponderance of the evidence, ran into the plaintiff's wheel and upset him and crushed his leg.

*V. Where automobile starts from unknown cause.*

The doctrine of *res ipsa loquitur* was held applicable in *Barnes v. Kirk Bros. Automobile Co.* (1911) 32 Ohio C. C. 238, where there was evidence that the plaintiff, as a possible purchaser, had been invited into the garage of the defendant to inspect an electrical car, and that while the manager was manipulating the car and exhibiting it to the plaintiff it was, by some means, made to move suddenly and strike the plaintiff, who was standing in front of it, forcibly pushing him against a post and injuring him. The court said: "I have said that the court is unanimous in the view that the principle of *res ipsa loquitur* should apply. We may borrow an illustration by way of analogy from the use of a firearm. A points a loaded gun at B. The gun is discharged, and B receives an injury, or is perhaps killed. The gun was charged with gunpowder; the automobile is charged with electricity. The gun is something which was intended, upon certain manipulations,—the pulling of a trigger and the descending of a hammer,—to go off, to be discharged. An automobile, upon certain manipulations, is expected and intended also to go off, to start in motion. Neither one is intended to kill some particular person or to injure him. It will not do, under the circumstances of the use of the firearm which causes the injury, for the man who holds it in his control to say, 'Although I knew that it was loaded,' as Mr. Kirk unquestionably here knew that this automobile was charged with electricity, 'and although possibly I pulled the trigger, still I am not blamable, because I did not know that the gun was cocked; I did not know that the hammer had been raised.' If the gun is discharged, the presumption at once

arises in the mind of any intelligent observer or any intelligent person who learns of the facts, that the man who had in his control this instrument of possible destruction was guilty of negligence. That assumption might be a rebuttable one, or it might not. There are cases of *res ipsa loquitur* where the presumption seems to have been held by the courts to be a conclusive presumption, and there are others, as in the case to which I shall refer in a moment, where it is deemed a rebuttable presumption, one in which, while the inference is raised that the person having control of the machinery, or the implement, or whatever it be that has caused the injury, is guilty of negligence, it devolves upon him, by some explanation or rebutting evidence, to meet such presumption.

It is said that in the case at bar there was evidence explaining just how it happened, that is, explaining everything that Mr. Kirk did, and that the evidence shows that he exercised ordinary care; but to the court it seems that after giving all the explanation that he is able to give as to what happened, he still leaves unexplained, absolutely unexplained, the principal and essential facts necessary to rebut the presumption of negligence. It is a matter of not the slightest consequence whether he started the machine by pulling up the starting plug, or whether he started it by moving the lever; if the other part of the contrivance was not in such a neutral position as to make it safe for him to move that particular thing which he did move, then we think that the presumption of negligence arises. Suppose that the man holding the gun says, immediately before he pulls the trigger, not knowing that the hammer is up, 'This is how we make it go off,'—pointing it at the person who receives the leaden charge. In this case Mr. Kirk says, 'This is the way we start it,' and then he either pulls the lever or he pulls up the starting plug, and the automobile proceeds, being an inanimate object, to obey the intelligent will of the person who is demonstrating how, when things are in proper condition, the automobile may

be started upon its mission. Now it will not do in the case of the firearm for the man to say, 'I didn't know that the hammer was up when I pulled the trigger.' And just so, it seems to us, it will not do for Mr. Kirk to say, 'I didn't know that the plug was not in a neutral position when I moved the lever,' or to say, 'I didn't know the lever was not in a neutral position when I pulled the plug.' In either event, it seems to us that, before moving that particular thing which caused the machine to start with its destructive effect, it was incumbent on him to ascertain whether the machine was in such condition as that he could safely do so."

The doctrine of *res ipsa loquitur* was also held applicable in *Wallace v. Keystone Automobile Co.* (1913) 239 Pa. 110, 86 Atl. 699, where there was evidence that the plaintiff's husband hired an automobile, with a chauffeur, from the defendant; that during the trip the chauffeur stopped the car on level ground and alighted to inquire the way; that when he had taken a few steps the machine started without being touched by any of the occupants; that the chauffeur ran back, jumped on the running board, and, in attempting to avoid a collision, turned the machine across the road, where it struck a tree and threw the occupants out. The court here said: "This is a clear case for the application of the doctrine of *res ipsa loquitur*. The machine was furnished by the defendant company. It also supplied the chauffeur to operate it. The testimony was ample to convince the jury that the accident which resulted in Mr. Wallace's death and the injury to his wife would not have occurred had the machine been in proper condition and the chauffeur had been competent and skilful and had operated the machine with proper care. At least, the testimony introduced by the plaintiff made out a *prima facie* case of negligence against the defendant which it was required to meet, and whether it did so successfully or not was a question for the jury. The chauffeur stopped the automobile, alighted from it, and, when he had gone but a few

yards towards the team standing on the opposite side of the Perrysville road, the machine started towards him and the team. From these facts, one of two conclusions is irresistible: that the machine started because it was out of repair, or the chauffeur had failed to properly adjust its mechanism so it would remain standing, or that some occupant of the car, after the chauffeur had left it, interfered with its mechanism and put it in motion. These were clearly questions for the jury. The three surviving occupants of the car testified positively that they had not touched and had not seen anyone touch any part of the mechanism of the machine after the chauffeur left it. He testified that directly before he stopped the car he closed the throttle, reached down and pulled the gear in neutral, and then stopped the car with the hand brake. He says that the car came to a full stop and that the gear-change lever was still neutral when he left the car. He further testified that if the gear lever had been in neutral the car could not have started of its own volition. But the car did start shortly after he had stopped and alighted from it, and, as suggested, it was a question whether it started in the chauffeur's absence by reason of some of its mechanism being out of repair or his failure to properly adjust the mechanism, or by reason of some act of the occupants of the car. There was ample evidence to warrant a finding that, if the car was in proper repair and the chauffeur had properly adjusted its mechanism before he alighted, it would not have started in his absence unless set in motion by another party. If the evidence of the occupants of the car is believed, no other person was responsible for putting the car in motion after the chauffeur left it, and aside from that cause, the only reasonable conclusion arising from the plaintiff's testimony was that the car, if in proper condition, started by reason of the negligent conduct of the chauffeur. The car was in the control of the chauffeur, and the other occupants had nothing to do in operating it. They were wholly unfamiliar with its mechanism

and made no attempt to control or operate it. It was hired by Mrs. Wallace for the purpose of carrying their party on a pleasure trip from Pittsburgh to Butler and back. Under the circumstances, therefore, it is not at all probable that either of the other occupants of the car would attempt to manage or control it by interfering with its mechanism. They knew absolutely nothing about operating the car, and consequently would recognize the danger of trying to start or stop it."

*VI. Where vehicle is struck by another vehicle and thrown against a third.*

The doctrine of *res ipsa loquitur* was held inapplicable in *O'Donohoe v. Duparquet, H. & M. Co.* (1910) 67 Misc. 435, 123 N. Y. Supp. 198, where the plaintiff's evidence showed that the defendant's truck was being slowly and carefully driven on the right side of the street when it was struck by a railroad car, owned by another, whereby the truck was thrown against the plaintiff's automobile, which was standing on the side of the street. The court said: "Assuming that this doctrine is applicable where a vehicle, lawfully standing at rest on the side of the street, is struck by a vehicle moving upon the street, in the absence of explanation as to the cause of the accident, it would not apply in a case like the case at bar, where there is no absence of explanation, but, on the contrary, positive proof introduced by the plaintiff as to the cause of the accident and the manner in which the accident occurred. The doctrine of *res ipsa loquitur* not being applicable to this action, the burden rested upon the plaintiff of establishing, as in every other case of this character, by a preponderance of evidence, that the accident was due to the negligence of this defendant. This the plaintiff failed utterly to do. But, were the doctrine of *res ipsa loquitur* applicable to this case, the application of such doctrine would not operate to shift the burden of proof, by making it incumbent upon this defendant 'to show that the proximate cause of the accident to plaintiff's automobile was due to any negligence on the part of the defendants Joline and Robinson.' The sole

burden upon the defendant Duparquet Company, even if the doctrine of *res ipsa loquitur* were applicable, was to overcome any presumption of negligence on its part which, 'in the absence of explanation,' might be inferred from the happening of the accident. The defendant Duparquet Company was relieved from this burden by the plaintiff's own evidence, which furnished a complete and detailed account of the cause of the accident, and established that it might have occurred through the negligence of the other defendants."

*VII. Where automobile skids and causes injury or damage.*

In *Wing v. London General Omnibus Co.* [1909] 2 K. B. (Eng.) 652, 3 B. R. C. 79, where there was evidence that the plaintiff, a passenger in a motor bus, was injured when it collided with an electric standard, that the road was greasy at the time, and that the omnibus, in attempting to avoid other vehicles, skidded when going about 5 miles an hour, and struck the standard, it was held that the mere occurrence of such an accident was not in itself evidence of negligence, and also that the act of allowing the motor bus to run, having regard to the fact that the highway was slippery or greasy, and the known tendency of such vehicles to skid on greasy surfaces, was not evidence of negligence. Fletcher Moulton, L.J., said: "There was no evidence whatever that the accident was due to negligence on the part of the servants of the defendants who were in charge of the omnibus, unless the mere occurrence of the accident amounts to such evidence. In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima*

**facie** responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adopt its own behavior to the behavior of other persons using the road, and over their actions those in charge of the vehicle have no control. Hence the fact that an accident has happened either to or through a particular vehicle is by itself no evidence that the fault, if any, which led to it, was committed by those in charge of that vehicle. Exceptional cases may occur in which the peculiar nature of the accident may throw light upon the question on whom the responsibility lies, but there is nothing of the kind here. The collision with the electric standard was due to the omnibus skidding; and, if we are to give any weight to the admissions made by the defendants' servants, which were proved in evidence in chief as part of the plaintiff's case, that skidding was due to difficulties in avoiding other vehicles. There is certainly no evidence to negative such a probable explanation of what actually happened, and it is impossible to say that this points to negligence, or that it establishes that any negligent act of the defendants' servant was the cause of the accident. I am therefore of opinion that the learned judge acted rightly in withdrawing from the jury the issue as to the accident being due to negligence of the defendants' servants in the driving or management of the vehicle."

And in *Williams v. Holbrook* (1913) 216 Mass. 239, 103 N. E. 633, the court stated that the mere skidding of the automobile was not an occurrence of

such uncommon or unusual character that, unexplained, the jury could say it furnished evidence of negligence, but the question of the defendant's negligence was held for the jury where it appeared from the evidence that he drove the automobile over a portion of the street in which the car track was laid at a time when it was wet and slippery, and increased his speed in attempting to get off the track, which resulted in the car skidding on the rails, running upon the sidewalk, and killing a pedestrian.

In *Isaac Walton & Co. v. Vanguard Motor Bus Co.* (1908) 25 Times L. R. (Eng.) 14, 72 J. P. 505, 53 Sol. Jo. 82, where a motor bus skidded on a greasy roadway and collided with and damaged a standard lamp erected on the footpath, it was held that the fact that a vehicle, which in ordinary circumstances confined itself to the roadway, knocked down a permanent structure on the footpath, was evidence from which the jury might find that there was negligence on the part of the driver.

In *Gibbons v. Vanguard Motor Bus Co.* (1908) 25 Times L. R. (Eng.) 14, 72 J. P. 505, 53 Sol. Jo. 82, where recovery was sought for damage to a standard lamp erected on the pavement, as a result of the defendant's motor bus skidding into it upon a day when the roads were greasy, it was held that it was well known that motor busses were liable to skid so that it was impossible to control them, and that the defendant was liable for placing a nuisance on the highway, and for negligently using the highway.

J. T. W.

## STATE OF WEST VIRGINIA

v.

ROLLIN R. PRICE, Plff. in Err.

*West Virginia Supreme Court of Appeals—November 15, 1918.*

(— W. Va. —, 97 S. E. 582.)

**Criminal law — deposit to meet overdraft — diversion by bank.**

1. Where one, without sufficient funds in the bank to meet a check which

Headnotes by RITZ, J.

he has given in payment for property delivered to him at the time of the issuance of the check, subsequently, and before the presentation of such check, deposits in the bank sufficient funds to meet the same, with the agreement that such funds are deposited for the express purpose of paying said check, and the bank, before the presentation of the check for payment, diverts such funds to another purpose, the drawer thereof cannot be held guilty under § 34 of chapter 145 of the Code (§ 5237). Such deposit of funds in the bank for the express purpose of paying the particular check negatives any fraudulent purpose upon his part as fully as though he had paid off the check after it had been dishonored, and within twenty days after demand upon him therefor.

[See note on this question beginning on page 1254.]

**Indictment — use of bad check.**

2. An indictment for procuring property or other thing of value by the issuance of a check therefor, without funds in the bank to meet the same, in the form prescribed by § 34 of chapter 145 of the Code (§ 5237), is sufficient on demurrer.

**Evidence — declaration of statute.**

3. The provision in the statute permitting one who has given a check without funds in the bank upon which it is drawn, to successfully defend an indictment against him by showing that he has paid off said check within twenty days after demand being made upon him, is a declaration that such payment of the check after demand, and within twenty days, is evidence of lack of fraudulent intent on his part.

**Appeal — instruction — ignoring defense.**

4. An instruction given on behalf of the state, directing the jury to find the defendant guilty if a certain state of facts is true, but which excludes from their consideration a good defense set up and relied upon by him, is erroneous.

[See 14 R. C. L. 793.]

**Criminal law — overdraft — effect of bankruptcy.**

5. In a prosecution under § 34 of chapter 145 of the Code (§ 5237) against one for obtaining property by means of a check, without funds in the bank upon which it is drawn, it

is not error to refuse to permit the defendant to show that shortly after the check was dishonored and demand made upon him for its payment he was forced into bankruptcy, and his property taken away from him by an officer of the bankruptcy court.

**Trial — instructions — doubts.**

6. An instruction which tells the jury that they should not doubt as jurors unless they doubt as men should not be given.

[See 10 R. C. L. 1014.]

**— belief not based on evidence.**

7. An instruction, in a criminal case, which tells the jury that they should convict if they believe the defendant guilty to a moral certainty, without requiring such belief to be based upon the evidence introduced in the case, should not be given.

[See 14 R. C. L. 786.]

**Criminal law — overdraft — failure to present check.**

8. The failure of the payee in a check to present it within a reasonable time will not affect the liability of the drawer of such check to indictment, under § 34 of chapter 145 of the Code (§ 5237), for obtaining goods or other property by giving a check therefor without having sufficient funds to meet the same, where it appears that the drawer of the check did not lose anything by reason of the failure to present the same earlier than it was actually presented.

**ERROR** to the Circuit Court for Randolph County to review a judgment convicting defendant of giving a check in payment for certain property without having sufficient funds to meet the same. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. E. Baker, Elkins, Smith, & Jackson, and R. G. Linn for plaintiff in error.

Messrs. E. T. England, Attorney

General, and Charles Ritchie, Assistant Attorney General, for the State:

It was not error to overrule the demurrer to the indictment because



the full name of the party to whom the check was given is not set out, but is merely given as Mrs. M. J. Pettit.

Brown v. Com. 86 Va. 466, 10 S. E. 745; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162; 1 Bishop, New Crim. Proc. § 685; 1 Whart. Crim. Proc. 10th ed. 159; 1 Whart. Crim. Ev. §§ 94, 95; Whart. Crim. Pl. & Pr. 8th ed. § 117.

The evidence does not show a special deposit of the draft on the Pittsburg firm for the purpose of taking care of the Pettit check.

Michie, Banks & Bkg. 1288, 1299; State ex rel. Coleman v. Dickerson, 71 Kan. 769, 81 Pac. 497; Sears v. Emerson, 182 Ill. App. 522.

It was not error to give state's instructions, Nos. 1, 3, 4, and 8.

1 Brickwood's Sackett, Instructions, § 334; State v. Dickey 48 W. Va. 327, 37 S. E. 695, 15 Am. Crim. Rep. 485; State v. Bickle, 53 W. Va. 598, 45 S. E. 917; State v. Ice, 34 W. Va. 244, 12 S. E. 695; State v. Gunnoe, 74 W. Va. 741, 83 S. E. 64; State v. Koch, 75 W. Va. 648, 84 S. E. 510.

Ritz, J., delivered the opinion of the court:

Rollin R. Price was convicted in the circuit court of Randolph county of procuring a certain lot of cattle by giving a check therefor without having sufficient funds to meet the same, in violation of § 34 of chapter 145 of the Code (§ 5237), and to a judgment sentencing him to be confined in the penitentiary he prosecutes this writ of error.

For many years the defendant was extensively engaged in the business of buying and selling cattle through a number of adjoining counties of the state. In the year 1915 he arranged to purchase from Mrs. Pettit, the prosecuting witness, twenty-eight head of cattle. On the 1st day of October of that year he went to the Pettit place and there had the cattle weighed, the purchase price ascertained, and gave Mrs. Pettit a check therefor, which is the basis of the indictment in this case. The cattle were then loaded on the cars and shipped to market. Mrs. Pettit deposited this check in a bank at Beverley near her home, and when it reached the bank at Janelew, upon which it was drawn, it was dis-

honored for want of funds with which to pay it. Price was notified of this fact, and did not pay the check within the time provided by § 34 of chapter 145 of the Code (§ 5237); in fact, he did not pay it at all, and this indictment resulted. During the season of 1915 Price was selling his cattle to the firm of Shannon & Ferrell, commission merchants of Pittsburg. On July 7, 1915, this firm wrote a letter to the People's Bank, of Janelew, West Virginia, the bank upon which this check was drawn, advising that bank that the firm would accept drafts drawn by R. R. Price against shipments of live stock, when the drafts were not made before the day of shipment, and had indicated on them the number of cars contained in the shipment, and the name of the station at which they were loaded. This letter was received by the bank of Janelew, and Price had during that season been drawing drafts in accordance therewith, and these drafts had been theretofore honored. Before starting to the home of Mrs. Pettit to take up her cattle, Price went to the bank of Janelew and advised the cashier that he was going to take up Mrs. Pettit's cattle, as well as some others, and that he would draw checks for the purchase price of the cattle, and asked the cashier if he would advise the parties to whom such checks were issued, should they make inquiry over the telephone, that the checks would be paid upon presentation, at the same time stating that he would upon his return draw a draft upon his correspondent in Pittsburg to cover the amount of such checks. The officer of the bank to whom he made this statement advised him that it would be all right. Upon Price's return he did draw a draft upon the firm of Shannon & Ferrell in Pittsburg for \$4,500 on account of the cattle he had taken up, including the Pettit cattle, and deposited this draft in the bank to his credit. Before giving him credit for the amount, the bank wired the firm of Shannon & Ferrell and asked them if the draft would be accepted,

and on the same afternoon, which was the 2d day of October, the bank was advised that Shannon & Ferrell would accept the draft. Upon receipt of this telegram, the amount of \$4,500 was placed to Price's credit. Price then left home for a week or ten days, and during the time he was away, and before the presentation of the check of Mrs. Pettit, Shannon & Ferrell wired the bank to reduce the draft to \$3,500 instead of \$4,500, and this the bank did without consulting Price, or without his knowing anything about it. During Price's absence, it is also shown that drafts were drawn on him by Shannon & Ferrell, and were accepted and paid by the bank out of his funds for considerable amounts; the officers of the bank stating that Price had authorized them to accept any drafts drawn on him by Shannon & Ferrell.

The combined effect of the reduction of his \$4,500 deposit to \$3,500, and the payment of the drafts drawn by Shannon & Ferrell, was to reduce the balance in the bank to such an extent that when Mrs. Pettit presented her check for \$2,477.25, there were not funds sufficient to meet the same, and it was protested. Upon Price's return, demand was made upon him to make the check good, and he promised to do so, but claims that within a few days he was thrown into involuntary bankruptcy, all of his property seized and taken from him, and he was unable to make any arrangement to meet the check. There is no contradiction in the evidence as to the foregoing facts, but Price states in addition thereto that the \$4,500 draft was deposited with an understanding with the bank officer taking the same that the checks drawn by him to pay for the three carloads of cattle, and particularly the check drawn to pay Mrs. Pettit, were to be paid out of this \$4,500; in other words, he contends that it was agreed between him and the officer of the bank that this \$4,500 was deposited for the particular purpose of meeting the checks given by him in payment for the cattle for which the \$4,500 draft

was drawn upon Shannon & Ferrell. The bank officer, however, who received the deposit, denies that this was so, but says that it was deposited just as any other item of credit.

The first error assigned is to the action of the court in overruling the demurrer to the indictment. The indictment is in the form prescribed by § 34 of chapter 145 of the Code (§ 5237), but it is contended that this form is not sufficient, inasmuch as it does not require an averment that after the dishonor of the check demand was made for its payment, and this demand not met in twenty days. Ordinarily, where the legislature prescribes a form of pleading, it will be sufficient to follow the requirements thereof. In many jurisdictions the whole matter of pleading and practice is regulated by forms prescribed by the legislature. We cannot say that

**Indictment—  
use of bad  
check.**

there is any essential element of the offense omitted in the indictment in this case.

It is true, a party drawing a check when he has not sufficient funds in the bank with which to meet it may excuse himself from prosecution by paying the check within twenty days after demand, but the essential elements of the offense created by this section are the making of the false representation and the obtaining of the goods of another thereby. Of course, as in most criminal cases, the element of intent is necessary. The legislature in passing this statute had in view the fact that a man might mistakenly give a check without funds in the bank to meet it, but, if such were the case, that he would rectify the error as soon as it was brought to his attention. The fact that the offense may be excused by showing that the defendant made good the check within the twenty days simply goes to the question of his criminal intent;

**Evidence—  
declaration  
of statute.**

it being declared by the legislature that, if the check is made good within that time, there is no fraudulent intent,

and can be no conviction. We think therefore the indictment in the form prescribed by the statute is sufficient on demurrer.

The defendant next assigns as error the refusal of the trial court to permit him to prove that, almost immediately after his attention was called to the fact that the check was not paid, he was forced into involuntary bankruptcy, his property seized, and he rendered unable to raise the funds to meet the check. Is this evidence material to his defense? As before stated, the elements of this offense are the making of false representations or pretenses and the securing of another's property thereby. The fact that a man was on the verge of bankruptcy, and subsequently forced into bankruptcy, might rather tend to strengthen the presumption of fraudulent intent than to relieve him of it. It would not be evidence tending to show that he did not have such fraudulent intent at the time he issued the check. Who would know better his condition than himself?

**Criminal law—  
overdraft—  
effect of  
bankruptcy.**

He must take notice of this condition. This evidence would not in any degree tend to prove that he was mistaken when he issued the check, and therefore had no criminal intent. The fact that proof that he made the check good within twenty days releases him from criminal responsibility is only a declaration by the legislature that this fact shows he was without criminal intent at the time he issued the check; in other words, that he issued it under a mistake of fact, and presupposes that he has ample means with which to meet the obligation, and that it is only necessary to make them available at the particular bank upon which the check is drawn. His insolvent condition would not in any wise tend to establish these facts, but would rather tend to prove that he did not have the assets available for the purpose. We do not think there was any error in rejecting this evidence.

The action of the court in giving

the state's instruction No. 1 is also assigned as error, and this may be considered in connection with the assignment of error based upon the court's refusal to give defendant's instruction No. 7. The defendant's contention is that he deposited the \$4,500 draft in the bank with an agreement that it was to be used in the payment of the check upon which this indictment was based, among others, given by him for the purchase of cattle, and that the bank by allowing this draft, after it had been accepted, to be reduced by the amount of \$1,000, and paying other drafts drawn on him without his knowledge, improperly diverted the funds which he had deposited for the particular purpose of paying this check. It is not denied that at the time Price drew this check he did not actually have the funds in the bank with which to meet it, and it is also not denied that the bank officer agreed to advise any person to whom he gave such a check that it was all right and would be paid. It is also not denied that Price did draw the draft for \$4,500, and that this draft was drawn because of the shipment of these very cattle, and it is also uncontroverted that the bank had this draft accepted by telegraph on the same day that it was drawn, and placed it to Price's credit. There is a conflict in the evidence as to whether it was specially deposited for the purpose of paying these checks given for cattle, or whether it was made as a general deposit. The court below evidently took the view that whether it was deposited for this special purpose or not made no difference. It cannot be doubted that under this statute, if Price had collected this \$4,500 himself and kept the money until demand was made upon him personally for the payment of the check after dishonor, and had then paid it out of the \$4,500, he would not be guilty under the statute. He could after the check was dishonored make it good. Why could he not make it good before it was dishonored? The fact that he provides funds for meeting

the check, or makes it good after its dishonor, shows lack of criminal intent. It shows the absence of the purpose to defraud, and it occurs to us that if the jury had believed in this case that Price did deposit this money in that bank before the check was presented, with the understanding that this money was to be applied to the payment of that check when it was presented, it is a good defense to the indictment. The fact that the bank misappropriates that money afterwards and applies it to another purpose does not make Price criminally responsible.

—deposit to  
meet overdraft—  
diversion  
by bank.

The state's instruction No. 1 entirely disregards this defense and directs the jury to find the defendant guilty if the jury found that he did not have the money in the bank at the time he drew the check and did not make it good within twenty days after demand. This instruction was in fact peremptory for the reason that all of the facts which the jury were required to find in order to show guilt are admitted, and entirely excludes the defendant's defense that he had provided the funds and that the bank had made an unauthorized use of them. We therefore think that instruction No. 1, given on behalf of the state, was wrong in so far as it excluded this defense; and the refusal of the court to give instruction No. 7 is likewise wrong, inasmuch as this instruction attempted to present this defense to the jury. We do not mean to say that Price actually deposited this draft with that understanding, although there are many circumstances which strongly tend to sustain his contention. The action of the court below, however, excluded from the consideration of the jury this theory entirely, and in effect told the jury that absence of criminal intent could only be shown by proof that the check was paid after it had been dishonored. It occurs to us that it would be stronger evidence of the absence of criminal

Appeal—  
instruction—  
ignoring  
defense.

intent if it were shown that the drawer of the check provided funds to meet it before it was dishonored than by showing that he had waited for the dishonor of the check and then provided the funds. If Price's contention is true as between the holder of this check and the bank, the funds are there, and upon the bank's refusal to pay the check suit could be maintained against the bank to recover the amount thereof. Of course, this is a question of fact. The bank officers deny Price's theory, but it should have been submitted to the jury, and their finding of guilt made to depend upon their determination of this question of fact.

It is also complained that the court erred in giving state's instruction No. 2. This instruction told the jury that a "reasonable doubt" is not a vague and uncertain doubt, and that what the jury believed from the evidence as men they should believe as jurors. This sort of attempt to define such simple and well-understood language as reasonable doubt has been condemned by this court in a number of cases, notably that of *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *State v. Alderson*, 74 W. Va. 732, 82 S. E. 1021; *State v. Snider*, 81 W. Va. 522, 94 S. E. 981; *State v. Worley*, 82 W. Va. 350, 96 S. E. 56; *State v. Cook*, 81 W. Va. 686, 95 S. E. 792; *State v. McCausland*, — W. Va. —, 96 S. E. 938. Ordinarily the attempt to define such simple terms as reasonable doubt but results in confusion. Metaphysical disquisitions as to the meaning of these terms, as a rule, are either entirely without effect upon the jury, or else have a mischievous one. Further than this, as we have repeatedly heretofore stated, this sort of an instruction is an invitation to the jury to disregard their oaths in considering the evidence. While in the minds of many an oath administered to a juror may appear supererogatory, but so long as it is one of the essential requirements of the law of the

Trial—  
instructions—  
doubts.

land the courts cannot so regard it. While we have never reversed a conviction upon this ground alone, in the case of *State v. Young* — W. Va. —, 97 S. E. 134, decided at this term of this court, we expressed the opinion that there might be cases in which the giving of this instruction would compel us to reverse it. Certain it is that it can accomplish no purpose but a mischievous one, and in no case should it be given.

Instruction No. 4 given by the state is criticized. It tells the jury that if they are morally certain of the defendant's guilt they should so find. The moral certainty which this instruction tells the jury is sufficient evidence of guilt may be based upon things which the jurors know aside from the evidence that has been introduced in the case; it may be based upon prejudice, or upon conduct of the accused in connection with other matters. Manifestly it would be improper to convict a man of a crime because the jury may be morally certain of his guilt when that moral certainty arises from its knowledge of his general course of dealing. It is not inconceivable, and frequently it is the case, that men have a reputation in the community undeserved which lead a considerable number of their neighbors to believe them guilty whenever they are suspected of any offense, and this belief in the minds of many is so strong as to amount to moral certainty of guilt as soon as a charge of crime is made. This instruction does not limit the jury to the consideration of the evidence introduced in the case, but allows them to arrive at this state of moral certainty from anything. This is as broad as their range of

—belief not  
based on  
evidence.

knowledge or information, and manifestly should not have been given. *State v. Sheppard*, 49 W. Va. 606, 39 S. E. 676.

The defendant also contends that it was error for the court to refuse his instruction No. 5. This instruction tells the jury that it is the duty of a person receiving a check drawn on a bank in another place to forward it direct to the place where the bank is located for payment, and that the plaintiff failed to present her check within a reasonable time, for which reason Price is relieved of all liability. This instruction is based upon § 186 of chapter 98a of the Code (§ 4357), being the Negotiable Instrument Law. That section provides that a check must be presented within a reasonable time after it is issued or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. We cannot see what application that has to this case. The loss referred to in that section means loss to Price, and in this case Price lost nothing by the failure to present this check at the time it was presented rather than at an earlier time. If the bank had become insolvent before the presentment of the check, and this resulted in a loss to Price of the amount he had on deposit there to meet the check, that section would have application; but he cannot say that, because the payee of the check has lost money on account of its being dishonored, Price is discharged from paying his debt.

Criminal law—  
overdraft—  
failure to  
present check.

What we have said disposes of all of the questions presented and results in a reversal of the judgment complained of.

## ANNOTATION.

**Violation of criminal statute against drawing checks without sufficient funds to meet them as affected by deposit of money, or a statutory provision permitting payment within specified time.**

The general rule is that, to obtain or sustain a conviction under statutes making it a criminal offense to give a check or draft without sufficient funds to meet it, proof of a fraudulent intent is essential, since to constitute crime intent must concur with the act. The question then arises as to the effect of a provision in such a statute permitting payment within a specified time after notice of dishonor, and a tender within such time. In the reported case (*STATE v. PRICE*, ante, 1247) this question was answered by the statement that such a provision is a declaration that a payment of the check after demand and within the statutory period is evidence of the lack of the necessary fraudulent intent on the drawer's part, which means that such a payment negatives any fraudulent intent and constitutes a defense to a prosecution under the statute. But to have this effect the tender of the amount of the check must actually be made within the period after notice provided by the statute, it having been held that proof of a tender made and refused after the expiration of such period raises nothing to be submitted to the jury on a prosecution for drawing a check with intent to defraud because of insufficient funds to meet the same. *Seigel v. Com.* (1917) 177 Ky. 232, 197 S. W. 809.

A question has also been made as to whether or not a provision of the character under consideration makes a failure to pay within the period provided therefor, after notice of nonpayment, an essential element of the statutory offense. Upon this point it was held in *State v. Crockett* (1917) 137 Tenn. 679, 195 S. W. 583, that under Tennessee Laws 1915, chap. 178, which in effect makes it unlawful to obtain money by check which is not paid by the drawee or by the drawer after seven days' written notice, the

failure to pay on such notice is one of the constituents of the offense and an essential condition of guilt, so that an indictment which does not allege the giving of the necessary notice and the subsequent failure to pay was insufficient and properly quashed on motion. However, a contrary conclusion was reached in *Merkel v. State* (1918) 167 Wis. 512, 167 N. W. 802, in construing Wisconsin Statute 1917, § 4438a, it having been held that the offense of fraudulently issuing a check as defined thereby was completed when the check was drawn, and that the provision making failure to pay within a specified time after notice of dishonor prima facie evidence of a fraudulent intent was merely a rule of evidence, so that such a failure to pay after notice was not an essential element of the offense.

The answer of the court in the reported case (*STATE v. PRICE*, ante, 1247) to the closely analogous question of the effect of the making of a deposit to meet the check after giving the same, but before presentation thereof, that such a deposit of funds, especially if made for the purpose of paying the particular check, negatives any fraudulent purpose upon the drawer's part as fully as though he had paid off the check after dishonor, but within the statutory period after notice thereof, is supported by the decision in *Dawson v. State* (1916) 79 Tex. Crim. Rep. 371, 185 S. W. 875, where it was held that under a statute making it a crime to obtain money with intent to defraud by drawing a check on a bank in which the drawer has not then, or at the time when in the ordinary course of business the check would be presented, sufficient funds to meet it, a defendant who deposits money in the drawee bank in time to meet the check upon its presentation cannot be convicted. G. J. C.

SARAH M. KNOWLES  
v.  
BOSTON ELEVATED RAILWAY COMPANY.

*Massachusetts Supreme Judicial Court — June 28, 1919.*

(233 Mass. 347, 123 N. E. 681.)

**Carrier — injury to passenger — liability for crowded car.**

1. Permitting a car to become so crowded that the doors have to be pressed against the crowd to close them does not render a railway company liable for injury to a passenger pushed out of the door by the crowding of the passengers when the door is opened to discharge passengers at a stop.

[See note on this question beginning on page 1257.]

**Evidence — incompetent — effect of admission.** without objection is entitled to its probative force.

2. Incompetent evidence admitted [See 2 R. C. L. 77.]

REPORT by the Superior Court for Suffolk County (Irwin, J.) for determination by the Supreme Judicial Court of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for defendant. *Judgment for defendant.*

The facts are stated in the opinion of the court.

Mr. John F. Scott for plaintiff.

Messrs. Fletcher Ranney and Thomas Allen, Jr., for defendant:

To hold defendant liable it is necessary to show that the conduct of the crowd on previous occasions was of such a nature—disorderly, boisterous, or violent—that the defendant had warning of danger to passengers which it should thereafter anticipate and guard against.

MacGilvray v. Boston Elev. R. Co. 229 Mass. 65, 4 A.L.R. 283, 118 N. E. 166; Gasciewicz v. Boston Elev. R. Co. 222 Mass. 266, 110 N. E. 269; McCumber v. Boston Elev. R. Co. 207 Mass. 559, 32 L.R.A. (N.S.) 475, 93 N. E. 698; Lord v. Sherer Dry Goods Co. 205 Mass. 1, 27 L.R.A. (N.S.) 232, 137 Am. St. Rep. 420, 90 N. E. 1153, 18 Ann. Cas. 41.

Carroll, J., delivered the opinion of the court:

The plaintiff was injured by falling from one of the defendant's cars when the door was opened for her to alight. There was evidence that the plaintiff entered the car at Harvard square station; that "most of the seats were filled;" that in the presence of the guard and starter many

people boarded the car and it became so crowded that the guard "had to press the doors in;" that at this hour in the morning, at Harvard square, the cars were always filled, and "everybody was rushing wild, trying to get on;" that the plaintiff was injured at Bigelow avenue, in Watertown, which was about twelve minutes' run from Harvard square, with no intervening stop. The evidence of what happened at Harvard square was not objected to (see Seale v. Boston Elev. R. Co. 214 Mass. 59, 60, 100 N. E. 1020); and even if it were incompetent, having been admitted without objection, it is entitled to its probative force (Hubbard v. Allyn, 200 Mass. 166, 171, 86 N. E. 356).

**Evidence—  
incompetent—  
effect of  
admission.**

The plaintiff testified that as the car stopped or was about to stop at Bigelow avenue "the door went open, and I landed on the street, on my shoulder. . . . I had an umbrella and a handbag in my hand. Just before the door opened, it [the car] was crowded, and each one was

pressing forward to get to the door. At the time the door opened, there was pressure upon me . . . from the crowd. . . . I was in the same position when the door opened and when I was thrown as I was when the car started. . . . I couldn't move from the time the car started at Harvard square."

A witness for the plaintiff testified that when the car stopped at Bigelow avenue the motorman opened the door and "the people all try more pressure."

Considering all the evidence, there is nothing to show that the plaintiff

**Carrier—injury  
to passenger—  
liability for  
crowded car.**

was injured by reason of the defendant's negligence. In *Seale v. Boston Elev.*

*R. Co. supra*, the plaintiff offered to show that "before she entered the crowded car at Scollay square," "and that as she was standing after the other passengers had entered the rear door of the next to the last car, the guard put his hand behind her back and pushed her into that rear door against the crowd." She testified that when the train reached Park street station, the car door was opened and she "'went to step' and before she 'had a chance to step the crowd pushed' her and she fell out, her leg going down between the car and a portion of the station platform which curved away from the car about 2 feet." It was decided that the plaintiff was not prejudiced by the exclusion of her offers of proof, and could not recover. This case cannot be distinguished from the case at bar, and is decisive of it.

The plaintiff's case really rests on the fact that the car was crowded. It was said in *Burns v. Boston Elev. R. Co.* 183 Mass. 96, at page 97, 66 N. E. 418, 13 Am. Neg. Rep. 527: "The fact that the car was crowded is immaterial." This has been said in substance in numerous cases and is implied in many other decisions. *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639, 9 Am. Neg. Rep. 490; *McCumber v. Boston*

*Elev. R. Co.* 207 Mass. 559, 32 L.R.A.(N.S.) 475, 93 N. E. 698.

In *Willworth v. Boston Elev. R. Co.* 188 Mass. 220, 222, 74 N. E. 333, 18 Am. Neg. Rep. 463, it was held that the defendant was not in fault in failing to take measures to prevent passengers from crowding in passing from the car if the passengers were not disorderly, and where there is no reason to expect that anything unusually dangerous would happen. *Field v. Boston Elev. R. Co.* 188 Mass. 222, 74 N. E. 334; *Marr v. Boston & M. R. Co.* 208 Mass. 446, 94 N. E. 692; *MacGilvray v. Boston Elev. R. Co.* 229 Mass. 65, 4 A.L.R. 283, 118 N. E. 166. These cases govern the case at bar.

*Chase v. Boston Elev. R. Co.* 232 Mass. 133, 122 N. E. 174, is to be distinguished. In that case the person in charge of the elevator, without warning, opened the elevator door against which the plaintiff was leaning, which appeared to be a part of the wall of the elevator. The elevator was stopped about 4 inches above the level of the floor, and there was a settee in the way, over which the plaintiff fell. In *Kelley v. Boston Elev. R. Co.* 210 Mass. 454, 96 N. E. 1031, and *Bryant v. Boston Elev. R. Co.* 212 Mass. 62, 40 L.R.A.(N.S.) 133, 98 N. E. 587, the plaintiff was injured in a crowded subway station where the conditions could have been foreseen and provided for. *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A.(N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815, rests on the fact of violent conduct at a subway waiting station. *O'Day v. Boston Elev. R. Co.* 218 Mass. 515, 106 N. E. 144, depends on *Stevens v. Boston Elev. R. Co.* 184 Mass. 476, 69 N. E. 338, 15 Am. Neg. Rep. 338, where there was a violation of a rule by a servant of the defendant, established by it for the protection of passengers. In *Treat v. Boston & L. R. Corp.* 131 Mass. 371, 3 Am. Neg. Cas. 799; *Glennen v. Boston Elev. R. Co.* 207 Mass. 497, 32 L.R.A.(N.S.) 470, 93 N. E. 700; *Coy v. Boston Elev. R. Co.* 212 Mass. 307, 98 N. E. 1041;



Morse v. Newton Street R. Co. 213 Mass. 595, 100 N. E. 1007; and Nute v. Boston & M. R. Co. 214 Mass. 184, 100 N. E. 1099, there was evidence of disorderly and unruly conduct on the part of passengers, which should have been foreseen and guarded against by the defendant. No such facts appear in the case at bar, and

these cases do not support the plaintiff's contention. Stat. 1906, chap. 463, pt. 3, § 96, was not applicable to the plaintiff's case, and we need not consider it.

According to the report, judgment is to be entered for the defendant.

So ordered.

## ANNOTATION.

### Liability of street railway company to passenger on account of crowded condition of cars.

The present annotation is confined to cases involving injuries resulting from or attributable to the activities of the crowd as such, and consequently does not include cases where the injuries were the result of or incident to the more exposed position on the car assumed by the injured person because of the crowded condition thereof, and in causing which the crowd took no active part. Also excluded are the cases where the injuries were caused by disorderly and unruly conduct rather than by the ordinary and usual movements of the passengers, due to the fact that the cars were crowded.

The Massachusetts theory as applied in the reported case (KNOWLES v. BOSTON ELEV. R. Co. ante, 1255) seems to be that the fact that a street car is crowded is immaterial upon the question of liability of the company to a passenger injured on account of the crowded condition of the car, and that the true test is whether or not there was reason to expect that anything unusually dangerous would happen; in other words, whether the conditions could have been foreseen and provided for; practically leaving out of consideration the fact that the car was overcrowded. Applying this line of reasoning, the court in the KNOWLES CASE, where the plaintiff's cause of action really rested on the fact that the car was crowded, held that no recovery could be had for injuries caused by a passenger being pushed off the platform of a car when the doors were opened at a station, although the car was so crowded that,

with the doors closed, the plaintiff could not move. This decision followed *Searle v. Boston Elev. R. Co.* (1913) 214 Mass. 59, 100 N. E. 1020, which it sufficiently sets out, and which is similar as regards both facts and conclusion. And in *Willworth v. Boston Elev. R. Co.* (1905) 188 Mass. 220, 74 N. E. 333, 18 Am. Neg. Rep. 463, a street railway company was held not to have been negligent in not taking measures to prevent passengers from crowding in passing out, on the ground that "there was no reason to expect anything unusually dangerous on this occasion." This decision was held to control *Field v. Boston Elev. R. Co.* (1905) 188 Mass. 222, 74 N. E. 334. Again, in *McCumber v. Boston Elev. R. Co.* (1911) 207 Mass. 559, 32 L.R.A. (N.S.) 475, 93 N. E. 698, proceeding upon the theory that it is not negligence upon the part of a street car company to permit passengers to come upon cars which are already crowded, and that pushing and crowding upon such a car becomes of consequence only when done in a disorderly way, or in such a manner as would naturally have caused a careful conductor to apprehend violence or disorder, it was held that one who took passage on a street car so crowded that she was compelled to stand in the doorway could not recover for injuries caused by being pushed off the car by passengers attempting to force a passage out of it.

And in *Lehberger v. Public Service R. Co.* (1909) 79 N. J. L. 134, 74 Atl. 272, in holding that a declaration based on the proposition that the

plaintiff's injuries, resulting from being pushed from a street car, were due to defendant's "overcrowding its car to such an extent that the ordinary result therefrom was the injury," failed to set out a cause of action, the court said that if the car was overcrowded at the time plaintiff entered it, that condition was as obvious to him as to the defendant's agents that permitted it, so that the defendant assumed the risk of such overcrowding; and that if the car became overcrowded after plaintiff entered it, by his act in pushing through the crowd to the platform before the car stopped, he passed from a position of safety inside the car to the very place where the overcrowding was likely to be dangerous to him; under which circumstances "he cannot complain as against the defendant on account of the acts of members of the crowd."

But in the great majority of the cases the courts have regarded the overcrowding of street cars as a controlling, or, at least, as a material, element in determining the liability of a street railway company for injuries to passengers caused by or resulting from such overcrowding.

Thus, in *South Covington & C. Street R. Co. v. Harris* (1913) 152 Ky. 750, 154 S. W. 35, in holding the company liable for injuries to a passenger pushed or crowded from an overcrowded car by other passengers in attempting to alight, it was said, in answer to the company's contention that the carrier should not be made responsible in damages for the acts of a crowd of passengers, who, in their hurry to get off a car, unintentionally or purposely push or crowd another passenger, who does not wish to get off, from the platform, that the question was, Did the company commit a breach of the duty it owed the injured passenger in permitting the car to become so crowded as that passengers, in an effort to get off at a transfer point, were almost necessarily compelled to so push and crowd other passengers standing on the platform, and not desiring to get off at such point, as to cause them to fall from the car? Answering this contention

and question the court argued as follows: "When a carrier permits its car to become so crowded with passengers as that those wishing to alight at a station cannot do so without pushing and crowding a passenger who does not desire to alight, to such an extent as to cause him to be thrown or shoved from the car, the company should be held liable in damages upon the ground that it is under a duty to anticipate the reasonable and natural conduct of passengers in making an effort to get off a car that has been permitted by its servants to become so overcrowded as that the passengers cannot alight without shoving and pushing to such an extent as to endanger the safety of those who do not wish to alight. . . . A carrier is not to be held liable for a wrong done or an injury inflicted by the act of a passenger that could not be reasonably anticipated by the servants of the carrier charged with the duty of looking after and protecting passengers from injury. . . . But a carrier can determine the number of passengers that may be safely carried in a car, and it can control the number that shall be permitted to ride on a car, and from its knowledge of conditions it can reasonably anticipate the number of passengers that will get on and off at given points during certain hours in the day, and when a carrier permits a car to become overcrowded with passengers, it assumes the obligation of exercising the highest practicable degree of care consistent with the proper conduct of its business to prevent a passenger from being injured by the pushing and crowding of other passengers at points where it may reasonably expect large numbers of passengers to get off its car, as it was the custom to do at the transfer station where appellee was injured. While a carrier may not be under any duty to anticipate or provide against accidental injury that may be inflicted by the rudeness or carelessness of one or a few passengers, it must be charged with knowledge of the habits of crowds of passengers and their indifference for the rights of others when they are in a

hurry to get off at the terminal, transfer, and other points established by it."

So, in *Lobner v. Metropolitan Street R. Co.* (1909) 79 Kan. 811, 21 L.R.A. (N.S.) 972, 101 Pac. 463, the court adopted the rule that a street railway company which permits its cars to become so overcrowded that a passenger is exposed to danger which reasonable foresight upon the part of those in charge of such cars might have anticipated and avoided is negligent, and held that a passenger injured by being pushed off by the crowd could recover therefor, it appearing as a matter of fact that the company was negligent in taking on passengers to the point of danger to them, and that the injured passenger was free from contributory negligence.

And in *Reem v. St. Paul City R. Co.* (1899) 77 Minn. 503, 80 N.W. 638, 778, 6 Am. Neg. Rep. 588, it was held that where a carrier undertook to carry more passengers on a street car than could sit and stand within the car and on the platform, with the direct result that, in attempting to get more on, the plaintiff, who had boarded the car before it was crowded, was pushed off the platform and injured, the company was guilty of negligence; the court saying that the exercise of reasonable foresight would have foretold the danger and the reasonable probability of the accident. In this case it was specifically found that the accident was caused by the overcrowding of the car.

And in *Merwin v. Manhattan R. Co.* (1888) 48 Hun, 608, 1 N.Y. Supp. 267, 5 Am. Neg. Cas. 441, where defendant so crowded its car that the platform, which was partly unguarded, was packed, it was held that it was liable for the death of a person crowded from such platform by other passengers preparing to alight, since it ought to have foreseen that crowding a platform one part of which was unguarded, might result in an accident such as occurred.

And in *McCaw v. Union Traction Co.* (1903) 205 Pa. 271, 54 Atl. 893, it was said that while it is not negligence for a street railway company to

overcrowd its cars, additional care and precautions must be exercised in such a case, and that such a company cannot invite or permit passengers to board its cars beyond their normal capacity, and not be responsible for danger which necessarily results from their overcrowded condition.

And in *Petersen v. Elgin, A. & S. Traction Co.* (1908) 142 Ill. App. 34, affirmed in (1909) 238 Ill. 403, 87 N.E. 345, where a person riding on the step of a street car was struck by a car passing on a parallel track, it was held that it was the duty of those in charge of the first car, which was crowded to overflowing, to know of the presence of passengers on the steps, and, knowing of the attendant danger, which was not known to the injured passenger, to either furnish them with a safe place to ride, or warn them of the danger of their position, and afford an opportunity to retire from it; so that, upon a failure to perform such duties, the company is liable for such injuries where the injured passenger was pushed against the passing car by other passengers, induced by the overcrowded condition of the car. *Tolleman v. Sheboygan Light, Power & R. Co.* (1912) 148 Wis. 197, 134 N.W. 406, where the facts were similar, is to the same effect. And in *Walker v. Connecticut Co.* (1917) 91 Conn. 606, 100 Atl. 1063, it was held that where an aggravated condition of crowding of the cross aisles of an open street car by passengers and luggage had been called to the attention of the conductor, to which complaint he paid no attention, the facts justified a finding of negligence against the company, a passenger having been so jostled as to fall out of the car while attempting to get out of the way of other passengers about to alight. The court said: "The conductor ought, in the exercise of the high degree of care required of common carriers of passengers, to have known that the aggravated overcrowding of this cross aisle created a condition dangerous to passengers who would have to use it in getting off the car, and to other passengers who, by reason of such overcrowding, might

have to move out onto the running board to get out of their way. The negligence alleged was the overcrowding of the aisle by hand luggage and passengers, and the jostling to which the plaintiff was subjected was a natural incident of the overcrowding."

And in *Broder v. New York Consol. R. Co.* (1917) 98 Misc. 256, 162 N. Y. Supp. 1002, it was held that a passenger who was invited by a railway company to enter a car that was so crowded both inside and on the platform as to compel him to maintain a precarious footing near the edge of the platform, from which he was forced by the pressure and pushing of other passengers while the car was in motion, which movement of passengers was caused directly by the overcrowding, may maintain a personal-injury action against the company.

And it has been held that if a passenger is injured because of the fact that the guard on an elevated train, against the remonstrance of those that were in the car, pushed and forced into the car more people than it would safely hold, the company is liable. *Viemeister v. Brooklyn Heights R. Co.* (1905) 182 N. Y. 307, 74 N. E. 831, reversing (1904) 91 App. Div. 510, 87 N. Y. Supp. 162.

In New York the court of appeals has held that the question whether or not a street railway company is negligent in overloading a car from the platform of which the crowded passengers had pushed another passenger, to his injury, is one of fact for the jury, since it cannot be said as matter of law that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding the car and platforms might render accidents like the one that befell the plaintiff probable. *Lehr v. Steinway & H. P. R. Co.* (1890) 118 N. Y. 556, 23 N. E. 889, 9 Am. Neg. Cas. 635, sustaining a judgment for the plaintiff. So, in *Kohm v. Interborough Rapid Transit Co.* (1905) 104 App. Div. 237, 93 N. Y. Supp. 671, 16 N. Y. Anno. Cas. 315, it was held that where the overcrowding of a car, which the company can control, either causes or

contributes to an accident to a passenger, it is a question for the jury whether the company negligently allowed the car and platform to become so crowded that a passenger was liable to be pushed off; that is, so crowded that a reasonably prudent person would apprehend danger from the situation. And in *Knaisch v. Joline* (1910) 138 App. Div. 854, 123 N. Y. Supp. 412, it was said that "there can be no doubt that the jury may find negligence from such overcrowding of cars as exposes the passengers to danger." Again, in *Dashew v. Interborough Rapid Transit Co.* (1919) 175 N. Y. Supp. 875, it was held that where the carrier has power to limit the number of passengers, it owes a duty to prevent dangerous overcrowding of its cars and platforms, and that where a passenger is injured by the rushing, pushing, and crowding of other passengers upon an overcrowded car, the company's negligence in permitting the same is a question for the jury. And that allowing a car to be negligently overcrowded may justify a recovery where such condition was the direct and proximate cause of an accident to a passenger, see *McVay v. Brooklyn, Q. C. & Suburban R. Co.* (1906) 113 App. Div. 724, 99 N. Y. Supp. 266.

And it has been held that where a company does negligently overcrowd a street car, it will not be relieved from liability for injuries to a passenger pushed off by the crowd by the fact that such pushing was the wrongful act of passengers in attempting to get out of the car before it stopped at their destination. *Morris v. Chicago Union Traction Co.* (1905) 119 Ill. App. 527. So, in *Kordick v. Chicago R. Co.* (1914) 187 Ill. App. 74, where a street railway company was negligent in permitting its car to be overcrowded, it was held that such negligence rendered it liable for injuries to a passenger, caused by being pushed from the platform by other passengers in attempting to get out, and that its negligence was the proximate cause of the injury, notwithstanding the concurrent conduct of the passengers in pushing forward to alight. And

again, in *Pray v. Omaha Street R. Co.* (1895) 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447, the court, in holding that the defendant's negligence was a question for the jury where it appeared that a street car passenger was forced by the pressure of other passengers to relinquish his hold, and fell from the step of the car, laid down the rule that it is evidence of negligence for a street railway company to overcrowd a car, and that such companies are presumptively liable for the concurrent negligence of their servants and third persons, resulting in personal injuries to passengers. And in *Sheridan v. Brooklyn City & N. R. Co.* (1867) 36 N. Y. 39, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619, where a boy was crowded and pushed from the platform of a street car by a passenger seeking to alight, it was held that the company was liable, it appearing that the accident was caused by the concurrent negligence of the alighting passengers and the company's illegal conduct in overcrowding its car, and in the conductor ordering the injured passenger to give up his seat and stand upon the platform. And in *Knaisch v. Joline* (1910) 138 App. Div. 854, 123 N. Y. Supp. 412, it was again held that the concurrent negligence of other passengers than the one injured by the negligent overcrowding of a car does not relieve the company from liability.

Of course, if the rush of passengers to get off a crowded street car is such as obviously to interfere with the safety and convenience of those in

front of them, it is the duty of the conductor to use reasonable efforts to check the rush to the end that passengers be not injured. *Jarmy v. Duluth Street R. Co.* (1893) 55 Minn. 271, 56 N. W. 813, 4 Am. Neg. Cas. 261, holding that, under the facts of the case, the conductor had no reason to apprehend special danger to plaintiff. But if a passenger leaves a place of safety in a crowded car and takes a position of danger upon the step, it has been held that, in order to charge the company with liability for an accident caused by the plaintiff being pushed off the step by reason of the crowded condition of the car, notice to the servants in charge of the car, of his position, is essential. *Buchter v. New York City R. Co.* (1904) 90 N. Y. Supp. 335.

Naturally, also, it is clear that the contributory negligence of the passenger may be such as to relieve the carrier from its negligent overcrowding of the car. For instance, in *Chicago City R. Co. v. Considine* (1893) 50 Ill. App. 471, it was held that even if it be assumed that the crowded condition of a street car platform had a tendency to cause a passenger to be thrown off, and that the company, by mismanagement, was to blame for such condition, yet, if such passenger knew that condition and made his way into it, he shared in the fault, and it being mutual, he cannot complain if injury resulted to him from the movements of such crowded passengers for no cause for which the company was directly responsible. G. J. C.

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WILLIAM M. EBNER, Respt.,

v.

PETER STEFFANSON, Appt.

*North Dakota Supreme Court — April 26, 1919.*

(— N. D. —, 172 N. W. 857.)

**Judgment — appeal — enforcement in other jurisdiction.**

1. In an action in the superior court of Los Angeles county, state of California, by the plaintiff against defendant and others, a judgment

Headnotes 1-3 by GRACE, J.

was entered in plaintiff's favor for \$7,399.99, upon which there was paid \$358.40, leaving a balance due thereon of \$7,041.40. Steffanson, with other of the defendants, appealed from such judgment to the supreme court of the state of California, and such appeal is still therein pending. The plaintiff, while the action was still pending in the supreme court of California, brought suit in the district court of Burleigh county, North Dakota, upon the judgment, and recovered judgment thereon in said court in the sum of \$7,709.61. The defense was that under the laws of California and the decisions of their supreme court no action could be maintained on the judgment in North Dakota while the appeal from the judgment remained undetermined in the supreme court of California, and that the judgment could not be offered in evidence during that time. Construing the laws of California in this regard, it is held that the judgment was a proper basis for cause of action thereon; that such judgment was competent evidence to prove its own existence and contents.

[See note on this question beginning on page 1269.]

— absence of stay bond — effect.

2. It is held that judgment was properly rendered in the district court of Burleigh county, North Dakota, upon the California judgment sued upon, in view of the fact that the appeal from the judgment to the supreme court of California would not suspend nor stay the execution nor other proceedings on the judgment; there being no stay bond executed, as required by § 942 of the Code of Civil Procedure of California, relative to an appeal from a money judgment.

[See 15 R. C. L. 942.]

— effect of appeal.

3. It is the general rule in California, as announced by their decisions, that in an appeal from a judgment in that state, where their laws do not require that a stay bond shall be furnished in order to stay execution or

other proceedings on the judgment, during the pendency of such appeal, such judgment is, to all intents and purposes, suspended during the appeal, and is not competent as evidence until a determination of the appeal. This rule does not apply to an appeal from a judgment where a stay bond under the law of California is required to stay execution or other proceedings on the judgment.

[See 15 R. C. L. 942.]

— conflict of laws — effect of judgment.

4. The status of a judgment until final determination upon appeal must be determined by the laws of the state in which it is rendered, not by those of another state in which attempt is made to enforce it.

[See 15 R. C. L. 942.]

(Robinson, J., dissents.)

**APPEAL** by defendant from a judgment of the District Court for Burleigh County (Nuessle, J.) in favor of plaintiff in an action brought to recover a balance alleged to be due and unpaid on a money judgment recovered by plaintiff in another state. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Newton, Dullam, & Young, for appellant:

A judgment rendered in the superior court of California, which has been appealed to the supreme court of that state, cannot be made the basis of a cause of action in North Dakota, while the action is still pending and undecided in the supreme court of California.

2 Elliot, Ev. § 1535; Mills v. Duryee,

7 Cranch, 481, 3 L. ed. 411; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972; Contra Costa Water Co. v. Oakland, 165 Fed. 529; Woodbury v. Bowman, 13 Cal. 634; Murray v. Green, 64 Cal. 363, 38 Pac. 118; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Re McPhee, 154 Cal. 385, 97 Pac. 878; Mitchell v. Cali-

fornia & O. S. S. Co. 154 Cal. 731, 99 Pac. 202; Feeney v. Hinckley, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580; Hills v. Sherwood, 33 Cal. 474; Gillmore v. American Cent. Ins. Co. 65 Cal. 63, 2 Pac. 882; Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757; Re Blythe, 99 Cal. 472, 34 Pac. 108; Webb v. Buckelew, 82 N. Y. 560; Story v. Story & I. Commercial Co. 100 Cal. 41, 34 Pac. 675; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; Fresno Mill. Co. v. Fresno Canal & Irrig. Co. 4 Cal. Unrep. 592, 36 Pac. 412.

Mr. J. A. Hyland, for respondent:

Since no supersedeas bond has been given on the appeal, there can be no stay of execution, and therefore judgment may be sued on in this state.

Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Lonnergan v. Lonnergan, 55 Neb. 641, 76 N. W. 16; Bank or North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; 23 Cyc. 1504; Magnolia Metal Co. v. Sterlingworth R. Supply Co. 6 North. Co. Rep. 358; Sweetser v. Fox, 43 Utah, 40, 47 L.R.A. (N.S.) 145, 134 Pac. 599, Ann. Cas. 1916C, 620.

Grace, J., delivered the opinion of the court:

This is an appeal from the judgment of the district court of Burleigh county. The judgment was for \$7,709.61 in favor of plaintiff and against the defendant.

The material facts in the case are as follows:

The plaintiff maintained an action in the superior court of the county of Los Angeles, California, against the West Hollywood Transfer Company, a corporation, C. H. Barck, and P. Steffanson.

On the 19th day of June, 1917, the superior court of the county of Los Angeles duly rendered and gave a judgment in said action in plaintiff's favor for the sum of \$7,399.99, upon which there was paid \$358.40, leaving a balance due thereon of \$7,041.40.

The defendants in said action appealed from that judgment to the supreme court of that state. In taking such appeal, the defendants did not give a supersedeas bond. After the said appeal was duly taken, the plaintiff commenced an action in the district court of Burleigh county,

North Dakota, upon the judgment rendered in the superior court of Los Angeles county, California, and recovered a judgment in the district court of Burleigh county, North Dakota, on the 3d day of October, 1918, for the sum of \$7,041.40, and interest thereon from the 19th day of June, 1917, at 7 per cent per annum, together with the costs, amounting in all to \$7,709.61. In the judgment of the district court of Burleigh county was inserted a condition that no execution issue out of that court on said judgment until the judgment sued upon shall have been affirmed by the supreme court of that state.

Specified errors in this appeal present a single question of law, viz.: Can a judgment rendered in the superior court of Los Angeles county, California, from which an appeal has been taken to the supreme court of that state, no supersedeas bond having been filed therein, be made the basis of a cause of action in North Dakota while the action is still pending in California, and while the appeal to the supreme court of that state remains undecided?

We are of the opinion that such judgment is a proper basis of a cause of action in the state of North Dakota. The judgment which

Judgment—  
appeal—  
enforcement  
in other  
jurisdiction.

we are considering is one for money only. In California the statutory requirements on appeal from a judgment of that character from the superior court (which corresponds in jurisdiction to the district court of this state), to the supreme court, are similar to those of this state. In other words, California has by statute provided the time and manner in which an appeal may be taken to their supreme court from a judgment of the character we are considering. An appeal may be taken from the superior court of the state of California to the supreme court in the manner provided in § 940 of the Code of Civil Procedure of the state of California. It provides the appeal is ineffectual unless, within

five days after service of the notice of appeal, an undertaking is filed or a deposit of money is made with the clerk, as hereafter provided, or the undertaking be waived by the adverse party in writing. Section 941 of the California Code of Civil Procedure sets forth the character of the bond required on appeal, which is in fact a cost bond, and must be of such sum as to secure the payment of all damages and costs not exceeding \$300.

Under § 940 of the Code of Civil Procedure of California, when a notice of appeal has been filed with the clerk of the superior court and served upon the adverse party, and the undertaking provided in § 941 duly executed and deposited with the clerk of the court in which judgment was entered, such appeal is perfected, and the supreme court of the state of California acquires jurisdiction of the action. If the appeal, however, is from a money judgment, it does not stay the execution of the judgment or order, unless, as provided by § 942 of the Code of Civil Procedure of California, a written undertaking is executed by the appellant and two or more sureties in double the amount named in the judgment or order, to the effect that, if the judgment or order appealed from or any part thereof be affirmed or the appeal be dismissed, they will pay the amount directed to be paid by the judgment or order or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against appellant, etc. Thus this section provides for the supersedeas bond.

The foregoing requirements of the California Code of Civil Procedure are practically identical with the requirements contained in the Code of Civil Procedure of the state of North Dakota with reference to appeal from the district courts of this state to the supreme court. It may be conceded that upon appeal to the supreme court of California from the superior court of that state, upon

the perfection of such appeal, the action is pending in the supreme court of that state.

Under § 941a of the Code of Civil Procedure of California, there is provided what is dominated an alternative method of appeal. Under this method all that is necessary to do to effect an appeal from a superior to the supreme court of California is to file with the clerk of the superior court a notice of appeal, as provided by § 941b. *Mitchell v. California & O. S. S. Co.* 154 Cal. 731, 99 Pac. 202. This section does not require service of notice of appeal. *Potrero Nuevo Land Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12. Under this section no undertaking is essential to the jurisdiction of the appellate court. *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435.

We are fully convinced that a money judgment of the court of California is a proper basis for a cause of action in this state, and the judgment was properly received in evidence; it being competent evidence of its own existence. The courts of the state of North Dakota will give the same force and effect to the judgments of the courts of California as their courts give to them.

The judgment being one for money only, if the defendant in this case were possessed of property, real or personal, in California, subject to levy of execution under the laws of that state, an execution could be issued upon the judgment of the superior court of California, and such property levied upon notwithstanding the perfecting of an appeal from the judgment to the supreme court of California, and such property so levied on may be sold on execution sale unless the right to issue such execution and to sell such property on execution sale has been stayed by supersedeas bond.

There is a money judgment in the superior court of Los Angeles county, California, and the remedies to enforce the judgment in that state have in no manner been suspended



by the appeal to their supreme court.

In these circumstances the courts of this state will permit the plaintiff to sue upon that judgment, and to procure the entry of the judgment in this state upon the proper procedure having been had to accomplish that purpose; thus in this state give effect to the judgment in the same manner and to the same effect as the courts of the state of California. When an action is maintained in this state, and judgment is entered therein on such judgment, this state has then given full faith and credit to the judgment of the court of the state of California.

The principal task presented in this case is to determine what the law of California is relative to the matters under consideration. The original judgment was one entered by the superior court of California. Appeal was taken from such judgment to the supreme court of that state. What the status of the judgment is until the final determination on appeal must be determined, not by the laws of North Dakota, or the decisions of this court, but by the laws of California and the decisions of their supreme court.

It is claimed by the appellant that, an appeal having been taken from the judgment of the superior court to the supreme court of California, the action is still pending in the courts of California, and therefore is not a final judgment, and for this reason they assert that, under the laws of California and the decisions of the supreme court of that state, the judgment, not being a final one, cannot in the courts of this state be made the basis of an action, and cannot be used as evidence to prove its contents nor any other purpose.

We are of the opinion that the contention of appellants as to the law of California and the decisions of their supreme court is in the  
5 A.L.R.—80.

main correct. They do not, however, take into consideration well-recognized exceptions to the general rule which exist by the laws of California and as announced by the decisions of their supreme court, and which have been recognized by their supreme court. The general rule that a judgment of the superior court or any inferior court of the state of California which is not a money judgment is not final where an appeal has been taken from the same, and cannot be used as evidence for any purpose, is well sustained by the following decisions of the supreme court of that state:

By the provisions of § 1049 of the Code of Civil Procedure of California: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

In *Feeney v. Hinckley*, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580, that court in the syllabus said: "A cause of action upon a judgment does not accrue until the judgment becomes final and admissible in evidence. The Statute of Limitations does not begin to run against an action upon the judgment from the date of its entry, but only after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after the final determination following an appeal so taken."

In *Gillmore v. American Cent. Ins. Co.* 65 Cal. 63, 2 Pac. 882, the court said: "Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, it is said: "Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under § 1049 of the Code of Civil Procedure, to be deemed as pending."

In *Re Blythe*, 99 Cal. 472, 34 Pac.

—absence of  
stay bond—  
effect.

Conflict of  
laws—effect  
of judgment.

108, it is said in the syllabus: "An action is deemed pending until the time for appeal has expired, or the judgment is sooner satisfied; and a judgment is not admissible in evidence for the purpose of proving facts therein cited so long as it is liable to reversal upon appeal, or until the action is finally determined, so that the judgment shall become *res judicata*."

In *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757, it is said in the syllabus: "An action is deemed pending under § 1049 of the Code of Civil Procedure from the time of its commencement until its final determination upon appeal, or until the time for appeal is past, unless the judgment is sooner satisfied, and a judgment in an action so pending cannot constitute a bar to recovery in another action between the same parties relating to the same subject-matter."

In the case of *Story v. Story & I. Commercial Co.* 100 Cal. 41, 34 Pac. 675, it is said: "The court erred in holding that the judgment rendered in the other action was a bar to the plaintiff's right of recovery for the moneys paid by her under the agreement. At the time that the court made its decision in the present case the other action was still pending (§ 1049, Code Civ. Proc. [of California]), and while that action was so pending, the judgment rendered therein could not be a bar to the prosecution of the present action. *Naftzgar v. Gregg*, and *Re Blythe*, *supra*. The justice of this rule is apparent, in view of the fact that the judgment pleaded by the respondent and determined by the court below to constitute a bar to the plaintiff's cause of action has been reversed in this court."

In the case of *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489, it is said in the syllabus: "The judgment of foreclosure is not evidence of the existence of the lien as against an execution purchaser, who was not a party to the foreclosure suit, and does not preclude him from contesting the title acquired under the fore-

closure sale; nor can such judgment have any effect as evidence of the facts therein determined pending an appeal therefrom; and it is necessary for one claiming title under the foreclosure sale to prove the existence of the lien by other evidence than the judgment roll in the action of foreclosure, and, if no other proof is offered, no lien is shown to exist, and the title acquired under the sale cannot antedate the sale."

In the case of *Woodbury v. Bowman*, 13 Cal. 635, it is said in the syllabus: "Where a suit is pending in the supreme court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue, even between the parties."

It is plain from the foregoing decisions that in California it is the general rule that a judgment does not become final until it is satisfied; or, if an appeal is taken therefrom, until the appeal is determined. It is also equally clear that during the pendency of an appeal from a judgment it will not support a plea of *res judicata*; that the Statute of Limitation will not begin to run excepting from the time of the satisfaction of the judgment or the determination of the appeal from the judgment; and that a judgment in California pending the appeal therefrom is not generally to be received as evidence to prove its contents, nor to be considered as evidence excepting in certain cases which we will now notice.

The case of *California Mortg. & Sav. Bank v. Graves*, 129 Cal. 649, 62 Pac. 259, construed § 945 of the Code of Civil Procedure of California, which is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be com-

mitted, any waste thereon, and that, if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

The court said in that case: "Appellant claims that the judgment roll in this case was improperly admitted in evidence because the case is on appeal to this court, and is deemed to be pending, citing Code of Civil Procedure § 1049, *Re Blythe and Naftzgar v. Gregg*, *supra*; *Murray v. Greene*, 64 Cal. 363, 28 Pac. 118."

The court in that case called attention that no stay bond was given, but only the ordinary appeal bond, and held that the cases cited by the appellant in that case did not reach the point made by him, and that the evidence was admissible, and that the writ should issue notwithstanding the appeal. The writ referred to is what is in California denominated a writ of assistance. In that state, when an action is brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendants in the action against whom the judgment has passed.

It will be seen from the examination of that case that most of the authority cited by the appellant in the case at bar has been held not to apply where the statute of California has provided that in certain cases judgment is not suspended nor

the execution stayed unless a proper stay bond is executed, or, in other words, a supersedeas bond.

In the case of *McKannay v. Horton*, 151 Cal. 721, 13 L.R.A. (N.S.) 661, 121 Am. St. Rep. 146, 91 Pac. 602, a case involving a title to office, the court used the following language: "It is said *arguendo* that an appeal to the supreme court operates a suspension of the judgment of the lower court for all purposes. This, as every lawyer knows, is not true. If in a civil cause the appellant does not file a sufficient undertaking to stay proceedings upon the judgment, execution will issue notwithstanding the pendency of the appeal, and may be levied upon the property of the judgment debtor, and the property may be sold, and an indefeasible title vested in the purchaser at the execution sale, notwithstanding the result of the appeal may be a complete and final reversal of the judgment of the trial court. And as in civil cases, so in criminal cases,—a judgment not final may be proved for every purpose for which it is effectual. It may be proved for the purpose of showing a vacancy in office, just as in civil cases it may be proved to justify the levy of an execution, or to establish the title of the purchaser at the execution sale; and this even after it has been reversed on appeal."

It would seem that in California the statute provides that in appeal from certain kind of judgments as distinguished from the ordinary judgment a stay or supersedeas bond must be filed; that such judgment, though not final, may be proved for every purpose for which it is effectual, as to prove vacancy in office, to justify the levy of an execution to establish the title of the purchaser at the execution sale; and such judgments may be proved for any purpose which will effectuate their purpose unless they have been suspended or stayed by a proper supersedeas bond. From this we are convinced that the judgment in the case at bar could be the basis of

a cause of action in this state; that it would be competent evidence to prove its own existence and its own contents for the purpose of effectuating the judgment; that is, by assisting in enforcing the judgment by way of execution. In the case at bar, under the law of California (§ 942 of the Code of Civil Procedure), the judgment being one for money, it is provided that an appeal from the judgment or order directing the payment of money does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant and two or more sureties to the effect that they are bound in double the amount named in the judgment or order; that, if the judgment or order appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, etc.

From this statute it is clear that the judgment in this action was not stayed, no stay or supersedeas bond having been filed, and that in California execution could issue on such judgment, and that any other proceeding upon the judgment might be taken there to effectuate the purposes of the judgment. If we are correct in this conclusion, and in order to give full faith and credit to the laws of California and the proceedings of their court, any proceedings could be taken upon the judgment in this state which might be taken upon it in the state of California. We are convinced it would be correct to hold that the judgment of the California court in the condition of this judgment is a proper basis for an action in this state; that it was proper for the trial court in this state to receive as evidence the judgment roll in the original action, though that action is still pending in the supreme court of California. The judgment roll, as we view the matter under the law and

decisions of California, was competent evidence to prove the existence of the judgment and its contents, and for the purpose of permitting a judgment to be entered in our court in an action, the basis of which is the judgment of the court of California, and, after the judgment in the proper court in this state, the same proceedings may be had thereon as might be had upon the judgment in the state of California; in other words, give it the same faith and credit as the judgment would receive in that state.

This would seem to be the correct rule and the one to be followed unless there is a conflict in some respect with public policy, or unless there is a constitutional objection or a direct prohibition by the statutory law of this state; and we find no such objection presented in this case.

The judgment of the district court of Burleigh county provided that no execution issue on the judgment until the judgment sued on was affirmed by the supreme court of the state of California. This properly held in abeyance all further proceedings after the entry of the judgment here until an affirmance of the judgment by the supreme court of California. This affords the defendant ample protection until the determination of the appeal by that court. We are of the opinion, however, that the trial court in this state should also have provided that, if the supreme court of California reversed the judgment, then and in that event the plaintiff should satisfy the judgment which was given by the district court of Burleigh county. The judgment appealed from is modified to that extent. In all other respects the judgment appealed from is affirmed. The respondent is entitled to the statutory costs on appeal.

Birdzell, J.:

I concur on the ground that the judgment constitutes a cause of action in this state.

Bronson, J., concurs.

**Robinson, J., dissents.**

**Christianson, Ch. J., concurring:**

I concur in an affirmance of the judgment with the modification thereof directed in the opinion prepared by Mr. Justice Grace. As stated in that opinion, the specifications of error on this appeal relate to, and in reality present, only the one question: May a judgment rendered in the superior court of California be sued upon in this state while an appeal from such judgment is pending in the supreme court of California, where there has been no compliance with the California statutes providing for a stay of proceedings on appeal upon the filing of a supersedeas bond?

There is no controversy as to the facts in this case. The defendant in his answer expressly admitted that judgment was rendered against him, as alleged in the complaint, and that he had not paid the judgment. This admission, of course, relieved the plaintiff of the burden of establishing, and of the necessity of offering any evidence tending to establish, these facts. 1 Enc. Ev. 398. Upon the trial it was stipulated as a fact that the defendant had not filed a supersedeas bond as prescribed by § 942, California Code of Civil Procedure. Hence we have a situation where an action is brought in this state upon a California judgment in all respects final and enforceable in

that state, subject alone to the contingency that it may be reversed on appeal. It is a general rule, supported by the great weight of authority, that "the pendency of an appeal does not prevent an action on a foreign judgment, if the appeal does not operate as a supersedeas or stay of proceedings in the jurisdiction wherein it was rendered, or if there has not been a compliance with the requisite conditions to obtain a supersedeas." 15 R. C. L. p. 942, § 419.

See also 23 Cyc. 1504, 1563.

Appellant does not deny the existence or correctness of this general rule, but contends that it is inapplicable to a California judgment. As I read the California statutes and decisions, the appeal taken by the defendant from the judgment involved in this case did not operate as a stay of proceedings on the judgment in California. I therefore agree with Mr. Justice Grace that, inasmuch as the defendant in this case failed to comply with the California statutes requisite to obtain a supersedeas, the plaintiff may bring suit in this state upon the California judgment, even though an appeal has been taken therefrom to, and is pending in, the supreme court of that state. The same conclusion was reached by the supreme court of Oregon in *Spencer v. Barnes*, 65 Or. 231, 132 Pac. 707, Ann. Cas. 1915A, 1287.

### ANNOTATION.

**Pendency of appeal from judgment as affecting right to enforce it in another state.**

Whether an action may be maintained on a judgment rendered in another state from which an appeal or writ of error has been taken will depend on the effect of such appeal or writ of error under the law of that state as it is proven or presumed to be. If an action may be maintained on such judgment, notwithstanding the appeal or writ of error, in the state in which it was rendered, even though the issuance of execution thereon be

stayed, it may be maintained in any other state; although if execution has been stayed in the state where the original judgment was rendered, the court in which suit is brought thereon will ordinarily also stay execution pending the determination of the appeal.

The rule that where an appeal or writ of error does not vacate or suspend the original judgment, an action may be maintained thereon in the

courts of another state, is uniformly recognized. See:

**United States.**—*Dawson v. Daniel* (1878) 2 Flipp. 301, Fed. Cas. No. 3668; *Union Trust Co. v. Rochester & P. R. Co.* (1886) 29 Fed. 609; *Woodbridge & T. Engineering Co. v. Ritter* (1895) 70 Fed. 677.

**California.**—*Taylor v. Shew* (1870) 39 Cal. 536, 2 Am. Rep. 478.

**Connecticut.**—*Bank of North America v. Wheeler* (1859) 28 Conn. 433, 73 Am. Dec. 683 (obiter).

**Illinois.**—*Dow v. Blake* (1893) 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

**Massachusetts.**—*Faber v. Hovey* (1875) 117 Mass. 107, 19 Am. Rep. 398; *Clark v. Child* (1884) 136 Mass. 344.

**Nebraska.**—*Lonnergan v. Lonnergan* (1898) 55 Neb. 641, 76 N. W. 16.

**Nevada.**—*Rogers v. Hatch* (1872) 8 Nev. 35.

**New Jersey.**—*Suydam v. Hoyt* (1855) 25 N. J. L. 230.

**New York.**—*Jenkins v. Pepoon* (1801) 2 Johns. Cas. 312.

**North Dakota.**—*EBNER v. STEFFANSON* (reported herewith) ante, 1261.

**Pennsylvania.**—*Merchants' Ins. Co. v. De Wolf* (1859) 33 Pa. 45, 75 Am. Dec. 577; *Falkner v. Franklin Ins. Co.* (1851) 1 Phila. 183; *Magnolia Metal Co. v. Sterlingworth R. Supply Co.* (1899) 6 North. Co. Rep. 358; *Dryfoos v. Uhl* (1902) 11 Pa. Dist. R. 688.

**Virginia.**—*Piedmont & A. L. Ins. Co. v. Ray* (1881) 75 Va. 821.

And see also *Gaines's Succession* (1893) 45 La. Ann. 1237, 14 So. 233, in which it is held that a decree admitting a will to probate will be recognized in another state, although an appeal has been taken therefrom, where the appeal does not have a suspensive effect.

So, also, in England and in Canada, it is held that the pendency of an appeal from a foreign judgment is no bar to an action thereon, though it may afford ground for the equitable interposition of the court to prevent the possible abuse of its process, and, on proper terms, to stay the execution in the action. See *Scott v. Pilkington* (1862) 2 Best & S. 11, 121 Eng. Re-

print, 978, 8 Jur. N. S. 557, 31 L. J. Q. B. N. S. 81, 6 L. T. N. S. 21; *Howland v. Codd* (1894) 9 Manitoba L. R. 435.

But where the effect of the pendency of an appeal or writ of error is to deprive a judgment of that finality of character necessary to entitle it to admission in evidence in support of the right or defense declared by it, suit cannot be maintained in another state thereon even though, under the statute, execution may be issued and the judgment may be enforced during the appeal when only a cost bond has been given. *Van Natta v. Van Natta* (1918) — Tex. Civ. App. —, 200 S. W. 907.

The court cannot refuse to give effect to a foreign judgment which has not been superseded because it seems probable that it may be reversed by the appellate court. *Lonnergan v. Lonnergan* (1898) 55 Neb. 641, 76 N. W. 16.

Where, in the state where the judgment was rendered, a supersedeas bond given in proceedings in error serves the purpose of staying the execution of the judgment only, and is no obstacle in the way of another action on the judgment, an action is maintainable thereon in the courts of another state. *Poll v. Hicks* (1903) 67 Kan. 191, 72 Pac. 847; *Falkner v. Franklin Ins. Co.* (1851) 1 Phila. (Pa.) 183; *Wood Co. v. Berry Co.* (1895) 4 Pa. Dist. R. 141; *Magnolia Metal Co. v. Sterlingworth R. Supply Co.* (1899) 6 North. Co. Rep. (Pa.) 358; *Woodbridge & T. Engineering Co. v. Ritter* (1895) 70 Fed. 677.

It should be noted that in the reported case (*EBNER v. STEFFANSON*, ante, 1261) it is held that the judgment rendered in a suit brought on the judgment from which the appeal is pending should provide that no execution shall issue until the judgment sued on is affirmed, and that if such original judgment is reversed, the plaintiff shall satisfy the judgment recovered thereon.

The court may say that on a reversal of the first judgment the defendant shall have a right to audita querela, or perhaps to a writ of error

coram nobis, to have the court below reverse its own proceedings and award restitution, as the case may require. *Merchants' Ins. Co. v. De Wolf* (1859) 33 Pa. 45, 75 Am. Dec. 577.

It is in the discretion of the court in which the action upon the judgment is brought pending a writ of error to stay the proceedings or not. *Suydam v. Hoyt* (1855) 25 N. J. L. 230.

If the appeal operates as a supersedeas, execution will be stayed pending the final determination of the appeal. *Wood Co. v. Berry Co.* (1895) 4 Pa. Dist. R. 141.

If the plaintiff can get no execution in the state in which the original judgment was rendered by reason of a supersedeas, the court may well be asked to stay proceedings in an action on the judgment unless it appears to have been a useless and vexatious appeal or writ of error, in which case the stay may be refused. *Dawson v. Daniel* (1878) 2 Flipp. 301, Fed. Cas. No. 3,668.

And it is within the discretion of the court to stay the action pending an appeal, though no stay of execution upon the original judgment has been imposed by the foreign court. *Huntington v. Attrill* (1887) 12 Ont. Pr. Rep. 36.

Where the judgment on which the suit was brought has been reversed after the recovery of judgment thereon, all proceedings on such judgment will be stayed pending the outcome of the original suit. *Heckling v. Allen* (1882) 4 McCrary, 303, 15 Fed. 196.

The court will stay execution upon the second judgment until the appeal from the original judgment has been determined. *Magnolia Metal Co. v. Sterlingworth R. Supply Co.* (1899) 6 North. Co. Rep. (Pa.) 358.

But compare *Troy City Bank v. Lau-man* (1857) Fed. Cas. No. 14,194, in which it was held that execution on a judgment obtained upon a judgment rendered in another state will not be stayed by reason of the fact that an appeal has been taken from the original judgment, where such appeal does not operate as a supersedeas.

The pendency of proceedings to set aside a judgment in the state in which it was rendered presents no obstacle to the prosecution of an action thereon in another state. *Parker v. Bowman* (1907) 83 Ark. 508, 104 S. W. 158; *Tompkins v. Cooper* (1896) 97 Ga. 631, 25 S. E. 247. The court will, however, if such litigation is set up, defer judgment until the validity of the original judgment is determined. *Parker v. Bowman* (Ark.) supra; *Charlebois v. Great Northwest C. R. Co.* (1893) 9 Manitoba L. R. 286.

And a judgment rendered upon a judgment by default, recovered in another state, will not be vacated because the court in such other state has opened the default; but the defendant's remedy is to move to open the judgment upon showing a good defense upon the merits, a good excuse for having suffered the default, and a good excuse for not having set up his present claim before the judgment was entered. *Coakley v. Rickard* (1910) 67 Misc. 592, 124 N. Y. Supp. 801.

In connection with the subject herein discussed, it is of interest to note that it has been held that suit may be brought upon a judgment of another state pending a motion for a new trial before the time for appeal has expired. *Spencer v. Barnes* (1913) 65 Or. 231, 132 Pac. 707, Ann. Cas. 1915A, 1287. E. S. O.

## C. R. DIEHL

v.

**GEORGE C. CRUMP**, Judge of the District Court for the Ninth Judicial District, et al.

*Oklahoma Supreme Court — February 25, 1919.*

(— Okla. —, 179 Pac. 4.)

**Courts — interference by legislature — affidavit of bias — constitutionality.**

1. A law which provides that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge without any hearing or determination of whether the affidavit is true or false is unconstitutional, as depriving the court of judicial power, and vesting the same in the litigants to that extent.

[See note on this question beginning on page 1275.]

**Constitutional law — special legislation — interference with judicial power.**

2. Record examined, and held: (1) That § 1 of chapter 135, Session Laws 1917, is constitutional and valid. (2) That § 14 of said act is special and local legislation, and is unconstitutional (1) because it was not published as required by § 32, article 5, Williams's Constitution, and (2) because it attempts to deprive the district court of judicial power and vest the same in the litigants.

[See 6 R. C. L. 158.]

— local and special law — what is.

3. A statute establishing a special court for a single county of the state is not a local or special law within the

meaning of the provisions of the Constitution dealing with such laws.

— transfer of cause for bias.

4. A statute providing for the transfer of a cause from a district to a superior court in only one county in the state, upon filing an affidavit of bias, violates a constitutional provision that all laws of a general nature shall have a uniform operation throughout the state.

— changing jurisdiction of courts.

5. A statute providing for the transfer of a cause from a district to a superior court in only one county of the state, upon filing an affidavit of bias, violates a constitutional provision forbidding local or special laws regulating the practice or jurisdiction of courts.

Headnotes 1 and 2 by KANE, J.

(Sharp and McNeill, JJ., dissent in part.)

**ORIGINAL** application for a writ to prohibit the defendant judge from trying a certain criminal case pending upon an indictment charging petitioning with violation of the State Election Laws. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. S. L. O'Bannon, C. T. Huddleston, and Logan Stephenson, for plaintiff:

A writ of prohibition is the only plain, adequate, and complete remedy to restrain an inferior court from proceeding beyond the authority or jurisdiction given it by law.

Evans v. Willis, 22 Okla. 322, 19 L.R.A. (N.S.) 1050, 97 Pac. 1047, 18 Ann. Cas. 258; State ex rel. Evans v. Shea, 28 Okla. 826, 115 Pac. 862; Hirsh

v. Twyford, 40 Okla. 223, 139 Pac. 313; High, Extr. Leg. Rem. § 762; State ex rel. Haskell v. Huston, 21 Okla. 782, 97 Pac. 982.

The act creating the superior court for Okfuskee county is not unconstitutional.

Leatherock v. Lawter, 45 Okla. 720, 147 Pac. 324; Chickasha Cotton Oil Co. v. Lamb, 28 Okla. 288, 114 Pac. 333; Pond Creek v. Haskell, 21 Okla. 735, 97 Pac. 338; Re Wellington, 16



Pick. 87, 26 Am. Dec. 631; Falconer v. Robinson, 46 Ala. 340; Cooley, Const. Lim. 105; People ex rel. Burrows v. Orange County, 17 N. Y. 241; Clarke v. Rochester, 24 Barb. 471; Burks v. Walker, 25 Okla. 353, 109 Pac. 544; Waterman v. Hawkins, 75 Ark. 120, 86 S. W. 844; State ex rel. Donham v. Yancy, 123 Mo. 391, 27 S. W. 380; State ex rel. Henderson v. County Ct. 50 Mo. 324, 11 Am. Rep. 415; State ex rel. Atty. Gen. v. Watson, 71 Mo. 470; Ewing v. Hoblitzelle, 85 Mo. 64; State ex rel. Strong v. Superior Ct. 38 Okla. 366, 132 Pac. 1077; Oklahoma F. Ins. Co. v. Phillips, 27 Okla. 234, 111 Pac. 334.

Messrs. S. P. Freeling, Attorney General, R. M. McMillan, R. E. Wood, Assistant Attorney General, and C. E. Hall, for defendants:

The act seeking to establish the superior court is unconstitutional.

Oklahoma County v. Beaty, — Okla. —, 171 Pac. 34; Ex parte N. K. Fairbank Co. 194 Fed. 978; Conn v. Chadwick, 17 Fla. 440; Howard County v. State, 120 Ind. 282, 22 N. E. 255; White v. State, 123 Ala. 577, 26 So. 343; Splane's Petition, 123 Pa. 527, 16 Atl. 481; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Mabry v. Baxter, 11 Heisk. 689; Cooley, Const. Lim. 5th ed. p. 115, ¶ 96; United States v. Klein, 13 Wall. 129, 20 L. ed. 520; Ex parte State Bar Asso. 92 Ala. 117, 8 So. 769; Cox v. United States, 5 Okla. 701, 50 Pac. 175; State ex rel. Nowakowski v. Lockridge, 6 Okla. Crim. Rep. 220, 45 L.R.A. (N.S.) 525, 118 Pac. 152, Ann. Cas. 1913C, 251; Crawford v. Ferguson, 5 Okla. Crim. Rep. 387, 45 L.R.A. (N.S.) 519, 115 Pac. 278; Kelly v. Ferguson, 5 Okla. Crim. Rep. 319, 114 Pac. 631; O'Brien v. Clark, 5 Okla. Crim. Rep. 114, 118 Pac. 543; State v. Brown, 8 Okla. Crim. Rep. 50, 126 Pac. 245, Ann. Cas. 1914C, 394; Long v. Allen, 10 Okla. Crim. Rep. 182, 135 Pac. 443; Johnson v. Wells, 5 Okla. Crim. Rep. 599, 115 Pac. 375; State ex rel. Courthouse & C. H. Comrs. v. Cooley, 56 Minn. 540, 58 N. W. 150; Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; State ex rel. Douglas v. Ritt, 76 Minn. 531, 79 N. W. 535.

Kane, J., delivered the opinion of the court:

This is an original application for a writ prohibiting George C. Crump, as judge of the district court of

Okfuskee county, from trying a certain criminal case wherein the petitioner is charged upon an indictment with a violation of the Election Laws of the state.

The petition of the plaintiff charges in effect that, when he was called upon to plead to the indictment filed against him in the criminal case, he filed the affidavit prescribed by § 14, chapter 135, Session Laws 1917, wherein he stated that he could not have a fair and impartial trial before said district court by reason of the bias and prejudice of said district judge; that by virtue of said statute, immediately upon filing said affidavit, the district court lost, and the superior court acquired, jurisdiction of said criminal cause.

The answer of the respondent alleged in effect that the act of the legislature which attempts to create a superior court for Okfuskee county invaded the province of the judiciary, and was unconstitutional and void for the reasons that it invaded the province of the judiciary, and that, although said act was local or special in its nature, it was considered and passed by the legislature without being published as required by § 32, article 5, William's Constitution, which provides: "No special or local law shall be considered by the legislature until notice of the intended introduction of such bill or bills shall first have been published for four consecutive weeks in some newspaper published or of general circulation in the city or county affected by such law, stating in substance the contents thereof and verified proof of such publication filed with the secretary of state."

The particular sections of the act which are attacked as unconstitutional are §§ 1 and 14, which provide, respectively, as follows:

Section 1: "There is hereby created and established in every county in this state, having a population of more than 19,990 and not to exceed 20,000, according to the last or any future Federal census, a court of civil and criminal jurisdiction co-extensive with the county to be

known as the superior court of such county, which shall be a court of record and shall be held at the county seat of such county."

Section 14: "All causes, whether civil, criminal, probate or otherwise, now pending or that may hereafter be filed in the district court of every such county, shall be transferred to such superior court by the court clerk of such county on the filing of an affidavit in such district court, with the court clerk thereof, by any party to any such cause or his or her attorney of record, or by the county attorney of any such county, stating that such party or that the state of Oklahoma, if the same be a criminal case, cannot have a fair and impartial trial before such district judge by reason of the bias and prejudice of such district judge. Immediately upon the filing of such affidavits and concurrently therewith, the district court shall lose jurisdiction and the superior court shall acquire jurisdiction of such cause, and it is hereby made the duty of such court clerk to immediately transfer to and file in such superior court, all the original files and papers of said cause, together with a certified transcript of such files, the accrued costs in such cause, and the entries and records made in said cause in such district court, and the same shall be docketed in such superior court and proceeded with in the same manner and with like effect as if the same had been originally filed in such superior court."

In *Leathercock v. Lawter*, 45 Okla. 720, 147 Pac. 324, the question of whether an act establishing a superior court for a single county was a local or special law was presented

**Constitutional law—local and special law—what is.**

squarely to this court for determination. After a careful consideration of the question the court answered the question in the negative, and also held that the act which repealed the act establishing a superior court in Custer county was general in its nature and uniform in its operation, in that it affected all the citizens of the

state alike so far as the exercise of its jurisdiction and power is concerned. Whilst the writer of this opinion dissented in the *Leathercock* Case, and still believes that legislation of this kind is purely local and special, there can be no doubt that the *Leathercock* Case is squarely in point here, and upholds the constitutionality of the section of the act creating the court.

**—special legislation—interference with judicial power.**

Granting then, that § 1 of the act is general and not special or local legislation, it does not follow that the same must be said of § 14 of the act. Section 14, it will be observed, relates directly to the disqualification of the judge of a court for bias and prejudice. It provides in effect that, upon filing the prescribed affidavit in the district court with the clerk thereof, by a party to any cause pending therein, merely stating that such party cannot have a fair and impartial trial before such district judge by reason of the bias and prejudice of such district judge, the district court forthwith loses, and the superior court acquires, jurisdiction of the cause, and it shall be the duty of the clerk of the latter court to immediately transfer such cause to the superior court. It is conceded that the district courts are constitutional courts, having general original jurisdiction throughout the state, and it is also conceded that there is a general law operating uniformly throughout the state which provides, in effect, that where any party to any cause pending in a court of record desires a change of judge, he must file a written application with the clerk of the court, setting forth the grounds or facts upon which the claim is made that the judge is disqualified, and request said judge so to certify after reasonable notice to the other side, which application must be presented to such judge, and, upon his failure to sustain such application within three days before said cause is set for trial, application may be made to the proper tribunal

for mandamus requiring him to do so.

The best proof possible that § 14 is a local and special law, and does not operate uniformly throughout the state, is that it does not apply to any other district judge in the state except the judge of the district court of the judicial district, and it does not affect him except when he is sitting in one of the several counties composing his judicial district, to wit, Okfuskee county. If this were permitted it would tend to destroy the harmony of the judicial system provided for by the Constitution, and work inter-

transfer of cause for bias. terminable confusion in the trial of causes. Section 59, art. 5, William's Constitution, provides that laws of a general nature shall have a uniform operation throughout the state. It does not require argument to show that § 14, now under consideration, does not meet this requirement. Another section of the Constitution (§ 46, art. 5) provides that the legislature shall not pass any local or special law regulating the practice or jurisdiction of, or changing the rules of evidence, in, judicial proceedings or inquiry before the courts. Section 14 seems to be in direct conflict with this section of the Constitution, as it attempts to regulate the practice and jurisdiction of a court of general jurisdiction, not by a general law applicable to all district courts and judges, but by a law applicable to a single dis-

-changing jurisdiction of courts.

trict judge while he is sitting in one of the counties comprising his judicial district.

For the reasons stated, we think § 14 is a special and local law, and that, not having been published as provided in § 32, supra, of the Constitution, it must fall as an invalid act.

Courts—  
interference by  
legislature—  
constitution-  
ality.

In our judgment, before the plaintiff is entitled to a change of judge upon the ground of bias and prejudice of the judge, he must file an affidavit, as provided by the general law governing such matters, "setting forth the grounds or facts on which the claim is made that the judge is disqualified." Moreover, it has been held that a law which provides that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge, without any hearing or determination of whether the affidavit is true or false, is unconstitutional, as depriving the court of judicial power, and vesting the same in the litigants to that extent. *Ex parte N. K. Fairbank Co.* (D. C.) 194 Fed. 978.

For the reasons stated, the writ of prohibition prayed for is denied.

All the Justices concur in the conclusion reached.

Sharp and McNeill, JJ., dissent from that portion of the opinion sustaining the constitutionality of the part of the statute creating superior courts in counties "having a population of more than 19,990, and not to exceed 20,000."

## ANNOTATION.

### Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge.

It is held in the reported case (*DIEHL v. CRUMP*, ante, 1272) that a statute which provides that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge, without any hearing or determination of whether the affidavit is true or false, is unconstitutional, as

depriving the court of judicial power, and vesting the same in the litigants to that extent. In so holding the court follows *Ex parte N. K. Fairbank Co.* (1912) 194 Fed. 978, which involved the validity of § 21 of the Federal Judicial Code (36 Stat. at L. 1090, chap. 231, Comp. Stat. § 988, 4 Fed. Stat.

Anno. 2d ed. p. 832), if construed to mean that the mere filing of an affidavit of prejudice was sufficient to divest a judge of further power in the case. Holding that, as thus construed, the Code section would be unconstitutional, the court said: "Is not the real operation of § 21 of the Judicial Code to arm the litigant, in everything except mere form, with the judicial power of the court, and to leave it absolutely to the litigant to decide and determine, in his own case, upon the particular facts as he selects and presents them in his *ex parte* affidavit, whether they are true or false, that the judge is disqualified, although in truth and in fact the judge may have neither bias nor prejudice, and is in every way competent to sit on the trial of the case? Unquestionably, personal prejudice or bias as to parties may be made a cause for disqualifying a judge on the trial of a particular case. When, however, as here, the statute does not undertake to define or prescribe the facts which shall constitute bias or prejudice, or the evidence which shall prove it, and commands that an *ex parte* affidavit of a litigant shall establish not only that the facts selected and grouped in the affidavit constitute personal bias or prejudice in the eye of the law, but that their existence is to be taken as conclusively proved by the *ex parte* affidavit, whether true or false, and *ipso facto* disqualify the judge—has not Congress inevitably delegated to the litigant, in effect, the legislative power to prescribe and define the causes which, when proved, shall constitute personal prejudice or bias, and also delegated to the litigant the judicial power of determining in his own case, upon its particular facts as he makes them to appear in his affidavit, both the law and fact in his favor, and thereupon of stripping the judge of his functions in his own court, without any investigation by him, or hearing by any other judicial officer?"

On the other hand, the view has been taken in Montana and Ohio that a statute which makes the mere filing of an affidavit of bias or prejudice suf-

ficient to disqualify a judge is not unconstitutional. *State ex rel. Anaconda Copper Min. Co. v. Clancy* (1904) 30 Mont. 529, 77 Pac. 312; *State ex rel. Durand v. Second Judicial Dist. Ct.* (1904) 30 Mont. 547, 77 Pac. 318; *State ex rel. Wulle v. Dirlam* (1906) 28 Ohio C. C. 69; See also *Godbe v. McCormick* (1868) 1 Mont. 105.

In *State ex rel. Anaconda Copper Min. Co. v. Clancy* (Mont.) *supra*, the court said: "The particular objection made here is that the filing of the affidavit operates *ipso facto* to deprive the judge against whom it is aimed of authority to proceed with the trial of the cause, and that no provision is made at all for determining judicially whether, as a fact, the judge is actually biased or prejudiced, or, in other words, that this act attempts to determine the question of bias and prejudice in advance, or permits the litigant to do so, whereas that can only be done by a judicial investigation and determination. But this proceeding to disqualify a judge is analogous to a proceeding for change of venue, and no one has yet denied the right of the legislature to provide for a change of venue upon such terms as it may propose. The authority to enact such statutes is not derived from the Constitution, but is inherent in the legislature, subject only to the constitutional provision that such laws shall not be local or special. In the absence of any constitutional inhibition, we know of no reason why the legislature might not provide for a change of venue merely upon demand of either party, without assigning any reason whatever. 4 Enc. Pl. & Pr. 431. The mere fact that no provision is made for a judicial determination of the bias or prejudice of the judge against whom the affidavit may be directed is not itself sufficient to invalidate this act. As a matter of fact, it is not the bias or prejudice of the judge which disqualifies him, but the mere imputation of such bias and prejudice, and that leaves nothing to be judicially determined."

In *State ex rel. Wulle v. Dirlam* (1906) 28 Ohio C. C. 69, which was a proceeding instituted to restrain the

defendant from acting as judge in a certain cause because of the fact that an affidavit had been filed seeking to disqualify him on account of bias and prejudice, the court held that the mere filing of such an affidavit was sufficient to disqualify the judge under the Ohio statute (Rev. Stat. § 550), and that the statute was not unconstitutional as being an attempted deprivation of judicial powers by the legislature. The court said: "While the question may be a serious one, yet we are inclined to follow what we believe to be the safer rule of holding that the statute is not an abridgment of the rights or powers of the judiciary by the legislature, but simply a provision for a litigant to have what is, in substance, a change of venue. Instead of transferring the case to another jurisdiction, it retains the case in the jurisdiction where the action is brought, but provides for another judge to hear and determine the cause. This statute, as we view it, does not rob the court of any of its powers or jurisdiction to hear and determine the cause, but simply provides that another judge than those disqualified by the statute shall preside in the hearing of the case when tried." In *Wolfe v. Marmet* (1905) 72 Ohio St. 578, 74 N. E. 1076, and in *Duncan v. State*

(1910) 82 Ohio St. 351, 92 N. E. 481, the question of the validity of the Ohio statute was raised, but not determined.

The rule laid down by the supreme court of Oklahoma in the reported case (*DIEHL v. CRUMP*, ante, 1272) is in apparent conflict with an earlier decision in the same jurisdiction, which decision, however, was by the criminal court of appeals, and involved a statute of somewhat different phraseology. See *Ex parte Ellis* (1909) 3 Okla. Crim. Rep. 220, 25 L.R.A.(N.S.) 653, 105 Pac. 184, Ann. Cas. 1912A, 863. The statutory provision in that case was as follows: "No judge of the county court shall sit in any cause or proceeding pending, after any party thereto has filed an affidavit in writing, corroborated by two credible persons residing in the county, stating that affiant has good reasons to believe and does believe that the judge is so prejudiced against him that he cannot have a fair and impartial trial if such judge continues to preside in such case." It was held that the statute was clearly not restrictive of, and did not impair, the constitutional guaranty that "right and justice shall be administered without prejudice." W. K. M.

## RE ESTATE OF ISAAC T. PUTERBAUGH, Deceased,

H. P. ROBINS et al., Appts.

*Pennsylvania Supreme Court—April 23, 1918.*

(261 Pa. 235, 104 Atl. 601.)

### Will — bequest to child of son — inclusion of adopted child.

1. A child adopted after death of testator is not within a provision of the will giving a life estate to testator's son, and after the death of the son to his child or children.

[See note on this question beginning on page 1280.]

### — construction — intention.

2. The first inquiry in the construction of a will is to ascertain, if possible, the intention of the testator as expressed in the will, which, when once ascertained, must be given effect.

### Parent and child — effect of adoption.

3. Giving an adopted child a right to inherit does not make him a child in fact or change his identity.

[See 1 R. C. L. 592, 593.]

**APPEAL** by legatees from a decree of the Orphans' Court (Sando, J.) for Monroe County overruling exceptions to the adjudication of the final account of the testamentary trustee of the estate of Isaac T. Puterbaugh, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Wilton A. Erdman, for appellants:

Under the statute, Edna Puterbaugh Marsh is not a child of Harrison S. Puterbaugh, the son of the testator.

Schafer v. Eneu, 54 Pa. 304; Com. v. Nancrede, 32 Pa. 389; Edwards's Appeal, 108 Pa. 283; Phillips's Estate, 17 Pa. Super. Ct. 103; Freeman's Estate, 40 Pa. Super. Ct. 31; Goldstein v. Hammell, 236 Pa. 305, 84 Atl. 772.

She was not born until more than a year and a half after testator's death, and certainly could not have been in the contemplation of the testator.

Kohler's Estate, 199 Pa. 455, 49 Atl. 286; Beahlor's Estate, 23 Pa. Dist. R. 1117.

In the absence of anything in the will to show an intention on the part of Isaac T. Puterbaugh to include adopted children in the class designated by him as "children," it was an error to place her in that class.

5 Am. & Eng. Enc. Law. 2d ed. 1089; Schafer v. Eneu, 54 Pa. 304; Com. v. Nancrede, 32 Pa. 389; Phillips's Estate, 17 Pa. Super. Ct. 103; Edwards's Appeal, 108 Pa. 283; Morgan v. Reel, 213 Pa. 81, 62 Atl. 253; Burnett's Estate, 219 Pa. 599, 69 Atl. 74; Freeman's Estate, 40 Pa. Super. Ct. 31; Hood v. Pennsylvania Soc. 221 Pa. 474, 70 Atl. 845; Crozer's Estate, 257 Pa. 241, 101 Atl. 801; Line's Estate, 221 Pa. 374, 19 L.R.A. (N.S.) 293, 70 Atl. 791; Hughes's Estate, 225 Pa. 79, 73 Atl. 1061; Harrison's Estate, 202 Pa. 331, 51 Atl. 976.

Messrs. A. Mitchell Palmer and C. Raymond Bensinger for appellee.

Stewart, J., delivered the opinion of the court:

Isaac T. Puterbaugh, late of Monroe county, died March 26, 1889, testate, leaving to survive him a son, Harrison S., who at that time was about forty years of age, married, but without children. This son, Harrison S., died intestate May 26, 1916, leaving a widow, no natural-born child or children, but an adopted child Edna, who had been adopted by him under a decree of court of May 29, 1894, and is here the ap-

pellee, now Mrs. Edna Puterbaugh Marsh. By the will of Isaac T. Puterbaugh, he directed, *inter alia*, as follows: "Fifth. All the rest and residue of my estate consisting of personal property, I give and bequeath to my executor hereinafter named, in trust for the following purpose, viz.: That my said executor shall keep the same invested or invest the same in good securities, and shall pay the interest and income thereof to my said son, Harrison S., during his natural life, and at his death shall give, assign, and transfer the said estate absolutely to his child or children and their heirs, . . . in the event of my said son, Harrison S., dying without leaving any child or children, then" over.

After the death of Harrison S., the trustee filed his account, showing a balance in the trust fund of \$7,925.66, which the auditing judge, Honorable M. F. Sando, specially presiding, awarded, after payment of costs and expenses, to Mrs. Edna Puterbaugh Marsh, the adopted child of Harrison S. To this final order exceptions were filed by H. P. Robins and Edwin Robins, who claim the entire fund as residuary legatees to whom the entire fund resulted under the will in the event of Harrison S. dying without leaving child or children. Upon the exceptions being overruled, this appeal was taken.

It brings before us the single controverted question of who is entitled to the fund, whether the adopted child of Harrison S., or the residuary legatees under the will of the testator, who were to take in the event of Harrison S. dying without child or children. In this as in every other testamentary disposition which becomes the subject of judicial construction or interpretation, the first inquiry must be to

ascertain, if possible, the intention of the testator as expressed in his will, which, once ascertained, must be given effect. The peculiarity here is that, while the will is entirely free from ambiguity in itself, inasmuch as the beneficiaries are not mentioned by name, owing to certain conditions and circumstances which arose subsequently to the testator's death, more or less difficulty is encountered when we come to apply it to the person or persons designated by the testator in distinction from all others.

**Will—construction—intention.**

The gift here, over upon the death of Harrison S., is to "his child or children and their heirs, . . . and in the event of his dying without leaving any child or children, then" over. Whom did the testator understand to be comprehended within the words, "children of Harrison S.," as he here employed them? It is proper enough to assume that he knew of existing legislation that enabled any proper person, by and with the consent of the parent or guardian of a minor child and with the approval of the court, to adopt it as his child and heir; but it is quite as fair and proper to assume that he knew at the same time of the clear distinction the law makes between natural and adopted children; for instance, that giving the latter the right to inherit does not make him a child in fact (Com. v. Nancrede, 32 Pa. 389), that one adopted has

**Parent and child—effect of adoption.**

the rights of a child without being a child, and that the identity of the child is not changed (Schafer v. Eneu, 54 Pa. 304). We derive but little light from these assumptions. A circumstance which we think, however, goes very far in support of appellants' contention, is that the adoption of this appellee occurred four years after the death of the testator, and nothing is to be found in the will suggesting that, so far as testator knew, the adoption of a child was then contemplated. Not a single extrinsic fact can be pointed to as indicating that the tes-

tator intended that anyone not of his blood should share in his bounty, while the will itself may be searched in vain for any indication tending even remotely to show that he so intended.

To give the words of the gift to Harrison's child or children a meaning which would include adopted children would be to enlarge them beyond their natural meaning and proper import. This was declared where the effort was made to have the same words include grandchildren, in *Hallowell v. Phipps*, 2 Whart, 376, a case requiring less strain, so at least it seems to the writer, than the effort to enlarge them so as to include adopted children, since ordinarily and by common usage these words are understood to mean immediate offspring or descendants. In the case referred to, Justice Rogers, delivering the opinion of the court, says: "Under a bequest to children, grandchildren and other remote issue are excluded, unless it be the apparent intention of the testator, disclosed by his will, to provide for the children of a deceased child. But such construction can only arise from a clear intention or necessary implication; as where there are not other children than grandchildren, or when the term 'children' is further explained by a limitation over in default of issue. The word 'children' does not ordinarily, and properly speaking, comprehend grandchildren, or issue generally. Their being included in that term is only permitted in two cases, viz., from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend to use the term 'children' in the proper, actual meaning, but in a more extensive sense."

**Will—bequest to child of non-inclusion of adopted child.**

We cite this case, not overlooking the lack of strict analogy between the cases, the one an effort to extend

the meaning of children in a will so as to include grandchildren, the other to extend it so as to include children by adoption, merely to show the disposition of the courts to confine and limit the word "children" in its application, when it occurs in a will, to its natural import, except where the testator has clearly shown by other words that he intended to use the term in a more extensive sense. No such word can be found in this will. In *Hunt's Estate*, 133 Pa. 260, 19 Am. St. Rep. 640, 19 Atl. 548, Mr. Justice Green, referring to the rule declared by Mr. Justice Rogers in the case above cited, says: "With us it has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms. . . . It is very clear that one of the two exceptions to the operation of the rule does not exist in the present case. There are other actual children of the testator, to whom the words of the codicil do apply, and hence there is no reason or necessity for departing from the ordinary meaning of the word 'children,' as designating the legatees mentioned in the codicil. The other exception is 'where the testator has clearly shown by other words that he did not intend to use the term "children" in the proper, actual meaning, but in a more extensive

sense.' All the authorities agree that such intention must clearly appear, and, if it does not, the word 'children' must be confined to its ordinary meaning."

No reason can be suggested why this rule should not apply as well to the case of adopted children as to grandchildren, where the sole inquiry is as to testator's meaning and intention. We think it does so apply.

The case calls for no discussion of the several statutes relating to the adoption of children; these are clearly not involved, for, however construed, they could reflect no light on the one pertinent inquiry which has regard to testator's intention. It is not a question of the right of an adopted child to inherit, but simply a question of the testator's intention with respect to those who are to share in his estate. We see nothing in the will, or in the circumstances surrounding it, indicating any intention on part of the testator to include in his bequest to the child or children of his son, Harrison S., any but his immediate offspring.

The decree awarding the fund to Mrs. Edna Puterbaugh Marsh is reversed, and the record is remitted for distribution in accordance with the views here expressed; the cost to be paid out of the fund.

### ANNOTATION.

#### Right of child adopted after testator's death to take under will.

In the great majority of the cases, the question of the right of a child adopted after the testator's death to take under his will has been regarded in accordance with the general rule, as one of intent upon the part of the testator.

And greatly aiding the majority view that such a child cannot be held to have been in the contemplation of the testator, it has been said, is the fact that the adoption was subsequent to the death of the testator.

Thus, in the reported case (*PUTERBAUGH'S ESTATE*, ante, 1277), in hold-

ing that a child adopted after the death of a testator cannot take as a "child" under a will giving the remainder in a residuary estate to the life beneficiary's "child or children," on the ground that such a child could not be presumed to have been within the intention of the testator, which intention, when not violative of law, must control, the court said that such conclusion was materially borne out by the facts that the adoption took place after the testator's death, and that there was nothing in the will suggesting that the testator knew that the



adoption of a child was contemplated. And again, in *Lichter v. Thiers* (1909) 139 Wis. 481, 121 N. W. 153, in applying the rule that a will should be so construed as to carry out the intention of the testator, the court held that a child adopted by testator's granddaughter after his death could not take as a child, under a will giving to the granddaughter a life estate with remainder to her children, and, in arriving at the testator's intention, laid particular emphasis upon the fact that the adoption did not take place until after the testator's death, saying that the fact that the granddaughter was a young, unmarried girl, both at the time the will was made and at the testator's death, rather repels the idea that her grandfather contemplated great-grandchildren in any other sense than issue of her blood.

And in addition to the element of time of adoption, it is of importance that the testator was a stranger to the adoption, and of alien blood.

Thus, in *Reinders v. Koppelman* (1887) 94 Mo. 338, 7 S. W. 288, it was held that a will giving a life estate to testator's wife, with one half the remainder to his adopted daughter and the other half to the "nearest and lawful heirs" of himself and wife, did not include within its benefits a child of a stranger, adopted by the wife long after the testator's death, the theory being that, under the facts, it was impossible to believe that he could have intended to include in the expression, "lawful heirs," the child of a stranger subsequently manufactured into an heir by deed. Continuing, the court said: "The testator devised to his widow a life estate, the remainder to others; in that remainder she had no interest; she could neither convey it by deed, nor devise it by will; she had no more power to convey it by a deed in the form of a deed of adoption, than by a deed in any other form; that which she could not do directly she cannot be permitted to do indirectly, as seems to have been attempted in this case."

So, in *Jenkins v. Jenkins* (1888) 64 N. H. 407, 14 Atl. 557, in holding that the adoption of an illegitimate child

by its father and mother long after testator's death did not render such child his "issue" so as to defeat a remainder created by the will and made contingent upon his having "no issue," it was said that it was clear that the testator intended the property to go over to another if the life tenant left no lawful issue, that such intention could not be defeated by the substitution, after the testator's death, of a different event from the one intended by him, nor by the attempt to supply the want of an heir of the body by any other than the natural, ordinary, and lawful means, and that "he could not have intended by the word 'issue' a child unlawfully begotten and never legitimated by marriage with the mother. He intended an heir in fact, and not one created for the purpose by subsequent legislation and judicial proceedings."

And in *Re Leask* (1910) 197 N. Y. 193, 27 L.R.A.(N.S.) 1158, 184 Am. St. Rep. 866, 90 N. E. 652, 18 Ann. Cas. 516, it was held that a child adopted after the death of a testator, who was a stranger to the adoption, could not take as a remainderman under a bequest to the "child or children" of the life beneficiary with provision that in case no child survived the property should fall into the residue, such being the clear intent of the testator, and the Adoption Statute expressly providing that, as respects the limitation over of property dependent upon the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat rights of remaindermen.

Again, in *Cochran v. Cochran* (1906) 43 Tex. Civ. App. 259, 95 S. W. 731, where the will provided that if a certain devisee died "without lawful children" the property given to him should go to the heirs of another devisee, the court proceeded upon the theory that it was not testator's intention to permit a reversion to be defeated by the adoption of one of alien blood, and held that a child adopted by the first devisee subsequently to the death of the testator was not a lawful child within the meaning of the will,

However, in a few cases it has been held that a testator, by the use of the term, "heirs at law," must be intended to have had in contemplation those whom the law should designate as heirs when the time arrived to ascertain the same, so that a subsequently adopted child may inherit as an "heir at law," where the Adoption Statute classifies it as such. Thus, in *Gilliam v. Guaranty Trust Co.* (1906) 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697, where a child was adopted long after the execution of a deed of trust which conveyed land to one for life with remainder to her "heirs at law," it was held, as against the contention that the rights of those who were heirs at law at the time of the execution of the deed and the death of the grantor could not be defeated by the subsequent adoption, by the life tenant, of a stranger to the grantor, that the property passed to those who were heirs at law at the date of the distribution of the estate, and that the adopted child fell within such class. The majority of the court argued not only that the testator must have intended that the property should go to those persons whom the law should designate as heirs when the time for distribution arrived, but that those who were heirs at law at the date of the execution of the deed had no vested interest during the continuance of the life estate, since the legislature not only had power to change the right of inheritance, but had done so subsequently to the adoption, but prior to the death of the life beneficiary, by conferring the right of inheritance upon adopted children. This decision, however, was by a court divided four to three. So, in *Smith v. Hunter* (1912) 86 Ohio St. 106, 99 N. E. 91, in holding that a child adopted subsequently to the death of a testator by a life beneficiary could inherit under the will as one of the "heirs at law" of such beneficiary, the court adopted the theory that even though there was no Adoption Statute in force at the time the will was executed, or at the testator's death, a specific intention that the succession should be to an adopted child was not required, where such child, since it had been adopted

in pursuance of law enacted before the succession, was within the terms by which the testator declared his general intention. In this connection, the court said that in ascertaining the meaning of a testator it is of first importance to assume that he meant what he said; that the expression, "heirs at law," meant those who by law might be entitled to succeed to the property; that those heirs would be selected by the law in force at the death of the life beneficiary; and that it must have been comprehended that the Laws of Descent and Distribution are frequently changed; and then continued as follows: "To the validity of the claim of the adopted daughter, it is not necessary that the testator should have had the particular intention that the fund should pass to a child by adoption. It is sufficient that she is the person designated by the law as the heir of the daughter, and is thus within the terms of the gift over."

In *Wilder v. Butler* (1917) 116 Me. 389, L.R.A.1918B, 119, 102 Atl. 110, where it appears that the child in question was adopted sixteen years after the execution of the will under which it claimed, it, not appearing whether before or after the testator's death, it was held that such subsequently adopted child could not take under a devise of a remainder to the "child or children" of the person who was the adopting parent, in the absence of a showing of a clear intention that he should do so, at least where, by statute, adoption gives only rights of custody, inheritance, and maintenance, and does not make the adopted child to all intents and purposes the child of his adopters the same as if born to them in lawful wedlock. In reaching this conclusion the court, in applying the rule of intention, said that where the testator or grantor is a stranger to the adoption, and of no blood relation, it is not reasonable to presume that an adopted child was within his intended bounty to the adopter and his "child or children," especially where the adoption took place long after the execution of the will.

G. J. C.

MRS. CORA BROOKER, Respt.,

v.

A. E. SILVERTHORNE, Appt.

*South Carolina Supreme Court — May 16, 1919.*

(— S. C. —, 99 S. E. 350.)

**Threat — actionability.**

1. To render actionable a threat causing fear, it must be of such a nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness so as to influence his conduct, or it must appear that the person against whom it was made was peculiarly susceptible to fear, and that the person making the threat knew and took advantage of the fact that he could not stand as much as an ordinary person.

[See note on this question beginning on page 1286.]

**Appeal — verdict — conclusions of fact.**

2. Whether or not one used abusive language towards another, as alleged in the complaint, is concluded by the verdict, and not open on appeal.

[See 2 R. C. L. 193.]

**Courts — effect of former decision.**

3. Every decision has tacit reference to the facts and circumstances of the case decided.

[See 7 R. C. L. 1003.]

**Threat — fear of bodily harm — sufficiency.**

4. A threat by one seeking a telephone connection which he could not get, that if he was at the exchange he would break the operator's neck, accompanied by profanity and abuse, is not of such a nature or made under

such circumstances as to put a person of ordinary reason and firmness in fear of bodily harm.

[See 8 R. C. L. 352.]

**Evidence — presumption as to firmness.**

5. It will not be presumed that one suing for injuries through threats was not a person of ordinary reason and firmness, in the absence of an allegation to that effect.

[See 10 R. C. L. 879.]

**Threat — definition.**

6. A statement by one seeking a telephone connection, to the operator of the exchange, upon failing to get his connection, that if he were there he would break the operator's neck, is not a threat.

[See 8 R. C. L. 352.]

**APPEAL** by defendant from a judgment of the Common Pleas Circuit Court for Barnwell County (Sease, J.) in favor of plaintiff in an action brought to recover damages for mental anguish and nervous shock alleged to have been caused by abusive and threatening language by defendant to plaintiff over a telephone. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. O. Patterson, Jr., for appellant:

Plaintiff was not entitled to recover for mental anguish in the absence of bodily injury.

Norris v. Southern R. Co. 84 S. C. 15, 65 S. E. 956; Lewis v. Western U. Teleg. Co. 57 S. C. 325, 35 S. E. 556; Taylor v. Atlantic Coast Line R. Co. 78 S. C. 552, 59 S. E. 641; Rankin v. Sievern & K. R. Co. 58 S. C. 532, 36 S. E. 997; Addison, Torts, § 1; Cooley, Torts, p. 3.

Messrs. A. H. Ninestein and Charles Carroll Simms, for respondent:

Plaintiff was entitled to recover.

Lipman v. Atlantic Coast Line R. Co. 108 S. C. 155, L.R.A.1918A, 596, 93 S. E. 714; Lewis v. Western U. Teleg. Co. 57 S. C. 325, 35 S. E. 556; Butler v. Western U. Teleg. Co. 62 S. C. 222, 162 Am. St. Rep. 893, 40 S. E. 162; 8 R. C. L. 75, 76; Kline v. Kline, 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9; Lonergan v. Small, 81 Kan. 48, 25 L.R.A. (N.S.) 976, 105 Pac. 27; Cooper v.

Hopkins, 70 N. H. 271, 48 Atl. 100; Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995.

Hydrick, J., delivered the opinion of the court:

Defendant appeals from judgment for plaintiff for \$2,000 damages for mental anguish and nervous shock alleged to have been caused by abusive and threatening language addressed to plaintiff by defendant over the telephone.

Plaintiff alleges: That on October 27, 1916, she was night operator at the telephone exchange at Barnwell. That defendant called the exchange over the telephone and asked for a certain connection, which she promptly tried to get for him, but, upon her failing to do so, he cursed and threatened her in an outrageous manner, saying to her: "You God damned woman! None of you attend to your business." That she tried to reason with him, telling him that she had done all that she could to get the connection he wanted, but he continued to abuse and threaten her, saying to her: "You are a God damned liar. If I were there, I would break your God damned neck." That the language and threat of defendant put her in great fear that he would come to the exchange and further insult her, and that she was so shocked and unnerved that she was made sick and unfit for duty, and had to take medicine to make her sleep. That for weeks afterwards, when defendant's number would call, she would become so nervous that she could not answer the call. And that her nervous system was so shocked and wrecked that she suffered and continues to suffer in health, mind, and body on account of the abusive and threatening language addressed to her by defendant.

The court overruled a demurrer to the complaint for insufficiency, and defendant answered by general denial. Plaintiff's testimony was in accord with the allegations of her complaint, and, at the close thereof, defendant moved for a nonsuit, which was refused.

Although it cannot affect the decision, because the truth of the facts alleged is concluded by the verdict, it is nevertheless due to the defendant to say that he denied emphatically using the language attributed to him, and his denial was corroborated by the testimony of his wife and a lineman of the telephone company. Defendant testified, also, that, on hearing that plaintiff was offended, he went to her and told her that he did not intend to say anything to offend her, and did not remember having done so, and asked her what he had said that offended her, and she replied that he had spoken a little harshly to her; that he told her he did not remember having done so, but, if she thought so, he was very sorry, and she seemed to be satisfied with this apology. This conversation was not denied by plaintiff.

The question is whether plaintiff stated or proved a cause of action. That question was decided in the negative in Rankin v. Sievern & K. R. Co. 58 S. C. 532, 36 S. E. 997. In that case, Mrs. Rankin alleged that the railroad company's agents trespassed upon her premises, and were about to cut down some trees of great value and beauty, and, when she approached them and requested them not to do so, the foreman of the gang "cursed her and ordered her to get away from there, or he would put her in the penitentiary, and threatened to strike her, she being an old woman, and otherwise maltreated and abused her to her great damage." A demurrer to this complaint was sustained. The court considered the complaint as having attempted to set forth two causes of action, one for trespass on the plaintiff's property, and the other for the abusive and threatening language. After showing that no cause of action for trespass was stated, the question whether an action would lie for the abusive and threatening language was considered, and it was held that it would not. On appeal, this court

Appeal—verdict  
—conclusions  
of fact.

affirmed the judgment upon the reasoning of the circuit court, and said: "No assault upon the plaintiff is alleged, and mere words, under the circumstances stated, would not be civilly actionable."

The circuit court rested its conclusions in part upon the following quotations from Cooley on Torts:

"An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will." 1 Cooley, Torts, 3d ed. p. 3.

"A threat to commit an injury is also sometimes made a criminal offense, but it is not actionable private wrong. . . . Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principle reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. "Words never constitute an assault" is a time-honored maxim. Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterwards reported by witnesses they seem to express deliberate malice and purpose to injure. Even when defamation is complained of, the law is very careful to require something more than expressions of anger, reproach, or contempt, before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And comparing assaults and threats, another important difference is to be noted: In the case of threats, as has been stated, preventive remedies are available; but

against an assault there are usually none beyond what the party assaulted has in his power of physical resistance." 1 Cooley, Torts, 3d ed. p. 29.

The plaintiff in this case relies upon the case of *Cave v. Seaboard Air Line R. Co.* 94 S. C. 282, L.R.A. 1915B, 915, 77 S. E. 1017, Ann. Cas. 1915A, 1065; and *Lipman v. Atlantic Coast Line R. Co.* 108 S. C. 151, L.R.A. 1918A, 596, 93 S. E. 714, in which it was held that a carrier is liable in damages for abusive language addressed to a passenger by the carrier's servants. It was pointed out in those cases that the ground of the carrier's liability for abusive language to a passenger is exceptional, on account of the special and peculiar relations, obligations, and duties existing between carrier and passenger, which differ in kind and degree from almost every other legal or contractual relation, since the carrier is in duty bound to protect his passengers from assault or insult by his servants, and to afford them courteous and respectful treatment. When the ground of liability is considered, the want of analogy between those cases and this becomes apparent, for the defendant in this case was under no legal or contractual obligation or duty to protect the plaintiff from insult, abusive language, or assault. Every decision has tacit reference to the facts and circumstances of the case decided. Therefore, when it was said in the Rankin Case that no action would lie for mere threats or abusive words spoken, the court was careful to qualify the statement by confining it to the circumstances stated; for, as we have seen, abusive language addressed to a passenger by a carrier's servants is actionable. And it is not absolutely true that no action will lie for threats. Blackstone says that injury may be committed "by threats and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, with-

*Courts—effect of former decision.*

out a consequent inconvenience, makes not the injury, but to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, . . . this being inchoate, though not an absolute violence." 3 Bl. Com. 120. But the threat which causes the fear must be such as the law will recognize as adequate to produce the result. There must be just and reasonable ground for the fear; hence a vain or idle threat is not sufficient. It must be of such nature

**Threat—  
actionability.**

under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear that the person against whom it is made was peculiarly susceptible to fear, and that the person making the threat knew and took advantage of the fact that he could not stand as much as an ordinary person. *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129.

If it should be conceded that the language of defendant contained a threat, it was not of such nature or

**—fear of bodily  
harm—  
sufficiency.**

made under such circumstances as to put a person of ordinary reason and firmness in fear of bodily hurt. And it is not alleged that plaintiff was not a person of ordinary reason and firmness and that defendant knew it; and, in the absence of such allegation, it

**Evidence—  
presumption as  
to firmness.**

will not be presumed. A person of ordinary reason and firmness should have known

that the profane and vulgar language alleged to have been used by defendant was the result of a momentary fit of passion, caused by his failure to get the connection he asked for, and that he had no intention of doing or attempting to do plaintiff any bodily hurt. But the words used did not amount to a threat. Defendant said: "If I were there, I would break your . . . neck." But he was

**Threat—  
definition.**

not there, and plaintiff knew it; and there is nothing in what he said expressive of an intention to go there and injure plaintiff. Webster defines a "threat" as "the expression of an intention to inflict evil or injury on another." The law dictionaries give practically the same definition. A threat, therefore, looks to the future. As Judge Cooley says, in the passage above quoted, "a threat only promises a future injury." Here there was no expression of an intention to injure in the future, and therefore no threat.

The language attributed to defendant—especially when used by a man to a woman—merits severest condemnation and subjects the user to the scorn and contempt of his fellow men. But it is not civilly actionable. Diligent search has failed to discover any case or authority to the contrary, but many in support of the conclusion which we have reached.

Judgment reversed.

Gary, Ch. J., and Watts, Fraser, and Gage, JJ., concur.

## ANNOTATION.

### Civil liability for using threatening or abusive language.

This note is confined to cases where the cause of action is predicated upon the use of threatening or abusive language to the exclusion of cases in which such language merely goes to the aggravation of damages in an action resting upon an independent cause of action, e. g., action for tres-

pass. It also excludes cases where the use of the language involves the violation of a duty arising out of a contractual relation, e. g., the relation between carrier and passenger; innkeeper and guest.

Few cases are to be found in the region between assault, on the one

hand, and libel or extortion, on the other, both of which are beyond the scope of the note.

It will be observed that it is held in the reported case (*BROOKER v. SILVERTHORNE*, ante, 1283) that an action will not lie for merely abusive language nor for language of a threatening nature unless it was such as to put a person of ordinary reason and firmness in fear of bodily hurt.

In *Grimes v. Gates* (1873) 47 Vt. 594, 19 Am. Rep. 129, a case of threatening letters, the court said: "Threats of bodily hurt which occasion such interruption or inconvenience as is a pecuniary damage are actionable. Not the threats alone, but the threats and consequent damage together. . . . The only threat alleged in the first count is this: that the defendants did threaten the plaintiff with great injury. This may have meant an injury to property, and not to person, and something remote and fanciful, and not anything direct and tangible. Such allegations are to be taken most strongly against the pleader. Such threats would not be sufficient to awe persons of ordinary firmness. And the count does not set forth that the defendants knew of any reason why the plaintiff could not withstand as much and as severe threatening as ordinary persons. If there was such a reason that the defendants knew of, and took advantage of, and thereby, and by making the threat alleged, they injured the plaintiff, and all these facts were alleged, the count would, probably, be sufficient. But such facts, not being alleged, cannot be presumed to exist. There seems to be a lack of any threat sufficient of itself, and of any threat made sufficient by accompanying circumstances, alleged in this count, to make it sufficient. . . . In each of the other counts a threat to imprison the plaintiff, or cause her to be imprisoned, is distinctly alleged. In each one of all the counts it is alleged that the defendants made threats intending to frighten, terrify, and injure the plaintiff, and that by means of the threats she was terrified, frightened, and made sick, and ren-

dered unable to attend to her usual business and perform her usual work, and was thereby put to expense, and made to suffer loss. These are sufficient allegations of pecuniary damage."

*Rankin v. Sievern & K. R. Co.* (1900) 58 S. C. 532, 36 S. E. 997, is sufficiently referred to in the reported case (*BROOKER v. SILVERTHORNE*, ante, 1283).

Quarreling with the plaintiff's husband and refusing to leave his premises, causing the plaintiff to become frightened, gives no cause of action. *Gaskins v. Runkle* (1900) 25 Ind. App. 584, 58 N. E. 740.

No action lies for causing the relapse of a convalescent woman by calling her over the telephone during her husband's known absence, and with threatening and abusive language ordering her to take charge of her husband's cattle, which had escaped from their inclosure, under penalty of a threatened visit to her home to avenge the speaker of the assumed wrong inflicted by failure to keep the cattle inclosed. *Kramer v. Ricksmeier* (1913) 159 Iowa, 48, 45 L.R.A. (N.S.) 928, 139 N. W. 1091.

Friendly talk to the plaintiff by officials, informing her that her minor son was suspected of arson, and that she had better take him away from his surroundings, and leave the city, will not support punitive damages, if any at all. *Meek v. Harris* (1916) 110 Miss. 805, 71 So. 1.

In *Taft v. Taft* (1867) 40 Vt. 229, 94 Am. Dec. 389, where the plaintiff sued to recover damages for writing an anonymous letter designed to drive him out of town on account of fear of physical injury to himself and family, the court said, in affirming a judgment for the defendant: "To warrant an action the loss or inconvenience sustained must be the direct or reasonable result of the letter, and of a reliance upon it, and must consist of something more than mental suffering or annoyance. The damages which the plaintiff here alleges are in substance, first, for his annoyance at receiving such a letter, and secondly, for his trouble and expense in discov-

ering its authorship, and exposing its falsehood. We do not think there was anything in this very shallow anonymous communication reasonably calculated to justify the plaintiff in either anxiety or expense; and in the light of all the allegations in the declarations it is clear that whatever anxiety or expense he incurred must have arisen from other causes than any reliance upon the letter."

There can be no recovery for threats made against one on account of his doing an illegal business, when the plaintiff did not alter his conduct by

reason thereof and no violence was attempted. *Prude v. Sebastian* (1902) 107 La. 64, 31 So. 764.

In an action for a miscarriage and other injuries, brought on by threats, it was held to be error to refuse an instruction that if the miscarriage and other injuries were occasioned by uremia, and would have happened without the interview at which the alleged threats occurred, the jury should find for the defendant. *Botkin v. Cassady* (1898) 106 Iowa, 334, 76 N. W. 722.

B. B. B.

**GEORGE D. PUFFER, Exr., etc., of Timothy E. Ryan, Deceased, Appt.,**  
v.

**ERNST MERTON et al., Respts.**

*Wisconsin Supreme Court—January 7, 1919.*

(168 Wis. 366, 170 N. W. 368.)

**Attorney and client — death of law partner — sharing in future business.**

1. The estate of a partner in a law firm is not entitled to share in the earnings of the surviving partners in closing up the business on hand at his death, which was held on a general retainer basis, and not on contingent fee.

[See note on this question beginning on page 1290.]

**Partnership — dissolution — right to share in accounts.**

2. A provision in the contract of a law partnership that in case of dissolution certain members are to have no interest in the outstanding accounts

refers to voluntary dissolution, not dissolution by death, where the other members of the firm retain the right in the contract to dissolve the partnership and determine its policy.

**APPEAL** by plaintiff from a judgment of the Circuit Court for Waukesha County (Fowler, J.) in his favor, in part only, in a suit for an accounting between plaintiff as executor and defendants as surviving partners of a law firm. *Affirmed.*

**Statement by Vinje, J.:**

Action for an accounting between the executor of the will of T. E. Ryan, deceased, and the defendants as surviving partners of the law firm of Ryan, Merton, Newberry, & Jacobson. Immediately after the death of Mr. Ryan, Mr. Newberry purchased from the executor of his estate all the tangible property belonging to it which had been used in the partnership busi-

ness. The circuit court held that the estate was not entitled to share in the proceeds received for legal services rendered after Mr. Ryan's death, and construed the partnership agreement to entitle Messrs. Newberry and Jacobson to their proportionate interest in the accounts of the firm outstanding at the time of Mr. Ryan's decease. From a judgment entered accordingly the plaintiff appealed.



Messrs. Grady & Farnsworth, for appellant:

The services of the surviving partners in completing the unfinished business of the partnership were incident to the winding up of the affairs thereof, and the estate of the deceased partner was entitled to participate in fees derived therefrom.

Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107; Consaul v. Cummings, 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83; Page v. Wolcott, 15 Gray, 536; McGill v. McGill, 2 Met. (Ky.) 253; Tyng v. Thayer, 8 Allen, 391; Freeman v. Freeman, 136 Mass. 260; Jepson v. Killian, 151 Mass. 593, 21 Am. St. Rep. 508, 24 N. E. 856; King v. Leighton, 100 N. Y. 386, 3 N. E. 594; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Starr v. Case, 59 Iowa, 491, 13 N. W. 645; Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; Clifton v. Clark, 83 Miss. 446, 66 L.R.A. 821, 102 Am. St. Rep. 458, 38 So. 251, 1 Ann. Cas. 396; 6 C. J. 623; McCoon v. Galbraith, 29 Pa. 293; 2 Bates, Partn. §§ 771, 772, 795, p. 843; 30 Cyc. 696; Roth v. Boies, 139 Iowa, 253, 115 N. W. 930.

Messrs. Miller, Mack, & Fairchild and Thomas M. Kearney for respondents.

Vinje, J., delivered the opinion of the court:

Broadly stated, plaintiff's claim is that upon the death of Mr. Ryan it became the duty of the surviving partners to conduct all business then in its hands to a conclusion and to permit his estate to receive its proportionate share of the proceeds received for such services. This claim is rested chiefly upon an alleged analogy between the winding up of the affairs of an ordinary mercantile partnership and that of finishing business in the hands of a law firm upon the death of a partner. The analogy, however, does not hold. In a mercantile firm the financial interests or assets of the estate remain to earn or enhance profits. Not so here. Mr. Newberry bought the tangible property of the Ryan estate, and it had no money interest in the business to earn profits. In a mercantile firm there are usually contracts and other obligations in which the firm has a vested interest and is entitled to

enforce, a part of which interest belongs to the estate of the deceased partner. In this case it appears that the firm had on hand no contingent fee cases, but that all business held by it was on the usual general retainer basis. Its clients could therefore dispense with the services of the firm at any time by a payment therefor in full to the date of discharge. Neither can it be said that the conducting to a conclusion of law business on hand at the time of the death of a partner is simply a winding up of the partnership. It is more than that; it is a continuation of business after the partnership has ceased to exist. Often such continuation may require years of hard work for completion. Hence it is not equitable that the estate of a deceased partner which has contributed nothing towards such work should share in its compensation. Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473.

Attorney and client—death of law partner—sharing in future business.

We think the trial court properly construed the partnership agreement to refer to a voluntary dissolution, and not to one by death, where it provided that "in case of the dissolution of said firm, the said Newberry and Jacobson, or either of them, are to have no interest in the outstanding accounts of said firm."

Elsewhere in the recitals the partnership agreement speaks of such accounts belonging to Ryan and Merton. Ryan and Merton were to determine the policy of the partnership. If either of them withdrew, his interest in the partnership must first be offered to the other. They reserved the right to dissolve the partnership at any time. It is quite evident that the senior partners desired to retain the control and interests of the firm as against any voluntary action of the new members, and that voluntary dissolution only, and not dissolution by

Partnership—dissolution—right to share in accounts.

death, was contemplated as coming within the terms of the partnership agreement.

We have not deemed it necessary to discuss the law applicable to the rights of estates of deceased partners generally in partnership assets, or the duties of the surviving partners to wind up the business

without expense to the estate, because the facts in this case do not bring it within the general rule. Having reached the conclusion that the trial court was right as to the two matters treated, the balance of plaintiff's contentions fall therewith.

Judgment affirmed.

### ANNOTATION.

#### **Rights of surviving members and of estate of deceased member of law firm in respect to business unfinished at time of latter's death.**

##### **In general.**

There is not much direct authority upon the question of rights of the estate of a deceased member of a law firm and those of the surviving members, respectively, in regard to firm business on hand at the date of the firm's dissolution by the death of the partner; and in the few cases directly upon the question the courts are not in harmony further than the very meager concession that equity has jurisdiction to compel an accounting. Moreover, in the few cases cited herein the facts and circumstances differ to such an extent that it is practically impossible to draw general conclusions backed by more than one or two cases. For example, the holding in the reported case (*PUFFER v. MERTON*, ante, 1288) is strictly limited to business taken upon the regular retainer basis, and the court carefully avoids any expression of an opinion as to business taken upon a contingent basis. Moreover, the decision sheds no light whatever upon the method of dividing the fees on work that was partly done before the dissolution; while in the California case, cited *infra*, the work had been taken on an agreement for a contingent fee and the case was pending on appeal when the dissolution by death occurred, but the court made no limitation on its holding, which was contrary to the holding in the *PUFFER* CASE.

The rule adopted by the court in the reported case (*PUFFER v. MERTON*), when applied within the limits prescribed by the court, seems to be the more equitable and reasonable, but

some additional rule must be devised to cover the situation where much work has been done on the case, and not compensated for when the dissolution of the firm takes place. Perhaps, in such case the value of the work then done should be estimated on the theory of quantum meruit, provided that the understanding with the client is that the whole compensation is to be upon a similar basis. But where the fee is contingent upon success, or estimated in *solido* without reference to the amount of work, a division on the quantum meruit theory would not seem fair. In such case the firm should receive, for distribution among the survivors and the deceased partner's estate according to the partnership agreement, such proportion of the whole fee as the work done by the firm bears to the whole amount of work done on the case to earn the whole fee, the balance going to those who performed the additional services. This is the rule adopted by the court in *Babbitt v. Riddell* (1854) 1 Grant, Cas. (Pa.) 161, cited *infra*, although that case did not involve a general partnership. It is not the rule adopted by the court in *Consaul v. Cummings* (1911) 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83, *infra*, but there it appeared that the deceased member of the special partnership had obtained the business and had in effect employed the partner who survived to do the work for half the contingent fees. Under these circumstances the surviving partner did only the work that he had agreed to do and would have done had the other partner

lived. Of course he was not entitled to extra compensation.

The weight of authority supports the rule adopted by the court in the reported case (*PUFFER v. MERTON*), so far as the rule goes in that case, so that business in the hands of a law firm at the time of a partner's death is not an asset of the deceased partner's estate if no services by the firm have been rendered, and the services are to be performed upon the regular retainer basis. The theory seems to be, although it is not so expressed in the *PUFFER CASE*, that where the work is taken upon a retainer basis the compensation which the survivor should receive for doing the work will exactly balance the amount paid by the client, leaving nothing to be divided with the estate. This would not be the case where part of the work was done before the death of the partner, or where the amount of the compensation does not bear any relation to the amount of work done. If this is not the theory, there would seem to be no ground whatever for making a distinction between the business taken upon a retainer basis and work taken on a contingent basis. However this may be, the decisions, with the possible exception of the *PUFFER CASE*, turn upon the questions of compensation to which the survivor is entitled for finishing the work after the death of the partner.

But there is a doctrine, not very well supported, except as applied under some particular circumstances that make its application equitable, to the effect that the survivor is not entitled, as against the estate of the deceased partner in the law firm, to compensation for any services he may render in finishing business that the firm has on hand at the date of dissolution of the firm by the death of the partner. This is, of course, the equivalent of a holding that the estate of the deceased partner is entitled to the same share in such business as the decedent would have been entitled to under the partnership agreement if he had lived and the firm had not been dissolved.

In the following cases it was either directly held or assumed that a bill

in equity can be maintained for an accounting, between the surviving partners in a law partnership and the estate of the deceased partner, as to the interests of each in the income from firm business on hand, but unfinished, at the time of the partner's death: *Denver v. Roane* (1878) 99 U. S. 355, 25 L. ed. 476 (and see *Rose's Notes to this case*); *Consaul v. Cummings* (1911) 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83, affirming (1909) 33 App. D. C. 132 (a special partnership); *Little v. Caldwell* (1894) 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107; *Jones v. Marshall* (1913) 24 Idaho, 678, 135 Pac. 841; *Starr v. Case* (1882) 59 Iowa, 491, 13 N. W. 645; *Senneff v. Healy* (1912) 155 Iowa, 89, 39 L.R.A. (N.S.) 219, 135 N. W. 27; *Sterne v. Goep* (1880) 20 Hun (N. Y.) 396 (a special partnership); the reported case (*PUFFER v. MERTON*, ante, 1288).

#### **Doctrine of no compensation for finishing business.**

One court has held, and another has vaguely stated by way of argument or dictum, that the surviving partner in a law firm is not entitled to compensation, as against the estate of the deceased partner, for services in finishing the business on hand at the time of the latter's death, unless express provision therefor is made in the agreement, thus making no distinction between this class of partnerships and those commonly called commercial partnerships. *Denver v. Roane* (1878) 99 U. S. 355, 25 L. ed. 476 (questionable dictum. And see *Rose's Notes to this case*); *Little v. Caldwell* (1894) 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107.

In *Denver v. Roane* (1874) 99 U. S. 355, 25 L. ed. 476, the court says that there may possibly be a distinction in this respect between commercial partnerships and partnerships in the law business, but that there is no authority for such distinction. This statement has been referred to both in support of and in opposition to the distinction. See quotation from same case and discussion thereof under the following heading.

In *Little v. Caldwell* (1894) 101

Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107, the court said: "It may be conceded that when a firm of attorneys is employed to conduct litigation, the client contracts for the services of all the members of the firm; and, while perhaps the spirit of such a contract does not require that all the partners shall personally participate in all the steps of the trial, if in their judgment it is not necessary so to do (*Eggleston v. Boardman* (1877) 37 Mich. 14; *Philips v. Edsall* (1889) 127 Ill. 535, 20 N. E. 801), still such a contract is so far one for the personal services of all that, upon the death of one member of the firm, the client may elect to consider the employment as terminated (*Wright v. McCampbell* (1890) 75 Tex. 644, 13 S. W. 293; *McGill v. McGill* (1859) 2 Met. (Ky.) 258). This would be the rule in controversies between the client and surviving members of the firm, where such election was properly made by the client; but the option to declare the contract terminated for such a cause is with the client, and if he does not do so, but is willing to intrust the survivor with the further management of the litigation in which the firm was employed, the survivor is bound to complete the unfinished contract for the benefit of the partnership, and unless it was otherwise agreed upon between the partners, he would not be entitled to compensation from the partnership, or from the estate of the deceased partner for his services in doing so. The rule is well settled in regard to commercial partnerships, that the surviving partner must complete all executory contracts of a firm which remain in force after the death of a partner, and must settle the business of the partnership without charge against the partnership for his personal services; and in the case of *Denver v. Roane* (1879) 99 U. S. 359, 25 L. ed. 478, it was said that none of the adjudicated cases recognize any distinction in this respect between such partnerships and those entered into between attorneys for the practice of their profession. And we know of no such distinction. . . . While it is certainly true when a professional

partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the good will of the partnership, or for the profits of such future business as may have been given to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, and which the client permits the surviving partner to complete, such contract of employment, although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership; and it is none the less an equitable asset when, as in this case, the compensation for such services is entirely contingent upon the final success of the litigation in which the services are to be rendered."

In *Clifton v. Clark* (1903) 83 Miss. 446, 66 L.R.A. 821, 102 Am. St. Rep. 458, 36 So. 251, 1 Ann. Cas. 396, the court said: "If after dissolution of the partnership by death or otherwise, the estate of the retiring partner be liable for the tortious or negligent act of his late partner, in reference to partially fulfilled executory contracts, as decided in the *McGill Case*, *Wilkinson v. Griswold* (1849) 12 Smedes & M. (Miss.) 669, and other cases, it would be illogical and inequitable to deny the representatives of the deceased partner an equitable participation in the compensation accruing by reason of the subsequent performance of such contracts by the surviving partner, and which the survivor was in duty bound to perform for the benefit of the firm." But this statement was not necessary to the holding.

And the surviving partner cannot avoid his responsibility of accounting to the estate of the deceased partner for unfinished business, by making a new contract with the client relating to the same subject-matter, in the profits of which he alone participates. *Little v. Caldwell* (1894) 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107; *Clifton v. Clark* (1903) 83 Miss. 466, 66 L.R.A. 821, 102 Am. St. Rep. 458, 36 So. 251, 1 Ann. Cas. 396.

In *Little v. Caldwell* (Cal.) *supra*, the court said: "This obligation of the surviving partner is one of the risks assumed by him in entering into the partnership, unless otherwise specially agreed. In the discharge of this obligation or duty in relation to the unsettled and unfinished business of the firm, the surviving partner occupies the position of a trustee; and, while he may compromise disputed claims, or modify an existing contract by releasing the other party thereto from some of its obligations, when in the exercise of an honest judgment the best interest of the partnership seems to him to require such action, still, in doing so, he cannot be permitted to make gain for himself at the expense of the estate of the deceased partner, by consenting to the extinguishment of a contract belonging to the partnership, and the substitution therefor of another relating to the same subject-matter, and in the profits of which he alone is to participate. Whatever may be the effect of such new or substituted contract as between the immediate parties to it, a court of equity in settling the accounts of the partnership will not treat it as an entire extinguishment of the original contract, or deny the right of the representatives of the deceased partner to an equitable participation in the profits realized from the latter contract, and which may be regarded, so far as concerns the partnership, as only a modification of the former contract. This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member leaving contracts not fully performed, often constituting a large part of the assets of the partnership, and which it is the duty of the survivor as far as possible to complete and preserve for the benefit of the firm."

And it has been held, without deciding whether or not the rule of no compensation is the correct rule to be applied as to the regular business of a law firm, that it should be applied so as to deprive the survivor of com-

pensation other than his portion as a partner—

—where the fees in question are contingent on success, and the interest of each partner is fixed by agreement, and by a supplementary agreement it is provided that the surviving partners are to finish all work on hand at the time of any partner's death, none of the agreements providing for pay to the surviving partners, *Denver v. Roane* (1878) 99 U. S. 355, 25 L. ed. 476 (and see *Rose's Notes* to this case);

—where the partnership is special or limited to a particular lot of claims, the fees are contingent upon success, and to be divided equally, it appearing, further, that the essence of the agreement really had made the survivor the employee of decedent before his death to attend to the business, so that the survivor really had done no more work than he would have been compelled to do had the other partner lived, *Consaul v. Cummings* (1911) 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83, affirming (1909) 33 App. D. C. 132;

—where there is no general partnership, but rather a joint enterprise among attorneys to prosecute a case for a contingent fee to be equally divided, and one dies before the work is finished, the case being carried to a successful conclusion by the survivors, *Senneff v. Healy* (1912) 155 Iowa, 89, 39 L.R.A. (N.S.) 219, 135 N. W. 27. But see *Babbitt v. Riddell* (Pa.) *infra*, for the statement of a rule that seems to be more equitable as applied to facts very similar to those here involved.

And the surviving partners are not entitled to compensation for collecting money due to the firm. *Starr v. Case* (1882) 59 Iowa, 491, 13 N. W. 645. This, of course, is merely settling partnership business, and is not earning fees.

**Doctrine of compensation for surviving partner.**

But other courts take the position that the ordinary business of a law firm differs from that of a commercial enterprise in that it requires peculiar skill on the part of each member, and finishing the business is really con-

tinuing the partnership business to that extent, so that the rule that a surviving partner is not entitled to pay for settling partnership affairs on the death of a member does not apply to the surviving partners of a law firm that has been so dissolved. *Denver v. Roane* (1878) 99 U. S. 355, 25 L. ed. 476 (dictum. And see *Rose's Notes to this case*); *Jones v. Marshall* (1913) 24 Idaho, 678, 135 Pac. 841. And see discussion of the reported case (*PUFFER v. MERTON*, ante, 1288), under title "In general," supra, as to theory of the case.

Thus the court in *Denver v. Roane* (1878) 99 U. S. 355, 25 L. ed. 476, after citing some cases, involving commercial partnerships, to this proposition, said by way of argument: "This is the rule in regard to what are commonly called commercial partnerships, and the authorities cited refer to those. There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work and results of work after the death of any of their number. The agreement of August 18, 1869, provided that in case of the death of any partner, one third of the fees in cases nearly finished, and one quarter of the fees in other partnership cases, should belong to the representatives of the decedent. Of course, it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement." While this statement in respect to the distinction was made arguendo and was perhaps not necessary to the holding, the case has usually been regarded as some authority on the point. The statement is quoted with apparent approval of the distinction in *Consaul v. Cummings* (1911) 222 U. S. 262, 56 L. ed. 192, 32 Sup. Ct. Rep. 83, but no ruling was

made upon it. And it has been quoted in support of the distinction in *Jones v. Marshall* (1913) 24 Idaho, 678, 135 Pac. 841. But the case has also been referred to as authority for holding that no such distinction exists. *Little v. Caldwell* (1894) 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107. See quotation from this case under preceding heading.

And while deciding a question between the estate of a deceased partner and a client of the firm, the court, in *Clifton v. Clark* (1903) 83 Miss. 446, 66 L.R.A. 821, 102 Am. St. Rep. 458, 36 So. 251, 1 Ann. Cas. 396, said: "With the possible limitation that they might be entitled to some additional compensation from the estate of his deceased partner for services rendered in winding up unfinished business, we see no reason why the general rule applicable to commercial partnerships should not apply to surviving partners of firms of attorneys."

In *Sterne v. Goep* (1880) 20 Hun (N. Y.) 396, the court, in affirming a decree for specific performance of a contract made between the surviving member of a law firm and the administrator of the deceased partner, whereby the latter had released the former from all claims of the estate growing out of the partnership, quoted with approval from the opinion of the general term as follows: "In commercial partnerships there is little difficulty in determining the rights of a surviving partner and of the representatives of a deceased partner, where the partnership is terminated by death. The survivor takes the assets of the firm, and is entitled to dispose of them by sale, and collect all outstanding debts and apply the proceeds to the payment of the debts of the firm, and he must account for the surplus to and with the representatives of the deceased partner; but he is entitled to no compensation for services as against the estate of such deceased partner, unless the same be stipulated for in the articles of copartnership. He is not, however, bound to continue and carry on the business of the firm, devoting his personal services thereto for the benefit of his deceased partner's es-

tate. His obligations are rather to close up and terminate the business in the most convenient practicable mode, with due regard to the rights and interests of creditors, and of his deceased partner's estate as well as of himself. Whether the same rules apply to a partnership between lawyers, where the profits of the firm are the product solely of professional skill and labor, need not now be discussed. It would seem, however, to be a harsh rule which would require the surviving partner of a law firm to take upon himself, solely, the conduct of all pending litigations in the office at the time of his partner's decease, and devote his professional skill and labor through a possible period of years to the conducting and closing up of such litigations, for the benefit equally of the estate of his deceased partner, and with the obligation ultimately to account to his representatives for an equal share of all the profits or results so earned. It would seem that equity might discern some juster rule by which to ascertain and determine the rights of the parties in such a case. But whatever may be the strict legal rights of the survivor and the representative in such a partnership, it is clearly manifest that the case is one eminently proper for any just and fair agreement between the survivor and the representative which shall ascertain and settle their respective rights."

In *Babbitt v. Riddell* (1854) 1 Grant, Cas. (Pa.) 161, where two attorneys, not partners, after entering into an agreement to conduct a case to a final termination for the sum of \$500 if successful, and for nothing if unsuccessful, tried the case in the trial court, after which one died and the other

conducted the case to a final successful conclusion in the appellate court, the court approved an instruction to the jury to the effect that the \$500 should be divided between the surviving attorney and the firm in proportion to the services rendered by the firm and those of the surviving attorney, taking the agreement as a basis for the whole work, rather than to measure the firm's work on a quantum meruit, and, of course, giving to the estate that portion of the firm's share to which the articles of partnership entitled the decedent in firm earnings.

In *McGill v. McGill* (1859) 2 Met. (Ky.) 258, it was held that the estate of a deceased member of a law firm is liable to a client of the firm for money collected after the decease by the survivor and never paid to the client, the survivor having later died insolvent, the claim for the money having been reduced to judgment by suit before the death of either partner. The court distinguished, in respect to such liability, between commercial partnerships and professional partnerships in so far as the usual business of a law firm is involved, but held that the mere collection of the money due upon a judgment without legal procedure does not require personal services in the sense of skill, peculiar to the legal profession. It is intimated that the estate would not have been liable if the partner had died before suit had been brought to reduce the claim to judgment. The case is not within the scope of the note, which does not treat of the liability of either the survivor or of the estate to clients, but it is cited here for the purpose of illustrating the distinction that is sometimes made between the two classes of partnerships.

J. W. M.

WOODILL & HULSE ELECTRIC COMPANY, Appt.,  
v.  
GEORGE YOUNG et al.,  
and  
EMPIRE SECURITIES COMPANY, Respt.

*California Supreme Court (Dept. No. 1) — July 5, 1919.*

(— Cal. —, 182 Pac. 422.)

**Lien — street improvement — priority.**

1. The last lien imposed upon abutting property for a street improvement assessment is paramount.

[See note on this question beginning on page 1301.]

**— effect of statute.**

2. A statutory provision that an assessment for street improvements shall be a first lien until fully paid does not

give it priority over a lien for a subsequent improvement of a similar nature.

[See 25 R. C. L. 189.]

**APPEAL** by plaintiff from a judgment of the Superior Court for Los Angeles County (Dewhirst, J.) in favor of defendant Securities Company in an action brought to foreclose certain street assessment liens on two parcels of land. *Reversed.*

The facts are stated in the opinion of the court.

**Mr. Richard J. O. Culver**, for appellant:

Plaintiff's liens, being last in point of time of attaching to the res, are prior encumbrances.

California Street Law, p. 231; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Littlefield v. Nichols, 42 Cal. 374; 28 Cyc. 1202; Burke v. Lukens, 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 641; California Loan & T. Co. v. Weis, 118 Cal. 439, 50 Pac. 697; Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119; German Sav. & L. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Morey v. Duluth, 75 Minn. 226, 77 N. W. 829; Jaicks v. Oppenheimer, 264 Mo. 693, 175 S. W. 972.

**Messrs. Crouch & Crouch**, for respondent:

The interest of the defendant Securities Company is superior to that claimed by the plaintiff.

Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Philadelphia v. Meager, 67 Pa. 345; Scott-McClure Land Co. v. Portland, 62 Or. 462, 125 Pac. 276; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77.

**Messrs. Charles A. Gray and Arthur M. Ellis**, amici curiæ:

The lien first imposed stands until the assessment shall be paid.

Maginn v. Lancaster, 100 Mo. App. 116, 73 S. W. 368; People ex rel. Woods v. Crissey, 91 N. Y. 631; Holcomb v. Chicago, R. I. & P. R. Co. 27 Okla. 667, 112 Pac. 1023; Skinner v. Christie, 52 N. J. Eq. 720, 29 Atl. 772; Daly v. Sanders, 9 N. Y. S. R. 794, affirmed in 118 N. Y. 688, 23 N. E. 1151; Parker-Washington Co. v. Corcoran, 150 Mo. App. 188, 129 S. W. 1031; Jaicks v. Oppenheimer, 264 Mo. 693, 175 S. W. 972; Cowell v. Washburn, 22 Cal. 519; Hendrick v. Crowley, 31 Cal. 471; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77; Scott-McClure Land Co. v. Portland, 62 Or. 462, 125 Pac. 276.

**Olney, J.**, delivered the opinion of the court:

This is an appeal from a judgment in an action to foreclose certain street assessment liens on two parcels of land. The defendants in the action were the original owners of the property upon which the plaintiff's liens were imposed, and the owner of certain other street assessment liens on the same property. These latter liens had been imposed prior to the imposition of



the plaintiff's liens, and were for work done under proceedings initiated prior to the proceedings under which the plaintiff's work was done. Intermediate the imposition of the plaintiff's liens and the commencement of the action, street improvement bonds representing the assessments of the defendant lien holder were issued, default made upon such bonds, and the property sold to the lien holder to satisfy the bonds.

The original owner of the property defaulted in the action, which thereafter proceeded as between the lien holders only. The sole question presented was one of priority between the two sets of liens, and this was determined in the lower court against the plaintiff, who appeals.

The appellant's contention is that street assessment liens are liens which are imposed upon the property without the owner's consent under the taxing power of the state, that they are imposed upon the property as such, so that every right or interest in the property is included in the subjection to the lien, with the result that a prior lien, even one itself for a street assessment, is subject to it. The respondent's contention is that the rule generally applicable to contractual liens applies, and that the one prior in time is prior in right.

The question as presented is a novel one in this state, unless *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52, can be considered as determining it. The action in that case was one to quiet title, and the plaintiff claimed as the purchaser at a foreclosure sale in an action brought to foreclose a street assessment lien. Certain of the defendants claimed as the purchasers at foreclosure sales in actions to foreclose other street assessment liens. The lien foreclosed by the sale to the plaintiff was prior in time to the liens foreclosed by the sales to the defendants, but the latter existed at the time of the commencement of the foreclosure action resulting in the sale to the plaintiff, and the defendants were not made parties to that action, with the re-

sult, as claimed by them, that their rights had not been foreclosed by the sale to the plaintiff. Under these circumstances the court inquired into the validity of the proceedings under which the defendants claimed, held them to be invalid, and upon this ground affirmed the judgment quieting the plaintiff's title as against them. The liens under which the defendants claimed being held to be invalid in toto, the decision did not involve a determination of their rank, if valid, with respect to the liens under which the plaintiff claimed. In the course of the opinion, however, it is said: "Although the sheriff's deeds made to appellants Wood and Diggins [the defendants] antedated those of plaintiff and are based upon judgments rendered prior to those under which plaintiff claims, yet, as the liens under which plaintiff's title has its origin are older than the liens to which the deeds of appellants relate, plaintiff has the superior legal title"—citing *Littlefield v. Nichols*, 42 Cal. 374.

It does not appear whether there was any contention over the question of rank as between the liens, if valid, and there is no discussion of the matter in the opinion. All that appears is the statement quoted and the citation of *Littlefield v. Nichols* in support of it. But the liens involved in *Littlefield v. Nichols* were not imposed by superior public authority, but were contractual, and, furthermore, no question as to their rank was involved. The point determined was merely that, as between conflicting foreclosure or execution sales, that one was superior which was based upon the superior lien. It must be that it was to this point and to this point alone that it was cited in *Brady v. Burke*, *supra*. Our conclusion is that the bald statement in *Brady v. Burke* cannot be taken as a governing determination of the question now squarely presented, and that we are at liberty to determine it upon its merits.

The question has arisen in other jurisdictions and has been there de-

cided. The decisions, however, are conflicting. Supporting the appellant's position are *Morey v. Duluth*, 75 Minn. 226, 77 N. W. 829; *Burke v. Lukens*, 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 641; *Jaicks v. Oppenheimer*, 264 Mo. 693, 175 S. W. 972. Supporting the respondent's position are *Philadelphia v. Meager*, 67 Pa. 345; *Scott-McClure Land Co. v. Portland*, 62 Or. 462, 125 Pac. 276; *Bell v. New York*, 66 App. Div. 578, 73 N. Y. Supp. 298; *Des Moines Brick Mfg. Co. v. Smith*, 108 Iowa, 307, 79 N. W. 77.

In spite of this conflict, however, we believe that the underlying principles by whose application the question must be decided are clear, and

lead with certainty to the conclusion that in liens of this character, imposed on property,—that is, on a thing itself regardless of ownership,—by public authority for a public purpose, the one last imposed is paramount.

No question is made but that this is the well-established rule as to liens for general taxes. It is so held almost universally and has been so decided in this state. *Anderson v. Rider*, 46 Cal. 134, 138; *Dougherty v. Henarie*, 47 Cal. 9, 14; *Chandler v. Dunn*, 50 Cal. 15; *California Loan & T. Co. v. Weis*, 118 Cal. 489, 50 Pac. 697. The reason for it is concisely stated in *Dougherty v. Henarie*, 47 Cal. 9, 14, thus: "The necessity of collecting revenue for the support of the government imperatively requires that the lien for taxes shall take precedence over all other liens, and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected."

Such being the rule and the reason for it in the case of conflicting general tax liens, the question arises: What reason is there for not applying the same rule to the case of conflicting street assessment

liens, or, possibly putting it more accurately, does the reason for the rule as between general tax liens apply as between street assessment liens? Now fundamentally the principle in the case of general tax liens is that the law for the purpose of insuring a payment required for a public purpose creates a lien for such payment, not upon any particular interest or set of interests in the property, but upon the property itself as such, so that all interests in it of every nature are made subject to the lien, with the result that, although there may be no explicit statutory provision, there is implicit the rule that the tax lien shall be paramount to all other prior existing liens, even to prior existing tax liens.

The case of street assessment liens under our statute comes exactly within the foregoing principle. The assessment is one for a public purpose. To insure its payment it is made a charge, not against any person, owner of property or otherwise, but against the res itself. So much has already been decided by this court. *German Sav. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89. In this case it was held that a street assessment lien was paramount to the lien of a mortgage. Now, the lien of a mortgage is not of the same character as a public assessment lien, and so far the decision mentioned cannot be said to be determinative of the present case. But the reasons given for the decision are exactly those for the rule as between conflicting tax liens, viz., that for the purpose of insuring a payment required for a public purpose a lien is placed on property paramount to all existing interests therein. It is said: "Whether the power to tax for street improvements is to be referred to the general taxing power and the power of eminent domain, or, as some courts have suggested, to the police power, is not very important. Whatever its source may be, it exists beyond question by reason of its nature and objects, and that it partakes of the nature of the taxing

power must be admitted. The power to levy a tax for general purposes, which shall be a lien superior to all other liens, prior or otherwise, is not doubted, and it is not because it is called a tax, but because of its object and the necessity for raising revenue in order to execute the functions of government. In modern times, whatever may have been the demands of society in an earlier period of the development of government, the necessity for improving the streets of cities and towns, while perhaps less important in degree than the general objects of government, is yet important and necessary to the welfare of the whole community, and in our opinion the principles on which the system of general taxation depends, and which govern in the enforcement of tax levies for general purposes, are also applicable to taxation for the improvement of streets, the construction of sewers, and other like public work. It is a mistaken assumption that the improvement of a particular street in a city is solely for the benefit of adjoining property owners; the benefit accrues to the public generally, and the power to compel such improvements is essential to the well-being of communities. The Bond Act expressly provides that the lien of the bonds shall be 'a first lien upon property' (Stat. 1893, § 4, p. 36); and § 5 also makes the provisions of the law for the collection of delinquent state and county taxes applicable to sales under the Bond Act (Pol. Code, § 3788). The intention seems to be clearly manifested that the bond lien shall be prior to all liens. The view we take of the statute makes it unnecessary to inquire as to the effect of the lien which attaches upon the recording of the warrant. If we are to protect prior mortgages against the lien, how can we in reason take from the owner his title, which antedates the mortgagee's interest?"

The assessments in question here were not levied under the same act as those in *German Sav. & L. Society v. Ramish*, supra, and the stat-

utory provisions are not exactly the same. But the essential thing, the intent to make the lien a paramount one upon the property, is present in both statutes. Sections 23, 63, and 66 of the Act of April 7, 1911; Stat. 1911, p. 730.

Such being the character and purpose of street assessment liens, and that character and purpose being the same as those of general tax liens, so far as this phase is concerned, it necessarily follows that the rule as to priority between conflicting tax liens should be the rule as to priority between conflicting street assessment liens.

Much might be said by way of amplification. Much is said and exceedingly well said, in *Jaicks v. Oppenheimer*, 264 Mo. 693, 175 S. W. 972, but we quote only the following: "When the two kinds of taxes are considered for the purpose of determining this question, it will be found that there is not such an inherent difference between them as to place the liens of special taxes merely in the category of ordinary liens. It is true general taxes are levied for the support of the government, and in that sense general taxes are the more important of the two and ought to take precedence over special taxes, so that the lien of a general tax ought to be prior to the lien of a special tax, even though the latter be prior in point of time. But that is not the question here. The question now is as to the rule of priority as between the different liens of different special taxes. And the precise inquiry now at hand is: What essential or inherent difference is there in the nature of special taxes which deprives their lien of a rule accorded to the lien of general taxes? Both are created by acts of the sovereign power exercised for the public good. In both the taxing power operates in rem, that is, on the property itself without regard to different or conflicting interests of ownership; in fact, in total disregard of any liens or interests attached thereto. The proceedings to collect both are proceedings in rem.

And 'the general and universal rule is that in proceedings in rem to enforce the payment of taxes the last tax levied and sought to be enforced is superior and paramount to the lien of all other taxes, claims, or titles.' 2 Cooley, Taxn. 3d ed. 875."

The principal reasons advanced in opposition to the foregoing view are: (1) That it permits the municipality or other public authority to give one party a lien, and then, without his consent and against his will, displace and perhaps destroy it by creating another lien in favor of another party; and (2) that it will defeat the purpose of the statute by preventing contractors from taking work through fear of subsequent liens.

As to the first of the reasons, it will occur immediately that it is equally applicable to liens for general taxes where admittedly the subsequent lien is the superior. No reason is apparent why the holder of a street assessment lien should be more favored than a purchaser at a tax sale. But the real fallacy in the argument lies in its overlooking the fact that all property and every interest in property, no matter how acquired or what its origin, must be held subject to the right of subsequent taxation, both general and special, and that any foregoing of this right by the state must be most exceptional. Yet there is just such an exception if the interest of a street assessment lien, an interest which is purely private property, although public in its origin, is not to be subjected to subsequent liens for public improvements. There is, in fact, no more displacement or destruction of the earlier lien by the imposition of the later than there is a displacement or destruction of any other right in the property by the imposition of a street assessment lien.

The second objection that the doing of public work will be hampered because contractors will be reluctant to undertake work if their liens are to be subject to liens for subsequent work is, we believe, almost entirely

fanciful. The same reason would apply to any acquisition of property which could not be concealed from the taxing authorities, and as yet there has not been observed any great reluctance to purchase real estate which cannot be so concealed, or to loan money secured by lien upon it, although it is well understood that real estate and any mortgage lien upon it may at any time be subjected to assessment for public work.

On the other hand, to hold that a street assessment lien is superior to any subsequent lien of the same character would most certainly interfere with the making of public improvements and seriously tend to frustrate the purpose of the statute. The lien of the assessment exists for two years, and if suit to foreclose is brought the lien exists until the termination of the suit. If such a lien is superior to any similar subsequent lien, there would be nothing to prevent the owner of property assessed from purchasing the lien, concealing the fact of purchase, having suit brought to foreclose the assessment, and then tolling the suit along indefinitely, thereby prolonging the apparent lien, and quite effectually deterring any bidding for work which could be paid for only by an assessment subordinate to the lien already on the property. If bonds are issued to represent the assessment, as was done in this case, the possibility of obstructing the making of public improvements is still greater, for the life of the bonds is ten years, and during this whole period any contractor doing public work payable by assessment must take a second lien.

Finally, the point is made by amici curiæ, arguing in support of the respondent's position, that the statute provides that the "assessment shall be a first lien . . . until . . . fully paid. . . ." They argue that if the assessment is to be a first lien until paid it necessarily follows that any subsequent lien must be subordinate to it. But this result is but one horn of a di-

lemma which presents itself, if we assume that the language quoted was intended to include the case of conflicting liens under the statute. The language is just as applicable to an assessment for subsequent work as to the one first imposed. In other words, the statute declares equally as well in the case of the second assessment as in the first that the lien shall be a first lien. But such lien can be first only if it is superior to the lien of the first assessment. The only escape from the dilemma thus presented is to conclude that the statute intended that, when once a lien for street work is imposed on property, no further improvement of a similar character can properly be made until such lien has been discharged by payment. Such a result, of course, would be subversive of the very purpose of the act, and it is inconceivable that it was intended.

The true answer to the dilemma is that the language quoted was not intended to apply to the case of conflicting liens, both under the same statute. It cannot so apply, since it would make both liens, though in conflict, first liens, — a manifest impossibility. The correct construction of the statute is that by the language quoted nothing more was intended than to declare the general proposition that a street

—effect of  
statute.

assessment lien should be a first lien on the property. The result is that the statute contains nothing governing the ranking of conflicting liens, each imposed under the statute, and such ranking must be determined by the general principles applicable to liens of that character. As to those general principles we have no doubt. Such liens, so far as any phase of the matter here material is concerned, are essentially tax liens imposed by public authority for a public purpose upon a res, and the same compelling reasons which have led to the practically universal recognition of the rule that a subsequent lien for general taxes is superior to a prior lien of the same sort lead to the same conclusion with regard to street assessment liens. It follows that the conclusion of law of the trial court that the assessments and bonds of the defendant Empire Securities Company are respectively liens prior and superior to the liens of the plaintiff is incorrect.

The judgment is reversed, and the lower court is directed to enter judgment subjecting to foreclosure the interests of the Empire Securities Company in the property, as well as the interests foreclosed by the present judgment.

We concur: Shaw, J.; Lawlor, J.

Petition for rehearing denied, August 4, 1919.

## ANNOTATION.

### Priority as between liens for public improvements.

The cases passing on the question of priority as between liens for public improvements are fairly evenly divided, so far as number is concerned, between those holding that the lien later in time is paramount, just as in the case of general tax liens, and those holding the reverse, in accordance with the rule as to ordinary liens.

The rule as laid down in the reported case (WOODILL & H. ELECTRIC CO. v. YOUNG, ante, 1296), favoring the junior lien, is supported by Burke v. Lukens (1895) 12 Ind. App. 648, 54

Am. St. Rep. 539, 40 N. E. 641; Gould v. St. Paul (1918) 120 Minn. 172, 139 N. W. 298; Jaicks v. Oppenheimer (1915) 264 Mo. 693, 175 S. W. 972, affirming (1914) — Mo. App. —, 168 S. W. 216; Redemeier v. Perkinson (1916) — Mo. App. —, 186 S. W. 1107.

Priority is given to the earlier liens in Brady v. Burke (1891) 90 Cal. 1, 27 Pac. 52; Des Moines Brick Mfg. Co. v. Smith (1899) 108 Iowa, 307, 79 N. W. 77; Parker-Washington Co. v. Corcoran (1910) 150 Mo. App. 188, 129 S. W. 1031; Oil City Bldg. & L. Asso.

v. Shanfelter (1905) 29 Pa. Super. Ct. 251. There is also, perhaps, an inference to that effect from the decision in *Daly v. Sanders* (1887) 9 N. Y. S. R. 794, affirmed without opinion in (1890) 118 N. Y. 688, 23 N. E. 1151.

Some cases, while not directly asserting the priority of the earlier lien, deny the superiority of the later one. *Wood v. Brady* (1885) 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; *Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, rehearing refused in (1910) 48 Ind. App. 210, 95 N. E. 585; *Scott-McClure Land Co. v. Portland* (1912) 62 Or. 462, 125 Pac. 276; *Philadelphia v. Meager* (1871) 67 Pa. 345.

*Burke v. Lukens* (1895) 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 649, *supra*, however, is criticized in the later case of *Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, rehearing refused in (1910) 48 Ind. App. 210, 95 N. E. 585, *supra*, decided by the same court, and its holding is not followed, though the reason for declining to follow the earlier decision is based partly upon a difference in the wording of the statute in force at the time the liens involved in the respective cases were acquired; while *Gould v. St. Paul* (1913) 120 Minn. 172, 139 N. W. 293, *supra*, is not strictly in point, as in that case the contest was between a general tax lien and an improvement lien, rather than between two improvement liens; and *Redemeier v. Perkinson* (1916) — Mo. App. —, 186 S. W. 1107, *supra*, is a decision by an intermediate court, and is controlled by the decision of the higher court in *Jaicks v. Oppenheimer* (1915) 264 Mo. 693, 175 S. W. 972, affirming (1914) — Mo. App. —, 168 S. W. 216, *supra*, and adds little to its authority.

On the other hand, the holding in *Brady v. Burke* (1891) 90 Cal. 1, 27 Pac. 52, *supra*, is little more than dictum, since the decision really rests upon the invalidity of the proceedings under which the defeated party claimed, and its authority on this point, together with that of *Wood v. Brady* (Cal.) *supra*, would seem to be destroyed by the later decision of the same court

which rendered them, in the reported case (*WOODILL & H. ELECTRIC Co. v. YOUNG*) *ante*, 1296; while *Parker-Washington Co. v. Corcoran* (1910) 150 Mo. App. 188, 129 S. W. 1031, *supra*, is expressly overruled by *Jaicks v. Oppenheimer* (Mo.) *supra*, and in *Oil City Bldg. & L. Asso. v. Shanfelter* (1905) 29 Pa. Super. Ct. 251, no contest between improvement liens was directly involved, but the distribution ordered by the court of the proceeds of a sale on foreclosure of a mortgage upon property against which two improvement liens were outstanding was such that the court must have given priority to the earlier lien over the later one. In that case it is evident also that there was a change in the statute between the times when the two improvement liens were acquired, but the effect of such change upon this question is not apparent.

That the question of priority is wholly within the control of the legislature is generally conceded, and many of the cases turn on the construction of statutory provisions in regard thereto.

The reported case (*WOODILL & H. ELECTRIC Co. v. YOUNG*) holds that a statutory provision that the "assessment shall be a first lien . . . until . . . fully paid" is not sufficient to give the earlier lien priority, as it is just as applicable to the later lien as to the earlier one.

In *Burke v. Lukens* (Ind.) *supra*, the court says: "The statute . . . creating the lien provides that it shall have precedence over all other liens excepting taxes. A strict construction of the wording of the statute fully warrants appellant's assumption that the last lien of this kind acquired must have precedence over all other liens of a like character."

The statute involved in *Gould v. St. Paul* (Minn.) *supra*, made assessments for local improvements paramount liens of equal rank with the lien for general taxes. The court says: "The rule applied to all other liens is that the first in point of time takes priority, while the rule is the reverse in tax liens. As to such liens, 'the last shall be first and the first last.' . . . It is

clear that the legislature intended this rule to continue and be applicable to assessment liens and rights accruing thereunder."

In *Jaicks v. Oppenheimer* (Mo.) *supra*, it is said, speaking of assessments for public improvements, "the charter of Kansas City provided that each should be a lien on the thing benefited, necessarily thereby providing that the last lienor should have preference over the former."

In *Brownell Improv. Co. v. Nixon* (Ind.) *supra*, the court says: "In this case we are to deal with the clause, 'to the same extent as taxes are a lien,' instead of the clause, 'and shall have precedence over all other liens excepting taxes,' which was before this court in the case of *Burke v. Lukens*. . . . To say that the clause, 'to the same extent as taxes are a lien,' clearly indicates a legislative intention to give later street improvement assessment liens priority over earlier like assessment liens not extinguished by a sale of the property would require us to read into the statute words that seem to us were advisedly omitted by the general assembly."

The statute considered in *Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa, 307, 79 N. W. 77, *supra*, after granting power to certain cities to levy special assessments for paving, curbing, or sewerage streets, provided that "said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid and shall have precedence over all other liens excepting ordinary taxes and shall not be devested by any judicial sale." The court says: "After all, the question is one of statutory construction only. The lien of intervener [the holder of the earlier lien] is first and paramount, unless the statute otherwise provides, and this we think is not the case."

It is held in *Scott-McClure Land Co. v. Portland* (1912) 62 Or. 462, 125 Pac. 276, that under a charter providing that such assessments should, from the

date of their entry in the docket of city liens, be declared a tax levied and a lien upon the land involved, "which lien shall have priority over all other liens and encumbrances whatsoever thereon," and that the holder of any other liens should have the right to pay such assessments and discharge the lien thereof, a sale upon a junior lien would not extinguish a former lien of a kindred character.

In *Philadelphia v. Meager* (1871) 67 Pa. 345, it is held that under a statute providing in express terms that the lien of claims for public improvements shall not be devested by any judicial sale as respects so much thereof as the proceeds of such sale may be insufficient to discharge and pay a lien under one such claim would not be devested by a sale on a subsequent similar claim except so far as the proceeds of sale were applicable to its payment.

Aside from questions of statutory construction, the principal arguments against giving priority to the later liens are: (1) The essential difference between general taxes and assessments for improvements in that the former are levied upon the property of the citizens generally for the purpose of carrying on the government, and hence public policy necessarily demands in such case that preference be given to the later lien, while improvement assessments are usually induced by the request of the property owners, and are levied for the benefit of the assessed property as an equivalent to the value added by the improvement, and are recovered, not like ordinary taxes, but by a particular mode prescribed by statute (*Wood v. Brady* (1885) 68 Cal. 78, 5 Pac. 623, 8 Pac. 599; *Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, 95 N. E. 585; *Parker-Washington Co. v. Corcoran* (1910) 150 Mo. App. 188, 129 S. W. 1031); (2) the unfairness of allowing a municipality by its own voluntary act to displace a lien which under the law it has given (*Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa, 307, 79 N. W. 77); (3) that the party making the later improvement is charged with notice of earlier

improvement liens outstanding, and should therefore take subject to them (*Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, 95 N. E. 585; *Parker-Washington Co. v. Corcoran* (1910) 150 Mo. App. 188, 129 S. W. 1031); (4) that allowing priority to the later lien would tend to prevent contractors from taking work through fear of subsequent liens (*Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa, 307, 79 N. W. 77).

Any essential difference between general taxes and improvement assessments, so far as this question is concerned, is denied, however, in the reported case and in *Jaicks v. Oppenheimer* (1915) 264 Mo. 693, 175 S. W. 972, affirming (1914) — Mo. App. —, 168 S. W. 216, supra, which cases point out that assessments for improvements are, equally with general taxes, levied against the property itself by authority of government and are imposed for the general public good as well as for the particular benefit of the district assessed, and that all the considerations of public policy which require the prompt and certain collection of general taxes are equally applicable to such assessments.

These same cases meet the second argument with the suggestion that it would apply equally to the case of general tax liens, as to which, concededly, the later lien is paramount. And the same suggestion would apply to the third objection.

There seems also to be considerable force in the further suggestion of the reported case (*WOODILL & H. ELECTRIC Co. v. YOUNG*, ante, 1296), in answer to the second objection, that a failure to give priority to the later lien would create an exception to the rule that all property, however acquired, is held subject to the right of subsequent taxation, both general and special, since it would make the interest of an improvement assessment lien free from subjection to subsequent liens of the same character.

The fourth objection is declared in the reported case to be entirely fanciful and equally applicable to any acquisition of property which could not be concealed from the taxing authorities, while both that case and *Jaicks v. Oppenheimer* (Mo.) supra, suggest that a failure to give priority to the later lien would be likely to prevent the making of subsequent improvements so long as the earlier lien remained in force.

*Scott-McClure Land Co. v. Portland* (1912) 62 Or. 462, 125 Pac. 276, states as a ground for holding the earlier lien not extinguished by a sale under a later lien, the fact that the purchaser under a junior lien always has it in his power to pay off the prior lien, which presumptively has increased the value of his property to an extent at least equal to its amount.

But other cases hold that the later lien should be given priority on the ground that the improvement upon which it is based enhanced the value of the property, and so increased the security for the payment of assessments previously made. *Burke v. Lukens* (1895) 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 641; *Jaicks v. Oppenheimer* (1915) 264 Mo. 693, 175 S. W. 972, affirming (1914) — Mo. App. —, 168 S. W. 216.

This reason is declared insufficient in *Brownell Improv. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, 95 N. E. 585; *Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa, 307, 79 N. W. 77; *Parker-Washington Co. v. Corcoran* (1910) 150 Mo. App. 188, 129 S. W. 1031, overruled by *Jaicks v. Oppenheimer* (1915) 264 Mo. 693, 175 S. W. 972, on the ground that the enhancement of value is often more fanciful than real, but, inasmuch as the whole basis of the right to levy such special assessments is the enhancement of the value of the assessed property, the objection seems to be hardly tenable.

M. A. L.



STATE OF IOWA EX REL. GEORGE COSSON, Attorney General, et al.,  
v.  
SHORES-MUELLER COMPANY, Appt.

*Iowa Supreme Court—January 12, 1918.*

(182 Iowa, 501, 166 N. W. 62.)

**Action — to recover license fees.**

1. A civil action will not, in the absence of statutory authority, lie to recover a license fee, although the act for which the fee is imposed has been performed without paying the fee.

[See note on this question beginning on page 1312.]

**License — fee — character.**

2. The fee authorized by a statute imposing an inspection fee for each ton of concentrated commercial food-

stuffs sold, but providing that in lieu of the inspection fee a license fee of \$100 per year may be paid, is a license and not an inspection fee.

**APPEAL** by defendant from a judgment of the District Court for Bremer County (Edwards, J.) overruling a demurrer to a petition filed to recover license fees alleged to be due and unpaid for a period of five years. *Reversed.*

Statement by Evans, J.:

Suit in equity in behalf of the state of Iowa against the defendant to recover \$100 per year for the years 1910, 1911, 1912, 1913, and 1914, as alleged license or inspection fees due from the defendant to the state of Iowa under the provisions of § 5077 a-10, Code Supp. 1907. There was a demurrer to the petition which was overruled. The defendant electing to stand upon his demurrer, judgment was entered accordingly. The defendant appeals.

Messrs. F. E. Farwell, F. P. Hagemann, and Ralph A. Dunkelberg, for appellant:

A tax is not a debt within the commonly accepted definition of the word, and a common-law action for its recovery as such will not lie without a statute expressly authorizing such action.

Bailies v. Des Moines, 127 Iowa, 124, 102 N. W. 813; Plymouth County v. Moore, 114 Iowa, 700, 87 N. W. 662; Crawford County v. Laub, 110 Iowa, 355, 81 N. W. 590; Richards v. Clay County, 40 Neb. 45, 42 Am. St. Rep. 650, 58 N. W. 594; Danforth v. McCook County, 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940; Cooley, Taxn. 2d ed. 16; 25 Am. & Eng. Enc. Law, 131, 132;

Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Grunewald v. Cedar Rapids, 118 Iowa, 222, 91 N. W. 1059; Burnham v. Milwaukee, 98 Wis. 128, 73 N. W. 1018; Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 467.

In the absence of express statutory authority, an action to recover the amount alleged to be due as a license cannot be maintained where the license has never been taken out.

25 Cyc. 629; Scranton v. Hensen, 163 Iowa, 457, 144 N. W. 1024; State ex rel. George v. Dix, 159 Mo. App. 573, 141 S. W. 445; Territory ex rel. Live Stock Sanitary Bd. v. Kenney, 11 Ariz. 353, 95 Pac. 98; United States v. Northwestern Development Co. 122 C. C. A. 262, 203 Fed. 960; United States v. Jourden, 113 C. C. A. 606, 193 Fed. 986; Hencke v. Standiford, 66 Ark. 535, 52 S. W. 1; Doran v. Phillips, 47 Mich. 228, 10 N. W. 350; 17 R. C. L. pp. 557, 558, § 70, 71.

The rule that the amount of a license fee is ordinarily a question for the taxing power is subject to the limitation that such license must not amount to a prohibition of any useful or legitimate occupation.

Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315; Fiscal Ct. v. F. & A. Cox Co. 132 Ky. 738, 21 L.R.A.(N.S.) 83, 117 S. W. 296; Iowa City v. Glassman, 155 Iowa, 671, 40 L.R.A.(N.S.) 852, 136 N. W. 899.

Messrs. H. M. Havner, and George Cosson, Attorneys General, and H. H. Carter, and Henry E. Sampson, Assistant Attorneys General, for appellees.

Evans, J., delivered the opinion of the court:

I. The allegations of the petition include the following:

"That the defendant is an Iowa corporation organized in 1906, with its principal place of business at Tripoli, Iowa, and since its organization has been engaged in the business of manufacturing, exposing for sale, offering for sale, and selling to the citizens of Iowa concentrated commercial feeding stuffs as defined in § 5077a8 of the Supplement to the Code 1907, in various forms and under different names and brands and for different animals.

"That the defendant has been during each of the past five years, and still is, manufacturing, exposing for sale, offering for sale, and selling to the citizens of Iowa concentrated commercial feeding stuffs as defined in § 5077a8 of the Supplement to the Code 1907, as appears more particularly in the three following paragraphs:

"(1) The defendant has, during each and all of the past five years, manufactured, exposed for sale, offered for sale, and sold to the citizens of Iowa concentrated commercial feeding stuffs as defined in § 5077a8 of the Supplement to the Code 1907, under the name of the Shores stock conditioner, the bulk of which preparation is made up of ground seeds of foxtail, black bindweed, black mustard, chaff, wheat, bran, and starch grains. Common salt constitutes about 20 per cent of said preparation. Three or four drugs are present in slight quantities.

"(2) The defendant has also, during each and all of the past five years, manufactured, exposed for sale, offered for sale, and sold to the citizens of Iowa concentrated commercial feeding stuffs as defined in § 5077a8 of the Supplement to the Code 1907, under the name of the Shores condition powder, the bulk

of which preparation consists of ground seeds of foxtail, black bindweed, black mustard, chaff, starch grains, and corn starch colored with charcoal. About one fifth of said preparation consists of ordinary common salt. Two or three drugs are present in very slight quantities.

"(3) The defendant has also, during each and all of the past five years, manufactured, exposed for sale, offered for sale, and sold to the citizens of Iowa concentrated commercial feeding stuffs as defined in § 5077a8, Supplement to the Code 1907, under the name of the Shores hog-worm powder, the bulk of which preparation consists of ground seeds of foxtail, black mustard, black bindweed, chaff, starch grains of corn and wheat, all colored with a small quantity of charcoal. Ordinary common salt constitutes over 20 per cent of said hog-worm powder. There are also present in said mixture two or three drugs in very small quantities.

"That the dairy and food commissioner of the state of Iowa has, upon divers occasions and from time to time during each of the past five years, analyzed and inspected the several forms of concentrated commercial feeding stuffs which the defendant has, during each of the past five years, been manufacturing, exposing for sale, and selling to the citizens of Iowa, all as required by chapter 13, title XXIV. Supplement to the Code 1907.

"That the defendant has failed and refused to pay to the state dairy and food commissioner of Iowa, on or before the 15th day of July of each year during the time its said company has been in business, the inspection fee of \$100 required under § 5077a10 of the Supplement to the Code 1907, or any part thereof, and that by reason of such failure and refusal there is now due the state of Iowa from the defendant herein the sum of \$100 for the year 1910, the sum of \$100 for the year 1911, the sum of \$100 for the year 1912, the sum of \$100 for the year

1913, and the sum of \$100 for the year 1914, making an aggregate amount of \$500 now due the state of Iowa from the defendant herein.

"That the state dairy and food commissioner has from time to time during the past five years, and as the same became due, made demand upon said defendant for the payment of every such annual inspection fee, and has been unable to collect from said defendant said inspection fee or any part thereof. That the several annual inspection fees of \$100 each sought to be recovered from the defendant are for a continuous period and for consecutive years, commencing with the year 1910 and extending to and including the year 1914, and due upon an open, current, and continuous transaction."

The demurrer challenged (1) the right of the plaintiff to maintain a civil action for the recovery of such fees; (2) the constitutionality of the statute invoked.

The legislation under which the fees claimed are alleged to have accrued was enacted as chapter 189 of the Acts of 32 General Assembly, and now appears as a part of §§ 5077a6-5077a24, inclusive.

Section 5077a8 is as follows: "Concentrated Commercial Feeding Stuffs Defined.—The term concentrated commercial feeding stuffs, as used in this act, shall include alfalfa meals and feeds; dried beet refuse; ground beef or fish scraps; bean meals; dried blood; brewers' grains, both wet and dry; cerealine feeds; cocoanut meals; corn feeds; corn and oat feeds; corn, oat, and barley feeds; compounds under the name of corn and cob meals; corn bran; clover meal; cottonseed meal and feeds; germ feeds; distillers' grains; gluten meals, gluten feeds; hominy feeds; linseed meals; malt sprouts; meat meals; meat and bone meals; mixed feeds of all kinds; oil meals of all kinds; oat feeds; oat bran; oat flour; oat middlings; oat shorts; pea meals; poultry foods; rice bran; rice meal; rice polish; rye bran; rye middlings; rye shorts; starch feeds and

starch factory by-products; tankage and packing house by-products; wheat bran; wheat middlings; wheat shorts, and low-grade wheat flour; and all materials of similar nature used for domestic animals; also condimental stock foods; patented proprietary or trademarked stock of poultry feeds claimed to possess medicinal or nutritive properties or both; and all other materials intended for feeding to domestic animals. But it shall not include: hay; straw; whole seeds; unmixed meals made from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, and broom corn; nor wheat flours nor other flours fit for human consumption."

Section 5077a10 is as follows: "Inspection Fee—License Fee—Tax Tags.—Before any manufacturer, importer, dealer or agent shall offer or expose for sale in this state any of the concentrated commercial feeding stuffs defined in section three (3) of this act he shall pay to the state food and dairy commissioner an inspection fee of ten cents per ton for each ton of such concentrated commercial feeding stuffs sold or offered for sale in the state of Iowa for use within this state; except that every manufacturer, importer, dealer or agent for any condimental, patented, proprietary or trademarked stock or poultry foods, or both, shall pay to the state food and dairy commissioner, on or before the fifteenth day of July of each year, a license fee of one hundred (\$100) dollars, in lieu of such inspection fee. Whenever the manufacturer or importer of such foods shall have paid the fee herein required, no other person or agent of such manufacturer or importer shall be required to pay such license fee; and shall affix to each lot shipped in bulk, and to each bag, barrel or package of such concentrated commercial feeding stuffs, a tag, to be furnished by the said state food and dairy commissioner, stating that all charges specified in this section have been paid; provided, that the inspection fee herein re-

quired shall not apply to unadulterated wheat, rye and buckwheat bran, nor wheat, rye and buckwheat middlings, nor to wheat, rye and buckwheat shorts manufactured in this state. . . ."

The first question confronting us is whether a civil action by the state will lie for the recovery of the fee of \$100 provided for in the foregoing section. The argument for the plaintiff is that the fee in question is an inspection fee, and not a license fee; that the inspection of the defendant's goods was had pursuant to the statute; that it was therefore obligatory upon the defendant, under the terms of the statute, to pay the inspection fee; and that this obligation was necessarily a personal obligation and the equivalent of a debt.

It is not claimed by the plaintiff that a civil action will lie for the recovery of a license fee, in the absence of statutory authority. Naturally the defendant contends that the fee in question is a license fee and not an inspection fee. The statute in express terms so denominates it and provides for "a license fee of \$100 in lieu of such inspection fee." The term "license fee" is not used as a possible synonym of the term "inspection fee," but is clearly used in contradistinction thereto. We would not be justified, therefore, in

**License-fee-character.**

departing from the plain terms of the statute and in construing this provision as other than a "license fee." This conclusion renders it unnecessary that we consider the question whether a civil action might lie for the recovery of a mere inspection fee as distinguished from a license fee.

It is well settled by the authorities that in the absence of statutory authority a civil action will not lie to recover a license fee. We so held in *Scranton v. Hensen*, 163 Iowa, 457, 144 N.W. 1024. To the same general effect are the following authorities: *Doran v. Phillips*, 47 Mich. 228, 10 N.W. 350;

**Action-to-recover license fees.**

*Hencke v. Standiford*, 66 Ark. 535, 52 S.W. 1; *United States v. Jourden*, 118 C.C.A. 606, 193 Fed. 986; *United States v. Northwestern Development Co.* 122 C.C.A. 262, 203 Fed. 960; *Territory ex rel. Live Stock Sanitary Bd. v. Kenney*, 11 Ariz. 353, 95 Pac. 93; *State ex rel. George v. Dix*, 159 Mo. App. 573, 141 S.W. 445. Ordinarily the payment of a license fee is not obligatory except in an alternative sense. The payment is a precedent condition to the exercise of some privilege by the applicant, which would be forbidden without a license. If he fails to pay the license fee, he may not lawfully exercise the privilege sought. If he afterwards perform the privileged acts without the license, he becomes criminally liable and is punishable accordingly. Subsequent payment of the license fee would not purge the criminality; nor would the criminality imply a precedent promise to pay. On the contrary, a precedent promise to pay would tend to negative criminal intent. We must hold, therefore, that unless we can find authority therefor in the enactment under consideration, this civil action will not lie.

II. We have studied the various sections of this act with much care to discover whether its language may be construed as authority for maintaining a civil action for the recovery of this license fee. We find nothing therein that would justify an affirmative holding. Indeed, as respects this particular provision, this statute is of doubtful construction even for the purpose of a criminal prosecution. Ordinarily such a statute would forbid the selling or exposing for sale of the specified goods before the payment of a license fee. The criminality in this class of offenses consists not in the failure to pay a license fee, but in the selling of the goods before paying such fee. But § 5077a10 does not in terms require the payment of the fee before the goods be sold or exposed for sale. It only requires the payment of the same "on or be-

fore the 15th day of July of each year." It seems to extend to the dealer a credit of six months, as though he might lawfully sell for the first six months of the year before he pays the license fee. Failure to pay the license fee on or before the 15th day of July of each year would doubtless render the dealer criminally liable for sales thereafter made. But would it render criminal the sales of the year made "before the 15th day of July of each year?"

We are not assuming now to construe this statute for the purposes of a criminal prosecution. All we hold now is that there is nothing therein which can be said to authorize a civil action to recover this license fee. Our reference to the doubtful form of the statute may be of aid in obtaining for it the further consideration of the legislature.

The question of the constitutionality of the statute has been argued in the briefs. Our conclusion on the

first question renders it unnecessary that we give any attention to the second.

For the reason indicated, the judgment below must be reversed.

Preston, Ch. J., and Ladd, Gaynor, Salinger, and Stevens, JJ., concur.

#### NOTE.

The decision in the reported case (STATE EX REL. COSSON v. SHORES-MUELLER Co. ante, 1305) that in the absence of statutory authority a civil action will not lie to recover a license fee, although the act for which the fee was imposed has been performed, is in accord with the weight of authority, as is shown in the annotation following STATE EX REL. CARTER v. KALL, post, 1312, on "Liability for license fee or occupation tax of one who has conducted business without required license or payment."

### STATE OF MONTANA EX REL. E. B. CARTER, Appt.,

v.

FRED KALL, Respt.

*Montana Supreme Court — January 11, 1917.*

(53 Mont. 162, 162 Pac. 385.)

#### **Intoxicating liquor — illegal sale — action for license fee.**

1. One who cannot secure a license to sell intoxicating liquor because the prescribed number of licenses is exhausted cannot be compelled in a civil action to pay the license fee for continuing to carry on the business, under a statute providing that a civil action may be maintained against any person required to take out a license who fails to do so, or who carries on or attempts to carry on business without such license.

[See note on this question beginning on page 1312.]

**License — collection of fee — where license is not granted.**

2. In the absence of express legislative authority, an action cannot be maintained to collect a license fee where a license has not been applied for or granted.

[See 17 R. C. L. 557.]

**— statutory penalty — effect.**

3. A statute imposing a penalty for doing business without a license does

not authorize a civil action to collect the tax from one doing business without it.

**Statute — construction — intention of legislature.**

4. In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature in enacting it.

[See 25 R. C. L. 960.]

— **intention — how ascertained.**

5. The intention of the legislature in enacting a statute is to be sought in the language employed and the apparent purpose to be subserved.

[See 25 R. C. L. 961.]

— **construction — dead letter.**

6. Construing a statute authorizing a

civil action against any person required to take out a license who carries on a business without it as providing means for collection of the license fee from one entitled to a license as matter of right upon payment of the fee does not render the statute a dead letter.

**APPEAL** by relator from a judgment of the District Court for Musselshell County (Crum, J.) in favor of defendant in an action brought to collect a license fee. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. B. Poindexter, Attorney General, and John H. Alvord for appellant.

Messrs. Boarman & Boarman and Jameson & Dusenbery for respondent.

Mr. Justice Holloway delivered the opinion of the court:

In the complaint in this action it is alleged that for more than six months during the year 1914 the defendant sold intoxicating liquors in the city of Roundup without having a license permitting him to do so. The prayer is for judgment for \$264, the amount required to procure a liquor license to do business for six months in a city of the class to which Roundup belongs, and for certain penalties. The answer admits all the material allegations of the complaint, and, by way of special defense, alleges that during all the times mentioned there were outstanding in full force and effect in the city of Roundup the maximum number of liquor licenses allowed by law, by reason whereof the defendant could not procure a license, and the county treasurer could not lawfully issue one to him. A motion to strike this affirmative defense was overruled, and the trial of the cause resulted in a judgment for defendant, from which this appeal is prosecuted.

The single question presented is: May the state by civil action collect a license tax from one whom it refuses a license, but who nevertheless engages in business in violation of the law?

It is the general rule that, in the absence of express legislative au-

thority, an action cannot be maintained to collect a license fee where a license has not been applied for or granted. 25 Cyc. 629. The statutes relating to the granting of licenses and the collection of license taxes are found in §§ 2746-2780, Revised Codes, with certain amendments subsequently enacted which are not of consequence here. Section 2749 provides that "a license must be procured immediately before the commencement of any business or occupation liable to a license tax." Section 2750 authorizes the county treasurer to commence a civil action in the name of the state "against any person who fails, neglects, or refuses to take out such license or who carries on or attempts to carry on business without such license." This is the only statute authorizing an action to collect a license tax, though counsel assume that authority is likewise granted by § 2780. The last section does nothing more than impose a penalty for doing business without a license. Section 2752 provides that upon the trial of an action prosecuted under § 2750, the production of the license, proof that such license has been procured, or proof of the payment of the proper license tax, with damages and costs, shall constitute a complete defense. Section 2755 provides that all property held or used in any trade, occupation, or profession for which a license is re-

License—collection of fee—where license is not granted.

—statutory penalty—effect.

quired is subject to a prior lien in favor of the state for the amount of the license tax. Section 2759 requires every person who sells or offers for sale intoxicating liquors to obtain a license from the county treasurer and to pay therefor the license tax, which is graduated according to the population of the place where the business is to be conducted.

With the enactment of the Codes in 1895 a general license statute went into effect. Under its terms almost every trade, profession, and business was subjected to the payment of a license tax. There were not any restrictions upon the number of licenses which might be issued, and no question of discretion was involved. Upon the payment of the required fee the license issued as a matter of course, and unless the state was in a position to grant a license, it could not exact the license fee. The sections mentioned above were all of that general legislative scheme.

Since § 2750 is the only statute which authorizes the prosecution of a civil action to collect a license fee, the solution of the question before us is to be found in the answer to the further inquiry: What does that section mean?

In the construction of a statute the primary duty of the court is to

Statute—construction—  
intention of  
legislature.

give effect to the intention of the legislature in enacting it. *Lerch v. Mis-*

*soula Brick & Tile Co.* 45 Mont. 314, 123 Pac. 25, Ann. Cas. 1914A, 346.

The intention is to be sought in the language employed and the apparent purpose to

—intention—  
how ascertained.

be subserved. *Johnson v. Butte & S. Copper Co.* 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1057.

The language of § 2750 is that the county treasurer must direct suit in the name of the state "against any person required to take out a license who fails, neglects, or refuses to take out such license or who carries on or attempts

to carry on business without such license." When the statute was enacted that language had a definite and well-understood meaning. "Any person required to take out a license" meant any person engaged in a profession, trade, or occupation for which a license tax was required, and a person engaged in any such business upon the payment of the required fee could demand a license as a matter of right. When we consider the history of our license legislation and the provisions of §§ 2749, 2752, and 2755, in connection with the terms of § 2750, and realize that when these statutes were enacted the licensing authorities could not refuse a license to anyone who applied for it and paid or tendered the required fee, we are driven to the conclusion that in the enactment of § 2750 the legislature intended nothing more than to provide a means for the collection of a license fee from one entitled to a license as a matter of right upon payment of the fee. Though our license statutes have been changed in many respects since 1895, there is not anything in the subsequent legislation to indicate that § 2750 should be given a different meaning from the one manifestly intended in the first instance. It cannot be said that this construction renders that section a dead letter.

It is true that under the present statutes a liquor license does not now issue as a matter of course; but a license is still required as a condition precedent to the right to engage in any one of the several other occupations, and such license can be demanded as of right by anyone who pays or tenders the required fee.

An attempt is made to distinguish between a license tax or occupation tax, on the one hand, and a license fee exacted merely for regulation purposes. Our license statutes fail to indicate the particular purpose for which they were enacted. Section 1, article 12, of the Constitu-

tion, authorizes the legislature to impose a license tax, but in *State v. Camp Sing*, 18 Mont. 128, 32 L.R.A. 635, 56 Am. St. Rep. 551, 44 Pac. 516, this court held, in effect, that it was not the intention of that provision to differentiate between the license tax, strictly so-called, and the license fee exacted in a regulatory measure, but that it was the purpose to refer the general subject of licenses to the legislature, and that, under the provision in ques-

tion, a license tax might be imposed for revenue, for regulation, or for both purposes.

The defendant may be prosecuted under the criminal laws, but he cannot be made to pay the license fee and be denied the license,—the consideration for the fee.

*Intoxicating liquor—illegal sale—action for license fee.*

The judgment is affirmed.

Brantly, Ch. J., and Sanner, J., concur.

### ANNOTATION.

#### Liability for license fee or occupation tax of one who has conducted business without required license or payment.

- I. Introductory, 1312.
- II. In absence of statute:
  - a. Majority rule, 1312.
  - b. Minority rule, 1314.
- III. Under statute, 1316.
- IV. Rule in California, 1318.

##### *I. Introductory.*

This note is devoted to a discussion of the right to recover by action a charge, whether it is termed a license or a tax, imposed by law as a condition precedent to the conduct of a particular business, from a person who has engaged in that business without making the prerequisite payment. The recovery by action of taxes generally is not included.

##### *II. In absence of statute.*

###### *a. Majority rule.*

The majority of jurisdictions hold that one who has conducted a business without having paid a license fee or occupation tax required as a condition precedent to the conduct of the business is not liable thereafter in a civil suit for the payment of the fee or tax.

*Alaska.*—See cases cited *infra*, III.

*Arizona.*—Territory *ex rel. Live-stock Sanitary Bd. v. Kenney* (1908) 11 Ariz. 353, 95 Pac. 93.

*Arkansas.*—*Hencke v. Standiford* (1899) 66 Ark. 535, 52 S. W. 1.

*California.*—See cases cited *infra*, IV.

*Illinois.*—*Chicago v. Enright* (1888) 27 Ill. App. 559; *Munsell v. Temple*

(1846) 8 Ill. 93. Compare *Bloomington & N. R. Electric & Heating Co. v. Bloomington* (1906) 123 Ill. App. 639.

*Indiana.*—*Ristine v. Clements* (1903) 81 Ind. App. 338, 66 N. E. 924.

*Iowa.*—*Scranton v. Hensen* (1914) 163 Iowa, 457, 144 N. W. 1024; *STATE EX REL. COSSON v. SHORES-MUELLER CO.* (reported herewith) ante, 1305.

*Kentucky.*—*Com. v. Central Hotel Co.* (1906) 121 Ky. 846, 90 S. W. 565, 12 Ann. Cas. 172, and note; *Owensboro v. Fields* (1907) 31 Ky. L. Rep. 627, 102 S. W. 1184. Compare *Fulton v. Blythe* (1895) 17 Ky. L. Rep. 341, 30 S. W. 1018; *Searcy v. Lawrenceburg* (1899) 20 Ky. L. Rep. 1920, 50 S. W. 534; *Lexington v. Wilson* (1904) 118 Ky. 221, 80 S. W. 811.

*Michigan.*—*Doran v. Phillips* (1881) 47 Mich. 228, 10 N. W. 350.

*Mississippi.*—*McWilliams v. Phillips* (1875) 51 Miss. 196; *State v. Piazza* (1889) 66 Miss. 426, 6 So. 316; *State v. Adler* (1891) 68 Miss. 487, 9 So. 645; *Thibodeaux v. State* (1892) 69 Miss. 683, 13 So. 352; *Adams v. Fragiacomio* (1893) 70 Miss. 799, 14 So. 21.

*Missouri.*—*Craig v. Smith* (1888) 31 Mo. App. 286; *State ex rel. George v. Dix* (1911) 159 Mo. App. 573, 141 S. W. 445.

*Montana.*—*STATE EX REL. CARTER v. KALL* (reported herewith) ante, 1309.

*South Carolina.*—*Charleston v. Ashley Phosphate Co.* (1890) 34 S. C. 541, 13 S. E. 845.



Utah.—*Summit County v. Gustavson* (1898) 18 Utah, 351, 54 Pac. 977.

Thus in a number of cases it has been held, in accord with *STATE EX REL. CARTER v. KALL* (reported herewith) ante, 1309, that a person who has engaged in the business of selling intoxicating liquor without procuring a license is not liable to a civil action for the amount of the license fee. *Chicago v. Enright* (1888) 27 Ill. App. 559; *Com. v. Central Hotel Co.* (1906) 121 Ky. 846, 90 S. W. 565, 12 Ann. Cas. 172; *Owensboro v. Fields* (1907) 31 Ky. L. Rep. 627, 102 S. W. 1184; *State v. Piazza* (1889) 66 Miss. 426, 6 So. 316; *State v. Adler* (1891) 68 Miss. 487, 9 So. 645; *Thibodeaux v. State* (1892) 69 Miss. 683, 13 So. 352; *Adams v. Fragiaco* (1893) 70 Miss. 799, 14 So. 21.

In several cases it has been held that a note given in lieu of money to procure the issuance of a liquor license is void, and that no recovery can be had thereon. *Hencke v. Standiford* (Ark.); *Munsell v. Temple* (Ill.); *Doran v. Phillips* (Mich.); *McWilliams v. Phillips* (Miss.); and *Craig v. Smith* (Mo.),—*supra*. In at least one jurisdiction, however, wherein the majority rule obtains generally, a recovery may be had on a note thus given. *Fulton v. Blythe* (1895) 17 Ky. L. Rep. 341, 30 S. W. 1018; *Searcy v. Lawrenceburg* (1899) 20 Ky. L. Rep. 1920, 50 S. W. 584.

In *Ristine v. Clements* (1903) 31 Ind. App. 338, 66 N. E. 924, the court said: "It is true that a municipal corporation has the power to receive, as payee, a note and mortgage for a debt lawfully due to such corporation. But a license fee, the payment of which is a condition precedent to issuing the license, is in no sense a debt owing the municipality. The fact that he had been selling for some months without a license did not make him indebted to the town for the license fee. If he voluntarily sold during those months without attempting to procure a license, he simply violated the ordinance, and was subject to its penalties. In such case the license, when issued, could not be dated back to protect sales made before the license was

5 A.L.R.—83.

issued. The license could not be issued until the fee was paid, and if sales were made, they were made without a license, not under a license that was not paid for. The primary purpose in exacting the license fee is not to increase the revenue of the municipality, but it is imposed from motives of public policy to restrain the sale of a commodity that is harmful to society. The language of the ordinance admits of no doubt that the payment of the license fee is a condition precedent to issuing of the license, and that it requires that the money should be paid into the town treasury. If the town authorities may disregard the provisions of an ordinance in part, they may disregard it as a whole; and, as the whole ordinance could be practically annulled by the acceptance of a note for the license fee, such note is void as being contrary to public policy. Moreover, a license issued without the payment of the license fee, as contemplated by the ordinance, is a void license, and a note given in payment for such license is without consideration."

In *Territory ex rel. Livestock Sanitary Bd. v. Kenney* (1908) 11 Ariz. 353, 95 Pac. 93, it appeared that the defendants had engaged in the slaughtering business without having obtained a license. The statutes which authorized the license (*Rev. Stat. 1901, Act No. 26, Laws 1903, and Act No. 51, Laws 1905*) did not contain a provision as to the manner in which the license was to be collected, or the methods to be used to enforce such collection, other than by criminal prosecution. The territory brought a civil suit for the amount alleged to be due. The court held that there was no civil obligation on the part of the defendant to pay the license fee.

In *Scranton v. Hensen* (1914) 163 Iowa, 457, 144 N. W. 1024, it appeared that the defendants were carrying on business as transient merchants without having procured the required license. The court said: "There was no license. There was no time that defendants had protection, and there was therefore nothing for which they should pay. Requiring payment now

would be in the nature of punishment. We think there was no debt owing from defendants to the city."

In *STATE EX REL. COSSON v. SHORES-MUELLER CO.* (reported herewith) ante, 1305, it appeared that the defendant had engaged in the business of selling feeding stuffs without having procured a license so to do, as was required by the provisions of the Code (§ 5077a10). This section of the Code failed to state whether a civil action would lie for the recovery of the license. The court held that in the absence of statutory authority, a civil action would not lie to recover a license fee.

In *State ex rel. George v. Dix* (1911) 159 Mo. App. 573, 141 S. W. 445, the defendant was sued in assumpsit for failure to pay an occupation tax. The same ordinance which imposed the tax provided a penalty for failure to pay it. The court held that the penalty was adequate, and for that reason exclusive. Hence the action in assumpsit to recover the amount of the occupation tax would not lie.

In *Charleston v. Ashley Phosphate Co.* (1890) 34 S. C. 541, 13 S. E. 845, it appeared that a city had passed an ordinance requiring phosphate companies (among others) to obtain a license before engaging in business. The ordinance also contained a clause which subjected the various companies to a penalty for failure to procure a license. The defendant carried on business without obtaining a license, and the plaintiff brought a civil action to recover the amount of the license. The court said that there was no provision in the ordinance which allowed the collection of the license fee in an action, and that since the remedy for failure to procure a license was specifically set forth, the action could not be maintained.

In *Summit County v. Gustavson* (1898) 18 Utah, 351, 54 Pac. 977, it appeared that the defendant had engaged in the business of sheep raising without having obtained a license. The ordinance under which the license fee was levied provided a method of enforcing it, but the plaintiff, instead of following out the provisions of the

ordinance, brought this action in assumpsit. The court held that a civil action would not lie because of the fact that there was no authority for it under the ordinance, and said: "This action was in assumpsit to recover the amount of the license. The right and the remedy were both created by the ordinance. The right did not exist at common law. When the right and the remedy are both created by ordinance, that remedy only can be followed."

But compare *Bloomington & N. R. Electric & Heating Co. v. Bloomington* (1906) 123 Ill. App. 639, wherein it appeared that by an ordinance every company operating a street railway in the city was required to pay a certain license fee for each car regularly operated. The aforesaid company had failed to pay the required license fees, whereupon an action in assumpsit was instituted to recover the same. The court held that the ordinance in question raised an implied promise on the part of the persons or corporations operating street railways to pay such license fee, so as to authorize a recovery therefor in the form of action adopted.

Compare also *Lexington v. Wilson* (1904) 118 Ky. 221, 80 S. W. 811, wherein the rule applicable to the recovery of a "tax" is applied to what was apparently a license fee, without reference to the other cases in the same jurisdiction, denying the right to recover a license fee.

#### *b. Minority rule.*

Several jurisdictions hold that one who has conducted a business without having paid a license fee or occupation tax is liable thereafter in a civil suit for the payment of the fee or tax.

*United States.*—*Philadelphia v. Atlantic & P. Tel. Co.* (1901) 109 Fed. 55.

*Alabama.*—*Powers v. Decatur* (1875) 54 Ala. 214; *State v. Fleming* (1895) 112 Ala. 179, 20 So. 846; *Annis-ton v. Southern R. Co.* (1896) 112 Ala. 557, 20 So. 915; *Dunning v. Thomasville* (1917) — Ala. —, 75 So. 276; *Jefferson County v. Gulf Ref. Co.* (1919) — Ala. —, 80 So. 798.

*Louisiana.*—See cases cited *infra*, III.

**Ohio.**—*State v. Hibbard* (1827) 3 Ohio, 63; *State v. Proudfit* (1827) 3 Ohio, 63; *Cincinnati v. Beuhausen* (1889) 10 Ohio Dec. Reprint, 652; *Kopelman v. Toledo* (1907) 29 Ohio C. C. 455.

**Pennsylvania.**—*Western U. Teleg. Co. v. Philadelphia* (1888) 9 Sadler, 300, 22 W. N. C. 39, 12 Atl. 144; *Allentown v. Western U. Teleg. Co.* (1892) 148 Pa. 117, 33 Am. St. Rep. 820, 23 Atl. 1070; *Chester City v. Western U. Teleg. Co.* (1893) 154 Pa. 464, 25 Atl. 1134; *Philadelphia v. American U. Teleg. Co.* (1895) 167 Pa. 406, 31 Atl. 628; *Com. v. Samuel W. Black Co.* (1909) 223 Pa. 74, 72 Atl. 261; *Harrisburg City v. East Harrisburg Pass. R. Co.* (1895) 4 Pa. Dist. R. 683; *Harrisburg City v. Citizens' Pass. R. Co.* (1895) 4 Pa. Dist. R. 687; *New Castle v. Electric Illuminating Co.* (1895) 16 Pa. Co. Ct. 663; *Taylor v. Central Pennsylvania Teleph. & Supply Co.* (1898) 8 Pa. Dist. R. 92; *Cochranon v. Cochranon Teleph. Co.* (1909) 41 Pa. Super. Ct. 146.

**Texas.**—*Texas Bkg. & Ins. Co. v. State* (1875) 42 Tex. 636.

In *Anniston v. Southern R. Co.* (1896) 112 Ala. 557, 20 So. 915, it appeared that a city passed an ordinance requiring a license for the privilege of operating a railroad through the city. The defendant company operated without a license, whereupon the city sued to recover the amount of the license. The court held that the action would lie, and that the action brought in assumpsit was a proper one. The court, however, viewed the license as a tax, and allowed this method of recovery on that ground.

In *Powers v. Decatur* (Ala.) *supra*, it appeared that a city had accepted the note of the appellant in lieu of the money for a liquor license, and the appellee sued on this note. The court held that it was within the power of the municipality to accept the note, and that hence the action could be maintained.

In *Dunning v. Thomasville* (1917) — Ala. —, 75 So. 276, while the court held that an ordinance which imposed a license on the privilege of buying cottonseed was void, nevertheless

there was dictum to the effect that such an ordinance created a legal liability which could be enforced by an action in assumpsit, and that the town would not be confined to any remedy as exclusive, since the ordinance in question did not make exclusive any remedies which it prescribed.

In *Jefferson County v. Gulf Ref. Co.* (Ala.) *supra*, it appeared that the defendant had engaged in selling various oils, etc., without having paid the required license tax thereon. The court, while it did not allow the plaintiff to recover, because of a faulty pleading, nevertheless said that either an action in debt or assumpsit would lie for the recovery of the amount of a license tax.

In *State v. Fleming* (1895) 112 Ala. 179, 20 So. 846, it appeared that the defendant had retailed intoxicating liquors for three years without having paid the license fee required by the statute. Code of 1886, § 629, subd. 3. The statute further provided (§ 3892) a fine of three times the amount of the license, for carrying on the liquor business without having first obtained a license. The court held that this section of the Code (3892) was intended to make the payment of the license more prompt, and at the same time to conserve the public morals, and that, in the absence of any statutory provision as to the manner in which the license fee was to be collected, an action for debt would lie.

In *State v. Hibbard* (1827) 3 Ohio, 63, judgment was rendered for the plaintiff *sub silentio* in an action in debt to recover a tax assessed upon the defendant as a practising attorney.

To the same effect see *State v. Proudfit* (1827) 3 Ohio, 63, wherein the defendant was a physician.

In *Kopelman v. Toledo* (1907) 29 Ohio C. C. 455, it appeared that the plaintiff in error had conducted the business of pawnbroker without having obtained a license, whereupon he was sued for the amount of the license fee. The court held that the plaintiff in error, by engaging in the business, had incurred a debt to the municipality, and was therefore liable despite the fact that the ordinance which was

alleged to have been violated provided penalties for (its) violation.

In *Cincinnati v. Beuhausen* (1889) 10 Ohio Dec. Reprint, 652, it appeared that the defendant was the owner of a number of wagons on which by statute (Russell, License Law, 80 Ohio Laws, 129, 81 Ohio Laws, 78) he was required to pay certain penalties which could be imposed in the event that the licenses were not paid, but the statute did not provide for the collection of the license fee itself. The court held that an action for debt would lie for the collection of the license fee.

In *Harrisburg City v. East Harrisburg Pass. R. Co.* (1895) 4 Pa. Dist. R. 683, it appeared that the defendant had failed to pay a required license fee on each car which it operated. The plaintiff brought suit and was allowed to recover the amount of the license fees. The defendant claimed that the ordinance by which the license was required provided a penalty for non-payment, i. e., by fine. However, the court held this to be an additional remedy, and not an exclusive one.

To the same effect, see *Harrisburg City v. Citizens' Pass. R. Co.* (1895) 4 Pa. Dist. R. 687.

In *Com. v. Samuel W. Black Co.* (1909) 223 Pa. 74, 72 Atl. 261, it appeared that the defendant had failed to pay an occupation tax required of real estate brokers, and the court allowed the plaintiff to recover the amount of the tax.

In *Texas Bkg. & Ins. Co. v. State* (1875) 42 Tex. 686, it appeared that the defendant had engaged in the banking business without having paid the required occupation tax. The same act (April 22, 1871) made no provision for the collection of the tax. Consequently a suit was instituted. The court held that the action for the collection of the tax would lie.

In a number of Pennsylvania cases a recovery has been permitted in a civil action of the amount of a license tax imposed on the poles and wires of telegraph and telephone companies. *Philadelphia v. Atlantic & P. Tel. Co.* (1901) 109 Fed. 55; *Taylor v. Central Pennsylvania Teleph. & Supply Co.*

(1898) 8 Pa. Dist. R. 92; *Western U. Teleg. Co. v. Philadelphia* (1888) 9 Sadler (Pa.) 300, 22 W. N. C. 39, 12 Atl. 144; *Allentown v. Western U. Teleg. Co.* (1892) 148 Pa. 118, 38 Am. St. Rep. 820, 23 Atl. 1070; *Chester City v. Western U. Teleg. Co.* (1893) 154 Pa. 464, 25 Atl. 1134; *Philadelphia v. American U. Teleg. Co.* (1895) 167 Pa. 406, 31 Atl. 628; *Cochran v. Cochran Teleph. Co.* (1909) 41 Pa. Super. Ct. 146; *New Castle v. Electric Illuminating Co.* (1895) 16 Pa. Co. Ct. 663.

### III. Under statute.

In a few jurisdictions statutes expressly give a remedy by civil action in cases where a person has failed to pay a required license fee or occupation tax. *Alaska Mexican Gold Min. Co. v. Alaska* (1916) 149 C. C. A. 274, 236 Fed. 64, writ of certiorari denied in (1917) 242 U. S. 648, 61 L. ed. 544, 37 Sup. Ct. Rep. 242; *Alaska Pacific Fisheries v. Alaska* (1916) 149 C. C. A. 280, 236 Fed. 70, writ of certiorari denied in (1917) 242 U. S. 648, 61 L. ed. 544, 37 Sup. Ct. Rep. 242; *State v. Wall* (1910) 18 Idaho, 300, 109 Pac. 724; *Bingham County v. Fidelity & D. Co.* (1907) 13 Idaho, 34, 88 Pac. 829; *Amite City v. Clementz* (1872) 24 La. Ann. 27; *Henderson v. Southwestern Traction & Power Co.* (1918) 143 La. 170, 78 So. 435; *State v. Maryland Casualty Co.* (1913) 133 La. 146, 62 So. 606; *Templeton v. Tekamah* (1891) 32 Neb. 542, 49 N. W. 373.

In Alaska an act passed in 1915 now provides a method to enforce the collection of unpaid license fees by a civil action. Prior to that time the decisions of that jurisdiction were in accord with the majority rule heretofore stated. *United States v. Jourden* (1911) 113 C. C. A. 606, 193 Fed. 986; *United States v. Northwestern Development Co.* (1913) 122 C. C. A. 262, 203 Fed. 960.

In *Alaska Mexican Gold Min. Co. v. Alaska* (1916) (Fed.) supra, it appeared that the plaintiff in error had operated a mining company without having paid the license tax imposed thereon by the Laws of Alaska 1913, chap. 52. The same act made the operating of a mining company without a license a misdemeanor and pro-

vided penalties therefor. Under the Laws of Alaska 1915, chap. 76, it was provided that special remedies provided by an act should not be deemed exclusive, and that any appropriate remedy, civil or criminal, might be invoked. The territory of Alaska had brought suit against the mining company for the unpaid license fee. The court held the territory of Alaska could recover, and said: "It may be assumed that under the Law of 1913 the only way the territory had to enforce the duty to pay was by conviction of misdemeanor after failure to pay, and, upon continuing failure to pay, by judgment to collect, as in civil suits. But the duty to pay having existed, remedy for the enforcement of the duty or obligation could be provided by legislation subsequent to the time when the duty arose; or if, when the duty arose, there was a remedy, but it was exclusively confined to criminal prosecution and judgment thereafter, such remedy could be changed or enlarged by subsequent legislative action, or additional remedy could be given, without impairing the rights of the plaintiff in error." And also the court said further: "By § 4 of chapter 76 of the Laws of Alaska for 1915, it was provided that special remedies provided by that particular act or other acts of the legislature shall not be deemed exclusive, and that 'any appropriate remedy, either civil or criminal, or both, may be invoked by the territory in the collection of all taxes, and in civil actions the same penalties may be collected' as were, by the Act of 1915, provided in criminal actions. Furthermore, it was provided by § 7 of the Act of April 29, 1915, which amended the Act of 1913, that the Act of 1913 was repealed except in so far as the same was re-enacted by the Act of April 29, 1915, but that nothing in the Act of 1915 contained 'shall be construed to relieve any person, firm, or corporation from the payment of any tax, penalty, and interest accrued and owing under the act of which this act is an amendment, but all such taxes, penalties, and interest shall be paid or collected and enforced in the same manner as taxes herein

provided for are collected and enforced.' Construing these statutes together, we find that a civil remedy for the collection of taxes was given by § 4 of the Act of 1915, and that, under § 7 of the same act, remedy became available to collect taxes due under the Act of 1913. There is no rule which prohibited the territorial legislature of 1915 from adopting the remedies it did to recover for license taxes prescribed by the law of 1913. Nor does the fact that, in an action of debt for the tax, it may be necessary to resort to sources of information outside of the statute to arrive at the amount on which the per centum of tax fixed by the statute is to be calculated, affect the question; for the statutory charge is certain for the purposes of an action in debt, because it can be made certain through action in court."

In *Alaska Pacific Fisheries v. Alaska* (1916) 149 C. C. A. 280, 236 Fed. 70, it appeared that the plaintiff in error had caught and canned certain quantities of salmon in Alaska without having obtained a license so to do. A civil action was brought by the territory for the amount of the unpaid license fees, and the territory was awarded the amount, whereupon the plaintiff in error appealed. The court held that the civil action would lie.

In *State v. Wall* (1910) 18 Idaho, 300, 109 Pac. 724, it appeared that the defendant had retailed intoxicating liquors without having obtained the necessary license. By a statute (Rev. Codes 1909, § 1835) it was provided that the collector should direct suit against the offending party in the name of the state for the recovery of the license tax. It was held that the action would lie against the defendant for the recovery of the license tax.

In *Bingham County v. Fidelity & D. Co.* (1907) 13 Idaho, 34, 88 Pac. 829, it appeared that the defendant was surety for the sheriff of Bingham county, Idaho, and held certain money collected by him for liquor licenses. The defendant claimed that the money was not due the plaintiff, since no license had ever been issued. Under a statute (Rev. Stat. 1887, §§ 1637 and 1639) a person who failed to take out

a required tax immediately became liable for the amount of the tax, plus certain costs of collection. The court held that the defendant was liable for the money received as license fees.

In *State v. Maryland Casualty Co.* (1913) 133 La. 146, 62 So. 606, it appeared that the defendant had conducted a general insurance business without having paid the required license tax. The plaintiff sued for the amount of the license fees alleged to be due. The court held that the defendant was liable for the license tax under Act No. 105 of 1898.

In *Henderson v. Southwestern Traction & Power Co.* (1918) 143 La. 170, 78 So. 435, it appeared that the defendant had operated an electric railroad without having paid the required license fee to do so. The plaintiff sued for the alleged amount due for unpaid license fees and the court allowed a recovery.

In *Amite City v. Clementz* (1872) 24 La. Ann. 27, it appeared that the defendant was a retailer of "ardent spirits," and had failed to procure a license allowing him to sell the same, whereupon this suit was instituted by the plaintiff to recover the amount of the license. The court held that "the corporation (plaintiff) was vested with the right to impose the tax or license, and consequently has the right to enforce its payment by legal proceedings."

In *Templeton v. Tekamah* (1891) 32 Neb. 542, 49 N. W. 373, it appeared that the plaintiff in error was the owner of four stallions which he used for breeding purposes and on which he had failed to pay a license, as was required by a city ordinance. This suit was brought to recover said sum. The court held that the statute, in so far as it fixed a civil liability, was valid, and that the action would lie.

#### *IV. Rule in California.*

The rule in California is in general accord with that obtaining in the majority of jurisdictions (see *supra*, II. a), but several decisions arising under ordinances expressly permitting a recovery of a license fee require a separate treatment of this jurisdiction.

In *People v. Craycroft* (1852) 2 Cal.

243, 56 Am. Dec. 331, it appeared that the defendant had for some time maintained a gaming house without having paid the license money therefor. The plaintiff brought this civil action for the amount alleged to be due. The act which made the licensing of a gaming house necessary was passed March 14, 1851, and made the keeping of a gaming table without a license a misdemeanor, and provided a penalty consisting of fine or imprisonment for violation of the act. The court held that the action could not be maintained, saying in part as follows: "There is no other penalty provided, nor any provision in the statute authorizing a civil action to recover the amount of the license. Where a right is given, and a remedy provided by statute, the remedy so provided must be pursued. It is true, if the right existed at common law, the plaintiff might pursue either remedy, the statutory one being regarded merely as cumulative. Here a new and independent obligation has been created; and the statute must be strictly followed. An action of debt will not lie against the defendant, as upon a penal statute. The penalty is not certain; and the law has made no provision for the mode of prosecuting such an action."

In *People v. Raynes* (1853) 3 Cal. 366, it appeared that the defendant had maintained a gaming house without having obtained a license. The action was brought to recover the license money alleged to be due under the acts to license gaming, of March 15th, 1851, and April 29th, 1851 (Stat. pp. 165-167). The court said: "It was decided . . . in this case of *People v. Craycroft*, *supra*, that such an action could not be maintained. The statute re-enacts the common law, in making this evil occupation a misdemeanor, punishable by fine and imprisonment, and the license is proposed as a sort of compromise for the offense, doubtless with the hope of regulating and thereby diminishing the bad influence of a vice which it is impossible to suppress. The failure to obtain the license leaves the party as he would have been at common

law, a public wrongdoer, and subject to indictment and punishment."

In *Santa Cruz v. Santa Cruz R. Co.* (1880) 56 Cal. 143, it appeared that the defendant had operated steam cars carrying passengers in the city of Santa Cruz, California, without having obtained a license so to do, as was required by a city ordinance. The action was brought for the amount which would have been due, had the defendant taken out the required license. There was dictum to the effect that the defendant might be subject to a certain fine or penalty for failure to procure a license, but that the defendant owed nothing *for a license* until such license had been taken out.

In *Monterey County v. Abbott* (1888) 77 Cal. 541, 18 Pac. 113, 20 Pac. 73, the plaintiff sued to recover the amount of a business license imposed on the defendant, among others, by the board of supervisors of Monterey county. While the case passed perhaps more specifically on the validity of the ordinance in question, nevertheless the court said that "the failure to take out a license did not of itself make the defendant a debtor of the county in such sense that an ordinary action, in the nature of an action for debt, could be maintained by the county."

In *Mendocino County v. Bank of Mendocino* (1890) 86 Cal. 255, 24 Pac. 1002, it appeared that the defendant had engaged in the banking business, after refusing to take out the required license. Under the County Government Act (Stat. 1883, p. 299) the board of supervisors of Mendocino county, California, passed the ordinance requiring the aforementioned license, and provided that suit could be brought in assumpsit for the collection of said license. The plaintiff sued the defendant for the amount of the license, and the court held that an action in assumpsit would lie under the ordinance.

In *Sacramento v. Sillman* (1894) 102 Cal. 107, 36 Pac. 385, it appeared that the defendant had sold intoxicating liquor without having taken out a license. The license was required by a city ordinance, and it appeared that there was a section (50) in the city

charter which gave the city a remedy by civil action against a person who was required to take out a license and who had failed to take out such a license. In view of this section of the city charter, it was held that the action could be maintained.

In *San Luis Obispo County v. Hendricks* (1886) 71 Cal. 242, 11 Pac. 682, the defendant was sued for the amount of a liquor license in a civil action, which was allowable under an ordinance passed by the board of supervisors of San Luis Obispo county. Although the court held that there was no authority for the meeting, and hence the ordinance was null and void, nevertheless it was said: "The license tax sought to be recovered in this action is not a penalty, but in the nature of a debt due from the defendant to the county; or what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county to pay such sum of money."

And in *Ex parte Benjamin* (1884) 65 Cal. 310, 4 Pac. 23, it was held that an ordinance passed by the board of supervisors of San Bernardino county, California, which provided, among other things, for the collection of license taxes "by suit or otherwise," was valid.

In *Los Angeles v. Southern P. R. Co.* (1882) 61 Cal. 59, it appeared that the defendant had operated a railroad in the city of Los Angeles without having obtained a license. The same ordinance which required the defendant to obtain a license also provided for the manner of collecting the fee. Among the methods prescribed was a suit for the amount of the license fee. The court held that the city was empowered, by virtue of the ordinance, to maintain an action, and said: "That a municipality, when authorized, may prescribe a penalty for a violation of an ordinance, is well established; it is equally clear that a municipality may be authorized to bring a civil action, in the competent court, for the recovery of a license tax."

W. K. M.

## ELLEN M. DARTNELL

v.

## GRACE S. BIDWELL.

*Maine Supreme Judicial Court — September 28, 1910.*

(115 Me. 227, 98 Atl. 743.)

**Easement — interruption — unrecorded notice.**

1. A written notice denying the existence of an easement and forbidding further attempted use of it is sufficient to interrupt a claim thereto, although the statute provides for interruption by notice served and recorded.

[See note on this question beginning on page 1325.]

**Adverse possession — necessity of owner's knowledge.**

2. To acquire an easement by prescription the owner must know of and acquiesce in the adverse claim, or the use must be so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed.

[See 9 R. C. L. 779.]

**Definition — acquiescence.**

3. Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence.

**Adverse possession — presumption of acquiescence.**

4. Where the adverse use of an easement is continued for twenty years without interruption or denial on the part of the owner, and with his knowledge, his acquiescence is conclusively presumed.

[See 9 R. C. L. 780.]

**— easement — character of use.**

5. Acts sufficient to establish an easement by prescription must be of such

a character and continued at such intervals as to afford a sufficient indication to the landowner that the easement is claimed.

[See 9 R. C. L. 776.]

**Pleading — trespass quare clausum — justification — evidence.**

6. A mere plea of justification in trespass quare clausum for working a road over another's property, of a right of way by user, is not sufficient to admit evidence of repairs, since the right of way may have existed and defendant exceeded his rights in his attempted use of it.

**Jury — testimony as to deliberations.**

7. A juror cannot testify as to what did or did not influence him in reaching his conclusion.

**Appeal — permitting rejected evidence to go to jury room.**

8. Permitting photographs which have been excluded from evidence to go into the jury room is reversible error, if they were of such a character as to be calculated to influence the jury.

[See 16 R. C. L. 300-303.]

EXCEPTIONS, and motion for new trial, by plaintiff, to rulings of the Supreme Judicial Court for Lincoln County, made during the trial of an action brought to recover damages for alleged unlawful trespass upon plaintiff's land, which resulted in a verdict for defendant. *Sustained.*

The facts are stated in the opinion of the court.

**Mr. Barrett Potter, for plaintiff:**

An inchoate easement may be interrupted by verbal protests.

Powell v. Bagg, 8 Gray, 441, 69 Am. Dec. 262, 90 Ill. 339; Indiana, I. & I. R. Co. v. Patchette, 59 Ill. App. 251; Workman v. Curran, 89 Pa. 226; Nichols v. Aylor, 7 Leigh, 546; Livett v. Wilson, 3 Bing. 115, 130 Eng. Reprint, 457, 10 J. B. Moore, 439, 3 L. J. C. P. 186; Reid v. Garnett, 101 Va. 47, 43

S. E. 182; Field v. Brown, 24 Gratt. 74; Crosier v. Brown, 66 W. Va. 273, 25 L.R.A. (N.S.) 174, 66 S. E. 326.

As to the matter of continuity of use, defendant must prove such repeated acts of use; of such character and at such intervals as afforded a sufficient indication to the owner of the land that the right of way was claimed.

Bodfish v. Bodfish, 105 Mass. 317; Hill v. Coburn, 105 Me. 446, 75 Atl. 67.



The burden as to justification is on the defendant.

Rollins v. Blackden, 112 Me. 464, 92 Atl. 521, Ann. Cas. 1917A, 875.

Permitting photographs excluded from evidence to go to the jury is ground for new trial.

Whitman v. Granite Church, 24 Me. 236; Benson v. Fish, 6 Me. 141; Read v. Cambridge, 124 Mass. 569, 26 Am. Rep. 690; Whitney v. Whitman, 5 Mass. 405; Hix v. Drury, 5 Pick. 302; Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; Munde v. Lambie, 125 Mass. 367; Alger v. Thompson, 1 Allen, 453.

Messrs. Wheeler & Howe also for plaintiff.

Mr. George A. Cowan, for defendant:

If the user was so open and notorious that a person ordinarily diligent in the protection of his property could have known of its use, then the mentioned element of adverse user is established, as acquiescence of the owner may be presumed.

14 Cyc. 1148, § 5; O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151.

Having established a way across the land of the plaintiff by adverse user, it carried with it the right to make all necessary repairs.

14 Cyc. 1210-1212; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 319; Brown v. Stone, 10 Gray, 61, 69 Am. Dec. 303; Rotch v. Livingston, 31 Me. 461, 40 Atl. 426; McMillan v. Cronin, 75 N. Y. 474.

It is for the court to decide whether the verdict was altered by the photographs going to the jury; whether an injustice was done or the losing party aggrieved thereby; and whether any different verdict would have been rendered had the photographs not been in the jury room.

Snowman v. Wardwell, 32 Me. 275; Woodis v. Jordan, 62 Me. 490; State v. Stain, 82 Me. 472, 20 Atl. 72; Reed v. Cumberland & O. Canal Corp. 65 Me. 53; Michaud v. Canadian P. R. Co. 88 Me. 381, 34 Atl. 172.

It must appear probable that the verdict would have been different had the photographs not been in the jury room, and that the plaintiff was prejudiced by their being there.

Parsons v. Lewiston, B. & B. Street R. Co. 96 Me. 503, 52 Atl. 1006, 12 Am. Neg. Rep. 88; Shepard v. Lewiston, B. & B. Street R. Co. 101 Me. 591, 65 Atl. 20.

Savage, Ch. J., delivered the opinion of the court:

Trespass quare clausum. In defense, it was contended that the defendant had a right of way over the plaintiff's premises, and that the acts complained of, or some of them, at least, were done in making necessary and reasonable repairs of the way. A portion of the way was acquired by grant. The remainder was claimed by prescription. Whether she had such a prescriptive right was contested. The verdict was for the defendant. The plaintiff brings the case here on exceptions to refusals to give requested instructions, and on a motion for a new trial.

One of the issues in the case, and perhaps one decisive of the case, is whether the prescriptive easement claimed by the defendant was interrupted by the plaintiff while it was yet inchoate. The presiding justice was requested to instruct the jury that "the defendant must not only prove the use of the way claimed by prescription, for twenty years, but that it was continued, uninterrupted, and adverse; that is, under a claim of right, with the knowledge and acquiescence of the owner, and not as a matter of favor or courtesy on his part."

This language seems to have been taken from the opinion in Sargent v. Ballard, 9 Pick. 251. The presiding justice declined to give this instruction. In declining to do so he said: "It is true that the use must be for twenty years, that it must be continued, uninterrupted, and adverse, under a claim of right, but it need not be under an acquiescence of the owner."

The plaintiff excepted. While the easement was still inchoate, as claimed by the plaintiff, the plaintiff wrote a letter to the defendant, in which she said: "You are hereby notified that that portion of my land . . . which you have recently plowed and made into a road is across my private property. . . . No person has or ever had any right to pass in or over this field, and you

are liable to me in damages for trespass. . . . I hereby notify you to at once go back to the original location and the original cart road width as given in deed Hussey to Myers in 1856. . . . I hereby forbid you or anyone in your behalf to pass in or travel over any portion of my land whatsoever, and especially that portion which you have unlawfully and without any right made into a road, and you are notified to hereafter travel only in the single cart road. . . ."

This letter related to the prescriptive way in question. The plaintiff at the trial contended that this letter was an interruption of the defendant's inchoate easement, and requested an instruction to that effect. A third request differently phrased was to the same effect. These requests were refused, and the plaintiff excepted. All the exceptions so far may be considered together.

A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. Each of the elements is essential, and each is open to contradiction. The existence of all the elements for the requisite period creates a right conclusive against attack. *Rollins v. Blackden*, 112 Me. 459, 92 Atl. 521, Ann. Cas. 1917A, 875, and cases cited. The present controversy concerns the element of acquiescence, and the question is whether the plaintiff's acquiescence was interrupted in law by the letter from which we have quoted. It is not claimed that the defendant's use was interrupted by it.

**Definition—acquiescence.** Acquiescence is used in its ordinary sense. It does not mean license or permission in the active sense. It means passive

assent, or submission. It means quiescence. It is consent by silence. *Pierce v. Pierce*, 66 Vt. 369, 29 Atl. 364; *Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635; *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898. See Webster's Dict. title "Acquiescence." Proof of acquiescence by the owner is held essential by all authorities. It raises the presumption of a grant. *Rollins v. Blackden*, supra. Where the adverse use has continued for twenty years without interruption or denial on the part of the owner, and with his knowledge, his acquiescence is conclusively presumed. It was error then to rule that proof of acquiescence was unnecessary.

**Adverse possession—presumption of acquiescence.**

The distinction between the creation of an easement by adverse use and the gaining of a title to land by adverse possession is not always borne in mind. We said in *Rollins v. Blackden*, supra, that "in the matter of acquiescence, the creation of a prescriptive easement logically differs from the acquisition of a title to real estate by adverse possession. In the former the possession continues in the owner of the servient estate, and the prescriptive right arises out of adverse use. In the latter, the owner is ousted from possession, and the right or title arises out of adverse possession; and nothing short of making entry, or legal action, will break the continuity of possession."

See *Workman v. Curran*, 89 Pa. 226.

If the case at bar had been one of claimed adverse possession, the request would have been erroneous, and the ruling would have been right.

Anything which disproves acquiescence rebuts the presumption of a grant. *Smith v. Miller*, 11 Gray, 145. It interrupts the inchoate easement. So far there is no dispute. The question now is: In what manner may acquiescence be disproved? And upon the question the authorities are divided. Upon

one side is the leading case of *Powell v. Bagg*, 8 Gray, 441, 69 Am. Dec. 262, in which it was said that if the owner of the land before the lapse of twenty years, "by a verbal act on the premises in which the easement is claimed, resists the exercise, . . . and denies its existence, . . . his acquiescence . . . is disproved, and the essential elements of a title . . . by adverse use are shown not to exist." In *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339, which was a case where the owner orally remonstrated against the use, the court approved the doctrine of *Powell v. Bagg*, and went further, and held that it was not material where the remonstrance was made, whether on or off the land. The doctrine that denials and remonstrances, on or off the land, are sufficient to rebut acquiescence and work an interruption, is supported by *Workman v. Curran*, supra; *Nichols v. Aylor*, 7 Leigh, 546; *Field v. Brown*, 24 Gratt. 74; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182; *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233; *Crosier v. Brown*, 66 W. Va. 273, 25 L.R.A. (N.S.) 174, 66 S. E. 326; *Andries v. Detroit*, G. H. & M. R. Co. 105 Mich. 557, 63 N. W. 526; *Bealey v. Shaw*, 6 East, 216, 102 Eng. Reprint, 1269, 2 Smith, 321, 8 Revised Rep. 466; *Livett v. Wilson*, 3 Bing. 115, 130 Eng. Reprint, 457, 10 J. B. Moore, 439, 3 L. J. C. P. 186; *Washburn, Easements*, p. 162.

On the other hand, there are courts which hold that mere denials of the right, complaints, remonstrances, or prohibitions of user, unaccompanied by physical interference to some degree, will not defeat the acquisition of a right by prescription. The leading case, perhaps, on this side, is *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605. See other cases referred to in *Rollins v. Blackden*, supra. In the *New Jersey* case, the court seemed to follow by analogy the doctrine of adverse possession, and did not

mark the distinction, which we have pointed out, between creating an easement and acquiring title by adverse possession.

When we consider what acquiescence means, and that nonacquiescence defeats an easement, but alone does not defeat title by adverse possession, we are persuaded that the doctrine in the former class of cases is founded upon the better reason. If acquiescence is consent by silence, to break the silence by denials and remonstrances ought to afford evidence of nonacquiescence, rebutting the presumption of a grant. In *Rollins v. Blackden*, supra, we held that the grant of an easement to A effectually interrupted the inchoate easement to B, because it was an act of the strongest potency to rebut the presumption of acquiescence. In that aspect, there was no physical interruption nor disturbance. In the case at bar, we think that the letter of the plaintiff to the defendant expressly denying the latter's right, protesting its present, and forbidding its future, exercise, ought, in reason, to be held sufficient evidence of the plaintiff's nonacquiescence, and of an interruption of the defendant's inchoate easement. And we do hold it to be

Easement—  
interruption—  
unrecorded  
notice.

such. In fact, the statute (Rev. Stat. chap. 107, § 12) provides expressly that an easement may be interrupted by a notice in writing served and recorded. That the notice should be served or delivered is necessary to bring knowledge of the interruption home to the claimant. Otherwise it is not notice to him. The provision for recording is to perpetuate the evidence of the interruption and give notice to third parties. But we think the statutory method is not exclusive. A notice in writing, served or delivered, but not recorded, is sufficient if proved. The plaintiff's requested instructions should have been given.

The plaintiff requested an instruction in these words: As to the mat-

ter of continuity of use, the defendant must prove such repeated acts of use, of such character and at such intervals, as afford a sufficient indication to the owner of land that the right of way was claimed. The presiding justice said: "I give you so much of the instruction as states that the acts must be of 'such a character.'"

He gave no more of it. As qualified, the instruction omitted the essential element of continuity of use. The plaintiff was entitled to have the instruction given. *Bodfish v. Bodfish*, 105 Mass. 317, from which case the language of the bequest was taken.

The defendant pleaded in justification, by way of brief statement, "that the way which is the subject of dispute has been used for forty-three years by defendant and those under whom she claims, and the defendant claims right by user to pass over the plaintiff's land."

The plaintiff requested an instruction in substance, as it is called in the brief, "that the defendant was not entitled under her plea to introduce evidence of repairs." The request was refused.

When a defendant would justify or excuse an act which is unlawful unless justified or excused, justification must be pleaded. *Hall v. Hall*, 112 Me. 234, 91 Atl. 949. Justification may be pleaded by way of brief statement, and when that is done the nicety of special pleading is not required. *Clark v. Foxcroft*, 6 Me. 296, 20 Am. Dec. 309. But the brief statement must be precise and certain to a common intent. *Washburn v. Mosely*, 22 Me. 160; *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715. The brief statement in this case sets up that the defendant had a prescriptive right of way, but it does not set up that the acts complained of were

done in the use of repair of the right of way. The fact that the defendant had a right of way, if proved, would not afford a complete justification. She might have had a right of way, and yet she might have exceeded her rights and become a trespasser. It was necessary for her to prove, and therefore to allege, that the acts complained of were done in the lawful use or repair of the way. Her justification would then be complete. The requested instruction should have been given.

The motion for a new trial is based upon the fact that three photographs which had been offered in evidence by the defendant and excluded by the court were sent to the jury room, and were seen and examined by one or more at least of the jury. So far as appears neither party was at fault. The photographs have been exhibited to us, and we think that they were calculated to influence the jury. It is not a question whether the jurors considered them, or were influenced by them. That we can never know. The testimony of jurors concerning their deliberations and proceedings is not admissible. It is not competent for a juror to testify what did or did not influence him. *Studley v. Hall*, 22 Me. 198; *Hovey v. Luce*, 31 Me. 346; *Greely v. Mansur*, 64 Me. 211; *Trafton v. Pitts*, 73 Me. 408; *Whitney v. Whitman*, 5 Mass. 405.

The photographs were prejudicial, and so much so as to require a new trial. *Benson v. Fish*, 6 Me. 141; *Rich v. Hayes*, 97 Me. 298, 54 Atl. 724; *Hix v. Drury*, 5 Pick. 296; *Alger v. Thompson*, 1 Allen, 453.

Exceptions and motion sustained.

Adverse  
possession—  
easement—  
character  
of use.

Pleading—  
trespass quare  
clausum—  
justification—  
evidence.

Jury—  
testimony—  
as to  
deliberations.

Appeal—  
permitting  
rejected evi-  
dence to go to  
jury room.

# ANNOTATION.

## What will disprove acquiescence by owner essential to easement by prescription in case of known use.

### I. Introductory, 1325.

### II. View that protest unaccompanied by obstruction is sufficient:

- a. Rule stated, 1325.
- b. Application of rule, 1325.

#### I. Introductory.

This note is designed to include only those cases of easements by prescription in which there is an adverse claim of right with the knowledge of the owner, and during a time when he is able in law to assert and enforce his rights. It does not include those cases in which knowledge is imputed to the owner, or where there is a permissive use, or those involving the merger of the dominant and servient estates, or those where a pending action stops the running of the prescriptive period, or where the owner is under a disability and cannot enforce his rights. The English doctrine of ancient lights is also excluded.

### II. View that protest unaccompanied by obstruction is sufficient.

#### a. Rule stated.

In some jurisdictions, when the owner of the land, by a verbal act of protest on the premises in which the easement is claimed, resists its exercise and denies its existence, his acquiescence is thereby disproved, and that essential elements of a title by adverse use is shown not to exist.

Illinois.—Chicago & N. W. R. Co. v. Hoag (1878) 90 Ill. 339. See the reported case (DARTNELL v. BIDWELL, ante, 1320).

Massachusetts.—Powell v. Bagg (1857) 8 Gray, 441, 69 Am. Dec. 262.

Michigan.—Andries v. Detroit, G. H. & M. R. Co. (1895) 105 Mich. 557, 63 N. W. 526.

North Carolina.—Ingraham v. Hough (1853) 46 N. C. (1 Jones, L.) 39.

Virginia.—Nichols v. Aylor (1836) 7 Leigh, 546; Field v. Brown (1873) 24 Gratt. 74; Reid v. Garnett (1903) 101 Va. 47, 43 S. E. 182.

### III. View that protest must be accompanied by obstruction:

- a. Rule stated, 1328.
- b. Application of rule, 1329.

West Virginia.—Eells v. Chesapeake & O. R. Co. (1901) 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479.

The reason for the view that mere protests and verbal acts negative the necessary acquiescence is that the adverse, exclusive and undisturbed use for the prescriptive period does not raise a conclusive presumption of the necessary acquiescence by the landowner, and that the mere presumptive acquiescence may be rebutted by any evidence that negatives it.

This theory is apparently founded on a distinction between an actual adverse possession of lands, of which the claimant is in possession, and a mere easement on lands, of which the owner himself is in actual possession. Powell v. Bagg (Mass.) supra.

In Rollins v. Blackden (1914) 112 Me. 465, 92 Atl. 521, Ann. Cas. 1917A, 875, the court said: "In the matter of acquiescence, the creation of a prescriptive easement logically differs from the acquisition of a title to real estate by adverse possession. In the former, the possession continues in the owner of the servient estate, and the prescriptive right arises out of adverse use. In the latter, the owner is ousted from possession, and the right or title arises out of adverse possession; and nothing short of making entry, or legal action, will break the continuity of possession."

#### b. Application of rule.

In Chicago & N. W. R. Co. v. Hoag (1878) 90 Ill. 339, there was a claim of a prescriptive right to flow waste water from a tank over certain premises. Proof was introduced that the tank had been in its present location and discharged its surplus water in the same way for more than the prescriptive period. To disprove acquies-

cence during that period, the owner introduced a former holder of the land, who testified "that he purchased this lot in 1858 and sold it to appellee in 1872; that he complained to the depot agent . . . about water running over the lot; that he spoke to him several times; that for the first thirteen years it was not so bad; it was worse every winter, for several reasons; that he called the depot agent's attention to it and complained; that he told him he wanted it stopped." The following instruction was granted: "If [the former holder] . . . while he owned the lot objected or complained to the agent of defendant because of his premises being so flowed with water, it prevented the defendant from obtaining a prescriptive right." The court held that the denials by the owner of the right exercised by the claimant were sufficient to disprove acquiescence, and added: "We do not think it necessary to prevent the gaining the right by adverse use, which is claimed, that the plaintiff should have asserted his right in opposition thereto by suit at law, or by any act of violence in resistance of the use."

But in *Smith v. Roath* (1909) 238 Ill. 247, 128 Am. St. Rep. 123, 87 N. E. 414, it appeared that the alley through which the claimant asserted a right of way had been closed by gates at both ends, but that the gates had never interfered with the use of the alley by the claimant. The court held that the mere fact of closing the passageway by gates, when the actual use was not interrupted, would not operate to prevent the acquisition of title by prescription, saying: "It is very evident from all the testimony that they did not in any way interfere with the free access to this passageway for the delivery of coal and groceries, and for any other use to which it might be properly put by the residents of said four lots. . . . The fact that this private passageway was closed at both ends by gates does not in any way negative the claim of an easement by prescription, as the gates never interfered with the use of the passageway for the purposes for which it was intended."

In *Powell v. Bagg* (1857) 8 Gray (Mass.) 441, 69 Am. Dec. 262, it was held that when the owner of land, by a verbal act on the premises in which the easement is claimed, resists the exercise of the right and denies its existence, the presumption of a grant is rebutted and his acquiescence in the right claimed is disproved.

In *Andries v. Detroit, G. H. & M. R. Co.* (1895) 105 Mich. 557, 63 N. W. 526, it was held that where a railroad company maintained notices on its right of way, to the public, to keep off, the mere fact that it knew that the public passed and repassed over its right of way did not create a right in the claimant to continue such passage.

In *Ingraham v. Hough* (1853) 46 N. C. (1 Jones, L.) 39, it appeared that the owner of land obstructed the right of way claimed by erecting gates. The claimant was allowed to continue the use of the passageway, and did continue its use until his death. Later, in an action to enforce the alleged easement, the court instructed the jury that "putting the gates across the road by William Hough was no obstruction to defeat the right of John Hough." On appeal, the court held that the actual obstruction of the alleged right of way was unnecessary, saying: "As to the erection of the gates there is no dispute. That the way was turned within the twenty years. . . . We conclude, then, that the facts of erecting the gates and turning the road were interruptions to the user of the easement by the plaintiff, and those whose title he held; and that, consequently, they were proper to be submitted to the jury, as tending to rebut the inference of a grant of the right of way to the plaintiff."

In *Nichols v. Aylor* (1836) 7 Leigh (Va.) 546, the court said: "The presumption of right or of a grant arises from the long acquiescence of the party, and does not arise where the enjoyment is contested. . . . It would be strange indeed if a grant was to be presumed to have been made by him, though he was continually contesting the right."

And following *Nichols v. Aylor* (Va.) supra, the Virginia court later held in *Field v. Brown* (1873) 24 Gratt. (Va.) 74, that evidence of adverse possession such as will create the presumption of a grant is not conclusive, and may always be rebutted by evidence showing that the adversary use and enjoyment relied on were not acquiesced in, but the right thereto contested, and that where there has been any verbal act on the premises resisting the exercise of the right, and denying its existence, it is error to instruct the jury that adverse possession for a period of twenty years is conclusive of a grant.

In *Cornett v. Rhudy* (1885) 80 Va. 710, the court uses language by way of argument which apparently overrules the cases of *Nichols v. Aylor* and *Field v. Brown* (Va.) supra. The principal question in *Cornett v. Rhudy* (Va.) supra, was the time necessary to acquire a right to an easement by prescription. Therefore what was said as regards the effect of a protest to disprove acquiescence was mere dictum, and cannot be regarded as overruling either *Nichols v. Aylor* or *Field v. Brown* (Va.) supra. Both cases are expressly upheld in *Reid v. Garnett* (Va.) infra.

In *Reid v. Garnett* (1903) 101 Va. 47, 43 S. E. 182, it appeared that before the expiration of twenty years from the time the right was first claimed the landowner denied the existence of the right and threatened to close the road. Similar denials and threats to close the road were made after the expiration of twenty years, but nothing was done to prevent the use of the way. Later the way was closed, and the claimant insisted that mere denials of the right, and verbal protests and remonstrances against its use, did not negative the idea of acquiescence. The court held that verbal protests and denials of the right claimed were sufficient to disprove acquiescence.

In *Eells v. Chesapeake & O. R. Co.* (1901) 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479, the lower court withheld from the jury the question whether the landowner protested against

the exercise of the right alleged by the claimant. On appeal, it was held that acquiescence was a question of fact to be submitted to the jury, and, if it was found that a protest had been made, that acquiescence was disproved and no title was acquired by prescription. The court said: "It is essential, however, that we should be careful about the law of prescription. An important element to establish it is that the party whose land is to be made subject to a right in another by prescription should be chargeable with acquiescence in the exercise of that right by the other party. The prescription of which we here speak is different from the Statute of Limitations, which is a bar whether the party acquiesce or not; but to establish an incorporeal right by prescription, acquiescence by the party affected by it must exist. If it be shown that that party protested against the exercise of that right, denied that right, then no time will establish it. There are many ways in which such protest may be manifested. Anything showing that the party did not recognize but repudiated and denied such right will prevent its existence, will prevent its consummation."

In *Crosier v. Brown* (1909) 66 W. Va. 273, 25 L.R.A. (N.S.) 174, 66 S. E. 326, wherein it appeared that the owner protested against the exercise of the right of the claimant to use the land, and the claimant actually desisted from its use, the court held that acquiescence was effectually disproved, saying: "Though one thus use a way over another's land, fully intending at last to claim a way, yet if, pending that use, the landowner protests against the use and denies the right, the other party cannot, by his own act alone, get such easement. If he is silent, the use may become a right; but not if he protests. . . . 'No title by prescription can be acquired in an easement without the acquiescence and knowledge of the owner of the servient tenant.'"

In *Brayden v. New York, N. H. & H. R. Co.* (1898) 172 Mass. 225, 51 N. E. 1081, it appeared that the plaintiff had been in the habit of crossing the de-

fendant's tracks for a period of twenty years, but that during that time the company had obstructed the opening in the fence through which plaintiff passed. It appeared, however, that this obstruction had been torn down, and that the plaintiff's use of the tracks had never been effectually interrupted. The court held that the assertion of the right on the part of the company was sufficient to prevent the gaining of the right of way, by disproving acquiescence on the part of the owner. The court said: "A landowner, in order to prevent that result, is not required to battle successfully for his rights; it is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence and the growth in his mind of a fixed association of ideas, or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that the acquiescence was not a fact."

It has been held that the grant of the easement, by the owner of the land, to a third person, disproves acquiescence, the court saying: "If the word 'acquiescence' has any signification, it would seem that a conveyance of the thing itself, while it would not interrupt an adverse possession, would interrupt an inchoate easement, one feature of which must be acquiescence." *Rollins v. Blackden* (1914) 112 Me. 459, 92 Atl. 521, Ann. Cas. 1917A, 875.

### *III. View that protest must be accompanied by obstruction.*

#### *a. Rule stated.*

In some jurisdictions, the rule obtains that a verbal act on the premises over which an easement is claimed, resisting its exercise and denying its existence, does not disprove acquiescence by the owner, unless it is accompanied by an overt act which in fact obstructs the use of the alleged easement. *Lehigh Valley R. Co. v. McFarlan* (1881) 43 N. J. L. 605, overruling (1878) 30 N. J. Eq. 180; *Morris Canal & Bkg. Co. v. Diamond Mills*

*Paper Co.* (1906) 71 N. J. Eq. 481, 64 Atl. 746, affirmed on opinion below in (1907) 73 N. J. Eq. 414, 75 Atl. 1101; *Okeson v. Patterson* (1857) 29 Pa. 22; *Demuth v. Amweg* (1879) 90 Pa. 181; *Ferrell v. Ferrell* (1872) 1 Baxt. (Tenn.) 329; *Kimball v. Ladd* (1870) 42 Vt. 747.

The theory of this view was stated in *Lehigh Valley R. Co. v. McFarlan* (1881) 43 N. J. L. 605, as follows: "The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife. . . . If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if, by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a pre-



scriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment."

*b. Application of rule.*

In *Lehigh Valley R. Co. v. McFarlan* (1881) 43 N. J. L. 605, the defendant contended that the right to maintain a dam at a certain height had been acquired by adverse enjoyment. It appeared that there had been protests and verbal denials of the right, but no interruption or obstruction in fact. It was held by the court that mere protests and verbal denials were insufficient to negative acquiescence, and that in the absence of acts amounting to a disturbance of the right in a legal sense there was no interruption that would negative acquiescence.

In *Morris Canal & Bkg. Co. v. Diamond Mills Paper Co.* (1906) 71 N. J. Eq. 481, 64 Atl. 746, affirmed on opinion below in (1907) 73 N. J. Eq. 414, 75 Atl. 1101, it appeared that the claimants, in the operation of a paper-making industry, dumped refuse matter into a canal. The canal company made verbal protests, but never seriously objected to the use claimed by the defendants. The court held that mere verbal protests were insufficient to disprove the acquiescence on the part of the canal company.

In *Okeson v. Patterson* (1857) 29 Pa. 22, it appeared that the claimant had used a right of way without interruption during the period essential to an easement. It further appeared that the landowner had voiced his protests and had openly claimed exclusive right to the land, but had never obstructed the use of the land in fact. The court held that to prevent the claimant from acquiring the easement it was necessary to actually obstruct its use, and the mere denial was not enough.

In *Demuth v. Amweg* (1879) 90 Pa. 181, the defendant sought to disprove his acquiescence in an easement by showing that he denied the claimant's

5 A.L.R.—84.

right of passage to a third person, in the claimant's absence, and that he later placed gates across the passageway. It appeared that the gates did not interrupt the use of the passageway by the claimant, but that he used it whenever he chose. The court held that a mere assertion of title is not enough to disprove acquiescence; that, to be effective, it must be accompanied with some act which, at least for the time being, prevents the use of the easement.

In *Ferrell v. Ferrell* (1872) 1 Baxt. (Tenn.) 329, it appeared that a landowner had made statements denying that the claimant had a right of way over his land. It did not appear that any of these statements had been made in the presence of the claimant. The court held that mere denials of the claimant's right could not affect the acquisition of the easement in the absence of an actual obstruction in fact. The court said: "We think the true rule should be that the enjoyment of the right, or the actual user and occupation, has been actually broken up, substantially and in fact, so that there was not only a claim of adverse right to the claim of right of way, but an actual adverse assertion of that claim, either by adversely occupying the land over which the claim of way is asserted, so as to prevent the user by the claimant, or by an action for the trespass, commenced within the period of twenty years. In other words, there should be shown an actual and substantial suspension of the use by the intervention of the owner of the land, which breaks the continuity of the enjoyment for the period required by law."

In *Kimball v. Ladd* (1870) 42 Vt. 749, it appeared that the landowner protested against the use of his premises, but no actual obstruction of the use was ever made. The court instructed the jury that "they would not be prevented from acquiring the right, even if the owner of the upper mills did occasionally, while the owners of the lower mills were thus enjoying the right, object or deny the right, if he did not in any way interfere with or interrupt the enjoyment of the right

by them (the owners of the lower mills), and they enjoyed the right in spite of such objections as fully as if there had been no such objections or denial." To this instruction the landowner objected. On appeal, the court said: "We regard the exceptions . . . as presenting, on this subject, nakedly, the operation and effect of a mere verbal objection to the denial of the right thus claimed, while at the same time permitting that use and enjoyment to continue in as full measure, in every respect, as if no such objections or denial had been made. We think the court committed no error in the instructions given to the jury on this point of exception."

In *Connor v. Sullivan* (1873) 40 Conn. 26, 16 Am. Rep. 10, it appeared that but a single instance of an attempted interruption occurred. The landowner forbade the claimant from using the right of way and commenced to erect a fence. The defendant threatened to tear it down, and did actually remove one post, whereupon the landowner desisted from any further attempt to hinder the claimant's use. The court held that an isolated

instance of attempted interruption of the user, resulting in no actual interruption, and followed by no attempt to test the right, would not, as a matter of law, necessarily destroy the presumption of a grant and disprove acquiescence, saying: "No explanation being offered, the plaintiff seems to have concluded to acquiesce in the defendant's claim of right. Such an acquiescence after a feeble struggle seems more significant than it would have been without such brief contest. The plaintiff's conduct was undoubtedly open to proof and explanation. If there were circumstances in the relative position of the parties indicating that the plaintiff's free action was controlled by fear, or that he was too poor to enforce his rights at law, that might have been shown. So, on the part of the defendant, evidence would have been admissible to show that the plaintiff desisted from his attempt at interruption, because on inquiry he became satisfied that the defendant's rights were such that they could not successfully be contested."

A. S. M.

## JOHN B. HULL

v.

## BERKSHIRE STREET RAILWAY COMPANY.

*Massachusetts Supreme Judicial Court — March 31, 1914.*

(217 Mass. 361, 104 N. E. 747.)

### Street railways — breaking of trolley pole — negligence.

1. Unless some explanation is offered, the fact that an iron trolley pole, while being used for the purpose for which it was designed, broke and was thrown violently from the car to the injury of a passer-by, warrants an inference that reasonable care had not been taken by the railroad company to make the apparatus safe.

[See note on this question beginning on page 1336.]

### Trial — question for jury — broken trolley pole.

2. The jury must determine the question of the negligence of a street railway company where its trolley pole was broken off while a car was running 40 or 50 miles an hour, and hurled against

a passing automobile to the injury of an occupant thereof.

[See 25 R. C. L. 1303.]

### Evidence — failure of attempt to explain accident — *res ipsa loquitur*.

3. The attempt by a street railway company to explain by direct evidence

the fall of a trolley pole from a street car to the injury of a passer-by, which failed, does not deprive the injured person of the benefit of the presumption of

culpability on the part of the railroad company arising from the doctrine of *res ipsa loquitur*.

[See 25 R. C. L. 1301, 1302.]

**EXCEPTIONS** by defendant to rulings of the Superior Court for Berkshire County (Crosby, J.) made during the trial of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff. *Overruled.*

The facts sufficiently appear in the opinion.

The rulings asked for by defendant at the close of the evidence, and which were refused, are as follows:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. The fall of the trolley pole in and of itself is no evidence of negligence in this case.

"3. The doctrine of *res ipsa loquitur* does not apply in this case."

Messrs. H. W. Ely and J. B. Ely for defendant.

Messrs. Clarence P. Niles and Frederick M. Myers, for plaintiff:

Where there is any evidence tending to support the issues in the case, however slight such evidence may be, the question as to liability should be submitted to the jury, and it is error to direct a verdict.

Reed v. Deerfield, 8 Allen, 522; Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; Morrissey v. Boston Elev. R. Co. 210 Mass. 424, 96 N. E. 83.

There is no question but that the injuries received by the plaintiff were the direct and proximate result of the defendant's negligence. There was an unbroken connection between the negligent act and the injury, without any independent and intervening cause.

Warren v. Boston & M. R. Co. 163 Mass. 484, 40 N. E. 895; Gannon v. New York, N. H. & H. R. Co. 173 Mass. 40, 43 L.R.A. 833, 52 N. E. 1075, 5 Am. Neg. Rep. 613; Cameron v. New England Teleph. & Teleg. Co. 182 Mass. 310, 65 N. E. 385, 13 Am. Neg. Rep. 86.

The plaintiff is to show the specific physical facts which surround the injury, and may then rely on the doctrine of *res ipsa loquitur*, if in the common course of events such occurrences do not take place in the absence of negligence.

White v. Boston & A. R. Co. 144 Mass. 404, 11 N. E. 552, 9 Am. Neg. Cas. 461; Magee v. New York, N. H. & H. R. Co. 195 Mass. 111, 80 N. E. 689.

Defendant offered no explanation of the breaking of the trolley pole and no evidence that it had taken pains to make the apparatus safe. It follows that the only proper inference is that the defendant had not taken reasonable care to make the apparatus safe, and the jury were justified in finding negligence on its part.

Thomas v. Western U. Teleg. Co. 100 Mass. 156; White v. Boston & A. R. Co. 144 Mass. 404, 11 N. E. 552, 9 Am. Neg. Cas. 461; Moynihan v. Hills Co. 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574, 15 Am. Neg. Cas. 602; Uggla v. West End Street R. Co. 160 Mass. 353, 39 Am. St. Rep. 481, 35 N. E. 1126; Graham v. Badger, 164 Mass. 47, 41 N. E. 61; Silva v. Boston & M. R. Co. 204 Mass. 63, 90 N. E. 547.

But assuming that the plaintiff has, by virtue of the evidence, presented a certain theory as to the accident, it does not follow that he has thereby waived his right to rely upon the doctrine of *res ipsa loquitur*.

Cassady v. Old Colony Street R. Co. 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10, 14 Am. Neg. Rep. 559; Sullivan v. Rowe, 194 Mass. 500, 80 N. E. 459; McNamara v. Boston & M. R. Co. 202 Mass. 491, 89 N. E. 131; Walters v. Seattle R. & S. R. Co. 24 L.R.A.(N.S.) 788, note; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530.

De Courcy, J., delivered the opinion of the court:

The accident happened on the highway that runs northerly from Williamstown to Bennington; and the single track of the defendant is located on the westerly side of the way. There was evidence from which the jury could find the following facts: The electric car, which was running in a southerly direction and downgrade, was running at a speed of from 40 to 50 miles an hour and was swaying from side to side; and the plaintiff, in his auto-

mobile, was going in a northerly direction and exercising reasonable care. The trolley wheel left the wire when the electric car was about 400 feet distant from the automobile; the trolley pole, after some violent movements up and down, was broken off near the base, hurled into the air, and thrown against the left forward wheel of the automobile, causing it to be turned sharply to the right, toward a bank; and the plaintiff, expecting that his machine was about to "turn turtle," jumped out and was injured. The electric car was not brought to a stop until it had gone two or three hundred feet beyond the automobile. Plainly this made a case for the

**Trial-question for jury—broken trolley pole.** jury, and the defendant's first request could not be given. *Steverman v. Boston Elev. R. Co.* 205 Mass. 508, 91 N. E. 919; *Ugla v. West End Street R. Co.* 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126.

The second and third requests presumably were intended to present the same contention, which was, in substance, that no inference of negligence could be drawn from the fall of the trolley pole under the circumstances. They were rightly refused, and the instructions of the trial judge on the doctrine of *res ipsa loquitur* were correct. Unless some explanation was offered, the fact that the iron trolley pole, while

**Street railways—breaking of trolley pole—negligence.** being used for the purpose for which it was designed, broke and was thrown violently from the car, would warrant an inference that reasonable care had not been taken to make the apparatus safe; and that the negligence *prima facie* was that of the defendant, which had exclusive control and management of the car. If, however, the evi-

dence explained the cause of the breaking of the trolley pole, then there was no occasion to resort to presumption, and the jury must determine from the facts as shown whether the accident was due to negligence on the part of the defendant. But the mere fact that the parties offered direct evidence to explain the occur-

**Evidence—failure of attempt to explain accident—res ipsa loquitur.** rence, and failed in the attempted explanation, would not deprive the plaintiff of the benefit of the presumption of culpability arising from the doctrine of *res ipsa loquitur*. *Ugla v. West End Street R. Co.* *ubi supra*; *McNamara v. Boston & M. R. Co.* 202 Mass. 491, 495, 89 N. E. 131; *Craft v. Boston Elev. R. Co.* 211 Mass. 374, 39 L.R.A. (N.S.) 878, 97 N. E. 610.

The exceptions to the admission and exclusion of evidence are not argued, and we treat them as waived.

Exceptions overruled.

#### NOTE

The holding in the reported case (*HULL v. BERKSHIRE STREET R. Co.* ante, 1330) that the fact that a trolley pole, while in use for the purpose for which it was designed, broke and was thrown violently from the car to the injury of a passer-by, warrants an inference of lack of reasonable care on the part of the railroad company, is sustained by the weight of authority, as is shown by the annotation appended to *BURGHARDT v. DETROIT UNITED R. Co.* post, 1336, on the subject of "Injury to one other than passenger or employee from fall of trolley pole or other part of street car." See also references in that annotation to annotation on related questions.

ERNEST C. BURGHARDT, Plff. in Err.,  
v.  
DETROIT UNITED RAILWAY.

*Michigan Supreme Court—July 17, 1919.*

(206 Mich. 545, 173 N. W. 360.)

**Evidence — fall of trolley pole — prima facie negligence.**

1. The fall of a trolley pole from a street car to the injury of a pedestrian on the highway, which would not have occurred if the fastenings had been in proper condition, is sufficient, if unexplained, to make a prima facie case of negligence for the jury.

[See note on this question beginning on page 1336.]

**— happening of accident.**

2. The happening of an accident alone is not evidence of negligence.

[See 20 R. C. L. 184.]

**— circumstantial evidence.**

3. Negligence may be established by circumstantial evidence.

[See 20 R. C. L. 180.]

**Trial — motion for directed verdict — view of evidence.**

4. Upon a motion to direct a verdict, the evidence and legitimate inferences from the established facts most favorable to the other party must be accepted.

**Street railway — negligence — inspection.**

5. Proof of a system of inspection in

consonance with good railroading is not sufficient to show inspection of a particular car so as to negative the inference of negligence arising from the fall of a trolley pole to the injury of a pedestrian on the highway, which would not have occurred had the fastenings been in proper condition.

**Evidence — adoption of system of inspection.**

6. Upon the question of the negligence of a street car company in permitting a trolley pole to fall to the injury of a pedestrian on the highway, evidence is admissible that it had adopted a system of inspection of a character to comport with the requirements of good railroading.

**ERROR** to the Circuit Court for Wayne County (Codd, J.) to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Dohany & Dohany for plaintiff in error.

Messrs. Corliss, Leete, & Moody and Clark C. Seely, for defendant in error:

It was proper to show by witness Malone the character and kind of inspection that was in vogue at the time that he was employed as an inspector.

Union Ice Co. v. Detroit & M. R. Co. 178 Mich. 351, 144 N. W. 1033; Budd v. Ann Arbor R. Co. 200 Mich. 257, 160 N. W. 927.

The court should have directed a verdict at the close of the plaintiff's case, and although the court saw fit to require the defendant to put in evidence as to its inspection of the car, it did not err in directing a verdict at the close of the plaintiff's case.

Elsev v. J. L. Hudson Co. 189 Mich. 135, L.R.A.1916B, 1284, 155 N. W. 377; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150.

There are no facts or circumstances surrounding the falling of the trolley pole from which an inference of negligence could be drawn.

Felske v. Detroit United R. Co. 166 Mich. 367, 130 N. W. 676; Thurston v. Detroit United R. Co. 137 Mich. 231, 100 N. W. 395; Voight v. Michigan Peninsular Car Co. 112 Mich. 504, 70 N. W. 1103, 2 Am. Neg. Rep. 725; Redmond v. Delta Lumber Co. 96 Mich. 545, 55 N. W. 1004; Robinson v. Charles Wright & Co. 94 Mich. 286, 53 N. W. 938; Toomey v. Eureka Iron & Steel Works, 89 Mich. 252, 50 N. W.

850; *Niedzinski v. Bay City Traction & Electric Co.* 160 Mich. 521, 125 N. W. 409; *Sewell v. Detroit United R. Co.* 158 Mich. 409, 123 N. W. 2; *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 72, 34 N. W. 659; *Scott v. Boyne City, G. & A. R. Co.* 169 Mich. 272, 135 N. W. 110; *Whitcomb v. Detroit Electric R. Co.* 125 Mich. 572, 84 N. W. 1072; *Renders v. Grand Trunk R. Co.* 144 Mich. 387, 108 N. W. 368.

Fellows, J., delivered the opinion of the court:

On October 7, 1915, plaintiff, while walking to a restaurant in the city of Detroit, reached the corner of Gratiot and Farmer. He desired to cross Farmer, but a car on the line of defendant was on that street, and he waited for it to get by, and then started across the street, passing to the rear of the car. The car track here curved both east and west. While passing the rear of the car, plaintiff was struck by the trolley pole which had become loosened in its socket and fell upon him, causing injuries claimed by him to be of a serious and permanent character. For the recovery of the damages thus occasioned he brought this action. At the close of plaintiff's case the court denied defendant's motion for a directed verdict, entertaining the view that the circumstances surrounding the accident were such that a jury might legitimately infer negligence on the part of the defendant, and that therefore a prima facie case was made, but at the conclusion of the case directed a verdict for the defendant upon the theory that, although plaintiff had made a prima facie case of negligence, such case had been successfully rebutted by defendant's testimony. To review the judgment entered upon the verdict so directed this writ of error was allowed.

To sustain this judgment defendant insists that there was no evidence in the case of negligence on its part; that the happening of the accident alone is not sufficient evidence of negligence to make a case for the jury; that to hold there was sufficient evidence to go to the jury

would be to adopt the rule, *Res ipsa loquitur*; that the trial court was right in directing a verdict for the defendant, and should have done so at the close of plaintiff's case.

This court has not adopted the rule, *Res ipsa loquitur*. We have uniformly held that the happening of the accident alone is <sup>Evidence—happening of accident.</sup>

not evidence of negligence; and we have as uniformly held that negligence may be established by circumstantial evidence, and that, where the <sup>—circumstantial evidence.</sup>

circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inferences from established facts, that at least a prima facie case is made: *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. 549; *Barnowsky v. Helson*, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989; *La Fernier v. Soo River Lighter & Wrecking Co.* 129 Mich. 596, 89 N. W. 353; *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227, 17 Am. Neg. Rep. 569; *Elsev v. J. L. Hudson Co.* 189 Mich. 135, L.R.A. 1916B, 1284, 155 N. W. 377; *O'Donnell v. Lange*, 162 Mich. 654, 127 N. W. 691, Ann. Cas. 1912A, 847; *Harris v. Royal Oak Sav. Bank*, 187 Mich. 407, 153 N. W. 677; *Sewell v. Detroit United R. Co.* 158 Mich. 407, 123 N. W. 2; *Gerstler v. Weinberg*, 160 Mich. 267, 125 N. W. 1; *Congdon v. Jackson & C. R. Co.* 179 Mich. 175, 146 N. W. 118; *Bayer v. Grocholski*, 196 Mich. 325, 162 N. W. 1030.

In *Barnowsky v. Helson*, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989, it was said:

"In this case the falling of the roof was in and of itself some evidence that the work of raising it was not being done with the ordinary care and skill. It is true that the mere fact of any injury does not impute negligence on the part of anyone, but, where a thing happens which would not ordinarily have occurred if due care had been used, the fact of such happening raises a

presumption of negligence in some-one.

"This roof, not properly supported, would fall as a natural result of the laws of gravitation, but if properly braced there would be no reason for its falling from that cause, and it would not fall from any other cause without the interposition of the elements or some human agency. Therefore, without any other showing than that it suddenly gave way, slipped or tipped to one side, and fell, the presumption is almost conclusive that it fell because it was not sufficiently braced or stayed."

In *Sewell v. Detroit United R. Co.* 158 Mich. 409, 123 N. W. 2, Mr. Justice Montgomery, speaking for the court, said: "It is the settled rule of this state that negligence of the defendant must be proved, and that an inference of negligence is not to be drawn from the mere fact of an accident. But it has also been held in numerous cases that the circumstances attending an injury may be such as to justify an inference of negligence. As in the present case, if all that appeared had been that the plaintiff was riding in a car of the defendant under the control of its servants, and the car in which plaintiff was riding continued its course until it collided with another car ahead of it standing still, with sufficient force to push the still car ahead 75 feet, the inference that someone had blundered prima facie would be the most natural one to be drawn, and that inference is so clear that it would not require further proof of negligence on the part of the defendant."

We are impressed that under the authorities cited the accident in the instant case with the circumstances surrounding it, un-

-fall of trolley pole—prima facie negligence.

explained, made a prima facie case

for the jury. The trolley pole was a steel tube 14 feet long, and rested in a socket. It was secured by being clamped into the socket with four bolts, two on either side. The clamps were about 8 inches long and were bolted with  $\frac{1}{4}$ -inch bolts. There

was a nut on each bolt. It is patent that if the pole was properly secured it would not have fallen from the socket. It is equally patent that a proper inspection would readily disclose whether or not it was securely fastened. The defect, if one existed, was not a latent one.

Upon a motion to direct a verdict, the evidence and legitimate in-

Trial—motion for directed verdict—view of evidence.

ferences from the established facts most favorable to the other party must be accepted. Under the circumstances disclosed by this record, a prima facie case was made for the jury to determine, from the unexplained falling of the trolley pole which admittedly would not have fallen had it been properly secured, and where an inspection would readily have disclosed any defects in it, from the circumstance of the pole falling when the car was moving at a slow rate of speed, from all the surrounding circumstances, the question of negligence on the part of the defendant company; and that the court could not say as matter of law that the plaintiff's proofs failed to make this question one of fact.

But defendant insists that it has established an inspection, and that, there being direct proof on the subject, the prima facie case, if one was made by the plaintiff, must fail. This was the view entertained by the learned trial judge. Our difficulty in agreeing with this conclusion lies in the fact that there is no competent evidence of an actual inspection of the car in question. The most that can be said of defendant's proof

is that it established a system of inspection inferentially in consonance with good railroading. But the proof does not establish that an inspection was in fact made. Where the duty to inspect exists, it is not discharged alone by the adoption of a system of inspection, or the promulgation of a set of rules. The system must be used; the rules must be enforced; the inspection must be made. It was

Street railway—negligence—inspection.

competent for the defendant to show that it had adopted a system of inspection, what that system was, that it comported with the requirements of good railroading; and plaintiff's objections to the introduction of such proof were properly

**Evidence—  
adoption of  
system of  
inspection.**

overruled; but to overcome plaintiff's prima facie case it was necessary that defendant prove an inspection in fact. This it failed to do. The court, therefore, was in error in directing a verdict.

The judgment must be reversed, and a new trial granted, with costs to plaintiff.

## ANNOTATION.

**Injury to one other than passenger or employee from fall of trolley pole or other part of street car.**

- I. Introductory, 1336.
- II. General rule, 1336.
- III. Application of rule:
  - a. Fall of trolley pole, 1336.
  - b. Fall of switchstick from top of electric car, 1338.
  - c. Fall of article from elevated railroad, 1338.
- IV. Limitation of rule, 1339.
- V. Rule in Pennsylvania, 1341.

### *I. Introductory.*

It seems that the words "trolley pole" are used in two senses, meaning either the pole on which or by which the trolley wires are suspended, or that part of a trolley car which connects the car with the trolley wire. This note, however, uses it only in the latter significance. As to whether a trolley pole in a street constitutes a nuisance, see the note to *Stern v. International R. Co.* 2 A.L.R. 487. For the applicability of the doctrine of *res ipsa loquitur* when a person or vehicle is struck by a street car, see the note to *Busch v. Los Angeles R. Co.* 2 A.L.R. 1607.

### *II. General rule.*

In an action for personal injuries sustained by the fall of a trolley pole or other part of a street car, proof of the fall of the object ordinarily makes a prima facie case of negligence. This seems to be the rule even in those jurisdictions which do not recognize the doctrine of *res ipsa loquitur*. *Toby v. Scranton R. Co.* (1917) 245 Fed. 365; *HULL v. BERKSHIRE STREET R. Co.* (reported herewith) ante, 1330; *Manning v. West End Street R. Co.* (1896) 166 Mass. 230, 44 N. E. 135;

*Goll v. Manhattan R. Co.* (1889) 25 Jones & S. 74, 5 N. Y. Supp. 185, affirmed in (1891) 125 N. Y. 714, 26 N. E. 756; *Maher v. Manhattan R. Co.* (1889) 53 Hun, 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309; *Cincinnati Traction Co. v. Holzenkamp* (1906) 74 Ohio St. 379, 6 L.R.A. (N.S.) 800, 113 Am. St. Rep. 980, 78 N. E. 529, 20 Am. Neg. Rep. 186; *Washington v. Rhode Island Co.* (1908) — R. L. —, 70 Atl. 913. And see *BURGHARDT v. DETROIT UNITED R. Co.* (reported herewith) ante, 1333.

### *III. Application of rule.*

#### *a. Fall of trolley pole.*

Proof of the falling of a trolley pole raises an inference of negligence on the part of the street railway company. *Toby v. Scranton R. Co.* (1917) 245 Fed. 365; *HULL v. BERKSHIRE STREET R. Co.* (reported herewith) ante, 1330; *Cincinnati Traction Co. v. Holzenkamp* (1906) 74 Ohio St. 379, 6 L.R.A. (N.S.) 800, 13 Am. St. Rep. 980, 78 N. E. 529, 20 Am. Neg. Rep. 186; *Washington v. Rhode Island Co.* (1908) — R. L. —, 70 Atl. 913. And see *BURGHARDT v. DETROIT UNITED R. Co.* (reported herewith) ante, 1333.

In *Toby v. Scranton R. Co.* (1917) 245 Fed. 365, it appeared that a pedestrian while crossing a street was injured by the fall of a trolley pole of a street car. In an action for the injury his case was rested on the falling of the trolley pole, on the ground that it raised a presumption of negligence on the part of the defendant. The court held that, while the doctrine of *res ipsa loquitur* applies only in excep-



tional cases, a trolley pole does not break unless there is carelessness in its construction, management, inspection, or user, and therefore, it being alleged that plaintiff was without fault, it was held that it remained for the defendant to explain. The court said: "The plaintiff rests her case upon the alleged falling of the trolley pole, insisting that it raises a presumption of negligence on the part of the defendant, entitling her to recovery, to which the defendant takes exception. The motion implies answer of the question whether the maxim of *res ipsa loquitur* applies to the case as it is made to appear from the plaintiff's statement. This doctrine applies only to cases of accident arising under the most exceptional circumstances. *Minneapolis & St. L. R. Co. v. Gotschall* (1917) 244 U. S. 66, 61 L. ed. 995, 37 Sup. Ct. Rep. 598, 14 N. C. C. A. 865. Judged by the limitation laid down in *Wigmore on Evidence*, vol. 4, § 2509, as applied by the court in *Delaware & H. Co. v. Dix* (1911) 110 C. C. A. 535, 188 Fed. 901, it would appear that the case falls within this rule. No injury is to be expected from the operation of a trolley pole, unless from a careless construction, inspection, or user. The breaking of the trolley pole does not happen in the ordinary course of events, unless there is some negligence, either in its construction or in the management of it. The inspection and user of the instrument occasioning the injury at the time of the accident were in the defendant, and, it being alleged that the plaintiff was without fault, the defendant will be held to explain."

In *HULL v. BERKSHIRE STREET R. Co.* (reported herewith) ante, 1330, the fact that an iron trolley pole used for the purpose for which it was designed broke and was thrown violently from the car, injuring a passer-by, was held, in the absence of explanation, to warrant an inference of negligence.

*BURGHARDT v. DETROIT UNITED R. Co.* (reported herewith) ante, 1333, holds that although the doctrine of *res ipsa loquitur* is not recognized in Michigan, still where it appeared that a pedestrian who was crossing the street in

the rear of a slowly moving street car was injured by the falling of the trolley pole, and the evidence shows that the pole would not have fallen if it had been properly secured, a *prima facie* case is made. It is insufficient for the defendant to prove that it had established a system of inspection of its cars unless it proved that the car in question was properly inspected.

In *Cincinnati Traction Co. v. Holzenkamp* (1906) 74 Ohio St. 379, 6 L.R.A. (N.S.) 800, 113 Am. St. Rep. 900, 78 N. E. 529, 20 Am. Neg. Rep. 186, it appeared that a person who desired to become a passenger on a street car stood in the street at the place where the car usually stopped. She was struck by a broken trolley pole when the car stopped. The court held that in the absence of any evidence tending to rebut the presumption of negligence, she was entitled to recover on proof of the fall of a trolley pole from the top of an electric car when it stopped at its usual stopping place, saying: "The plaintiff was not only lawfully in the street, but she stood where she had an implied invitation from the defendant to stand, and it was the duty of the defendant to use reasonable care to avoid injuring her, and the court was warranted in taking judicial notice of the fact, as it did, that such a thing as the breaking of the trolley pole and the falling of the trolley with a portion of the pole does not happen in the ordinary course of events unless there is some negligence either in its construction or in the management of it, and, this being so, the court very properly charged the jury that the plaintiff, in the absence of any evidence tending to rebut the presumption of negligence, was entitled to recover for her injuries."

In *Washington v. Rhode Island Co.* (1908) — R. I. —, 70 Atl. 913, it appeared that a trolley pole which had come off of the trolley wire was banging against the cross wires for some time. When the car was passing a vehicle, the trolley pole became disconnected from the spring and fell on the driver thereof, injuring him. In an action for such injuries the court held that the case presented came

within the doctrine of *res ipsa loquitur*, which cast the burden of explaining its freedom from negligence on the defendant. In that case it was said: "The case presented is one in which *res ipsa loquitur*, thereby casting upon the defendant the burden of explaining its freedom from negligence in the accident. The explanation offered is that the conductor in charge of the car did nothing to prevent damage, after notice that the trolley had left the wire, except to give a signal (one bell) to the motorman to stop the car at the foot of College hill. As it appears that in order to save the trolley pole from doing damage after leaving the trolley wire it was necessary to stop the car forthwith, or to control the pole by the rope attached to it and provided for that purpose, and as no excuse was offered by the defendant for not making an attempt to do either, it has failed to sustain the burden imposed upon it."

*b. Fall of switch stick from top of electric car.*

Proof of the falling of a switch stick which was being used on the top of an electric car to free the trolley, which was caught in a network of wires, has been held to be sufficient evidence of negligence. *Manning v. West End Street R. Co.* (1896) 166 Mass. 230, 44 N. E. 135. In that case it appeared that a conductor was using a switch stick on the top of an electric car to free the trolley, which had caught in a frog at a junction of some overhead wires. The stick flew from the conductor's hands and injured a person on the sidewalk. The court held that there was sufficient evidence of negligence on the part of defendant, either in the use of the switch stick or the defective arrangement of the overhead wires, saying: "Next it is said that there was no evidence of negligence on the part of the defendant. The conductor must be taken to have known that he was in a public street in which there were or might be travelers, and therefore must be taken to have known that, if the stick did fly with violence from his hands, there was a danger to passers-by similar, although less in degree, to that

which would have attended the firing of a pistol into the way. Apart from the possibility that he might receive an electric shock sufficient to make him let go his hold, the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was negligence in the particular case. . . . A ruling was asked that there was no evidence that the accident was caused by defective construction of the trolley wires and trolley pole. The question is not what we should have found had the matter been submitted to us. We cannot say that the jury were not warranted in finding the arrangements defective from the fact of the trolley leaving the wires and getting so firmly jammed, and the explanation of what the arrangements were and what was possible, especially when coupled with evidence let in without objection that similar accidents had occurred there half a dozen times before, and an admission of the defendant's expert that, if that was true, the place required attention. . . . If there was negligence, and the later acts were proper in view of the exigency, the only question would be that of remoteness, to which we shall refer in a moment. We must deal with the fitness of the switch stick for the use to which it was put, in the same way as with the construction of the wires and trolley pole. The jury possibly might have inferred that alone, without india-rubber gloves, it gave rise to unnecessary danger of an electric shock, and thus of escaping from the holder's hands."

*c. Fall of article from elevated railroad.*

Negligence is inferable from the fall of a piece of metal from an elevated railroad train. *Goll v. Manhattan R. Co.* (1889) 25 Jones & S. 74, 5 N. Y. Supp. 185, affirmed in (1891) 125 N. Y. 714, 26 N. E. 756; *Maher v. Manhattan*

R. Co. (1889) 53 Hun, 506, 6 N. Y. Supp. 309.

In *Goll v. Manhattan R. Co.* (N. Y.) *supra*, it appeared that a pedestrian, while walking on the sidewalk under an elevated structure, was struck by a piece of metal which fell from a cylinder of defendant's locomotive, which suddenly burst. The court held that from the nature of the accident itself negligence might be inferred.

In *Maher v. Manhattan R. Co.* (N. Y.) *supra*, it appeared that a person who was about entering the cellar of his residence was struck by a bar of iron which fell from a train which was passing overhead. The court held that by proof of the fall of a missile from the defendant's structure or machinery, and injury done by it, defendants are put to the duty of an explanation, saying: "In the effort to sustain the first proposition it is said that there is no evidence whatever connecting the defendant with the fall of the iron. This is somewhat extraordinary when the testimony is that it was seen falling from the direction of the defendant's train passing at the time, and immediately thereafter striking the plaintiff, there being no other structure at the locus in quo from which it could have fallen. The testimony may be interpreted, by ingenious device, to mean something else as matter of argument, or speculative theories may be invoked to demonstrate that it was part of a thunderbolt such as the ancients supposed Jove to employ, and particularly to threaten when worsted in argument; but the fact stated, and wholly uncontradicted, is that a piece of iron similar to the one shown in court on the trial, and which struck the plaintiff, was seen in the air, falling, and apparently coming from the defendant's track or train. The second proposition depends for its maintenance upon a kindred argument; and therefore, if the first be unsound, the second has no force under the facts and circumstances which required the justice presiding at the trial to submit the question of negligence to the jury. That was, indeed, the only issue, there being no pretense that the plaintiff con-

tributed to his own injury. It may be unnecessary to say that the plaintiff was entitled to protection from any negligent act of the defendant while in the exercise of any right of property and the lawful use of the street, and that it was the duty of the defendant, in the exercise of its franchise, to use all necessary caution, care, and diligence to prevent injury to person or property. If by any untoward circumstance a person is injured, and there is reason to believe that a missile occasioning it emanated from the defendant's structure or machinery, and that incident from its nature may constitute an element of negligence or want of care, the defendants, on proof of its appearance and the injury done by it, are put to the duty of explanation at least. Here the evidence fully justified the conviction that the iron which struck the plaintiff came from the defendant's structure or its appointments, there being evidently no other source at the time of its appearance. The presumption is against the employment of the missile by the wrongful act of persons for whose conduct the defendant is not responsible; and if the defendant is excusable upon this ground, it must prove the fact establishing the excuse. . . . The iron which fell is germane to the structure, which is chiefly of that material, as well as the machinery employed, and it must be that it was broken off in some way while the franchise was in use, which would indicate the absence of that care and duty, that high sense of obligation which is imposed upon the defendant to keep its structure and machinery in such perfect condition that no one, except by extraordinary circumstance to be proved by it, shall be injured. And this rule should apply as well to wayfarers along the public streets as to passengers."

#### IV. *Limitation of rule.*

Unless there is direct proof of the act or acts causing the injury and of all the circumstances of the accident the rule does not apply. Mere presumptions are insufficient. *De Gloppe v. Nashville R. & Light Co.* (1910) 123 Tenn. 633, 33 L.R.A. (N.S.) 913,

134 S. W. 609. In that case it appeared that while he was driving alongside of a street car on an upgrade, a person was injured by a sliver of metal piercing his eye. It was alleged that the injury was caused by the revolving of the wheels on the tracks without moving the car, the sliver of metal being thrown off of either the wheels or tracks. It was held that unless there was direct proof of the act which caused the injury and of all the circumstances of the accident, and unless the only reasonable explanation of the accident would give rise to an inference of negligence, the doctrine of *res ipsa loquitur* would not apply. It was said: "The limitations upon this doctrine are well defined and well understood, and are fully illustrated and fully expressed by this court in *East Tennessee & W. N. C. R. Co. v. Linda-mood* (1903) 111 Tenn. 457, 78 S. W. 99, where the court quoted the following from the supreme court of California with approval: 'Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but when a plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. The inference cannot be drawn from a presumption, but must be founded upon some fact legally established.' Applying these principles to the present case, we find that plaintiff in error was passing the car mentioned when his face was about 6 feet from the car, with his left side to the car, when he was struck in the left eye with force by a hard substance coming under from the car, while the wheels of the car were revolving rapidly in the same place under a heavy load. The fact that the substance which struck plaintiff in error in the eye came from under the car is a fact which may reasonably be drawn from the whole

circumstances of the accident by a fair inference from the situation of the parties at the time. It is not directly proven, and is arrived at by inference only. There is no direct, open, and visible connection between this inferred fact and the rapid turning of the wheels of the car at the same place. Whatever of connection there may be between the turning of the wheels and the striking of plaintiff in error arises only upon inference, and in order to make this connection between the operation of the car and the injury of plaintiff in error it must be inferred that the substance which struck plaintiff in error came from under the car, and from that fact it must be further inferred that it was thrown from under the car by the rapidly turning wheels, and there still must be superadded to these two inferences the further inference that the motorman was negligent in the operation of the car at the time, or that the wheels of the car were defective, or that the track was defective at the place of the accident, and that defendant in error had notice of the defects, or by the exercise of due care should have known of them. If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an inference of negligence, then the rule of *res ipsa loquitur* would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care. . . . The only fact that is directly proven, from which it is possible that negligence might be inferred, is the fact that the car was heavily loaded upon

a steep ascent in defendant's track, so much so that it stalled and the application of the power to its machinery caused the wheels to slip and revolve rapidly. Nothing else appears than the facts stated. It is not proven that the car was overloaded, or carelessly loaded, or that the power was negligently or improperly applied. It is a matter of common knowledge that the wheels of a street car may turn rapidly at the same place upon the rails of the track, when both the wheels and the rails are in perfect condition and the motorman is in the exercise of due care . . . The negligence averred in the declaration as the proximate cause of the injury is: First, that the electrical machinery and wheels of the car were defective. Second, that the rails were worn and out of repair. Third, that the motorman was negligent and careless in the management and operation of the car. Fourth, that rocks and debris and other hard substances had been allowed to accumulate on the track. Fifth, that the car was overloaded. There is no testimony in the record tending to establish either of the alleged acts of negligence; and from the facts proven, if it were permissible to infer the act which caused the injury, no inference points directly to one of the acts of negligence rather than any of the others. What caused the injury, and the defendant's negligent connection with it, are left entirely at large by the proof, and are matters of pure conjecture. Under all the cases cited, this is not sufficient."

*V. Rule in Pennsylvania.*

In Pennsylvania, it seems that the unexplained fall of a trolley pole is not sufficient to raise an inference of negligence. Thus, in *Benson v. Philadelphia Rapid Transit Co.* (1915) 248 Pa. 302, 93 Atl. 1009, it appeared that a pedestrian was injured by the fall of a trolley pole, which was drawn from its socket on the roof of the car when the trolley wheel slipped from the wire and caught in a crotch of the supporting wires. The court held that as such an accident could reasonably be expected to occur but rarely, and as there was nothing to show that there

was anything the matter with the apparatus, or that the pole was not adjusted properly, a nonsuit was properly entered. It was said: "There was nothing in the evidence which tended to show that anything was wrong with the apparatus, or that the pole was not adjusted in its place in the ordinary and proper way. The accident was the result of an unusual combination of circumstances. In the ordinary operation of a car it is necessary that the trolley pole be left free at the upper end where the wheel comes in contact with the wire from which the current is derived, in order that the pole may be detached or shifted from the trolley wire, as frequently occasion may require. The accidental slipping of the wheel from the trolley wire is difficult to prevent, but ordinarily no harm results therefrom; but in the present case it happened to leave the wire at the precise point where the tension of the spring upon the pole threw the end of it into a fork or crotch of the supporting overhead wires, where it caught and held fast, while the car moved on. The result was that the pole was drawn out of the socket in which it was fastened at the lower end. Such a combination as to time and place as here occurred when the wheel of the trolley pole left the track could reasonably be expected to occur but rarely, and even if such a possibility had been anticipated, no practicable means of preventing the thing which occurred has been shown. Doubtless it is a rare thing for the upper end of the pole to get out of its place and become fastened in the overhead wires; but, as we said with reference to a similar occurrence which was disclosed by the evidence in *Clark v. Philadelphia Rapid Transit Co.* (1913) 241 Pa. 442, 88 Atl. 683: 'Manifestly in such a case something must give away. Unless the trolley pole should do so at some point in its length, either at the top or bottom, the overhead wiring system would be dragged down by the weight of the ongoing car. It might well be that greater damage would result from this than could be reasonably anticipated from the pulling of the trolley

pole from its socket.' The placing of the safest point for a possible necessary separation where some part of the appliance must give way was a matter of judgment for the builders of the car. Neither as to the plan upon which the apparatus was constructed, nor as to the method of its operation, nor as to the condition in which it was maintained, do we find anything in the evidence from which it can fairly be held that the defendant was properly chargeable with negligence."

So, in *Zercher v. Philadelphia Rapid Transit Co.* (1912) 50 Pa. Super. Ct. 324, it appeared that a pedestrian while standing at a street crossing was injured by the fall of a trolley pole. After proving the fall of the pole and the injury, plaintiff rested her case. The court held that the mere fall of the pole and the consequent injuries did not constitute negligence unless there was further proof of the condition of the car, its equipment, or operation, or the like, saying: "Now it is manifest that this testimony is absolutely barren of even a scintilla of evidence tending to support the material averment of the declaration which we have quoted. Unless, then, the situation described by the plaintiff and her witnesses brings this case within the operation of the principle expressed in the maxim *res ipsa loquitur*, which is an exception to the general rule, the plaintiff's case has failed. It is true that in administering the rule cases have arisen of such a character that the courts have felt obliged to consider as legally sufficient to support an averment of negligence a very slight amount of evidence in addition to the circumstances of the accident itself. *Booth v. Dorsey* (1904) 208 Pa. 276, 57 Atl. 562, and *Ahern v. Melvin* (1902) 21 Pa. Super. Ct. 462, are fair illustrations of this class of cases. It will be observed, however, from an examination of the record of each of these cases that there was testimony, apart from the occurrence itself, tending to show that the injury resulted from the careless act of the servant or employee of the defendant. Here there is not a line or syllable tending to establish any such fact.

The pole fell and injured the plaintiff. Unless that fact is a witness for the plaintiff and speaks in support of her averment, she is absolutely without proof to sustain it. There is nothing to show whether the car was an old one or a new one; no hint that it was being operated in any unusual or improper manner; not a spark of evidence that it was not equipped in the usual and ordinary manner, or was not controlled by the usual officials; nothing to even faintly indicate that the condition of the pole as it lay on the sidewalk exhibited any appearance that would warrant an inference that its fall came from some defect that would have been discovered by proper inspection; in a word, nothing but the fact that it fell, with the consequent injury to the plaintiff. Can it be successfully argued that we have here a proper case for the application of the exceptional principle expressed in the maxim already quoted? The force of the argument of the able counsel for the appellee in support of this conclusion is fairly expressed in the following paragraph from the conclusion of his printed brief: "The plaintiff was injured by the fall of a mechanical appliance attached to one of the defendant's cars. This trolley pole was in the exclusive control of the defendant company. The duty of keeping it in position and repair was wholly its own, and the result was so far out of the usual course that there was no fair inference from the testimony that it could have been produced from any other cause than the negligence of the company in the original construction, or in their manner of keeping it in good condition and proper repair.' Whatever might be said of the convincing character of the argument to support the desired conclusion, were the question an open one, it would be useless for us to discuss it, because we think it has been authoritatively answered by several recent cases in the supreme court and this court, which we are obliged to follow."

But in the recent case of *Dougherty v. Philadelphia Rapid Transit Co.* (1917) 257 Pa. 118, 101 Atl. 344, 15 N. C. C. A. 1057, it was held that on

proof of the falling of a trolley pole the proof of negligence need be very slight. In that case it appeared that a pedestrian was injured by a trolley pole leaving the trolley wire, becoming caught in the overhead wires, and falling. The court said: "On the whole, we think that there was sufficient circumstantial evidence to require its submission to the jury, so that they might determine whether or not the trolley pole had been pulled from the top of the car by becoming enmeshed in the wires, and further, if they so found, whether or not the conductor was guilty of negligence in failing to hold the rope at the place in question; finally if he was so guilty, whether or not his neglect was the proximate cause of the accident. Outside of Pennsylvania, there is a strong line of cases which hold that the mere happening of such an accident as the one here under investigation puts the burden of explanation upon the defendant. These cases go upon the principle that 'where a thing is shown to be under the management of the defendant and his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it offers reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care (see leading case of *Scott v. London & St. K. Dock Co.* (1865) 3 Hurlst. & C. 596, 159 Eng. Reprint, 665, 84 L. J. Exch. N. S. 220,

11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410); but we have not gone this far. . . . In *Geiser v. Pittsburg R. Co.* (1909) 223 Pa. 172, 72 Atl. 351, however, where a pedestrian upon the street was injured by a car which jumped its track, near a switch, and the only evidence of negligence was the fact that 'the switch point was worn flat,' we held the jury might draw the inference that the accident was occasioned by the worn condition of the switch point. There we affirmed per curiam, adopting the opinion of the court below wherein the applicable principle is stated thus: 'It is still the rule of law that the happening of the accident in such cases as this one is not evidence itself of negligence, but the quantum of proof necessary to establish negligence, under certain circumstances need be very slight.' We feel that the rule as just stated should be applied in the present instance. While, before the plaintiff can recover, she must show how the accident happened and fix the defendant with negligence, yet, in so doing, she is not restricted to direct evidence; she may make her case out by circumstantial proofs sufficiently strong to carry conviction to a reasonable mind. As already indicated, we feel that certain parts of the testimony offered should have been allowed as evidence, and that the issues heretofore suggested should have been submitted to the jurors for their determination."

R. C. L.

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RILLA LONG

v.

ALEXANDER LONG, Plff. in Err.

*Ohio Supreme Court—April 2, 1919.*

(— Ohio St. —, 124 N. E. 161.)

**Eminent domain — parties — dower right.**

1. One having an inchoate right of dower is neither a proper nor necessary party to an action in condemnation of real estate or any interest therein, in the exercise of the power of eminent domain.

[See note on this question beginning on page 1347.]

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Headnotes by WANAMAKER, J.

**Dower — inchoate — right to proceeds of condemnation.**

2. Neither has such person any right to participate in the fund arising from such condemnation proceedings, whether it be for land taken or for damages to the residue.

[See 9 R. C. L. 582.]

— when attaches.

3. The right of such person is inchoate, and therefore wholly dependent, under the laws of Ohio, upon survivorship as to any and all property, real or personal.

[See 9 R. C. L. 582.]

**ERROR** to the Court of Appeals for Crawford County to review a judgment modifying and affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the fair and reasonable value of her inchoate right of dower out of funds awarded defendant in condemnation proceedings. *Reversed.*

Statement by Wanamaker, J.:

Alexander Long and Rilla Long, husband and wife, lived in Polk township, Crawford county, Ohio, on a farm, the fee of which was in Alexander Long. The Cleveland, Cincinnati, Chicago, & St. Louis Railway Company brought an action in the probate court of said county to appropriate a part of said land for railroad purposes. The wife, Rilla Long, was not a party to said action. Such proceedings were had that damages were awarded in the sum of \$3,410 for lands appropriated, and in the sum of \$2,540 for injury to the residue; the total award being \$5,950. Shortly thereafter Rilla Long commenced an action in the court of common pleas of Crawford county, asserting that she was entitled to a share of the \$5,950, as the fair and reasonable value of her inchoate right of dower, claiming her right of action under favor of §§ 11,038 et seq., Gen. Code.

Alexander Long, the defendant, demurred to said petition, which demurrer was overruled and exceptions noted. Upon answer duly made and issues joined, the court of common pleas found the plaintiff entitled to an inchoate dower in both the compensation and damages in the total amount of \$606. Upon appeal taken to the court of appeals this judgment was modified by reducing the sum to \$585, for which amount final judgment was rendered.

Error is now prosecuted here to reverse that judgment.

Mr. W. J. Geer for plaintiff in error.  
Mr. R. V. Sears for defendant in error.

Wanamaker, J., delivered the opinion of the court:

What property rights has the wife in the real property of the husband during the life of both, particularly while living together as husband and wife? It is conceded that her property interests in her husband's real property are declared and defined by statute.

Section 8606, Gen. Code, reads: "A widow or widower who has not relinquished [relinquished] or been barred of it, shall be endowed of an estate for life in one third of all the real property of which the deceased consort was seised as an estate of inheritance at any time during the marriage, in one third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, and in one third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim."

Section 8607, Gen. Code, reads: "The widow or widower may remain in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned. Dower shall not be assigned to a widow or widower in real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, until the termination of the prior estate."

The universal rule is that the right of either husband or wife in



the real property of the other, of which said other died seised, is conditioned solely upon survivorship.

**Dower—when attaches.** If the one claiming such interest die before the one seised of the fee, such death wholly extinguishes such interest. During the life of such consort such interest in realty is usually spoken of as "inchoate right." Inchoate right is defined by Bouvier, "That which is not yet completed or finished," and the author states that, "during the husband's life, a wife has an inchoate right of dower," citing 2 Bl. Com. 130. It is, in short, merely the beginning of a right that does not ripen unless the one possessing such right in the property of another shall survive.

Now, was the wife a necessary party in the condemnation proceedings had in the probate court of Crawford county? If she was, then by not being made a party her right in the property still exists, and therefore she would have no right in the fund. Her right cannot attach to both at the same time.

This question has never been squarely before this court in a condemnation case. However, the property rights of the wife in the real estate of the husband have been before this court in a partition case involving substantially the same question, that of *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355. That was a case in partition in which the husband of plaintiff was seised as tenant in common of the one undivided fourth of certain lands. The wife of such tenant in common had the "inchoate right of dower." The question was, The wife not being a party to the action, did her "inchoate right of dower" pass to the purchaser at partition sale? Did the purchaser take the entire estate free from the right of dower?

The syllabus in that case reads as follows: "A sale, under the Act to Provide for the Partition of Real Estate," of an estate held in common, divests the wife of a cotenant in fee of the estate of her inchoate

right of dower therein, and passes the entire estate to the purchaser."

Judge Brinkerhoff, in the opinion in this case, uses the following language:

"Dower is not the result of contract, but is the creature of positive law, founded on reasons of public policy, and subject, while it remains inchoate, to such modifications and qualifications as legislation, for like reasons of public policy, may see proper to impose. *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473, in which it was held that 'where, in pursuance of an act of the legislature, lands are taken by a municipal corporation for public use, upon an appraisalment and payment of their value to the holder of the fee, the corporation acquires an absolute title to them, divested of any inchoate right of dower existing in his wife.' See also *Gwynne v. Cincinnati*, 3 Ohio, 24, 17 Am. Dec. 576.

"Now, in case of a sale as provided for in this statute, where the husband is the owner of the fee and the wife has but a contingent right of dower, how and to whom is this distribution of the proceeds of the sale of the estate made? Always in practice, so far as we know, it is made to the husband, and to him alone. And we think properly, for he is the sole representative of the estate. She has a contingent possibility of interest in it, which may be released, but no property, no actual interest in it which is the subject of grant or assignment. *Millers v. Woodman*, 14 Ohio, 518. Nor is the value of her possible and contingent interest capable of estimate with any degree of accuracy. *Moore v. New York*, ubi supra. And on this point we may consider the rule of distribution as settled by the universal and unvarying practice. . . .

"The fact that the wife was not a formal party to the proceeding in partition does not, we think, at all alter the case. The terms of the statute do not require that she should be made a party, and we see

no good reason why it should be required. . . .

"And when the law steps in and divests the husband of his seisin and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

Now if she was not a necessary party, if she did not have such legal or equitable estate in the lands partitioned as to make her a necessary party to the partition suit, upon what principle may it be claimed

**Eminent domain** that the wife was a  
**parties—** necessary party to  
**dower right.** the condemnation

suit? In both cases the entire interest of the husband was divested; as much in the condemnation suit as in the partition suit.

The whole interest of her husband is likewise divested under the Weaver Case, *supra*, which case still stands as the law of this state. As Judge Brinkerhoff wisely observes: "And when the law steps in and divests the husband of his seisin and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

Some confusion has arisen in failing to comprehend and apply the full significance of this language. As her interest in the realty was "inchoate," that is, unavailable to her as a present vested or subsisting interest, so when this real estate was converted to personalty her

**Dower—** right therein was  
**inchoate—** still "inchoate," that  
**right to pro-** is, she did not have  
**ceeds of** a present right to  
**condemnation.** possess it, to seize

it, and to use it, because it was still conditioned upon her survivorship, the same as her interest in any other personalty of the husband.

It should be noted that §§ 11,038 et seq., Gen. Code, and the language of these statutes, particularly §

11,042, deal only with "all persons having or claiming an interest, legal or equitable, in the property." It has long been the well-settled practice in partition suits to make all persons claiming an interest, legal or equitable, in the estate in question, parties to the action, so as to foreclose all interests and give a full and complete title to the premises; but the Weaver Case clearly and convincingly declares that the wife has not such an interest, legal or equitable, which requires her to be a party. Her interest in the land in an action to condemn through eminent domain being the same as in an action to partition, no good reason can be assigned why she is a necessary party to pass full title to the premises in one action and not in the other.

What are her interests in the fund? As Judge Brinkerhoff well said, the right is "inchoate." May she claim a present pecuniary interest therein? This fund is no different than other personal estate of the husband. No one would claim that she had a right during his lifetime to subject to present possession any part of his personal property to which she might be entitled upon her survivorship.

The soundness of this position is made doubly evident by this supposed case, which might happen any day. Suppose to-day she gets her share in the fund by order of this court. To-morrow her husband dies. As his surviving widow she would have her right to again share in the remaining fund, as she would in all other personal and real property. Such a doctrine would give her a double portion as against other interests in the same estate. This policy might prove not only most burdensome to the estate, but grossly unjust and unfair to the interests of the heirs.

Some reliance has been placed upon those cases in which creditors have subjected the estate of the husband to the satisfaction of judgments rendered against him, in which cases the "inchoate" right of

dower of the wife was ascertained under the mortality tables and the same exempted from execution. Such judgments, however, clearly proceed out of the humanities of the law, out of a desire to save something for the wife out of property of the husband that has been wholly extinguished so far as the husband's interest is concerned, from which he will receive no compensation such as arises from cases of emi-

nent domain or a sale in partition. Equity does not call for an extension of the doctrine so far as to permit the wife to share twice in the proceeds from the sale of realty, either through partition or by reason of condemnation proceedings under eminent domain.

The judgment is reversed.

Nichols, Ch. J., and Jones, Matthias, Johnson, Donahue, and Robinson, JJ., concur.

## ANNOTATION.

### Eminent domain: rights of one having inchoate right of dower.

It is the general rule that the wife is not a necessary party to proceedings to condemn her husband's real property, and that she has no interest in the proceeds.

**Indiana.**—*Duncan v. Terre Haute* (1882) 85 Ind. 104 (as stating the rule).

**Maine.**—*French v. Lord* (1879) 69 Me. 537 (as stating the rule).

**Massachusetts.**—*Flynn v. Flynn* (1898) 171 Mass. 312, 42 L.R.A. 98, 63 Am. St. Rep. 427, 50 N. E. 650.

**Missouri.**—*Venable v. Wabash Western R. Co.* (1893) 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493 (as stating the rule).

**Montana.**—*Summers v. Sullivan* (1909) 39 Mont. 42, 101 Pac. 166.

**New York.**—*Moore v. New York* (1853) 8 N. Y. 110, 59 Am. Dec. 473.

**Ohio.**—*LONG v. LONG* (reported herewith) ante, 1343.

**Pennsylvania.**—*Arnold v. Buffalo, R. & P. R. Co.* (1907) 32 Pa. Super. Ct. 452 (as stating the rule).

**Virginia.**—*Justice v. Georgia Industrial Realty Co.* (1909) 109 Va. 366, 63 S. E. 1084 (obiter).

An inchoate right of dower is not such an interest in land that when the land is taken by the right of eminent domain the wife can have any portion of the money received for the land, either paid to her directly or set aside for her benefit on the contingency of her surviving her husband. *Flynn v. Flynn* (1898) 171 Mass. 312, 42 L.R.A. 98, 63 Am. St. Rep. 427, 50 N. E. 650, *supra*.

"The courts of this country seem to have uniformly held, when the question has come before them, that when lands are appropriated by the exercise of eminent domain, . . . the dower of the wife is defeated." *Duncan v. Terre Haute* (1882) 85 Ind. 104, *supra*.

In *Venable v. Wabash Western R. Co.* (1893) 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493, *supra*, a case of sale to a railroad company by a husband alone, the court said: "The common consent and opinion of the legal profession in this state has been that it was not necessary to make a wife a party in order to bar her inchoate right of dower, either as to a railroad right of way or other public highway. This of itself is a very pregnant circumstance, and very good evidence of what the law is."

Where there had been an agreement between the husband and the railway company the court said: "Dower inchoate is not an estate in the land, but a mere contingent claim, and is defeated by proceedings to appropriate the land to public use during the life of the husband." *Arnold v. Buffalo, R. & P. R. Co.* (1907) 32 Pa. Super. Ct. 452, *supra*.

It is not necessary to make a woman having an inchoate right of dower a party to proceedings to secure a right of way. *Summers v. Sullivan* (1909) 39 Mont. 42, 101 Pac. 166, *supra*.

The New Jersey courts take a different view. Thus, in *State National R. Co., Prosecutors, v. Easton & A. R. Co.* (1873) 36 N. J. L. 181, the court expressed the opinion that a statute re-

quiring notice of condemnation proceedings to be given to the persons interested included those having an inchoate right of dower, the object being to extinguish the right by payment. And it was held in *Wheeler v. Kirtland* (1875) 27 N. J. Eq. 534, that equity will secure to the wife that portion of the award which represents her inchoate dower.

The courts of New York have taken a curious course on the subject.

It was held in *Moore v. New York* (1853) 8 N. Y. 110, 59 Am. Dec. 473, *supra*, that an owner of an inchoate right of dower is not entitled to notice of condemnation proceedings, nor to a share in the award. This was an action brought by a widow against the city to recover dower in premises condemned in the husband's lifetime, the award having been paid to him.

In *Re Central Park Extension* (1863) 16 Abb. Pr. (N. Y.) 56, the court, in holding that the corporation took title irrespective of inchoate rights of dower, said, obscurely enough, of *Moore v. New York* (N. Y.) *supra*: "It might have been added to that case that the right was transferred from the land to the money received for the land by the husband, if the wife survived him."

In *Re New York & B. Bridge* (1894) 75 Hun, 558, 27 N. Y. Supp. 597, affirmed without opinion in (1894) 143 N. Y. 640, 37 N. E. 823, it was held, upon an application in the condemnation proceedings, that as between husband and wife the law will protect the wife's inchoate right of dower in an award for condemnation. The court said: "In the case of *Simar v. Canaday* (1873) 53 N. Y. 304, 13 Am. Rep. 523, it is said in the opinion of the court: 'We think that it must be considered as settled in this state, notwithstanding *Moore v. New York* and some dicta in other cases, that as between a wife and any other than the

state or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end.' This limitation of the *Moore Case* materially circumscribes its operation and leaves it to stand as an authority only as between the wife and the state and its delegates." (The statement in the *Simar Case* was obiter so far as eminent domain was concerned.) The same ruling was repeated in *Re New York & B. Bridge* (1895) 89 Hun, 219, 34 N. Y. Supp. 1002.

It may be noted that it was held in *McCullough v. St. Edward Electric Co.* (1917) 101 Neb. 802, 165 N. W. 157, that "while the husband is living the interest of the wife in his real estate, other than the homestead, is not such as requires that she be made a party to an action" by her husband for damages for the taking of or injury to land by a corporation having the right of eminent domain, under a statute providing that "when any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a nonresident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead;" one fourth, one third, or one half to the surviving husband or wife, depending upon the number and parentage of the children."

B. B. B.

O. B. KEE et al., Plffs. in Err.,  
v.  
ARMSTRONG, BYRD, & COMPANY.

Oklahoma Supreme Court — June 17, 1919.

(— Okla. —, 182 Pac. 494.)

**Libel — nonlibelous.**

1. A publication is not libelous per se which states that the publisher has a bond of a merchant to give away because the merchant would not accept it for merchandise at face value, but only at a heavy discount.

[See note on this question beginning on page 1362.]

— **classes of statements.**

2. Words charged to be libelous may be divided into three classes: First, those that cannot possibly bear a defamatory meaning; second, those that are reasonably susceptible of a defamatory meaning, as well as an innocent one; third, those that are clearly defamatory on their face.

— **construction of words.**

3. Words used in an alleged slanderous communication or article are to be construed by their most natural and obvious meaning, and in the sense that would be understood by those to whom it was addressed.

[See 17 R. C. L. 312.]

— **words libelous per se.**

4. In order that words shall be libelous per se as disparaging a person in his trade or business, they must have been spoken of plaintiff in relation thereto, and be of such a character as would prejudice him by impeaching either his skill or knowledge, or attacking his conduct in such business.

[See 17 R. C. L. 296–298.]

— **charging lawful transaction.**

5. Words charging one with being engaged in a perfectly lawful transaction, or merely doing that which he has a legal right to do, are not actionable per se.

[See 17 R. C. L. 296.]

**Pleading — libel — extrinsic facts.**

6. If the alleged defamatory words are not actionable on their face, but derive their defamatory import from extrinsic facts and circumstances, such extrinsic facts and circumstances must be set forth and connected with the words charged, by a proper averment. Words not actionable per se may be made to appear actionable by averring such extrinsic facts as will show that

they were intended to be slanderous and were so understood. These averments must be distinctly stated in the inducement, and applied to the plaintiff by a proper colloquium, with the intended and understood meaning correctly set out in the innuendoes.

[See 17 R. C. L. 398.]

**Libel — pleading — inducement.**

7. An "inducement" is a statement of facts out of which the charge arises, or which is necessary or useful to make the charge intelligible, or, in other words, it is intended to state facts whereby the libel or slander is rendered intelligible, and is shown to contain an injurious imputation.

[See 17 R. C. L. 393.]

— **colloquium.**

8. A "colloquium" only serves to show that the words were spoken in reference to the matter of the averment.

[See 17 R. C. L. 394.]

— **innuendo.**

9. An "innuendo" is only explanatory of the subject-matter sufficiently expressed before, and is and can be only explanatory thereof, and cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain, nor can it make a thing certain which is in fact uncertain, nor enlarge or restrict the meaning of words, nor introduce new matter.

[See 17 R. C. L. 396.]

**Trial — construction of libel.**

10. It is the duty of the court to determine whether the language used in the publication can fairly or reasonably be construed to have the meaning imputed to it in the petition.

[See 17 R. C. L. 425, 426.]

**Pleading — libel — demurrer — admission.**

11. The demurrer to the petition for libel only admits the truth of the facts pleaded, and does not determine the truth of the inference of the pleader, based on facts pleaded, unless the facts are sufficient to authorize such inference.

[See 17 R. C. L. 398.]

**Libel — construction by complainant — correctness.**

12. The publication in the instant case is not susceptible to the construc-

tion placed upon it by the plaintiff in its petition, and, in determining whether the petition states a cause of action, the improper construction placed upon the same by the plaintiff must be disregarded.

**Pleading — libel — extrinsic facts.**

13. The petition fails to connect the publication with any extrinsic facts and circumstances which would make the same libelous, therefore does not state a cause of action.

[See 17 R. C. L. 393.]

(Kane, J., dissents.)

**ERROR** to the District Court for Oklahoma County (Oldfield, J.) to review a judgment in favor of plaintiff in an action brought to recover damages sustained by reason of an alleged libelous publication. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John H. Burford, John H. Miley, Roy Hoffman, Frank Burford, and Warren K. Snyder for plaintiffs in error.

Messrs. Harris & Howard and Claude Nowlin, for defendant in error:

The publication complained of was libelous because it tended to injure plaintiff in its business.

*Verbeck v. Duryea*, 36 Misc. 242, 73 N. Y. Supp. 346; *Spencer v. Minnick*, 41 Okla. 613, 139 Pac. 130; *Atkinson v. Detroit Free Press Co.* 46 Mich. 348, 9 N. W. 501.

The allegation that plaintiffs had issued piano bonds to the public, or its patrons, purporting to be good for the amount therein named upon the purchase price of pianos at their store, is a proper part of the petition.

*O'Connell v. Press Pub. Co.* 214 N. Y. 352, 108 N. E. 556; *Stone v. Cooper*, 2 Denio, 293; *Crashley v. Press Pub. Co.* 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440; *McDonald v. Press Pub. Co.* 174 App. Div. 463, 161 N. Y. Supp. 356; *Stern v. Press Pub. Co.* 162 N. Y. Supp. 891; *First Nat. Bank v. Winters*, 165 App. Div. 726, 151 N. Y. Supp. 332; *Wittemann Bros. v. Wittemann Co.* 88 Misc. 266, 151 N. Y. Supp. 813; *Lyford v. Winters*, 163 App. Div. 720, 149 N. Y. Supp. 203; *Carpenter v. Glens Falls Post Co.* 164 App. Div. 396, 149 N. Y. Supp. 801; *Russell v. Brooklyn Daily Eagle*, 168 App. Div. 121, 153 N. Y. Supp. 450; *Blechner v. Kraser*, 157 N. Y. Supp. 256; *Miller v. Donovan*, 16 Misc. 453, 39 N. Y. Supp.

820; *Gracy v. Sun Printing & Pub. Asso.* 171 App. Div. 490, 157 N. Y. Supp. 438.

Exemplary damages may be recovered where malice is actual or presumed, and, if a libelous publication is wantonly made, malice in fact is presumed from the wanton publication.

*Ulrich v. New York Press Co.* 23 Misc. 168, 50 N. Y. Supp. 788; *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475, 94 Fed. 762; *Minter v. Bradstreet Co.* 174 Mo. 444, 73 S. W. 668; *Atchison, T. & S. F. R. Co. v. Chamberlain*, 4 Okla. 542, 46 Pac. 499; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, 41 N. E. 409.

McNeill, J., delivered the opinion of the court:

This controversy arose over the publication of an article appearing in the *Daily Oklahoman*, November 22, 1908. The publication complained of is as follows:

I have a \$100 bond from Armstrong-Byrd Music Co. that I will give to anyone that can use it. I bought a piano there, and when I showed my bond they refused to accept it without I would add \$50 to the price I paid for it.

Mrs. O. B. Kee.

Upon the trial of the case in the district court, plaintiff Armstrong, Byrd, & Company recovered a judgment against O. B. Kee and Rose

Kee. The case was appealed here, and on July 13, 1915, an opinion was rendered by Commissioner Brett, and the same is reported in — Okla. —, 151 Pac. 572. Thereafter numerous petitions for rehearing were filed, and the case was transferred to the supreme court proper, and on the 19th day of November, 1917, the supreme court adopted the opinion of Commissioner Brett, and the same is reported in — Okla. —, 175 Pac. 836. A petition for rehearing was again filed and granted, and the case is again before this court for final determination.

The plaintiff's petition was very lengthy, and the substance of the same is that Armstrong, Byrd, & Company, a corporation, was engaged in the music business, and enjoyed a large trade; that its reputation was of very great pecuniary value; that the article above referred to was published in the Oklahoman on the 22d day of November, 1908. They then pleaded the meaning of the article published, alleging that the same was libelous and untrue. A more complete reference to the petition will be referred to hereafter in this opinion.

The defendants filed a motion to make the petition more definite and certain, which was overruled by the court, and to which the defendants excepted. Thereafter the defendants filed a demurrer attacking the petition on the grounds that the same did not state facts sufficient to constitute a cause of action. This was overruled by the court, to which ruling the defendants excepted. Defendants then answered, first, by way of general denial; second, denying that any conspiracy existed between O. B. Kee and Rose Kee; third, denied that they had published, or caused to be published, the article set forth in plaintiff's petition, or that they had anything whatever to do with the publication of the same; fourth, they further state that the supposed libelous publications as set forth in the article were each and all of them true in

substance and in fact, and then state the facts of a transaction occurring between the parties, attempting to justify or show the statements contained in the article were true. Upon the trial of the case, the court instructed the jury that the article was libelous, and if the defendants had published the same they would be liable for damages unless the facts therein stated were true. The jury returned a verdict for plaintiff, and defendants appealed.

The parties will be referred to hereafter as Armstrong, Byrd, & Company, plaintiff, and O. B. Kee and Rose Kee as defendants, the positions they occupied in the court below.

For reversal, the defendants assign sixteen separate and distinct assignments of error. The first assignment of error is that the court erred in overruling the demurrer interposed by these defendants and each of them to the petition.

It will be necessary to direct our attention, first, to the petition to ascertain whether the petition stated a cause of action. The subject of libel and slander is an important one, and occupies a large space in the reported decisions of the courts of the different states.

In considering cases of this kind and character, the different courts have referred to articles as being "libelous," and those that are "libelous per se." No writer has attempted to lay down any strict rule of law, which may be followed by the courts in distinguishing between publications that are "libelous" and those termed "libelous per se." We have been unable to find any writer who has defined the term "libelous per se," but our court has often referred to publications as being "libelous" and those "libelous per se."

It has been well said that words charged to be libelous fall into one of three classes: "First, those that cannot possibly bear a defamatory meaning; second, those that are reasonably susceptible of

Libel—classes of statements.

a defamatory meaning, as well as an innocent one; third, those that are clearly defamatory on their face." *Pratt v. Pioneer Press Co.* 30 Minn. 41, 14 N. W. 62.

If a particular publication comes within the first of these classes, the same will not support an action for libel, although such a publication might support an action for a malicious wrong or malicious injury, or an action as designated by common law, an action on the case, but the same cannot be the foundation for an action for libel or slander. The foundation for an action of libel must be that the words are defamatory or bear a defamatory meaning.

The second class is those words that are reasonably susceptible of a defamatory meaning, as well as an innocent one, and may be made defamatory by reason of their ambiguity, or by pleading certain extrinsic facts connecting said facts with the publication, and by pleading that the article was meant and understood by the general public to have such a meaning, and that the general public so construed the publication.

The third class has been referred to by numerous text-writers, and in the different decisions, as words or publications that are libelous per se, and this court, in numerous decisions, has adopted the rule and termed said publication as libelous per se.

In determining what classification a publication is within, our courts have adopted the following rule in construing the meaning of publications, to wit: "Words used in an alleged slanderous communication or article are to be construed by their most natural and obvious meaning, and in the sense that would be understood by those to whom it was addressed." *Bodine v. Times-Journal Pub. Co.* 26 Okla. 135, 31 L.R.A. (N.S.) 147, 110 Pac. 1096; *Spencer v. Minnick*, 41 Okla. 613, 139 Pac. 130; *Kelly v. Roetzel*, — Okla. —, 165 Pac. 1150.

—construction  
of words.

The statute in force and effect at the time of the publication was Wilson's Rev. & Ann. Statutes of 1906. Section 2237 defines "libel" as follows: "Libel is a false or malicious unprivileged publication . . . or which tends to deprive him of public confidence, or to injure him in his occupation."

In determining whether the publication is libelous or not, the plaintiff, operating a store, will come within that class of cases that refer to merchants, and whether such a publication when referring to a merchant is libelous.

"No general rule can be laid down defining absolutely and once and for all what words are defamatory and what are not. Words which would seriously injure A's reputation might do no harm to B. Each case must be decided mainly on its own facts." *Odgers, Libel & Slander*, p. 2.

The general rule is that the alleged libelous publication, when referring to a person engaged in business of a merchant, in determining whether the publication is libelous per se, is, —words libelous per se. if the publication imputes to the merchant any fraud, dishonesty, misconduct, or insolvency or incapacity in the management of said business, or any connection therewith, then said publication is termed libelous per se.

The publication in the case at bar, if libelous, is to be determined so under the subdivision of the statute which provides: "Or which tends to deprive him of public confidence, and to injure him in his occupation."

This court, in the case of *N. S. Sherman Mach. Co. v. Dun*, 28 Okla. 447, 114 Pac. 617, stated: "The question essential for determination is whether said publication was libelous per se. The alleged libel does not impute to the plaintiff any fraud, dishonesty, misconduct, or incapacity in the management of said business, or in connection therewith, or in any other relation of life."



Odgers on Libel & Slander, p. 32, stated as follows: "Any printed or written words are libelous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present, or future, or which impute to him fraud or dishonesty or any mean or dishonorable conduct in his business, or which impugn his skill, or otherwise injure him in the way of his trade or employment."

In referring to injuring a person in his trade or business, the supreme court of New York, in the case of *Armstrong v. Sun Printing & Pub. Asso.* 137 App. Div. 828, 122 N. Y. Supp. 531, states as follows: "In order that words shall be libelous per se as disparaging a person in his trade or business, they must have been spoken of plaintiff in relation thereto, and be of such a character as would prejudice him by impeaching either his skill or knowledge, or attacking his conduct in such business."

Cyc., in treating this subject and dealing with merchants, tradesmen, and manufacturers (25 Cyc. 337), lays down the following rule: "Every wilful and unauthorized imputation, spoken, written, or printed, which imputes to a merchant, manufacturer, or other business man conduct which is injurious to his character and standing as a merchant, manufacturer, or business man, is libelous or slanderous as the case may be. . . . Words charging one with being engaged in a perfectly lawful transaction, or merely doing that which he has a legal right to do, are not actionable per se."

—charging  
lawful  
transaction.

25 Cyc. on page 255, lays down the rule as to what articles are libelous per se, and states as follows: "Words in disparagement of goods, relating to the quality of articles made, produced, or sold, but containing no imputations in themselves affecting personal character or reputation, are not held to be libelous per se."

The supreme court of New York, in the case of *Hehmeyer v. Harper's Weekly Corp.* 170 App. Div. 459, on page 461, 156 N. Y. Supp. 100, in viewing the authorities, stated as follows: "It has long been the settled law of this state that an attack, not on a manufacturer or trader, but upon the quality of an article he makes or vends, must, to be actionable per se, import that he is guilty of deceit or malpractice in making or vending the article, and otherwise there is no cause of action unless special damages are alleged. *Tobias v. Harland*, 4 Wend. 537; *Kennedy v. Press Pub. Co.* 41 Hun, 422; *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 59 L.R.A. 310, 64 N. E. 163, and cases cited; *Adolph Philipp Co. v. New York Staats-Zeitung*, 165 App. Div. 377, 150 N. Y. Supp. 1044. See also *Dooling v. Budget Pub. Co.* 144 Mass. 258, 59 Am. Rep. 83; 10 N. E. 809; *Victor Safe & Lock Co. v. Deright*, 77 C. C. A. 437, 147 Fed. 211, 8 Ann. Cas. 809; *Hopkins Chemical Co. v. Read Drug & Chemical Co.* 124 Md. 210, 92 Atl. 478; *Bosi v. New York Herald Co.* 33 Misc. 622, 68 N. Y. Supp. 898, affirmed in 58 App. Div. 619, 68 N. Y. Supp. 1134."

Again, the supreme court of New York, in the case of *Willis v. Eclipse Mfg. Co.* 81 App. Div. 591, 81 N. Y. Supp. 359, stated as follows: "A letter charging a merchant with 'cutting' prices on a certain bicycle brake, but which does not charge that plaintiff was bound by any contract not to cut prices, or that he was connected with any contract to maintain them, was not libelous per se."

The supreme court of errors of Connecticut, in the case of *Donaghue v. Gaffy*, 54 Conn. 257, 7 Atl. 552, states as follows: "Where defendant, a retail seller of liquor, issues a circular to other retail sellers of his town, charging that plaintiffs, wholesale sellers of liquor, being vexed by his having ceased to buy from them, overbid him in the mat-

ter of a lease, and turned him out of his place of business, plaintiffs, in the absence of special damages, have no cause of action."

17 R. C. L. p. 296, states as follows: "Not every conceivable charge which may possibly lessen a man's business will warrant a recovery of damages for the publication thereof. . . . Also, on the ground that it is not a libel to charge a person with having done that which he may legally and properly do, it has been held not libelous to publish a copy of a public record of conditional sales made by a retail merchant, although the publication subjects the seller to the hatred of his customers and injures him in his business. There are a few other limitations on the right to recover damages for imputations affecting one's profession or business, which must be noted. Thus, the publication of an article stating that a dinner furnished by a caterer on a public occasion was 'wretched,' and was served 'in such a way that even hungry barbarians might justly object,' and that 'the cigars were simply vile, and the wines not much better,' has been held not actionable per se, on the ground that such a charge relates to but one occasion, and is therefore not a libel on the plaintiff in the way of his business, and that therefore in such a case no recovery will be allowed without proof of special damages."

We will then see if, under the reasoning adopted in the above-entitled cases, this publication can be said to be libelous per se, by giving to the words used in the publication their most natural and obvious meaning, and by giving to them that meaning which would most naturally be ascribed thereto by those who would read the publication. The natural and ordinary construction that would be placed upon the article would be the bond the defendant had would only be accepted by the plaintiff as having a value of \$50. The publication does not state whose bond this is, nor does it state that Armstrong, Byrd, & Company had

signed the bond or had guaranteed the payment of the same. The publication does not say, nor does it purport to say, that Armstrong, Byrd, & Company ever agreed to accept the bond. The publication only states that Armstrong, Byrd, & Company refused to accept this bond of the defendant when shown to them, for the sum of \$100.

It does not impute dishonesty, nor does it accuse the plaintiff of any misconduct in its business. It does not accuse the plaintiff of bad faith or breach of contract. As was said in 25 Cyc. 337, above: "Words charging one with being engaged in a perfectly lawful transaction or merely doing that which he has a legal right to do are not actionable per se."

There is no imputation in this publication that Armstrong, Byrd, & Company did any more than what they had a right to do.

We therefore agree with the former opinion of this court that the article, in and of itself, does not come within the class of publications that are clearly defamatory on their face, and are actionable per se, and that the said publication is not susceptible of such a construction. —nonlibelous.

We must, therefore, hold that the same is not what is termed as "libelous per se."

If the publication is libelous, it must come within that class of cases as being reasonably susceptible of a defamatory as well as an innocent meaning, and those publications that are termed and designated as not libelous per se. In order for the petition to state a cause of action, it is necessary for the plaintiff to plead by way of inducement or averment, colloquium and innuendo, certain extrinsic facts which connect the plaintiff with the libelous publication, and to plead the meaning the words have and that they would be understood to have in connection with the libelous article as published.

The rule is laid down in 13 Enc. Pl. & Pr. 32, as follows: "If the al-

leged defamatory words are not actionable on their face, but derive their defamatory import from extrinsic facts and circumstances, such extrinsic facts and circumstances must be set forth and connected with the words charged by a proper averment. Words not actionable per se may be made to appear actionable by averring such extrinsic facts as will show that they were intended to be slanderous, and were so understood. These averments must be distinctly stated in the inducement, and applied to the plaintiff by a proper colloquium, with the intended and understood meaning correctly set out in the innuendoes."

The following cases support the above rule: Hays v. Mitchell, 7 Blackf. 117; Maerlender v. Porter, 114 App. Div. 180, 99 N. Y. Supp. 533; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322; Carter v. Andrews, 16 Pick. 1; Quinn v. Prudential Ins. Co. 116 Iowa, 522, 90 N. W. 349.

The distinction between the inducement or averment of the petition, the colloquium, and the innuendo is well defined by text-writers, Words and Phrases, and Cyc. But by reading the numerous decisions we often find no distinction made, but all are apparently grouped together and referred to as being innuendoes. The distinction between them, or the office they supply in the petition, is technical, and under our pleading, which requires that you plead the facts, it perhaps is not necessary to distinguish whether the portion of the pleading is properly referred to as the averment, inducement, colloquium, or innuendo; but if the facts are properly pleaded, and all the necessary allegations are contained in the petition, this would be sufficient, no difference how they are designated.

The supreme court of Alabama, in the case of Penry v. Dozier, 161 Ala. 292, 49 So. 909, speaking through Justice Mayfield in distinguishing such phrases and explaining the of-

fice and purpose of each of them, states as follows:

"An inducement is a statement of facts out of which the charge arises, or which is necessary or useful to make the charge intelligible. In other words, it is intended to state facts by reference to which the libel or slander is rendered intelligible and is shown to contain an injurious imputation.

"A colloquium only serves to show that the words were spoken in reference to the matter of the averment.

"An innuendo is only explanatory of the subject-matter sufficiently expressed before, and is and can be explanatory only of such matter. It cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain. Van Vechten v. Hopkins, 5 Johns. 220, 4 Am. Dec. 339. An innuendo cannot make a thing certain which is, in fact, uncertain. An innuendo cannot enlarge or restrict the natural meaning of words, nor can it introduce new matter. An innuendo cannot be proved, and it is for the court to decide whether given words or given publications are capable of the meaning ascribed to them by the innuendo, and for the jury to decide whether such meaning is truly ascribed to them. Gaither v. Advertiser Co. 102 Ala. 458, 14 So. 788; Wofford v. Meeks, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625; Henderson v. Hale, 19 Ala. 154; 25 Cyc. 449. Where words claimed to be defamatory are capable of conveying an innocent meaning, then there must be an averment and an innuendo showing not only that the words were intended by plaintiff in a defamatory sense, but that the hearers may have understood the language as conveying the alleged defamatory meaning. Smith v. Gafford, 33 Ala. 168. But if the words are unequivocally actionable per se—that is, charging a crime—then an innuendo will be

Pleading—  
libel—extrinsic  
facts.

Libel—pleading  
—inducement.

—colloquium.

—innuendo.

treated as mere surplusage. 25 Cyc. 452."

For further discussion of inducement and colloquium, see 25 Cyc. 436; 17 R. C. L. 393-395.

"An innuendo is used to explain the meaning of words employed by the defendant, but not to change or enlarge their natural meaning, and whether a publication is libelous per se or the language thereof will bear the interpretation or convey the meaning ascribed to it in the innuendo are questions of law for the court." *State v. Huff*, 96 Kan. 632, 152 Pac. 642.

"A complaint alleging the speaking of words not slanderous per se must show by the innuendo not only that the words were slanderously uttered, but were understood in the same slanderous sense by those in whose hearing they were spoken." *Floyd v. Fordyce*, 53 Ind. App. 449, 101 N. E. 825.

"Where, in an action for libel, the situation is not controlled by matters of inducement or colloquium pleaded, the question whether the publication is libelous per se is for the court." *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618.

It is the duty of the court to determine whether the language used in the publication

**Trial-  
construction  
of libel.**

can fairly or reasonably be construed to have the meaning imputed to it in the petition. *Harris v. Santa Fé Townsite Co.* 58 Tex. Civ. App. 506, 125 S. W. 77; *Penry v. Dozier*, 161 Ala. 292, 49 So. 909; *Emig v. Daum*, 1 Ind. App. 146, 27 N. E. 322; *Rodebaugh v. Hollingsworth*, 6 Ind. 339; *State v. Huff*, 96 Kan. 632, 152 Pac. 642; *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618.

It is also held that a demurrer to the petition for libel and slander only admits the truth of the facts

**Pleading-libel  
-demurrer-  
admission.**

pleaded, and does not determine the truth of the inference of the pleader based on the facts pleaded unless the facts are sufficient to authorize such inference. *Harris v. Santa Fé Townsite*

*Co. supra*; *Wofford v. Meeks*, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625; *Naulty v. Bulletin Co.* 206 Pa. 128, 55 Atl. 862.

The petition in the case at bar does not set out a copy of the bond purported to be referred to in the publication, nor does it set out any transaction between the plaintiff and the defendants where a bond was involved, nor does it set out any transaction or attempt to set out any transaction where the purchase of a piano was involved between the plaintiff and the defendants, or where a bond was offered as payment. The first four paragraphs of the petition contain just a general statement of who the plaintiff is, the character and reputation it has, the kind of business it is engaged in, the extent of its business, that its good name and standing are of great pecuniary value, and a copy of the publication, the fact that the same was published in the *Daily Oklahoman*, a newspaper of large circulation. If the petition does state a cause of action by pleading the extrinsic facts, it must be determined from the fifth paragraph of the petition, which paragraph is as follows:

"(5) The plaintiff alleges that about November 1, 1908, it had delivered to certain customers and prospective customers, piano bonds for different sums of money, and that said bonds were good for the amounts named, as part payment upon the purchase of pianos from the plaintiff.

"That, by the said printed article, the defendant intended to allege and did allege that the bond of the plaintiff, which the plaintiff had issued as good for a part payment upon pianos which the plaintiff had for sale, was of no value whatever.

"The plaintiff avers that in the said libelous newspaper article, the printed words, 'Mrs. O. B. Kee,' were intended by the defendants to mean, and did mean, the defendant Rose Kee, the wife of the defendant O. B. Kee. That in the said article,

by the printed words, 'Armstrong & Byrd Music Company,' the defendants intended to mean, and did mean, the plaintiff, 'Armstrong, Byrd, & Company.'

"That by the said printed articles, the defendants by innuendo intended to allege, publish, and circulate against the plaintiff, and did thereby allege, publish, and circulate against the plaintiff, wilfully, falsely, and maliciously, the libelous averment that this plaintiff, Armstrong, Byrd, & Company, made a contract with the defendant Mrs. O. B. Kee, alias Rose Kee, for the sale of a certain piano, and when the said Mrs. O. B. Kee showed to the plaintiff a certain piano bond, the plaintiff refused to accept said bond unless the defendant, Mrs. O. B. Kee, would pay to the plaintiff fifty (\$50) dollars more than the agreed purchase price of said piano.

"That by the said printed article these defendants intended to allege, and did allege, the libelous averment that this plaintiff had broken its contract with the defendant Mrs. O. B. Kee, alias Rose Kee, and refused to comply with its contract and to carry out its contract with the defendant Mrs. O. B. Kee, alias Rose Kee, and had wholly repudiated the same.

"That by the said printed article the defendants intended to allege, and circulate, and publish, and did allege, circulate, and publish, the libelous averments that the contracts of this plaintiff in business are of no binding force, and that the word of this plaintiff in business is unreliable, and that this plaintiff will repudiate and refuse to comply with any of its business contracts and business obligations, and that the plaintiff as a business concern is unreliable, unworthy of belief, unworthy of credit, and false in its business dealings."

A great many of the states have a statute which makes it unnecessary to plead extrinsic facts and circumstances, or the inducement or colloquium, but the courts of those states hold that in an action for

libel, based upon a publication which is not libelous per se, it is necessary to plead the extrinsic facts and circumstances in order for the petition to state a cause of action. It will be noticed that the publication refers simply to one transaction, and does not in any way refer to the manner or method of the way the plaintiff does business. It is necessary to plead by inducement or averment such extrinsic facts, to make the publication intelligible by reading the petition. In order to do this, some explanation of what a piano bond is should be given, to enable the court, by reading the publication in connection with the petition, to say what was meant by referring to a piano bond, also that the court might know by whom the bond was signed, if payable, to whom payable, and for what purposes it was issued. Under what circumstances the defendant had received it, whether they had paid value for the same or not. How these bonds were disposed of by the persons who issued them. The petition alleges they were delivered by the plaintiff. It should also state whether they were a gift or whether sold. These are essential facts that must be known by the court and pleaded in the petition for the court to determine whether the article can be made libelous. The publication does not state those facts. The only thing the petition states is that the plaintiff had delivered certain piano bonds to certain customers and prospective purchasers, and they were good for \$100 on the purchase price of the piano. This is the only reference to the piano bond in the petition.

The publication refers to the purchase of a piano by the defendants from the plaintiff, or an attempt to purchase the same. A proper averment that the court might know what this transaction was should be set out in the petition, or, if there was no transaction of any kind or character in reference to the purchase of the piano, then that should be stated.

It is also necessary to set out something about the transaction as to whether a piano bond was offered in payment for a piano; if so, then this should be set out. In this the pleader has failed to set out any of said facts.

These are the proper inducements or averments that must be pleaded in order that one may read them in connection with the publication, in order to see if said publication is defamatory.

The colloquium then would be to plead the facts, showing that this publication was directed toward this particular transaction or to plaintiff's business in general; then the court could say by construing the publication, in connection with this transaction, whether the language used under such conditions was defamatory, but there is no colloquium in the petition. There is no allegation in the petition that the publication refers to any transaction whatever.

The innuendo, then, would be to show wherein the publication was ambiguous, and by giving the ambiguous words their proper construction, or one the general public would give to the same when used in reference to the transaction set out in the averment, if they then became defamatory.

It will be for us to determine whether the language used in the publication can reasonably be construed to have a meaning imputed to it in paragraph five. This paragraph is divided into five sections. We will take them up and dispose of them separately.

The first section is a proper averment or inducement to be pleaded.

The second section, the plaintiff alleges that the defendant meant and intended to allege that the bond was of no value whatever. This must be considered in a technical sense an innuendo, and the rule placed upon the construction to be given an innuendo is defined in *Newell on Slander & Libel*, § 752, as follows:

"The office of an innuendo is to

define the defamatory meaning which the plaintiff seeks to put upon the words complained of, to show how they come to have the defamatory meaning claimed for them, and also to show how they relate to the plaintiff, whenever that is not clear upon the face of them. But an innuendo must not introduce new matter, or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. It cannot alter or extend the sense of the defamatory words, or make that certain which is in fact uncertain. If the words are incapable of the meaning ascribed to them by the innuendo, and are *prima facie* not actionable, the judge at the trial will sometimes order a nonsuit. But if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it is properly province of the jury to say whether they were in fact so understood.

"The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. Their use of it can never change the import of the words, nor add to nor enlarge their sense. 'An innuendo helps nothing unless the words to which it applied have a violent presumption of the innuendo.' If the common understanding of men takes hold of the published words and at once applies, without difficulty or doubt, a libelous meaning thereto, an innuendo is not needed and would be but useless surplusage in pleading."

The following cases have held "that an innuendo cannot be used to enlarge the meaning of words, nor attribute to them a meaning which they would not bear." *Van Vechten v. Hopkins*, 5 Johns. 220, 4 Am. Dec. 339; *Penry v. Dozier*, 161 Ala. 292, 49 So. 909; *Naulty v. Bulletin Co.* 206 Pa. 128, 55 Atl. 862; *Wisner v. Nichols*, 165 Iowa, 15, 143 N. W. 1020; *Maerlender v. Porter*, 114 App. Div. 180, 99 N. Y. Supp. 533; *Quinn v. Prudential Ins. Co.* 116

Iowa, 522, 90 N. W. 349; Moore v. Miers, 78 N. J. L. 201, 73 Atl. 32.

This section in the petition is improperly pleaded, and the publication which states that the \$100 bond would only be accepted for \$50 cannot support an innuendo or allegation that it is worthless, and has no value. In determining whether the petition states a cause of action, this section of the paragraph and construction placed upon the same must be disregarded.

The third section refers only to the parties and who is meant by reference to the names. This is a proper innuendo.

The fourth section alleges the publication meant that Mrs. Kee had purchased a piano, and, when she showed her bond, the plaintiff refused to accept the same unless she would pay \$50 more than the agreed purchase price of the piano. This is a correct pleading and statement by way of innuendo, unless it would be said that the article should be construed, not that they add \$50 to the price of the piano, but they required her to pay \$50 more than they had paid for the bond; but the result would be the same. It would still leave the value of the bond at \$50.

In the fifth section, plaintiff alleges that the article meant that this plaintiff had broken its contract with Mrs. O. B. Kee, and refused to carry out its contract with her, and had wholly repudiated the same. In a strict technical sense, this is pleaded by innuendo.

It must be remembered that no copy of the purported bond referred to in the publication is pleaded. It must be further remembered that the pleading in no manner refers to any transaction between the plaintiff and the defendant, where a piano bond was involved; nor does the pleader in any way refer to any transaction between the plaintiff and the defendant where a piano was sold or where a bond was offered in payment. Then, without pleading that there had been a contract for the sale of a piano and that

the plaintiff had refused to accept the bond, the publication cannot be construed to mean that the plaintiff had broken its contract with the defendant, and had refused to carry out its contract, and had wholly repudiated the same. There is nothing in the publication that refers to the fact that, at the time Rose Kee bought the piano, the plaintiff agreed to accept a piano bond. There is nothing in the publication, nor the pleadings either, that alleges the plaintiff had delivered a piano bond to Mrs. Kee. This interpretation of this publication cannot be sustained without pleading some extrinsic facts that connect the plaintiff with the fact that they had given Mrs. Kee a bond and then allege the fact that, when she presented it, they repudiated it. The publication cannot bear such a construction, without pleading some facts to base such a construction upon. These allegations must be treated as surplusage, and cannot add to or take from the petition in determining whether it states a cause of action.

The sixth section, the plaintiff alleges by innuendo that the article means that the contracts of plaintiff's business are of no binding force. That construction cannot be placed upon the publication, because the publication does not refer to any contract, which they refused to comply with, nor does it say that plaintiff did anything that it did not have a legal right to do, and the pleading in no way refers to or alleges that there was a contract between the plaintiff and the defendant that was repudiated, or over which there was any controversy.

The next portion of the petition alleges that article means the plaintiff is unreliable in business. Certainly that cannot be a proper interpretation to be given to this publication. If that denotes unreliability, then it can be said, if I state that I bought a suit of clothes of a merchant and offered a Liberty bond in payment therefor, and he refused to accept the same at its

face value, that would impute that the merchant is unreliable.

The next, they allege that this article means that the plaintiff will repudiate and refuse to comply with any of its business contracts and obligations. This publication cannot be so construed, unless the plaintiff attempts to connect it with some transaction where they refused to comply with a contract, and this the plaintiff has not alleged, nor attempted to connect it in its pleading to any contract existing between these parties or any other parties.

They next allege that the article meant that the plaintiff as a business concern was unreliable, unworthy of belief, unworthy of credit, and fraudulent in its business dealings. They have attempted to plead this by innuendo. Remembering that the term "innuendo" cannot be used to enlarge the meaning of words, nor attribute a meaning which they will not bear, it can be readily seen that this is placing an imaginary construction upon the words used in this publication, and giving to them a meaning which is improper.

The balance of the petition goes simply to the question of damages. We then have the petition stripped of its improper pleadings by way of innuendoes, and as a matter of law are improper, and no such a construction can be

**Libel—con-  
struction by  
complainant—  
correctness.**

placed upon said words as pleaded, and therefore cannot be taken into consideration by the court. The portion of the petition, then, which is properly pleaded in order for the court to determine whether this article is libelous, will be the first, third, and fourth sections of paragraph five, which portion of the petition then would be as follows:

"(5) The plaintiff alleges that about November 1, 1908, it had delivered to certain customers and prospective customers, piano bonds for different sums of money, and that said bonds were good for the

amounts named, as part payment upon the purchase of pianos from the plaintiff.

"The plaintiff avers that in the said libelous newspaper article, the printed words, 'Mrs. O. B. Kee,' were intended by the defendants to mean, and did mean, the defendant Rose Kee, the wife of the defendant O. B. Kee. That in the said article, by the printed words 'Armstrong & Byrd Music Company,' the defendants intended to mean, and did mean, the plaintiff 'Armstrong, Byrd, & Company.'

"That by the said printed articles, the defendants by innuendo intended to allege, publish, and circulate against the plaintiff, and did thereby allege, publish, and circulate against the plaintiff, wilfully, falsely, and maliciously, the libelous averment that this plaintiff, Armstrong, Byrd, & Company, made a contract with the defendant Mrs. O. B. Kee, alias Rose Kee, for the sale of a certain piano, and, when the said Mrs. O. B. Kee showed to the plaintiff a certain piano bond, the plaintiff refused to accept said bond unless the defendant, Mrs. O. B. Kee, would pay to the plaintiff fifty (\$50) dollars more than the agreed purchase price of said piano."

We then have a petition attempting to state a cause of action for libel upon a publication which is not libelous per se, and the pleader has not connected this publication with any transaction whatever. The only fact that is pleaded in order to determine whether the publication is libelous or not, that does not appear from reading the publication, is that the plaintiff herein had delivered certain bonds to certain customers and prospective customers that were worth \$100 on the purchase of a piano. There is no allegation in the petition as to the meaning the general public would give to this article as published, or how it would be naturally construed by them. The pleader has pleaded only in general terms. As was said in the case of *Penry v. Dozier*, 161 Ala. 292, 49 So. 909: "A mere allegation in the



complaint that it was intended to charge a crime, or to degrade or bring the plaintiff into contempt or ridicule, cannot be sufficient."

A case where the pleading is very similar is the case of *Wallace v. Homestead*, 117 Iowa, 348, 90 N. W. 835, where the plaintiff attempted to plead a cause of action very similar to the one at bar, and the court held that the publication was not libelous per se and the innuendo pleaded was improper, and that the words could have no such meaning.

Another rule, this publication refers only to a particular transaction, and without the proper averments or pleadings cannot be held to be construed to reflect upon the general way or manner that the plaintiff does business. This theory is supported in the case of *Dooling v. Budget Pub. Co.* 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809.

We must remember that it is not actionable per se, when a publication charges one with being engaged in a perfectly lawful transaction, or doing that which he has a legal right to do, and, unless there is some inference that can be drawn from this publication, by construing it with extrinsic facts set out in the petition, that the plaintiff was doing that which he had no legal right to do, then the petition does not state a cause of action. This article not being libelous per se, and the plaintiff not having pleaded extrinsic facts and circumstances connecting this publication with any transaction between the plaintiff and the defendant or anyone else, but pleaded in general terms by attributing a meaning which the publication will not support, and which cannot be given the said words, then it cannot be said to be libelous. Then we have the petition practically without any inducement, colloquium, or proper innuendoes, to determine whether the publication is libelous.

The plaintiff in one petition for rehearing sets out a copy of the bond. While in construing the petition, the bond cannot properly be considered, as it is not attached to

the petition, but the fact that the plaintiff has referred to the same in the brief. We will take the liberty to refer to that fact here. The bond is as follows:

**Factory Piano Bond. \$100.**

This one bond, if presented at Armstrong, Byrd, & Company, Oklahoma City, on or before Nov. 21st, 1908, entitles Mrs. O. B. Kee to a credit of \$100 on any new piano in their stock, this bond to apply as per contract with manufacturer.

J. A. Owenhouse,

Factory Representative.

[Seal.] Recorder 105.

It can readily be seen that if the bond had been attached to the petition it would change the foundation for this cause of action, and necessitate different allegations in the pleading. This bond not being signed by the Armstrong, Byrd, & Company, and the fact that they had only delivered the same, with no allegation or intimation, any place, that they are selling this bond, how could it affect their business or refer to it in a defamatory manner without such allegation? If this is a libel, it would not be a libel against the corporation, unless the article itself imputes to this corporation dishonesty, fraud, deceit, or other misconduct in its trade or business; but the article itself does not do this. The petition does not allege any facts by which this can be done. If the publication does anything, it only tends to show the value of this piano bond.

As was said by the supreme court of New York in the case of *Hehmeyer v. Harper's Weekly Corp.* 170 App. Div. 459, 156 N. Y. Supp. 98: "An attack, not on a manufacturer or trader, but upon the quality of an article he makes or vends, must, to be actionable per se, import that he is guilty of deceit or malpractice in making or vending the article, and otherwise there is no cause of action unless special damages are alleged. *Dust Sprayer Mfg. Co. v. Western Fruit Grower*, 126 Mo. App. 139, 103 S. W. 566; *Victor Safe & Lock Co. v. Deright*,

77 C. C. A. 437, 147 Fed. 211, 8 Ann. Cas. 809; *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882.

The most that can be said of this article is that this piano bond, instead of being worth \$100, was only worth \$50. There is no averment or extrinsic fact alleged in the petition which in any way connects this bond with the plaintiff, any more than they delivered the same. There is no allegation in the petition that refers to any contract between the signer of the bond and Armstrong, Byrd, & Company. The bond on its face does not purport to be good after the 21st of November, 1908. The article published was published November 22. Construing the petition as plaintiffs have suggested, in the light of the wording of the piano bond, this would make the plaintiff's petition still more vulnerable to attack by demurrer. We have the petition which simply sets forth the publication, and to whom it refers, and the allegation that the plaintiff had delivered it and would accept the bond as of the value of \$50, and the bond itself which shows it was not signed by the plaintiff, and no intimation in the publication that the plaintiff was even obliged to accept the same.

The criticism of the petition is that the pleader has attempted to use general terms and suggestions in a general way, that this publication refers to the general conduct of the plaintiff in its business, without pleading any of the extrinsic facts to show in what way or what man-

ner it could be so construed. It in no way or manner refers to the conduct or the manner in which the plaintiff conducts its business. Having decided that the publication is not libelous per se, then it is not libelous as pleaded by the plaintiff for the reason that he has not pleaded any extrinsic facts by which the publication can be so construed. The publication, construed in the light of the pleadings, does not impute dishonesty, or bad faith in the plaintiff, nor can the same be so construed from any extrinsic facts alleged in the petition.

Pleading—libel  
—extrinsic facts.

The petition does not allege, nor can the publication be construed to accuse the plaintiff of doing anything it did not have a legal right to do. The petition does not even allege as to how this publication would be construed by the general public. There are no facts alleged in the petition that connect this publication with any transaction by which the court could say this publication is libelous.

We must, therefore, conclude that the petition does not state a cause of action, and that the court committed error in overruling the demurrer, and the case is therefore reversed and remanded, with directions to the court to sustain the demurrer to the petition.

Owen, Ch. J., and Sharp, Harrison, Pitchford, Johnson, and Higgins, JJ., concur.

Kane, J., dissents.

## ANNOTATION.

### Libel and slander: charging one with failure to keep his contracts.

Charges of failure to pay debts, or of misrepresenting goods sold, or of matters necessarily involving dishonesty are excluded.

Very few cases have been found within the scope of this note.

It is not libelous to publish of the plaintiff that to get rid of a just claim in court he set up as a defense the

existing prohibitory law. *Homer v. Engelhardt* (1875) 117 Mass. 539.

It is not libelous to charge of the maker of a note that when it became due he begged for delay, which was granted, and afterwards pleaded the Statute of Limitations. *Bennett v. Williamson* (1850) 4 Sandf. (N. Y.) 60.

"The publication of a false statement that one has in a particular instance, even without sufficient reason, refused to pay a claim against him until its validity has been adjudicated, is certainly not actionable unless some particular injury, directly resulting from the publication, is alleged." *Pascone v. Morning Union Co.* (1907) 79 Conn. 523, 65 Atl. 972.

In *Crisp v. Gill* (1857) 29 L. T. (Eng.) 82, it was held that it was a privileged communication where a customer said to his butcher, in the presence of other customers: "I intended to have dealt with you, but I shall not do so, for you changed the lamb that I bought of you for a coarse piece of mutton."

But it is error to sustain a demurrer to a declaration which alleges that the defendant sent out postal cards to the plaintiff's customers as follows: "Dear Sir:—I drop you a line to let you know [plaintiff], my successor in business, is not legally responsible for his contracts, as he is yet a minor, under twenty-one years of age. A word to the wise is sufficient. Store No. 118 South Water street, I shall occupy and do business. Would be pleased to hear from you." *Hays v. Mather* (1884) 15 Ill. App. 30.

And to publish of a merchant that he has not "succeeded in obtaining the implicit confidence of local people," and that "he is looked upon locally as an itinerant trader, of small financial responsibility and of uncertain pros-

pects," is, if false, libelous per se. *Dun v. Weintraub* (1900) 111 Ga. 416, 50 L.R.A. 670, 36 S. E. 808.

In *Spence v. Johnson* (1914) 142 Ga. 267, 82 S. E. 646, Ann. Cas. 1916A, 1195, the court said, in overruling a demurrer to a petition, the quotations being from the Georgia statute: "It was alleged that the plaintiff was a farmer, conducting and carrying on a general farming business; that the defendant falsely and maliciously stated in the hearing of others, 'of and concerning the said plaintiff, and of and concerning him in his trade and business,' certain things, among them being that the plaintiff was of no account, that he would not do what he said he would do, that he made a contract with a named person to sell his (plaintiff's) cottonseed, and to deliver them in the fall, and that when he brought the cottonseed to town 'he was shipping them off,' and did not deliver them to the purchaser, and would not pay 'the money' (meaning the money advanced by the purchaser to the plaintiff on account of his cottonseed). As against a demurrer, these allegations are sufficient to show that the words were used concerning the plaintiff in reference to his 'trade' or business."

It will be seen that in the reported case (*KEE v. ARMSTRONG, B. & Co. ante*, 1349) it is held that the publication in question did not accuse the plaintiff of breach of contract.

B. B. B.

## RE ESTATE OF ANDREW BERGLAND, Deceased.

CHARLES EDWIN BERGLAND, Appt.

*California Supreme Court (Dept. No. 1)—June 20, 1919.*

(— Cal. —, 182 Pac. 277.)

**Evidence — application of forfeiture clause to attempt to probate subsequent will.**

1. A provision in a will that should any beneficiary object to the distribution made or attempt to defeat the provisions of the will such person shall receive only a nominal sum, and no more, has no application to an attempt in good faith to probate what purports to be a later will, although such will proves to be spurious.

[See note on this question beginning on page 1370.]

**Will — construction — several testamentary instruments — effect of statute.**

2. A statutory provision that all testamentary instruments executed by the same testator are to be taken and construed together as one instrument does not inject into a later instrument terms and provisions in a former one, not found in it, unless by express reference in the later instrument or by necessary implication.

**— imposing conditions on codicil.**

3. Unless there is something in a will to indicate a contrary intention, any gift made by a codicil is subject to conditions imposed by the will on the testamentary gifts generally.

**— provision against contest — effect on subsequent will.**

4. A provision in a will for forfeiture of interest in case of attempt to contest the will does not apply to a subsequent holographic will making a specific pecuniary bequest to a child of the testator.

**— construction of forfeiture clause.**

5. While clauses in a will providing for forfeiture of interest in case of attempt to contest the will are valid and to be given effect according to the intent of the testator, they are to be strictly construed, and not to be extended beyond what was plainly the testator's intent.

**Evidence — forgery of will — genuineness.**

6. Dismissal of a proceeding to probate a will and conviction of one for forging it are not evidence, in a proceeding to probate an earlier will and secure distribution according to its provisions, that the later will was not genuine.

**— dismissal of attempt to probate later will — effect.**

7. That an attempt to probate a spurious will was withdrawn before hearing does not destroy its effect as a contest or attempt to defeat an earlier one, within its provision that one making such attempt shall be limited to a nominal legacy.

**— burden of proof — good faith of attempt to probate will.**

8. One seeking to probate a later will of testator is not bound to prove that he acted in good faith, to avoid the operation of a provision in the earlier one, limiting him to a nominal bequest in case he attempts to contest the earlier will.

[See 10 R. C. L. 897.]

**— presumption of bad faith.**

9. No presumption of bad faith in attempting to probate a later will of testator arises from withdrawal of the attempt.

[See 10 R. C. L. 875.]

**APPEAL** by legatee from an order of the Superior Court for San Diego County (Sloane, J.) distributing a portion of a legacy to the daughter of Andrew Bergland, deceased, left her by him, in a proceeding for the probating of his will. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John H. Bowlby, for appellant:

The condition contained in the 4th paragraph of the will of June 7, 1910, is valid.

Re Miller, 156 Cal. 121, 23 L.R.A. (N.S.) 868, 103 Pac. 842; Re Hite, 155 Cal. 436, 21 L.R.A. (N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993; Re Garcelon, 104 Cal. 570, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 414.

Any legal steps which amount to a dispute of, or a refusal to acquiesce in, the will in question, or any provision thereof, works a violation of the condition.

Smithsonian Inst. v. Meech, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396; Re Bratt, 10 Misc. 491, 32 N. Y. Supp. 168; Perry v. Rogers, 52 Tex. Civ. App. 594, 114 S. W. 897; Massie v. Massie, 54 Tex. Civ. App. 617, 118

S. W. 219; Moran v. Moran, 144 Iowa, 451, 30 L.R.A. (N.S.) 898, 123 N. W. 202; Kayhart v. Whitehead, 78 N. J. Eq. 580, 81 Atl. 1133; South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961, Ann. Cas. 1918E, 1090; Re Hite, 155 Cal. 436, 21 L.R.A. (N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993; Re Edwards, 154 Cal. 93, 97 Pac. 23; Re Kirkholder, 86 Misc. 692, 149 N. Y. Supp. 87, 171 App. Div. 153, 157 N. Y. Supp. 37; Re Miller, 156 Cal. 122, 23 L.R.A. (N.S.) 868, 103 Pac. 842.

Mr. M. A. Luce, for respondent:

The proceedings at the time of the probate of the will of Andrew Bergland do not show sufficient proceedings on the part of the respondent which could be considered a contest of the will of Andrew D. Bergland.

Re Hite, 155 Cal. 436, 21 L.R.A.

(N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993; *Re Robinson*, 106 Cal. 493, 39 Pac. 862; *Drennen v. Heard*, 198 Fed. 414; *Re Bratt*, 10 Misc. 491, 32 N. Y. Supp. 168.

**Olney, J.**, delivered the opinion of the court:

This is an appeal from an order distributing to one Kate J. Misner a portion of a legacy left her by the decedent. The sole question is as to whether she had forfeited the legacy under a provision of the decedent's will reading as follows: "Fourthly, it is my positive instruction that should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars (\$5) each and no more. And any and all other provisions made herein for such objector, other than the sum of five dollars (\$5) as stated, shall be annulled and revoked, and such person or persons shall take nothing from my estate other than the sum of five dollars (\$5)."

There is no dispute as to the facts, which are:

The decedent, Andrew Bergland, died March 3, 1916, leaving as his heirs two sons, Charles and Louis, and a daughter, the last the legatee mentioned whose legacy is in question. Immediately upon his death a formal instrument attested by two witnesses, very evidently drawn by a lawyer, and making a complete disposition of the decedent's estate, was offered for probate as his will by the parties named as executors therein. Under it the sons and the daughters are all substantial beneficiaries. It likewise contains the forfeiture provisions quoted, but it does not provide for the legacy in question here. It is dated June 7, 1910, and was reaffirmed by formal codicils—otherwise immaterial here—on March 10, 1914, and December 26, 1914.

Two days after the offer of this formal will for probate, the daughter offered, as being an holographic

will of the decedent, a writing reading as follows:

August 29, 1915.

i give al Money in Banks to my Dater Kate Misner when i Die.

A. Bergland.

The gift made by this instrument is the legacy involved here. It is to be noted that the date of this writing is subsequent to the dates of the formal will and its codicils, and also that it makes no reference whatever to them.

Eight days after the holographic writing was presented for probate the daughter offered for probate still another instrument, dated this time December 25, 1915, which purported to dispose of practically all the decedent's property in a manner substantially different from that of the will of 1910, and more advantageous to the daughter, and to appoint the daughter executrix.

No objection was made by anyone, so far as the record discloses, to the probate of the will of 1910 with its codicils; but the two sons filed formal objections to the probating of the two instruments offered by the daughter, alleging that both were forgeries, and that the instrument of December 25, 1915, was the result of a conspiracy to which the daughter was a party. The daughter pressed her petition for the probate of the instrument of December 25, 1915, until it came on for trial, when she dismissed it. Later, after hearing, the will of 1910 with its codicils and the holographic writing of August 29, 1915, were both admitted to probate as constituting together the last will of the decedent.

Subsequently, the daughter petitioned for the distribution to her of the money of her father in bank at the time of his death, pursuant to the provisions of the holographic will of 1915, and this petition was opposed by the sons on the ground that under the forfeiture clause of the will of 1910 she had lost all right

to this legacy by her action in seeking the probate of the spurious will of December 25, 1915. The lower court granted the petition of the daughter, and from its order this appeal is taken by one of the sons.

The contention of the appellant must be overruled for two reasons:

First, the forfeiture clause contained in the will of 1910 has no application to the will of 1915 or to the legacy given by it. The will of 1915 contains no reference to that of 1910, is not a codicil to it, and, so far as anything appears, is wholly independent of it, its provisions prevailing over any inconsistent provisions of the earlier will merely because, in the particular covered by it, it is a later expression of the decedent's testamentary wishes. It is true there is a general rule of testamentary construction formulated by our Civil Code (§ 1320) as follows: "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument."

But this, like any other rule of construction, is but a guide for the purpose of ascertaining the intention of the testator. It cannot be used to inject into

**Will—construction—several testamentary instruments—effect of statute.**

the later instrument terms and provisions not found in it, unless by express reference in the later instrument, or by necessary implication, it appear that such was the testator's intention. It is always his intention as fairly ascertained and expressed that must govern, and the Code makes the rule quoted, together with other rules of construction, subordinate to this. Civ. Code, § 1319. In the case of a codicil which by its terms picks up the will previously executed, and, in effect, reaffirms it, it is apparent that the decedent's testamentary intent at the time of the execution of the codicil includes as one both the codicil and the will, with the result that unless there is something to indicate a contrary in-

tention any gift made by the codicil is subject to conditions imposed by the will on the testator's gifts generally. Of this character was the codicil in *Re Hite*, 155 Cal. 436, 21 L.R.A. (N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993, wherein a forfeiture clause contained in a will was held to operate because of a contest made to a codicil. But here we do not have a single testamentary act covering both will and codicil, but two distinct testamentary acts occurring at different times, the later making no reference to the earlier, and consisting in terms of an unqualified and unconditional bequest. There is no language, no expression of any nature, that would indicate that the testator intended that the terms of this bequest should be modified and the gift be subject to conditions elsewhere prescribed. The two wills should be read together in the sense that each should be read in the light of the other, and their terms harmonized so far as possible, but this is a very different thing from changing the express terms of the later will by importing conditions into it without express warrant contained in it, itself. We do not mean to say that a case is not possible where this may be properly done by implication only. But to justify this the circumstances must be such as fairly to show affirmatively that the testamentary intent of the decedent at the time of his last expression included not merely the matters which he then set down, but also those which he had set down on a previous occasion. *Deppen v. Deppen*, 132 Ky. 755, 117 S. W. 352.

In the present case there is nothing to give rise to any implication that the testator, when he wrote and signed the holographic will of 1915, intended to do anything different from what his language literally expresses, namely, to make an unqualified and unconditional gift to his daughter. This becomes doubly clear

**—imposing conditions on codicil.**

**—provision against contest—effect on subsequent will.**

when we consider the character of the condition which it is sought to import and the effect such importation would have. While it is the rule in this state that forfeiture clauses of the nature of that involved here are valid, and are to be given effect according to the intent of the testator, yet it is also the rule, and a salutary one, that such a provision—being by way of forfeiture and condition subsequent—is to be strictly construed and not extended beyond what was plainly the testator's intent. In the present case the importation of the will of 1910 with its forfeiture clause into the will of 1915 would mean that the testator intended not only that his daughter should forfeit the legacy there given if she contested the disposition made by the will of 1910, but also that if any beneficiary under the will of 1910 contested the will of 1915, he or she should forfeit the testator's bounty. It is hardly conceivable that the testator, when he executed the informal and unwitnessed holographic writing of 1915, intended that if its authenticity should be questioned by his sons, for instance, they should be cut off from their inheritance. The informal and unattested nature of the instrument is such as to make such intent wholly unreasonable. Yet this result would necessarily ensue, if the appellant's contention is to be sustained. In this respect the position of the appellant and his brother is no better than that of the respondent. They have endeavored to contest the later will, and if the earlier will is to be read into it and made a part of it, the later will is protected by the forfeiture clause of the earlier, and the case of the sons comes directly within *Re Hite*, supra. The answer, both as to the daughter and as to the sons, is that such construction, is not justified either by implication or by express language, and that the later will is just what it purports to be, an absolute gift to the daughter, uncon-

—construction  
of forfeiture  
clause.

ditioned on the one hand by the forfeiture clause and unprotected on the other by it.

Second. The forfeiture provision has no application to an attempt made in good faith to probate what purports to be a later will. The language of the clause is that if any beneficiary "object to the distribution (of the estate) as made (by the will), or attempt to defeat the provisions of this will," any gift to such beneficiary other than \$5 shall be annulled and revoked. If an attempt were made knowingly to probate a spurious will of a later date which purported to distribute the testator's estate in a manner different from that of the genuine will, such an attempt would quite certainly come within the language of the forfeiture clause as an attempt to defeat the provisions of the will. *Re Kirkholder*, 171 App. Div. 153, 157 N. Y. Supp. 37.

But it is not alleged in the present case that the daughter acted in bad faith in presenting the purported will of December 25, 1915, and seeking its probate, and no evidence on the point was introduced. It was alleged in the objection to the probate of the instrument that it was a forgery, made pursuant to a conspiracy to which the daughter was a party, but this allegation is not repeated in the objections to her petition for distribution, and apparently the omission is not an oversight. The expressed position of appellant's counsel is that the good faith of the daughter is immaterial, that the mere fact that she unsuccessfully endeavored to probate an instrument making a different disposition of the estate from that directed by the will of 1910 is sufficient to work a forfeiture.

It is to be noted that there is no proof in this proceeding that the instrument of December 25, 1915, was, in fact, spurious. All that appears is that the petition for its probate was withdrawn, and also the fact that a certain person was

convicted of the crime of forging it.

**Evidence of forgery of will—genuineness.** But neither the dismissal nor the criminal conviction is competent evidence in the present proceeding that it was not genuine. We, however, do not desire to rest our conclusion upon this ground, and will assume that it was spurious.

Respondent contends that proceedings taken by the daughter to probate the spurious will do not amount to a contest or to an attempt to defeat the testator's real will, that in order to amount to this the proceedings must have been carried

**—dismissal of attempt to probate later will—effect.** to the point of a hearing and trial, which was not done.

With this we do not agree. The attempt was there, manifested by overt acts designed and taken for the purpose of bringing about a different disposition of the estate, assuming that the instrument was known to the daughter not to be genuine. The fact that she desisted from her attempt before actually going to trial is immaterial. The attempt was made, and that is enough. *Re Hite*, 155 Cal. 436, 21 L.R.A.(N.S.) 953, 101 Pac. 443. The question, therefore, reduces itself to this: Is an attempt made in good faith to probate a spurious instrument—whether such attempt is carried through to a final adjudication of the spurious character of the instrument or not—such an attempt to defeat the testator's wishes as is meant by the language of the will?

As we have already said, the forfeiture clause is to be strictly construed, that is, while it is valid and is to be enforced according to the ascertained intent of the testator, yet in ascertaining his intent no wider scope is to be given to his language than is plainly required. The conditions upon which the forfeiture is to work under the will are two: First, in case any beneficiary

is subject to the distribution (of the

estate) as made (by the will)," or, second, "attempt to defeat the provisions of this will." The attempt to probate a later will cannot be said to be an objection to the distribution made by the first will. Is it within the second condition, "an attempt to defeat the provisions of this will?" It would certainly have the effect, if successful, of defeating those provisions. This, however, is not a complete answer. While the effect would be to nullify, and thereby in one sense defeat, the provisions of the first will, that result is but incidental, and is not the primary object of the attempt to probate the purported later will, provided such attempt be made in good faith. The primary object of such attempt is to establish what is believed to be the final expression of the decedent's testamentary wishes. In the words, "attempt to defeat," lies the idea of action taken for the purpose of defeating the provisions of the will. A direct contest of the validity of the will would, of course, be such action, regardless of the good or bad faith of the beneficiary, and such was the ruling in *Re Miller*, 156 Cal. 119, 23 L.R.A.(N.S.) 868, 103 Pac. 842. So also would be an attempt to accomplish the same result indirectly, as by seeking to probate a later instrument, known to be false. In such a case the primary purpose is to defeat the provisions of the real will. But it is easy to conceive of a beneficiary offering for probate, purely through a sense of duty to the decedent, what he believes to be the genuine expression of the testator's last desire, without any purpose whatever of defeating a prior will and without any interest in defeating it. Many a child has still such regard for his parent that he or she would endeavor to establish and carry out what was believed to be the father's will, although so doing is directly contrary to his or her own material interest. In such a case there is no



element of an "attempt to defeat" a prior will.

It follows that an attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, does not fall within the forfeiture clause under consideration here.

As strengthening this conclusion, it may be worthy of note that to hold that the testator intended to forbid, under penalty, any attempt to probate what was genuinely believed to be a later will, would mean that he intended decidedly to limit his own freedom of subsequent testamentary action. Such penalty would seriously discourage any attempt to probate even a genuine later will, and would distinctly lessen the chance of any later testamentary expression by the testator being made effective. It is not to be presumed that he contemplated or intended any such consequence.

Appellant contends that the burden rested on the respondent to show that she acted in good faith.

**Evidence—burden of proof—good faith of attempt to probate will.** This is not true. The fact of bad faith was an essential element of the appellant's case.

The burden rested on him to show that the respondent had brought herself within the forfeiture clause, and this could not be shown without it appearing that her attempt to probate the spurious will of December 25, 1915, was in bad faith and for an ulterior object. Appellant argues that bad faith must be presumed from the fact that the respondent's petition for probate was withdrawn, and cites *Re Kirkholder*, 171 App. Div. 153, 157 N. Y. Supp. 37. It is clear, however, that

no presumption of bad faith arises from the withdrawal of the petition. —presumption of bad faith.

It would not have arisen even if the matter had been carried to a hearing and final adjudication that the will was not genuine, unless possibly, as a part of such adjudication, facts were found that proved the respondent's bad faith. If such facts were found as a part of such adjudication, it may be that such finding would be *res judicata* as between the parties. This was the situation in *Re Kirkholder*, supra, and therein lies the difference between it and the case at bar.

Finally, we would say that there are grave reasons of public policy why a provision for forfeiture in case of an unsuccessful but bona fide attempt to probate a purported later will should not be enforced. It is the policy of the law to encourage the presentation for probate of wills of decedents in order to make the more certain that those really entitled to their bounty shall enjoy it. To place upon one under the moral, if not the legal, obligation of probating the decedent's will the burden of gambling on his ability to do so successfully, no matter how sincere he may be, would be directly opposed to such policy. These reasons are very different from those applicable to direct attacks upon a will, and the question is not precluded by *Re Hite*, supra. It is unnecessary to put this decision upon that ground, and we do not do so. We mention the point, however, to avoid any inference that our discussion of the case solely as one of the construction of the will means that this question of public policy is not present in it. It is present, but it is not necessary to decide it.

Order affirmed.

We concur: Shaw, J.; Lawlor, J.

## ANNOTATION.

### What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary.

- I. Introductory, 1370.
- II. Acts constituting contest of will, 1370.
- III. Acts not constituting contest of will, 1372.

#### I. Introductory.

It is not an uncommon practice of testators to provide that any beneficiary who shall contest or otherwise seek to avoid the will shall forfeit the share given to him by the will. This note, without entering into the disputed question of the validity of such a provision, confines its discussion to the question, what acts of a beneficiary constitute a violation thereof.

On account of the variance in the form of the testamentary provisions in question, and the variety of acts which have been urged as constituting a violation thereof, it is obviously impossible to formulate any general rule, and the cases are accordingly collated with reference to the specific acts of the beneficiary which were passed on in the cases cited.

#### II. Acts constituting contest of will.

In each of the following cases, it was held that the act in question amounted to a contest of a will within the meaning of a clause therein forfeiting the share of a contesting beneficiary:

##### **Claim to title of land devised.**

An attempt on the part of a legatee to claim by legal procedure the title to land, ownership of which is asserted by his testator in the will, is a contest of the will within the meaning of a forfeiture clause. *Smithsonian Inst. v. Meech* (1898) 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396; *Moran v. Moran* (1909) 144 Iowa, 451, 30 L.R.A. (N.S.) 898, 123 N. W. 202.

In *Smithsonian Inst. v. Meech* (U. S.) supra, it appeared that a testator, having stated in his will that a certain piece of real estate was his property and devised it as such, although it stood in his wife's name, provided several bequests for relatives of the wife, on condition that they should ac-

quiesce in the will, the share of any legatee disputing the will to go to the residuary legatee. The court held that by acquiescence in the will was intended an approval of all the conditions and statements of title made in the will, and that the heirs of the wife, who had died intestate, forfeited their legacies by contesting the testator's title to the real estate in question.

In *Moran v. Moran* (Iowa) supra, it appeared that a testator, by his will, gave his farm to his wife, certain bequests to his children by a former wife, and specified that any legatees who contested the will should forfeit their shares thereunder. Four of the children sought in an action in equity to recover most of the farm in question as the heirs of the testator's first wife, to whom they asserted it had been granted, alleging that the testator had acquired title thereto by forgery. It was held that by this action the legatees involved therein contested the will and forfeited the bequests to them thereunder. It was pointed out that to contest a will it was not necessary to make "a direct assault upon the entire instrument as a will," but that any attack which would defeat the purpose of the testator, as expressed in the will, came within the meaning of clauses working a forfeiture.

##### **Action for conversion of property of legatee.**

In the case of *Re Bratt* (1894) 10 Misc. 491, 65 N. Y. S. R. 247, 32 N. Y. Supp. 168, it appeared that a legatee brought an action against an executor for the conversion of certain property used by the legatee and his wife in their home, and bequeathed by the wife of the legatee to other persons. It was held that by that action the legatee had forfeited a bequest to him under the will, which also provided that his share was to pass to another if he prevented or opposed the execution of the will.

**Aiding nominal contestants.**

One who assists and co-operates with the nominal contestants of a will is guilty of a breach of a condition therein, specifying a penalty for contestants of the will. *Donegan v. Wade* (1881) 70 Ala. 501; *Kayhart v. Whitehead* (1910) 77 N. J. Eq. 12, 76 Atl. 241, affirmed in (1911) 78 N. J. Eq. 580, 81 Atl. 1133.

In *Donegan v. Wade* (Ala.) *supra*, the plaintiff sought to have partition made of certain land in which he asserted an ownership by virtue of purchase at an execution sale of the interest of one of the defendants, David Wade. The land had been the property of David Wade, Sr., who, by will, specified that the share of any child who resisted the probate of the will, or attempted to set it aside, should be forfeited to those who did not oppose it. It appeared that David Wade had assisted a sister in opposing the probate of the will, and that, although not nominally a contestant, he had supplied money therefor and had been in consultation with the attorneys on the days set for the hearing, which, however, after several continuances, failed to take place, the objections having been withdrawn by the contestants, without prejudice to "their right to file a bill in chancery contesting the will." It was held that David Wade, by his co-operation with his sister, had brought himself within the terms of the will so as to forfeit his share thereunder, though he failed to appear on the record as a party to the contest.

In *Kayhart v. Whitehead* (N. J.) *supra*, it appeared that a testator provided in his will that any caveator or contestant of the will should bear the expense to the estate of such contest. It was shown that a contest, while undertaken in the name of a certain legatee, was in fact supported and assisted by two other defendants, who aided the lawyers in securing witnesses. It was held that these defendants, by their aid and assistance to the nominal contestant, had made themselves liable to pay to the estate the expenses of the contest.

**Secret agreement with contestants.**

In the case of *Re Stewart* (1889) 1

*Connolly*, 412, 5 N. Y. Supp. 32, it was shown that a legatee who did not appear on the record as a contestant of the will, and had ranged herself with the proponents thereof, had been a party to a secret agreement between a number of the heirs at law, next of kin, and legatees. The professed purpose of the agreement was to avoid controversy over the estate, but the real effect was the pooling of the interests of the contestants of the will in an endeavor to evade a provision therein annulling the gifts made to anyone who, directly or indirectly, became a party to a suit to set aside or interfere with the provisions of the will. The intent of the agreement was to unite all the signers under one name, in assistance of the contest of the will. It was held that the legatee in question, while nominally on the side of the proponents of the will, was in fact, by virtue of the agreement signed by her, an opponent thereof, and that as a consequence she was deprived of her legacy by the clause which forfeited her share in case she interfered with the provisions of the will.

**Contest withdrawn before hearing.**

An attempt to dispute a will, which is pressed to the time of trial and then withdrawn, constitutes a contest of a will within the meaning of a clause of forfeiture. *Re Hite* (1909) 155 Cal. 436, 21 L.R.A. (N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 998. And see the reported case (*RE BERGLAND*, ante, 1363).

In the case of *Re Hite* (Cal.) *supra*, it appeared that a testator, by a codicil, reduced a bequest made in the body of a will, which also contained a provision revoking the share of any beneficiary who should contest the will. The legatee in question filed a contest to two codicils, opposing their probate on the ground of mental incapacity, undue influence, etc. Answer thereto was filed by the executor, to which a motion was made by the legatee that certain parts thereof should be stricken out and the motion granted. Before the time set for hearing a compromise was made, and the legatee later sought to obtain her bequest under the codicil. It was held

that to constitute a contest under the terms of the will it was not necessary to continue legal proceedings to a conclusion, as contended by the legatee, but that the steps taken in this case amounted to a violation of the provision in the will.

In the reported case (*RE BERGLAND*), wherein it appeared that a legatee offered for probate a spurious will, it is held that the fact that "she desisted from her attempt before actually going to trial was immaterial."

**Appeal from decree admitting will to probate.**

In *Kayhart v. White* (1910) 77 N. J. Eq. 12, 76 Atl. 241, affirmed in (1911) 78 N. J. Eq. 580, 81 Atl. 1133, it appeared that a legatee had filed "an appeal to the prerogative court from the decree of the orphans' court admitting the will to probate." It was held that this act constituted an attempt to prevent the proof of the will, within a clause therein providing for the infliction of the costs of probate on the share of any contestant.

**Offer to probate will known to be spurious.**

The offer for probate of a spurious will amounts to an attempt to dispute a will, within the meaning of a forfeiture clause. *Re Kirkholder* (1916) 171 App. Div. 153, 157 N. Y. Supp. 37, affirming (1914) 86 Misc. 692, 149 N. Y. Supp. 87. And see the reported case (*RE BERGLAND*).

In *Re Kirkholder* (N. Y.) *supra*, it appeared that a legatee, under a will providing for the forfeiture of the share of any contestant of the validity thereof, had offered for probate an instrument purporting to be a later will of the testator. Probate thereof was refused, and the legatee was refused the bequest made under the probated will, by reason thereof. It was held that, while offering for probate a second will is no denial of the validity of an earlier one, the legatee in this case had forged the will in question, and that her attempt to probate such a will effected the forfeiture of her share under the genuine will, since it sought the defeat thereof.

**Contest of codicil.**

In *Re Hite* (1909) 155 Cal. 436, 21

L.R.A. (N.S.) 953, 101 Pac. 443, 19 Ann. Cas. 993, it appeared that a legatee, under a will which contained a provision forfeiting the share of any beneficiary thereunder who should offer contest thereto, had opposed the probate of two codicils, one of which reduced the amount of her legacy. It was held that to contest the probate of a codicil was to contest the will, and that the legatee had thereby forfeited her bequest. The codicil in this instance republished the will, and moreover it was pointed out that the purpose sought to be subserved forbade the contest of a part of the will as well as of the whole.

**III. Acts not constituting contest of will.**

In each of the following cases, it was held that the act in question did not amount to a contest of a will within the meaning of a clause therein forfeiting the share of a contesting beneficiary:

**Action to construe will.**

An action brought for the purpose of obtaining an interpretation of a will is not a contest thereof within the meaning of a forfeiture clause. *Black v. Herring* (1894) 79 Md. 146, 28 Atl. 1063; *Woodward v. James* (1887) 44 Hun, 95, 7 N. Y. S. R. 411; *Scott v. Ives* (1897) 22 Misc. 749, 51 N. Y. Supp. 49; *Perry v. Perry* (1918) 175 N. C. 141, 95 S. E. 98.

In *South Norwalk Trust Co. v. St. John* (1917) 92 Conn. 168, 101 Atl. 961, Ann. Cas. 1918E, 1090, it was pointed out that an action by a legatee to determine the construction of a will could not be considered a contest thereof, within the meaning of a clause effecting a forfeiture of the share of an opposing beneficiary. But this principle was held to be inapplicable to a case where all the children of the testator had sought, by an appeal to the superior court, to determine whether or not the will was void in part under the law against perpetuities, and whether, consequently, the gift of the income to the children passed an absolute estate to them.

In *Black v. Herring* (1894) 79 Md. 146, 28 Atl. 1063, it appeared that a testatrix had bequeathed property in

trust, and had stipulated in her will that the share of any contestant thereof should cease and be void. The beneficiary under the trust brought an action to have the will construed as to certain points, it being contended, *inter alia*, by the defendants that by reason of punctuation it must be considered that they possessed discretionary powers as to the payment of the income from the trust fund. It was held that the action of the plaintiff in seeking the construction of the will could not be considered as an attempt to thwart the desire of the testatrix, and that it did not amount to a contest of the will so as to bring him within the clause of forfeiture.

In *Woodward v. James* (1887) 44 Hun, 95, 7 N. Y. S. R. 411, it appeared that a testator, after making certain disposition of his property, stipulated that any of the heirs, the residuary legatees, who attempted to interfere with this disposition of the property, should forfeit his share thereof. The plaintiff brought an action wherein questions arose as to whether the "legal heirs" were to take "*per stirpes*" or "*per capita*." It was held that the plaintiff did not, by an action seeking a construction of the will, bring himself within the meaning of the clause forfeiting the interest of contesting heirs.

In *Scott v. Ives* (1897) 22 Misc. 749, 51 N. Y. Supp. 49, it appeared that a testator provided that the bulk of his property should go to charitable institutions, and he specified that any bequests to his wife should fail in case she contested the will. She offered no objection to the probate of the will, but when the executor brought an action to have the will interpreted, and made her a party defendant, she asked to have the will construed with reference to the laws of the state, with which the will was not in accord. It was held that such procedure was not such a contest by the wife as to prohibit her taking thereunder.

In *Perry v. Perry* (1918) 175 N. C. 141, 95 S. E. 98, it appeared that a testator provided that any person who attempted to defeat his will should be

barred from any interest thereunder. An action was brought by the executor for services rendered to the testator, who had promised to reimburse the plaintiff by a devise under his will, which, however, was later adeemed by his sale of the property. All the heirs, devisees, and legatees under the will were joined as parties defendant, and they all authorized the court to construe the will, "in view of the ademption of the legacies of realty." It was held that such an action was not an attempt to defeat the will, within the meaning thereof.

#### Filing of caveat.

The filing of a caveat to the probate of a will does not, without more, amount to an attempt to defeat the will, within the meaning of a clause providing for the forfeiture of the bequest to a contestant. *Drennen v. Heard* (1912; D. C.) 198 Fed. 414; *Re Bratt* (1894) 10 Misc. 491, 65 N. Y. S. R. 247, 32 N. Y. Supp. 168; *McCahan's Estate* (1908) 221 Pa. 188, 70 Atl. 711; *Lewis's Estate* (1910) 19 Pa. Dist. R. 695.

In *Drennan v. Heard* (Fed.) *supra*, it appeared that a testator, after providing for his wife a life interest in one half of his estate, specified that if she took "legal steps to set aside the will, and should not succeed in such endeavor," the bequest to her should be void and a legacy of \$500 was granted her in lieu of the bequest, which, with the exception of the \$500, was to go in part to the plaintiff. The counsel for the wife of the testator filed a caveat to the will about a month after the death of the testator, but ten days later withdrew it by consent. The plaintiff sought to recover under the item of the will providing a share for her in case the will were contested by the wife. It was held that the filing of the caveat, with the early voluntary withdrawal thereof, was not such a violation of the provisions of the will as to forfeit the bequest to the wife, the court saying that the will specified as the basis of forfeiture the taking of legal steps which should not succeed, and pointing out that an early voluntary abandonment of a cause

could not be considered a failure of an endeavor to set aside the will.

In the case of *Re Bratt* (1894) 10 Misc. 491, 65 N. Y. S. R. 247, 32 N. Y. Supp. 168, it appeared that a legatee had filed objections to the probate of a will, and had cross-examined the witnesses at the proceedings. It was held that his action merely aided the surrogate in the performance of his duty, and that he had not thereby forfeited his interest under the will, which disposed otherwise of such interest in case the legatee prevented or opposed the execution of the will.

In *McCahan's Estate* (1908) 221 Pa. 188, 70 Atl. 711, wherein it appeared that a testatrix had provided in her will that the share of any legatee thereunder who should attempt to contest the will should be forfeited, it was held that the filing of a caveat could not be construed as a contest of the will, within the meaning of the forfeiture clause.

In *Lewis's Estate* (1910) 19 Pa. Dist. R. 695, it appeared that a testatrix had specified in her will that if her mother contested the will she was to forfeit her share thereunder. The mother filed a caveat to the probate of the will, but did not appeal from the decision of the register. It was held that this procedure did not constitute a contest of the will within the meaning of the forfeiture clause. It was pointed out that "a paper presented for probate is not a will of the testator until so decided by the register after proofs," and that, moreover, a "register of wills has no jurisdiction to hear a contest."

In the case of *Re Hite* (1909) 155 Cal. 436, 21 L.R.A. (N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993, there was a remark of the court to the effect that a mere filing of a paper contest which is abandoned without action, where not done to defeat the wishes of the testator, is not necessarily a legal contest within a provision forfeiting the share of a legatee contesting the will.

#### **Petition for letters of administration.**

In *Re Hill* (1917) 176 Cal. 619, 169 Pac. 371, it appeared that a legatee, a daughter of the testator, had filed a petition for letters of administration

in one state, stating that he died without leaving a will, but referring to certain papers filed as a will in another state. It was held that this petition for the grant of letters of administration on the estate of the testator was not such a contest of his will as to effect a forfeiture of the petitioner's share under the will, which provided that contestants thereof should lose any bequest thereunder.

#### **Contest of jurisdiction of court.**

In the use of *Re Hill* (Cal.) supra, it appeared that a testator provided in his will that any contestant thereof should forfeit his share under the will. A daughter of the testator, specifically stating that she did not contest the validity of the will, opposed the probate thereof on the ground that the original jurisdiction for the probate of the will was in the courts of another state. It was held not to constitute a contest of the will.

#### **Petition for settlement of community of acquets and gains.**

In *Rouse's Succession* (1918) 144 La. 143, 80 So. 229, it appeared that two daughters of a testator by his first wife sought to have settlement made of a community of acquets and gains under which their parents had been married, and to obtain their mother's succession. The widow of the testator and coexecutrix of his estate asked that the petition of the plaintiffs be decreed to be an attack on the will of the testator, whereby their bequests were forfeited. The court said that the suit was not a contest of the will, and that the provision of forfeiture for contest did not apply.

#### **Tacit approval of contest.**

In *Re Lague* (1917) 198 Mo. App. 261, 200 S. W. 83, it appeared that a legatee had unsuccessfully contested a will wherein it was provided that the share of a contestant should be forfeited, and it was sought to have the shares given other legatees declared to be forfeited on the ground that they had assisted the active contestant. It was testified that all of the defendants, when interviewed by the contestant, had flatly refused to be parties to the dispute, although there was some evidence that they

looked on the suit with favor. The court held that there was no evidence of any active assistance given to the contest by the defendants, and that a desire on their part for the success of the suit would not bring them within the meaning of the forfeiture clause.

**Withholding of property of estate.**

In *Chew's Appeal* (1863) 45 Pa. 228, it appeared that one of the testator's children resisted the sale of the family homestead, and held possession until removed by ejectment. He also withheld possession of the books and papers belonging to the estate. The court held that those acts were not sufficient to constitute a contest of the will; since the homestead was claimed on some alleged right of election, the title of the testator was not denied, and no dispute was made concerning the provisions of the will. The court said: "The prohibition did not mean to prevent the assertion of supposed legal rights, not amounting to denial of the devises to others, by any of the devisees, or by the executors."

**Action to recover bequest under will.**

In *Loyd v. Spillet* (1734) 3 P. Wms. 344, 24 Eng. Reprint, 1094, it appeared that a testator devised his real and personal estate to the defendants in trust to pay to the two plaintiffs annuities of £15 per annum. It was held that the annuitants, the plaintiffs, by bringing an action to recover from the trustees their annuities and arrears, had not forfeited them by reason of a clause in the will providing that the heirs of the testator should lose their annuities in case they disputed the will.

**Suit for share of residue.**

In *Atty. Gen. v. Parkin* (1769) 2 Ambl. 566, 27 Eng. Reprint, 365, it appeared that a testator made a bequest to his next of kin, his sister, and stipulated that if she sought to set aside the will, or to make a further claim on his estate, the bequest should void. It was held that the next of kin might claim the residue of the estate, undisposed of under the will, without incurring a forfeiture.

**Publishing denial of executors' right to sell real estate.**

In *Chew's Appeal* (Pa.) supra, it appeared that a testator provided in his will that the share of any devisees or legatees thereunder should be forfeited in case of any attempt on their part to dispute or invalidate the will. A beneficiary under the will published a notice denying the right of the executors to sell any part of the estate, and caused similar notices to be posted in a county where the executors were holding a public sale of the real estate of the testator. It was also shown that he had brought suit against several of the purchasers at the sale, which suits, however, were not pressed. It was held that the publication of the notices was not a dispute of any of the bequests or provisions under the will; it did not affect the distribution under the will, but was merely an attack on the administration of the estate, for which the legatee in question could not be considered to have forfeited his share under the will.

**Continuance of defensive action begun before death of testator.**

In *Warwick v. Varley* (1861) 30 Beav. 347, 54 Eng. Reprint, 923, it seemed that a testator gave a share of his property to his nephew, and specified in his will that any person instituting proceedings against the provisions thereof should forfeit his share thereunder. The testator, during his lifetime, had attempted to assert possession to several cottages, the rent of which he had permitted the nephew's mother to collect for some thirty years, and, to raise the question, distrained on the tenants, with the consequence that various actions of replevin were brought. After the death of the testator the nephew distrained. The court held that the distraint by the nephew was only by way of defense, and that the matter was to be treated as one whole proceeding begun during the testator's lifetime, with the consequence that the procedure did not constitute a violation of the condition in the will, which did not forbid the nephew to defend himself, and which referred to proceedings un-

dertaken after the death of the testator.

**Offer to probate will not known to be spurious.**

In *Re Kirkholder* (1916) 171 App. Div. 153, 157 N. Y. Supp. 37, affirming (1914) 86 Misc. 692, 149 N. Y. Supp. 87, the court said, obiter, that the offering for probate of a will alleged to be of later date than the one which

is finally established, and which contains a clause forfeiting the share of any disputant thereof, does not constitute an attempt to contest the validity of the earlier will so as to bring the proponent of the later will within the jurisdiction of the forfeiture clause, provided he is acting in good faith.

See also the reported case (*RE BERGLAND*, ante, 1863). R. S.

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WILLIAM KRESS, Appt.,

v.

ARTHUR LANE et al.

*Iowa Supreme Court — April 10, 1919.*

(— Iowa, —, 171 N. W. 571.)

**Explosives — storage in frame building — negligence.**

1. Merely storing gasoline and kerosene in barrels in a frame building is not such negligence as to render one liable for loss by fire of adjoining buildings, due to the explosion of the oils when the building in which they were set afire without negligence on the part of the one so storing the oil.

[See note on this question beginning on page 1378.]

**Nuisance — storage of inflammable oils.**

2. The mere possession in a frame building of several barrels of gasoline and kerosene does not create a nuisance which will render the owner liable in case fire originating without his negligence in the building is spread to neighboring buildings by explosion of the oils, for the loss thereby caused to such adjoining buildings.

[See 20 R. L. C. 409.]

**Proximate cause — storage of oils — setting fire to building.**

3. The wrongful act of a stranger in setting fire to a building in which gasoline is stored in barrels is the proximate cause of destruction of neighboring buildings by the explosion of the inflammable oils by the fire.

[See 22 R. C. L. 166.]

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**APPEAL** by plaintiff from a judgment of the District Court for Harrison County (Arthur, J.) sustaining a demurrer to a petition filed to recover damages for the burning of plaintiff's building, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cochran & Wolfe and H. L. Robertson, for appellant:

It is a matter of such common knowledge that gasoline or coal oil, in large quantities, are dangerous, that courts will take judicial notice of the fact of their explosive character.

*Whittemore v. Baxter Laundry Co.* 181 Mich. 564, 52 L.R.A. (N.S.) 930, 148 N. W. 437, Ann. Cas. 1916C, 818.

The question of whether the storing and keeping of about 350 gallons of gasoline and about 250 gallons of coal oil, in and about a building which is located in an alley in a small town, in the business part thereof, and within 40 feet of the business houses and residence property, is a nuisance or not, is an issue of fact for the jury to determine, and it is error for the court to hold



that the storing and maintaining of such gasoline and coal oil is not a nuisance as a matter of law, regardless of the question of negligence.

*Whittemore v. Baxter Laundry Co.* Ann. Cas. 1916C, 821, and note, 181 Mich 564, 52 L.R.A.(N.S.) 930, 148 N. W. 437; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74; 20 R. C. L. 407, 409, notes.

In an action for damages based upon an alleged nuisance, it is not necessary for plaintiff to allege or prove negligence.

*Watson v. Mississippi River Power Co.* 174 Iowa, 23, L.R.A.1916D, 101, 156 N. W. 188, 13 N. C. C. A. 873.

A man has no right to use his property, even lawfully, in such a manner as to unnecessarily interfere with the right of others to lawfully use their property.

*Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593.

Messrs. Roadifer & Roadifer, for appellees:

The mere fact that explosives are kept stored upon premises even in large quantities, for sale, does not constitute a nuisance if the same are stored and kept in a reasonable and prudent manner, without negligence on the part of the party handling them.

*Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224; *Kinney v. Koopman*, 167 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593.

*Evans, J.*, delivered the opinion of the court:

The plaintiff is a resident of the town of Pisgah. The defendants constitute a copartnership engaged in a general merchandise business in the same town. The alleged wrongdoing which the plaintiff charges against the defendants is as follows:

"That as a part of its said business and in connection therewith said defendants kept in a building situated on lots 1, 2, and 3, block 5, of the town of Pisgah, Iowa, about 350 gallons of gasoline and about 250 gallons of coal oil in and about said building; that the said building in which said gasoline and coal oil were kept in and about was a small building, and was located near the alley running north and south just west of said premises; that said

gasolene and coal oil were highly inflammable substances.

"Plaintiff further states that on or about the 29th day of August, A. D. 1917, there was a fire set or broke out in said building in which said gasoline and coal oil were kept in and about as aforesaid, and that said fire caused an explosion of said gasoline and coal oil in and about said building, and thereby set fire to plaintiff's said building, and caused it and the household goods and furniture and personal property therein to be completely destroyed."

The petition is in two counts. In the first the plaintiff claims a recovery on the theory that the defendants maintained a nuisance. In the second count the same facts are stated and a claim of liability based thereon on the theory of negligence. There is no allegation in the petition that the defendants were in any manner responsible for the setting of the fire which caused the explosion of the gasoline. The naked proposition upon which the petition rests is that the defendants were guilty of an actionable wrong in that they stored nine barrels of gasoline and six barrels of kerosene in a frame building upon the premises, and that such wrongful storing of such quantity of these inflammable substances was the proximate cause of the burning of plaintiff's house, in that the fire caused an explosion and thereby enlarged the conflagration. It is not claimed that any statute or ordinance was violated. The claim of nuisance is predicated upon the highly inflammable character of the substances. The second count predicates the claim of negligence upon the large quantity of these inflammable substances and upon the fact that they were stored in a "frame building near the alley." There is no complaint otherwise as to the method of storage. It is not alleged that the gasoline was confined in defective containers. Nor, is there any claim that the presence of the gasoline or kerosene had anything to do with the starting of the conflagration. Nor is there any

claim that the defendants had anything to do with the starting of the fire. The fair implication of the petition is that the fire was "set" by other persons. We think it quite

**Nuisance—  
storage of in-  
flammable oils.**

clear that the mere possession of the gasoline and kerosene in question, without more, was not an actionable wrong. In *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224, a question of possession and storage of dynamite was involved. In that case it was held that the possession and temporary storage of dynamite by the defendant, if done in a reasonable and prudent manner, did not constitute a nuisance, and was not wrongful. The fact that dynamite is subject to explosion by contact and concussion was an element of danger which does not appear in this case. Gasoline is concededly a dangerous substance if used, stored, or exposed negligently. Properly used, it is not highly dangerous. For proper use, it has become one of the pressing necessities of the community. Thousands of gallons of it are daily in course of transportation into and through every town in the state. It is, of course, highly inflammable, and will not stand exposure to the torch of conflagration. If it be so exposed either by wilful or negligent act, such is the actionable wrong. If gasoline is to be used, it must be stored and handled in some manner and in some quantities. If it be exposed to fire even in small quantities, disastrous consequences are likely to follow. But it should not be thus

**Explosives—  
storage in frame  
building—  
negligence.**

exposed, and no one is ignorant of that fact.

It being averred in the petition that fire was "set" to the building in which the gasoline was stored, such act was a wrongful one, and was the proximate cause of the resulting conflagration. If the quantity of

**Proximate cause  
—storage of oils  
—setting fire to  
building.**

gasoline thus stored in the building had been contained in the tanks of automobiles stored in a garage, a like result would have followed the setting of fire to the garage. Could it be said in such a case that the owners of the garage or the owners of the automobiles were liable for the consequential damage because they were responsible for the presence of the gasoline? We reach the conclusion that no cause of action against the defendants can be predicated on the mere presence and storage of the gasoline, in the absence of allegation that the method of storage was negligent or wrongful, and that such wrongful method of storage operated as a direct and proximate cause of the conflagration itself. The mere fact that it increased the conflagration would not of itself be sufficient. All combustible material necessarily does that. Even a frame building, when exposed to the conflagration, aids the spreading of it to other buildings.

The demurrer was therefore properly sustained, and the ruling is accordingly affirmed.

Ladd, Ch. J., and Salinger and Preston, JJ., concur.

Petition for rehearing denied.

## ANNOTATION.

**Liability for damage to other premises from fire in building where inflammable materials are stored.**

The term "inflammable materials," as used in this annotation, is confined strictly to oils, gases, explosives, and other materials of a highly dangerous character. This limitation, of course, excludes cases involving combustible

materials, such as brush, lumber, sawdust, wood, coal, haystacks, and other similar things.

The authorities are to the effect that the owner of premises on which are stored dangerous inflammable mate-

rials is liable for the destruction by fire of property on neighboring premises of another person, where such inflammable materials were negligently so stored, or were kept in such a manner as to constitute a nuisance, or to be in violation of a valid ordinance or statute, and provided that the destruction was the direct result of such wrongful storing. The following cases in effect lay down this general rule: *Quaker Oats Co. v. Grice* (1912) 115 C. C. A. 343, 195 Fed. 441; *Rudder v. Koopman* (1896) 116 Ala. 332, 37 L.R.A. 489, 22 So. 601; *Wright v. Chicago & N. W. R. Co.* (1888) 27 Ill. App. 200; *Van Fleet v. New York C. & H. R. R. Co.* (1889) 27 N. Y. S. R. 76, 7 N. Y. Supp. 636; *McGuffey v. Pierce-Fordyce Oil Co.* (1918) — Tex. Civ. App. —, 211 S. W. 335.

Of course, to render the owner of the premises on which dangerous inflammable materials are stored liable for the damage to other premises to which fire is communicated by the burning storehouse, on the theory that such storing of inflammable materials was wrongful, the plaintiff must show that the burning or exploding of the wrongfully stored materials was the proximate cause of his damages. *Hamilton v. Cranford Mercantile Co.* (1918) — Ala. —, 78 So. 401; *Beckham v. Seaboard Air Line R. Co.* (1906) 127 Ga. 550, 12 L.R.A. (N.S.) 476, 56 S. E. 638; *Wright v. Chicago & N. W. R. Co.* (1888) 27 Ill. App. 200; *KRESS v. LANE* (reported herewith) ante, 1376; *Stone v. Boston & A. R. Co.* (1898) 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; *Van Fleet v. New York C. & H. R. R. Co.* (1889) 27 N. Y. S. R. 76, 7 N. Y. Supp. 636; *Behling v. Southwest Pennsylvania Pipe Lines* (1894) 160 Pa. 359, 40 Am. St. Rep. 724, 28 Atl. 777. And the question of proximate cause is for the jury where the facts are in dispute. *Wright v. Chicago & N. W. R. Co.* (1888) 27 Ill. App. 200; *Van Fleet v. New York C. & H. R. R. Co.* (1889) 27 N. Y. S. R. 76, 7 N. Y. Supp. 636. But where, upon all the evidence, the court is able to see that the burning of the plaintiff's property was not the probable but the remote result of de-

fendant's wrongful act, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence or other wrongful act. *Stone v. Boston & A. R. Co.* (1898) 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; *Behling v. Southwest Pennsylvania Pipe Lines* (1894) 160 Pa. 359, 40 Am. St. Rep. 724, 28 Atl. 777.

And it also follows that where the owner of the premises on which the fire originated keeps the inflammable materials in a non-negligent manner, and not in violation of law, he cannot be held liable for the destruction of property on other premises by fire originating in such inflammable materials. Thus in the reported case (*KRESS v. LANE*, ante, 1376), it was held that no cause of action could be predicated on the mere presence and storage of inflammable materials, there being no allegation of negligence or wrongful storage, or that such storage was the proximate cause of plaintiff's loss. And in *Cosulich v. Standard Oil Co.* (1890) 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259, reversing (1888) 23 Jones & S. 384, it was held that the mere fact that the plaintiff's loss was a direct result of a fire on defendant's premises which was started by the explosion of a tank in its oil yard did not render it liable, in the absence of a showing of negligence or other wrongful act. So in *Langabaugh v. Anderson* (1903) 68 Ohio St. 131, 62 L.R.A. 948, 67 N. E. 286, 14 Am. Neg. Rep. 170, reversing (1901) 12 Ohio C. D. 341, 22 Ohio C. C. 178, it was held that the storage of crude oil was not a nuisance per se, independent of the use and care thereof. In *Cook v. Anderson* (1887) 85 Ala. 99, 4 So. 713, it was held that the tenant of a building destroyed by fire could not set off his loss against the claim of his landlord for rent, on the ground that the fire originated from an unknown cause in the landlord's adjoining store where plaintiff kept for sale quantities of oils, paints, and other inflammable materials, at least, in the absence of a showing of negligence upon the part of the plaintiff landlord.

In reaching this conclusion it was said that the mere fact of keeping such materials in stock was not sufficient negligence, and that the defendant could not recover upon the ground that keeping inflammable materials for the purpose of trade in the basement of a store in a city is a private nuisance per se, which made the plaintiff liable for actual injury resulting therefrom without regard to negligence on his part. And see also *Hamilton v. Cranford Mercantile Co.* (1918) — Ala. —, 78 So. 401, wherein it was held that damages for the destruction of a building by fire communicated to it from a burning warehouse in which a quantity of dynamite had been temporarily stored could not be recovered from the owner of the warehouse in the absence of negligence in the keeping of the dynamite in the warehouse.

There is a conflict of authority as to the effect of the fact that the fire was actually started upon the plaintiff's property by a third person.

In *Quaker Oats Co. v. Grice* (1912) 115 C. C. A. 343, 195 Fed. 441, where a feed mill was negligently allowed to become filled with dust, which would explode on the application of a spark or flame, it was held that the owner thereof was liable for the destruction by fire of the property to which fire, following an explosion in the mill, was communicated, and that the mill owner could not be relieved of liability because of the fact that the actual spark which fired the dust was produced by an intruder, who undertook to light his pipe in the mill. The actionable negligence was said to be the failure of the owner of the mill to adopt ordinary methods of removing combustible dust therefrom.

On the other hand, in *Beckham v. Seaboard Air Line R. Co.* (1906) 127 Ga. 550, 12 L.R.A. (N.S.) 476, 56 S. E. 638, it was held that a railroad company was not liable for damages for the loss of a building destroyed by fire communicated to it from a near-by burning wooden building in which the company negligently stored oil and waste, kept lights burning, and allowed tramps and other persons to

congregate, where the fire originated from the careless or accidental act of a person not in the company's employ, although in the building by its permission. This was upon the theory that the fire was the result of the intervening act of a responsible agency, wherefore the company's negligence was not the proximate cause of plaintiff's injury. It is worthy of note in connection with this decision that the court seemingly took no notice of the rule approved in *Wright v. Chicago & N. W. R. Co.* (1888) 27 Ill. App. 200 (cited supra), to the effect that "any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action," —which rule, it would seem, might well have been applied.

And a conclusion similar to that in *Beckham v. Seaboard Air Line R. Co.* (Ga.) supra, was reached in *Stone v. Boston & A. R. Co.* (1898) 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490, it having been held that neither negligence in storing oil upon the platform of a freight house nor in permitting it to remain there in violation of statute was the proximate cause of damage by fire to the neighboring premises of an individual, where the fire was started by the careless dropping of a match by a man who came to the platform to deliver goods for transportation, and who was in no sense a servant, agent, or guest of the railroad company. This also was upon the theory that there

was an intervention between the original cause and the resulting damage by an intelligent and responsible human being, but the decision does not lend full support to the Beckham Case because the court, in reaching its conclusion, placed considerable emphasis upon the fact that the person who dropped the match was rightfully upon the premises, and that the railroad company could not lawfully have excluded him from its grounds because it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad and to the use of its depot, other buildings, and grounds.

In *Van Fleet v. New York C. & H. R. R. Co.* (1889) 27 N. Y. S. R. 76, 7 N. Y. Supp. 636, where defendant erected a shanty of pine boards within a few inches of plaintiff's building, and kept therein not only a stove in which soft coal was burned, but lamps and considerable highly combustible substances, such as oil, oil cans, and waste, which, in combination with oil, were subject to spontaneous combustion, it was held that the defendant was liable for the destruction of plaintiff's building by fire communicated to it from the burning shanty, although there was no direct evidence as to the origin of the fire.

The question under annotation has also been viewed as affected by the fact that the fire originated on the premises of a third person, and was communicated to the defendant's premises, and from there to the plaintiff's property. In such a case it seems that where the keeping of dangerous inflammable materials consti-

tutes a nuisance, such keeping renders the owner thereof liable for the destruction of near-by premises by fire resulting from an explosion of such materials, although the explosion was caused by fire originating on the adjoining property of a third person. Thus, in *Rudder v. Koopman* (1896) 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, it was held that the keeping of large quantities of dynamite and gunpowder in a wooden building in a thickly settled portion of an incorporated town where there were many buildings and persons in proximity constituted a nuisance and created a liability for the burning of a building which was set on fire by firebrands cast upon it by an explosion of the dangerous materials, although the explosion was caused by a fire which originated on the premises of a third person, and without any fault of the owner of the explosives. But the contrary is the rule where the defendant's inflammable materials are properly and lawfully kept. This is illustrated by *Behling v. Southwest Pennsylvania Pipe Lines* (1894) 160 Pa. 359, 40 Am. St. Rep. 724, 28 Atl. 777, wherein it was held that a pipe line company was not liable for the burning of a building on adjoining premises where burning oil from neighboring property flowed down upon its pipe line, causing it to burst and throw burning oil upon plaintiff's building, the court arguing that since its pipe line was in itself harmless, and the defendant was not bound to anticipate the bursting of its line from burning oil flowing over it from other property, the bursting of its line was not the true proximate cause of plaintiff's loss. G. J. C.

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HENRY F. WOODWARD et al.

v.

FREDERIC E. SNOW et al.

ALLAN FORBES, Trustee in Bankruptcy, et al., Appts.

*Massachusetts Supreme Judicial Court—June 24, 1919.*

(233 Mass. 267, 124 N. E. 85.)

**Will — compromise — affirmance by court — change of terms.**

1. Upon confirmation by a court having jurisdiction of the parties of

a compromise by legatees under a will, which changes the nature of the interest conferred upon one of them, the subsequent controversies must be determined upon the footing that the interest was changed, and not upon construction of the original will.

[See note on this question beginning on page 1384.]

**Bankruptcy — validity of assignment for creditors.**

2. An assignment in good faith to secure present debts, made more than four months before bankruptcy, is binding on the trustee.

[See 3 R. C. L. 271, 272.]

**Trust — right to assign income.**

3. A right of a beneficiary of a trust under a will to receive the income from the trustee is subject to assignment for creditors.

**APPEAL** by certain defendants from a judgment of the Supreme Judicial Court for Suffolk County in favor of plaintiffs in a suit to reach and apply the interest, if any, of defendant Cheney under the will of his deceased father, to the payment of claims of defendant's creditors as established by an instrument of trust. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hale & Dickerman, Samuel M. Child, John L. Hall, and James W. Burke for appellants.

Messrs. Robert Cushman, Robert G. Dodge, and Henry F. Woodward for appellees.

Pierce, J., delivered the opinion of the court:

This is a suit in equity brought by the plaintiffs as trustees for certain creditors of the defendant Benjamin P. Cheney under a trust for such creditors created and established by a sealed agreement and an assignment dated respectively April 6, and April 10, 1914, against the trustees under the will of Benjamin P. Cheney, the father of the defendant of that name, to reach and apply the interest, if any, of the defendant Cheney under the will, to the payment of the claims of the aforesaid creditors against Cheney as established by the instrument of trust.

In 1895, Benjamin P. Cheney died testate. By a decree of the probate court for the county of Norfolk his will was admitted to probate and the defendant Cheney was duly appointed one of the executors and trustees thereof. An appeal from said decree was taken by the widow and certain heirs to the supreme judicial court for said county. While the appeal was pending, an agreement by compromise was executed

by all persons who would "be entitled to the estate . . . under the statutes regulating the descent and distribution of intestate estates," "subject to the approval of the supreme judicial court." After the appointment of a suitable person to represent certain minors interested under the provisions of said will, and all future subsequent interests which may arise under the same, and upon the report of that person that the compromise and agreement "sought by said bill to be confirmed by the decree of this court is just and reasonable in its effects upon the interests of such minors and such future contingent interests," a single justice of this court, by decree entered March 27, 1896, and unreversed, found the compromise and agreement "is just and reasonable" and ordered that the written agreement of compromise be "ratified and confirmed." He also ordered "that the decree of the judge of probate for Norfolk county allowing and approving said instrument purporting to be the last will and testament of said Benjamin P. Cheney be affirmed, as provided in and subject to the terms of said agreement."

The defendant Cheney's first contention is that the interest given

him by the will was one which could not be assigned.

His second proposition is that under the decisions of this court (see *Ellis v. Hunt*, 228 Mass. 39, 116 N. E. 956; *Baxter v. Treasurer*, 209 Mass. 459, 95 N. E. 854) parties in making a compromise of a controversy as to the validity of an alleged will under the statutes (now Rev. Laws, chap. 148, §§ 15-18) have no right to make a new will for the testator, and from this it follows (especially when the compromise is carried out by the will being admitted to probate) that the nature of the interest given a legatee is that described in the will.

In the case of the agreement of compromise of the will of the defendant Cheney's father, here in question, the parties did undertake to change the nature of the interest given to the defendant Cheney, and the agreement of compromise was confirmed by a decree of a single justice of this court made on March 27, 1896.

By the agreement of compromise, which was confirmed by this decree, the interest given to the defendant Cheney was an interest which could be assigned. The decree confirming this agreement of compromise has not been reversed. Whether that decree was or was not an erroneous one is not material. This court had jurisdiction of the parties and of the subject-matter of the cause in which that decree was made. It follows that this unreversed decree is the law of this case, and that the rights of the parties are to be determined upon the footing that the terms

Will-com-  
promise-  
affirmance by  
court-change  
of terms.

of the will were  
changed by the  
agreement of com-  
promise, and not

upon a construction of the will as it appeared when offered for probate.

Under the unrevoked decree of this court the defendant Cheney had an assignable interest to the amount of \$615,000, and also a vested assignable expectant interest in the income from a trust estate, which

he could sell or assign in payment of or to secure the payment of any present or future maturing obligations. *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Putnam v. Story*, 132 Mass. 205, 212; *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210; *Andrews Electric Co. v. St. Alphonse Catholic Total Abstinence Soc.* 233 Mass. 20, 123 N. E. 103. The single justice of this court, upon the evidence reported by the commissioner, was warranted in finding, as he did, that the instrument of assignment and agreement under which the plaintiffs make claim to the fund in the hands of the trustees, was given by Cheney "to the plaintiffs for a present and valuable consideration, . . . in good faith and without fraud, either actual or constructive,—and was given to secure a valid existing indebtedness." As the assignment was made in good faith upon a present consideration for the payment, and securing the payment, of an admitted obligation of Cheney to some of his creditors, and was made more than four months before the commencement of bankruptcy proceedings against Cheney, it was good between the parties and against the trustee in bankruptcy, whether the assignment be treated as a partial or full assignment of income. *Bridge v. Kedon*, 163 Cal. 493, 43 L.R.A. (N.S.) 404, 126 Pac. 149, and cases collected; *Andrews Electric Co. v. St. Alphonse Catholic Total Abstinence Soc.* supra.

Bankruptcy-  
validity of  
assignment  
for creditors.

The right of Cheney and the right of the assignee to receive the income of the trust fund was a present, equitable right of ownership which ripened into an ordinary property right when the income accumulated in the hands of the trustee became payable under the terms of the trust; and was not a right or an assignment of a right in a debt to be created in the future, or of the bare possibility of

Trust-right to  
assign income.

there ever being such a debt. *Wainwright v. Sawyer*, 150 Mass. 168, 22 N. E. 885; *Cummings v. Stearns*, 161 Mass. 506, 37 N. E. 758; *Huntress v. Allen*, 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949; *Clarke v. Fay*, 205 Mass. 228, 27 L.R.A. (N.S.) 454, 91 N. E. 328. We

are of opinion that the trust in favor of the plaintiffs attached to any undistributed income in the hands of the trustees after payment in full of the two prior assignments.

The decree of the single justice should be affirmed, with costs.

Decree accordingly.

### ANNOTATION.

#### Compromise or settlement of controversy over will as changing nature of interest or estate under will.

This note is confined strictly to a discussion of the cases wherein it appeared that a controversy respecting a will was settled by an agreement purporting to change the nature of an interest or estate given by the will. It excludes family settlements made in the absence of a controversy, though they tend to alter the provisions of a will, and also excludes settlements by which the amount or extent of a share given by a will is affected.

The question whether a compromise or settlement of a controversy over a will may operate to change the nature of an interest or estate given by the will seems to have arisen only in Massachusetts. In that jurisdiction there is a statute providing that a binding settlement of a controversy arising from a will may be made where the agreement is signed by all the parties in interest, and is found on adjudication to be just and reasonable in its effect. In *Neafsey v. Chincholo* (1917) 225 Mass. 12, 113 N. E. 651, in a discussion on the statute, the court said by way of dictum: "It is hard to see how it authorizes interested parties to make a new will for the testator and thereby to extinguish a devise over after a life estate."

But in two later cases, it is held that a compromise of a controversy over a will, when executed in strict accordance with the statute, may change the nature of an interest or estate granted by the will. *Copeland v. Wheelwright* (1918) 230 Mass. 131, 119 N. E. 667. And see the reported case (*WOODWARD v. SNOW*, ante, 1381).

In the reported case (*WOODWARD v. SNOW*) it was held that an interest, asserted to be unassignable under the will, was properly made assignable by the terms of a compromise, approved as provided by statute.

In *Copeland v. Wheelwright* (Mass.) supra, it appeared that a testator by his will bequeathed property in trust "for the benefit of his son and daughter, with remainder as to the share of the son in certain contingencies to his heirs at law." The heirs presumptive of the son were his sister and, in the event of her decease, her children. The remainder of the share bequeathed to the sister during her life was for the benefit of her issue. The sister contested the will and a compromise was executed in compliance with the statute, all the interests being represented and signing the agreement. The result of the compromise was to eliminate the provisions "for the benefit of the heirs at law of the son," and to give the son an absolute interest instead of the equitable interest granted by the will. It was held that under the circumstances, all the statutory precautions having been observed, it was possible to find that an agreement which resulted in destroying future contingent interests was "just and reasonable" as demanded by statute. The compromise as approved by the probate court was upheld, the court saying: "There is nothing in the express terms of the statute which prevents the entire extinguishment by agreement of a future contingent interest in appropriate circumstances." R. S.



GIUSEPPE TRIMBOLI et al., Respts.,  
v.

JOHN C. KINKEL, Appt.

*New York Court of Appeals — April 8, 1910.*

(226 N. Y. 147, 123 N. E. 205.)

**Attorney and client — passing invalid title — reliance on other ground.**

1. An attorney who passes a title to real estate, which is unmarketable because of an exchange of real estate under a power to sell and distribute the proceeds, cannot avoid liability because the title was good by adverse possession unless he gathers the evidence showing that fact.

[See note on this question beginning on page 1389.]

**Power — to sell and distribute.**

2. A power to sell and distribute the proceeds is not a power to exchange.

[See 21 R. C. L. 780.]

**Attorney and client — negligence — failure to apply rules of law.**

3. It is negligence on the part of an attorney in preparing an abstract of title to real estate to fail to apply the settled rules of law which should be known to all conveyancers.

[See 2 R. C. L. 1018, 1019.]

**Adverse possession — lapse of time — effect.**

4. Mere lapse of time is insufficient to establish title to real estate by adverse possession without proof of hostile holding.

[See 1 R. C. L. 703, 716.]

**Definition — marketable title.**

5. A marketable title to real estate is one that may be freely made the subject of resale.

**Attorney and client — liability for passing unmarketable title.**

6. An attorney who passes a title to real estate which is not marketable, by reason of which his client loses a resale, is answerable to him for the loss thereby occasioned, although the title of the client is supported by evidence which would make a prima facie case in a contest with an adverse claimant, if, when the title is challenged, the attorney makes no effort to support it.

**Damages — passing unmarketable title to real estate — lost profits.**

7. An attorney who passes an unmarketable title to real estate is not liable for the lost profits in case a resale fails because of such title, nor for the costs of attempting to establish against the purchaser, as marketable, a title which under known rules of law is not so.

**— costs of litigation.**

8. Costs of litigation are not chargeable as damages unless reasonably incurred.

[See 8 R. C. L. 499.]

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a special term for Kings County (Scudder, J.) in favor of defendant, and granting a new trial, in an action brought to recover damages alleged to have been caused by negligence of defendant in the performance of professional services in searching and examining title to certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles B. Templeton, and John C. Kinkel, in propria persona, for appellant:

The judgment of the special term in the Turco action against the plaintiffs as affirmed upon appeal is not binding upon defendant for the reason that he was not a party to that action, or

to the record thereof; nor is it a bar against him in this action for the same reason.

Durant v. Abendroth, 97 N. Y. 132; Ward v. Boyce, 152 N. Y. 191, 36 L.R.A. 549, 46 N. E. 180; New York v. New York City R. Co. 193 N. Y. 543, 86 N. E. 565.

The findings of fact and conclusions of law are fully sustained by the parol testimony and the documentary evidence in the case.

*Baker v. Oakwood*, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312; *Arents v. Long Island R. Co.* 156 N. Y. 1, 50 N. E. 422; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; *Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841; *Green v. Horn*, 207 N. Y. 489, 101 N. E. 430; *Clarke v. Wollpert*, 128 App. Div. 203, 112 N. Y. Supp. 547; *Monnot v. Murphy*, 207 N. Y. 240, 100 N. E. 742.

Title by adverse possession clearly established by parol evidence constituted a marketable title.

*Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841; *Baker v. Oakwood*, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312; *Clarke v. Wollpert*, 128 App. Div. 203, 112 N. Y. Supp. 547.

Messrs. Charles L. Fasullo and Joseph G. Giambalvo, for respondents:

The purchaser's title must be good and marketable; that is, a title free from reasonable doubt. If there is anything to the contrary, it is the imperative duty of the attorney who examines the title to inform his client fully and fairly of all matters which may involve his client in litigation.

*Weeks*, Attys. 2d ed. 1892, p. 541, § 267; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Jordan v. Poillon*, 77 N. Y. 518; *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed in 160 N. Y. 699, 55 N. E. 1093.

Defendant was grossly negligent in determining that the executor's deed in question was valid.

*Gerard*, Titles to Real Estate 1896, 4th ed. 439; *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540; *Scholle v. Scholle*, 113 N. Y. 261, 21 N. E. 84; *Moran v. James*, 21 App. Div. 183, 47 N. Y. Supp. 486; *Woerz v. Rademacher*, 120 N. Y. 62, 23 N. E. 1113; *Powers v. Bergen*, 6 N. Y. 358; 2 *Reeves*, Real Prop. p. 1226; 2 *Perry*, Trusts, § 769; *King v. Whiton*, 15 Wis. 685; *Carr's Petition*, 16 R. I. 645, 27 Am. St. Rep. 773, 19 Atl. 145; *Heard v. Read*, 171 Mass. 374, 50 N. E. 638; *Toole v. Toole*, 112 N. Y. 333, 2 L.R.A. 465, 8 Am. St. Rep. 750, 19 N. E. 682; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527; *Stokes v. Johnson*, 57 N. Y. 673; 1 *Thornton*, Attys. 1914, § 314.

It was reversible error to admit evidence tending to prove title by adverse possession, offered by defendant as a separate and complete defense to plaintiffs' cause of action, for the reason that until such a title is judicially established in an action wherein all interested persons are made parties it will remain unmarketable.

*Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 994; *Berkowitz v. Brown*, 3 Misc. 1, 23 N. Y. Supp. 792; *Smith v. Reich*, 80 Hun. 287, 30 N. Y. Supp. 167; *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674.

Even if defendant has proven title by adverse possession, plaintiffs might still be obliged to litigate with the record owners the question of title.

*Simis v. McElroy*, supra.

It was incumbent upon the plaintiffs, if they sought to hold defendant liable for damages, to prove that due notice of the commencement of the Turco action against them was given to defendant, with request to him to assume the defense thereof.

*Finton v. Eggleston*, 61 Hun. 246, 16 N. Y. Supp. 721; *Charman v. Hibbler*, 31 App. Div. 477, 52 N. Y. Supp. 212; *Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275; *Friedgood v. Kline*, 67 Misc. 428, 123 N. Y. Supp. 247; *Hudson River Teleph. Co. v. Aetna L. Ins. Co.* 66 Misc. 329, 121 N. Y. Supp. 565.

The mere fact that there are mesne conveyances of record from Harriet A. Anderson (1863) down to plaintiffs (1906) does not, of itself, establish title by adverse possession. The law requires parol evidence of all the essential elements which constitute such a title.

*Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 994; *Berkowitz v. Brown*, 3 Misc. 1, 23 N. Y. Supp. 792; *Smith v. Reich*, 80 Hun. 287, 30 N. Y. Supp. 167; *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674.

The exclusion of evidence offered by plaintiffs to the effect that prior to and at the time they retained defendant the latter held himself out as a specialist in real estate was reversible error.

*Carpenter v. Blake*, 50 N. Y. 696.

*Cardozo*, J., delivered the opinion of the court:

This is an action by client against attorney.

In 1906, the plaintiffs retained the defendant to search the title to land

in Brooklyn which the plaintiffs were about to buy. The defendant reported that the title was good and marketable. He made up an abstract which he delivered to his clients. This abstract shows that in 1861 title was in Aaron Clark and Harriet A. Anderson as tenants in common. Mr. Clark left a will by which his real estate passed to devisees in fee. Power to sell the land and divide the proceeds was given to the executor. The executor in 1863 conveyed his testator's undivided interest to the cotenant, Harriet A. Anderson. The grantee in return conveyed to the executor an interest in another parcel. The transaction was not a sale for money, but an exchange. Its nature is disclosed by the deed, which is described in the abstract. Harriet A. Anderson conveyed the land in 1868 to one Frederick W. Grimme, whose title passed thereafter, by mesne conveyances, to the plaintiffs' vendors. The law is settled that a

Power—to sell  
and distribute.

power to sell and distribute the proceeds is not a power to exchange. *Woerz v. Rademacher*, 120 N. Y. 62, 68, 23 N. E. 1113; *Moran v. James*, 21 App. Div. 183, 185, 45 N. Y. Supp. 486; *Woodward v. Jewell*, 140 U. S. 247, 253, 35 L. ed. 478, 481, 11 Sup. Ct. Rep. 784. There was, therefore, a flaw in the record title. The defendant made no mention of it to his clients. He made no investigation of the occupation of the land. He supplied no evidence of adverse possession. He let his clients complete the purchase on the assumption that the record title was perfect. In 1910 the plaintiffs made a contract of resale. The purchaser rejected title because of the flaw in the record. The defendant represented the plaintiffs at the closing. Even then he supplied no evidence of adverse possession. He made no claim that title could be sustained upon that ground. His position still was that the record title was sufficient. The purchaser sued for the deposit and

the expenses of searching title. The sellers defended. They were then represented by new counsel. The purchaser prevailed, and the title was adjudged unmarketable. *Turco v. Trimboli*, 152 App. Div. 431, 137 N. Y. Supp. 343. This action was then brought to compel the attorney to respond for the damages resulting from his negligence. In defense he has attempted to prove that the defect in the record title has been cured by adverse possession for more than fifty years. The trial judge held that with this evidence available there was a marketable title, and that the defendant had not been negligent. The complaint was dismissed upon the merits. The appellate division rules that "the defendant was negligent in passing the title upon the view that the executor's deed was valid." It therefore reversed the judgment and ordered a new trial.

We agree with the appellate division that negligence was proved. The executor's deed was plainly invalid. It is negligence to fail to apply the settled rules of law that should be known to all conveyancers. *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed on opinion below in 160 N. Y. 699, 55 N. E. 1093; *Citizens' Loan Fund & Sav. Asso. v. Friedley*, 123 Ind. 143, 7 L.R.A. 669, 18 Am. St. Rep. 320, 23 N. E. 1075; *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213. The defendant knew the facts; for his search went back to the executor's deed and farther. Knowing the facts, he was chargeable with knowledge of their significance. In the absence of clear and cogent evidence of adverse possession, the title was unmarketable. *Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841. That evidence, if it existed, should have been gathered by the defendant, and preserved in fitting form, before title was accepted. *Crocker Point Asso. v. Gouraud*, 224 N. Y.

Attorney and  
client—negli-  
gence—failure  
to apply rules  
of law.

343, 350, 120 N. E. 737. Nothing of the kind was done. Mere lapse of time was insufficient without proof of a hostile holding. *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674. The defendant does not acquit himself of negligence by showing that evidence *could* have been collected. He must show that it *was* collected. Until that duty had been fulfilled, the title was unmarketable.

The question remains whether there is any evidence of damage. The defendant has proved that for more than fifty years the plaintiffs and their grantors have been in hostile and unchallenged occupation of the land. The trial judge has held that they have title. We do not need to determine whether their ownership is unclouded by any reasonable doubt. *Freedman v. Oppenheim*, and *Simis v. McElroy*, *supra*; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387; *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99. At least, they cannot be said to have made good their allegation that they are *not* the owners. *Woolley v. Newcombe*, 87 N. Y. 605. Their title to an undivided half is independent of the power of sale, and is undoubted. Their title to the other half, if not undoubted, has been supported by evidence which would make out a *prima facie* case in any contest with an adverse claimant. *Koch v. Ellwood*, 138 App. Div. 584, 123 N. Y. Supp. 502; *Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766; *Arnold v. Limeburger*, 122 Ga. 72, 79, 49 S. E. 812; *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935; *Dessaunier v. Murphy*, 33 Mo. 184; *Gross v. Disney*, 95 Tenn. 592, 32 S. W. 632. In such circumstances there can be no recovery either of the whole purchase price or of half of it, even if we assume this to be the proper measure of damage where title to the whole or

the half has altogether failed. The cloud, if there is any, is shadowy and vague and distant. There has been no attempt to prove the extent to which the presence of such a cloud depreciates the value. *Lawall v. Groman*, 180 Pa. 532, 540, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69; *Whiteman v. Hawkins*, L. R. 4 C. P. Div. 13, 39 L. T. N. S. 629, 27 Week. Rep. 262. The defendant argues that the damages are therefore nominal. But we think this does not follow. The plaintiffs relied on the defendant's assurance that they had a marketable record title. Relying upon that assurance, they made a fruitless contract of resale. They have lost the commissions paid their brokers. They have been forced to reimburse the purchaser for the cost of an examination of the title. If the defendant had been diligent, these expenses would have been saved. The consequences were to be foreseen. A marketable title is one that may be freely made the subject of resale. Resale involves certain expenses as common, if not necessary, incidents. A lawyer takes the risk that those expenses will be lost if he fails to gather in due season the evidences of title. It is a loss within the range of probable contemplation. *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. 266; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184; *Whitehead & A. Mach. Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736. A different situation would be presented if the plaintiffs had themselves been negligent in failing to supply proof of adverse possession, and had thereby thrown away the opportunity of preserving their contract and minimizing the damage. They are not chargeable with negligence, for the defendant was still their lawyer, and when title was rejected, he made no claim, and supplied no evidence, of title through possession.

Adverse possession—lapse of time—effect.

Attorney and client—passing invalid title—reliance on other ground.

Definition—marketable title.

Attorney and client—liability for passing unmarketable title.

Crocker Point Asso. v. Gouraud, supra. The fault was still his own. It is true that the plaintiffs claimed more than they should get. They are not entitled to recover the profits of the resale.

Damages—  
passing un-  
marketable title  
to real estate—  
lost profits.

Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Messmore v. New York Shot & Lead Co. 40 N. Y. 422; Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754. They are still the occupants, and, it may be, the owners of the land, which, for all that the evidence shows, is equally valuable to-day. They are not entitled to recover the costs of their lawsuit with the purchaser. It was foolish as

—costs of  
litigation.

well as futile to litigate the validity of the exercise of the power of sale. Costs of litigation are not chargeable as damages unless reasonably incurred. Gallo v. Brooklyn Sav. Bank, 129 App. Div. 698, 700, 114 N. Y. Supp. 78; Hammond v. Bussey, L. R. 20 Q. B. Div. 79, 57 L. J. Q. B. N. S. 58; Fitz-

gerald v. Heady, 225 Mass. 75, 77, 113 N. E. 844; Sedgw. Damages, § 236. Payments made in the reasonable endeavor to discover evidence of adverse possession may stand upon another basis. Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Pub. Asso. 226 N. Y. 1, 122 N. E. 463; Jones v. Morgan, 90 N. Y. 4, 11, 12, 43 Am. Rep. 131. But we have said enough to show that there is some evidence of damage. Beyond that we need not go. The extent of the recovery is not important at this time. If the plaintiffs made out a right to *anything*, the appellate division did not err in granting a new trial. Upon the inquest that will follow, the defendant's stipulation for judgment absolute may charge him with heavier damages than he would otherwise have to bear. That risk, however, was assumed when the stipulation was given.

The order should be affirmed, and judgment absolute directed in favor of the plaintiffs upon the stipulation, with costs in all courts.

Hiscock, Ch. J., and Collin, Cuddeback, Pound, Crane, and Andrews, JJ., concur.

## ANNOTATION.

### Liability of attorney passing defective title.

- I. General rule, 1889.
- II. The duty required, 1892.
- III. Limits of the rule, 1894.
- IV. Measure of damages, 1894.
- V. Statute of Limitations, 1895.
- VI. Miscellaneous, 1895.

This note does not include cases of fraud, nor cases where the negligence was simply failure to record papers promptly, nor cases against makers of abstracts and title examiners, where it does not appear that they were attorneys.

#### I. General rule.

An attorney employed to examine the title to real property must exercise reasonable care and skill in the matter, and the failure to do so is

negligence for which he will be liable to his client in damages.

United States.—National Sav. Bank v. Ward (1880) 100 U. S. 195, 25 L. ed. 621 (as stating the rule); Page v. Trutch (1876) Fed. Cas. No. 10,668.

Alabama.—Pinkston v. Arrington (1892) 98 Ala. 489, 13 So. 561.

Iowa.—Thomas v. Schee (1890) 80 Iowa, 237, 45 N. W. 539.

Kentucky.—Humboldt Bldg. Asso. v. Ducker (1901) 111 Ky. 759, 64 S. W. 671, also later appeal in (1904) 26 Ky. L. Rep. 931, 82 S. W. 969; Morehead v. Anderson (1907) 125 Ky. 77, 100 S. W. 340.

Maryland.—Watson v. Calvert Bldg. & L. Asso. (1900) 91 Md. 25, 45 Atl. 879 (as stating the rule).

Missouri.—*Gilman v. Hovey* (1858) 26 Mo. 280; *Priddy v. MacKenzie* (1907) 205 Mo. 181, 103 S. W. 968; *Dodd v. Williams* (1877) 3 Mo. App. 278 (as stating the rule).

New Jersey.—*Jacobsen v. Peterson* (1918) 91 N. J. L. 404, 103 Atl. 983, affirmed in (1918) — N. J. —, 105 Atl. 894.

New York.—*TRIMBOLI v. KINKEL* (reported herewith) ante, 1385; *Byrnes v. Palmer* (1897) 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed in (1899) 160 N. Y. 699, 55 N. E. 1093; *Fay v. McGuire* (1897) 20 App. Div. 569, 47 N. Y. Supp. 286, affirmed in (1900) 162 N. Y. 644, 57 N. E. 1109; *Gardner v. Wood* (1902) 37 Misc. 93, 74 N. Y. Supp. 750.

Oregon.—*Currey v. Butcher* (1900) 37 Or. 380, 61 Pac. 631.

Pennsylvania.—*Lawall v. Groman* (1897) 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69.

England.—*King v. Withers* (1690) Prec. in Ch. 19, 24 Eng. Reprint, 10; *Ireson v. Pearman* (1825) 3 Barn. & C. 799, 107 Eng. Reprint, 930, 5 Dowl. & R. 687, 3 L. J. K. B. 119, 27 Revised Rep. 490; *Green v. Dixon* (1837) 1 Jur. 137; *Donaldson v. Haldane* (1840) 7 Clark & F. 762, 7 Eng. Reprint, 1258; *Cooper v. Stephenson* (1852) 16 Jur. 424, 21 L. J. Q. B. N. S. 292; *Allen v. Clark* (1863) 11 Week. Rep. 304, 7 L. T. N. S. 781; *Whiteman v. Hawkins* (1878) L. R. 4 C. P. Div. 13, 39 L. T. N. S. 629, 27 Week. Rep. 262.

In *National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621, Clifford, J., said, obiter: "Attorneys employed by the purchasers of real property to investigate the title of the grantor prior to the purchase impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. Addison, Contr. 6th ed. 400. Like care and skill are also required of attorneys when employed to investigate titles to real

estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. Addison, Torts, Wood's ed. 615."

In *Watson v. Calvert Bldg. & L. Asso.* (1900) 91 Md. 25, 45 Atl. 879, supra, it was said that an attorney in examining title is liable to his client for the possession of a reasonable degree of skill in his profession as well as for the exercise of a like degree of diligence.

It will be seen that in the reported case (*TRIMBOLI v. KINKEL*, ante, 1385) it is held that an attorney employed to examine the title for an intending purchaser is guilty of negligence if he fails to apply the settled rules of law that should be known to all conveyancers.

In *Morehead v. Anderson* (1907) 125 Ky. 77, 100 S. E. 340, it was held that in estimating the value of an attorney's services in preparing abstracts of his client's title which it had agreed to furnish to an intending purchaser, the jury may consider the elements of his responsibility, to wit, for any loss occurring by reason of his ignorance of the law relating to titles, or by his failure to exercise reasonable care in the performance of the service.

It is reasonable care and skill which are required. In *Humboldt Bldg. Asso. v. Ducker* (1901) 111 Ky. 759, 64 S. W. 671, the court said: "We feel authorized in stating that, while the rule in England seems to have been that an attorney is liable to his client only in case of gross neglect or gross incompetence, yet in this country a juster rule for the clients, and one which the profession cannot reasonably find fault with, is that the attorney is liable for the want of such skill, care, and diligence as men of the legal profession possess and exercise in such matters of professional employment."

And this is the present rule in England. In *Whiteman v. Hawkins* (1878) L. R. 4 C. P. Div. (Eng.) 13, 39 L. T. N. S. 629, 27 Week. Rep. 262, it was held that gross negligence was not a prerequisite to recovery against an attorney for negligence in examining a title, a want of due care and attention to his business as solicitor being sufficient. It may be noted that in *Baike v. Chandless* (1811) 3 Campb. (Eng.) 17 (see *infra*, III.), Lord Ellenborough held that an attorney was only liable for *crassa negligentia*. The same idea that there must be *crassa negligentia* was asserted in *Freehold Loan Co. v. McArthur* (1888) 5 Manitoba L. R. 207 (*infra*, II.).

An attorney employed to examine a title is liable for negligence to his client only. *National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621 (see also *Rose's Notes* to this case); *Dundee Mortg. & Trust Invest. Co. v. Hughes* (1884) 20 Fed. 39; *Currey v. Butcher* (1900) 37 Or. 380, 61 Pac. 631.

Where an attorney, at the request of his client, examined his title to a piece of real property and gave him a certificate of the title which the client presented to third parties, who lent him money on the face of it, the attorney not knowing the purpose for which the certificate was desired, the attorney was held not to be liable to the lenders for negligence in examining the title, as he was not in privity with them. *National Sav. Bank v. Ward* (U. S.) *supra* (three judges dissenting).

An attorney who examined title for one who lent on note and mortgage is not liable to the lender's assignee merely of the note and mortgage. *Dundee Mortg. & Trust Invest. Co. v. Hughes* (1884) 20 Fed. 39, *supra*.

Attorneys employed by a man to examine a title are not liable to the man's wife as her attorney unless they knew at the time that he was acting for her. *Currey v. Butcher* (1900) 37 Or. 380, 61 Pac. 631.

The general rule first stated applies where the examination is for an intending purchaser.

**United States.**—*National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621 (as stating the rule).

**Alabama.**—*Pinkston v. Arrington* (1893) 98 Ala. 489, 13 So. 561.

**Iowa.**—*Thomas v. Schee* (1890) 80 Iowa, 237, 45 N. W. 539.

**Missouri.**—*Priddy v. Mackenzie* (1907) 205 Mo. 181, 103 S. W. 968; *Dodd v. Williams* (1877) 3 Mo. App. 278 (stating the rule).

**New Jersey.**—*Jacobsen v. Peterson* (1918) 91 N. J. L. 404, 103 Atl. 983, affirmed in (1918) — N. J. —, 105 Atl. 894.

**New York.**—**TRIMBOLI v. KINKEL** (reported herewith) *ante*, 1885; *Byrnes v. Palmer* (1897) 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed in (1899) 160 N. Y. 699, 55 N. E. 1093; *Fay v. McGuire* (1897) 20 App. Div. 569, 47 N. Y. Supp. 286, affirmed in (1900) 162 N. Y. 644, 57 N. E. 1109.

**Oregon.**—*Currey v. Butcher*, *supra*.

**England.** — *Ireson v. Pearman* (1825) 3 Barn. & C. 799, 107 Eng. Reprint, 980, 5 Dowl. & R. 687, 3 L. J. K. B. 119, 27 Revised Rep. 490; *Allen v. Clark* (1863) 11 Week. Rep. 304, 7 L. T. N. S. 781.

In an action by an attorney for services in examining a title for a mortgagee who proposed to purchase the property, the defendant may show, as going to the value of the services, that the plaintiff reported the title good although it was encumbered with a tax title which the defendant had afterwards to buy for \$50. *Hinckley v. Krug* (1893) 4 Cal. Unrep. 208, 34 Pac. 118.

An attorney who is the owner of land, and who, to induce its purchase by a person, presents to him an abstract with his certificate showing title in him, is liable to such person, if he purchases the land, both upon the warranty that the title was as shown in the abstract and also for a failure to exercise reasonable care, skill, and diligence in preparing the abstract. *Thomas v. Schee* (Iowa) *supra*.

An attorney will be liable for the negligence of his partner in examining a title although he knew nothing

about the matter at the time. *Priddy v. Mackenzie* (Mo.) *supra*.

A cause of action against an attorney for failing to ascertain in whose names certain annuities were standing, as he was retained to do by the plaintiff, who, on his erroneous report, purchased the interests of certain persons, accrues on the breach of duty, not on the discovery of it. *Short v. M'Carthy* (1820) 3 Barn. & Ald. 626, 106 Eng. Reprint, 789, 22 Revised Rep. 503.

It may here be noted that in *Waine v. Kempster* (1859) 1 Fost. & F. (Eng.) 695, the plaintiff claimed that he employed the defendant to advise him in regard to the purchase of hay which he wished to leave on the ground for some time, and in particular whether the same was liable to be seized for rent. The defendant on his side declared that the plaintiff had told him that he himself had inquired about the rent, and desired his advice as to the mode of securing his right of leaving hay on the ground for a time, which was provided for by the receipt as drawn; and the jury found for the defendant.

The general rule also applies where the examination is for an intending lender.

**United States.**—*National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621 (as stating the rule); *Page v. Trutch* (1876) Fed. Cas. No. 10,668.

**Kentucky.**—*Humboldt Bldg. Asso. v. Ducker* (1901) 111 Ky. 759, 64 S. W. 671, also later appeal in (1904) 26 Ky. L. Rep. 931, 82 S. W. 969.

**Maryland.**—*Watson v. Calvert Bldg. & L. Asso.* (1900) 91 Md. 25, 45 Atl. 879 (as stating the rule).

**Missouri.**—*Gilman v. Hovey* (1858) 26 Mo. 280.

**New York.**—*Gardner v. Wood* (1902) 37 Misc. 93, 74 N. Y. Supp. 750.

**Pennsylvania.**—*Lawall v. Groman* (1897) 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69.

**England.**—*King v. Withers* (1690) Prec. in Ch. 19, 24 Eng. Reprint, 10; *Green v. Dixon* (1837) 1 Jur. 137; *Donaldson v. Haldane* (1840) 7 Clark & F. 762, 7 Eng. Reprint, 1258; *Cooper v. Stephenson* (1852) 16 Jur. 424, 21

L. J. Q. B. N. S. 292; *Whiteman v. Hawkins* (1878) L. R. 4 C. P. Div. 13, 39 L. T. N. S. 629, 37 Week. Rep. 262.

Where an attorney examined title for an intending lender, and later foreclosed the mortgage for such lender, and the title was perilous and doubtful and the foreclosure therefore contested, the attorney was not entitled to charge for the labor due to the contest on account of the doubtful nature of the title. *Page v. Trutch* (Fed.) *supra*.

In *King v. Withers* (1690) Prec. in Ch. 19, 24 Eng. Reprint, 10, a scrivener employed by an intending lender to examine title was compelled to carry out an agreement he had made to make good his client for loss occasioned by his omitting to inquire, as counsel had advised him to do, as to whether the wife of the borrower was barred.

An attorney acting for a client who intends to advance money on the security of a legacy is not justified in relying on a partial extract from the will furnished by his client unless the client agrees to take the responsibility. *Wilson v. Tucker* (1822) 3 Starkie (Eng.) 154, Dowl. & R. N. P. 30, 25 Revised Rep. 777.

An attorney employed by the lender to examine the title is liable to him for negligence, though the borrower pays the fees. *Page v. Trutch* (Fed.) and *Lawall v. Groman* (Pa.) *supra*.

See also *Wittenbrock v. Parker* (1894) 102 Cal. 93, 24 L.R.A. 197, 41 Am. St. Rep. 172, 36 Pac. 374, where it is recognized that the attorney employed by the lender is none the less his attorney although the borrower pays the fees.

## II. The duty required.

The attorney employed to examine a title must not overlook encumbrances, such as mortgages (*Gardner v. Wood* (1902) 37 Misc. 93, 74 N. Y. Supp. 750; *Lawall v. Groman* (1897) 180 Pa. 537, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69), judgments (*Gilman v. Hovey* (1858) 26 Mo. 280; *Jacobsen v. Peterson* (1918) 91 N. J. L. 404, 103 Atl. 983, affirmed in (1918) — N. J. —, 105 Atl. 894), or liens in general (*Humboldt Bldg. Asso.*



*v. Ducker* (1901) 111 Ky. 759, 64 S. W. 671, later appeal in (1904) 26 Ky. L. Rep. 931, 82 S. W. 969; *Fay v. McGuire* (1897) 20 App. Div. 569, 47 N. Y. Supp. 236, affirmed in (1900) 162 N. Y. 644, 57 N. E. 1109; *Donaldson v. Haldane* (1840) 7 Clark & F. 762, 7 Eng. Reprint, 1258; *Whiteman v. Hawkins* (1878) L. R. 4 C. P. Div. (Eng.) 13, 39 L. T. N. S. 629, 27 Week. Rep. 262).

He must bring down his search to the time of closing title. *Humboldt Bldg. Asso. v. Ducker* (1904) 26 Ky. L. Rep. 931, 82 S. W. 969.

But an attorney not residing at the county seat, employed simply to examine title for a lender, who found it good October 4th, and who, on being requested to make up an abstract from his notes, and a report, did so on October 8th, was held not responsible for failure to report a judgment of October 6th, although on October 21st he accompanied his client's agent to a bank which released a prior mortgage when a new mortgage was executed and taken charge of by such agent. *Watson v. Calvert Bldg. & L. Asso.* (1900) 91 Md. 25, 45 Atl. 879.

The attorney for the purchaser is liable for failing to notice that a release of part of the mortgaged premises released not the premises described in the release, but all the premises mortgaged except those described in the release. *Byrnes v. Palmer* (1897) 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed in (1899) 160 N. Y. 699, 55 N. E. 1093.

Where an attorney in examining a title for a purchaser and taking counsel's opinion neglected to set out deeds for counsel's opinion and drew wrong conclusions from them, there was held to be evidence on which the jury could find him guilty of negligence. *Ireson v. Pearman* (1825) 3 Barn. & C. 799, 107 Eng. Reprint, 930, 5 Dowl. & R. 687, 3 L. J. K. B. 119, 27 Revised Rep. 490.

It is evidence for the jury of the negligence of an attorney for an intended mortgagee that he failed to search in the insolvent court to see whether the mortgagor had taken the benefit of the Insolvent Act, although 5 A.L.R.—88.

he had some suspicion about it. *Cooper v. Stephenson* (1852) 16 Jur. (Eng.) 424, 21 L. J. Q. B. N. S. 292.

In *Pinkston v. Arrington* (1893) 98 Ala. 489, 13 So. 561, it was held to be a question for the jury whether attorneys, in examining title for an intending purchaser, were guilty of negligence in omitting to examine the equity trial docket or to inquire of the register regarding it.

An attorney employed by the purchaser of a lease at auction, where the client had agreed to an underlease according to the draft produced at the time of the sale, and had also agreed that no abstract of the vendor's title should be required, nor should the lessor's title be objected to or gone into, was held to be guilty of negligence in not seeing that there was a lease from the original lessor to the seller which created the interest he pretended to sell, as, if he had made any inquiry, he would have found that the seller had no title at all; and if he imagined that the condition meant that there was to be no inquiry into the vendor's title, he should have become suspicious and made inquiries. *Allen v. Clark* (1863) 11 Week. Rep. (Eng.) 304, 7 L. T. N. S. 781.

In *Freehold Loan Co. v. McArthur* (1888) 5 Manitoba L. R. 207, it was held that an attorney employed by the intending purchaser of a mortgage to examine the title of the mortgagee was not negligent in failing to require a statement of the mortgage debt from the mortgagor which would have brought out the fact that the mortgage tendered was a forgery, the court being of the opinion that to render a solicitor liable in such case there must be crassa negligentia or gross negligence, the highest degree of negligence recognized in the law. But it was also held that notwithstanding the Registry Acts the solicitor should have inquired for the title deeds of the property.

As to taxes, see *Hinckley v. Krug* (1893) 4 Cal. Unrep. 208, 32 Pac. 118, supra, I. There is an old decision in Upper Canada to the effect that an attorney was not required to examine for taxes or tax sales. Thus in *Ross*

v. Strathy (1858) 16 U. C. Q. B. 430, an attorney employed to examine the title for an intending purchaser made no search for taxes or tax sales. The property, when purchased, had been sold for taxes, but there was still one year in which to redeem at that time. Whether the purchaser discovered the sale before the redemption period had expired does not appear. It was held that the attorney was not chargeable with the duty to examine the title for taxes or for sales for taxes, that not being customary and a professional search for taxes being expensive.

### III. Limits of the rule.

An attorney in examining titles is not a guarantor. *Dundee Mortg. & Trust Invest. Co. v. Hughes* (1884) 20 Fed. 39; *Citizens Loan Fund & Sav. Asso. v. Friedley* (1890) 123 Ind. 143, 7 L.R.A. 669, 18 Am. St. Rep. 320, 23 N. E. 1075; *Humboldt Bldg. Asso. v. Ducker* (1901) 111 Ky. 759, 64 S. W. 671 (stating the rule); *Byrnes v. Palmer* (1897) 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed in (1899) 160 N. Y. 699, 55 N. E. 1093 (stating the rule); *Watson v. Muirhead* (1868) 57 Pa. 161, 98 Am. Dec. 213.

The attorney only undertakes to bring to the "discharge of his duty reasonable skill and diligence. He did not warrant or guarantee the correctness of his work any more than a physician or a mechanic does." *Dundee Mortg. & Trust Invest. Co. v. Hughes* (Fed.) supra.

The attorney examining a title is not liable for making a mistake in a doubtful question of law. *Citizens Loan Fund & Sav. Asso. v. Friedley* (1890) 123 Ind. 143, 7 L.R.A. 669, 18 Am. St. Rep. 320, 23 N. E. 1075; *Watson v. Muirhead* (1868) 57 Pa. 161.

Particularly when he secures and acts on the opinion of eminent counsel. *Watson v. Muirhead* (Pa.) supra.

An attorney is not liable for negligence who, in passing a title for a loan, makes an error in a matter of law not at that time decided by the courts of the state, and into which any reasonably careful and prudent lawyer might have fallen. *Citizens Loan Fund & Sav. Asso. v. Friedley* (Ind.) supra.

An attorney employed to investigate as to the validity of a certain annuity for the proposed purchaser was held not responsible for not objecting to a matter which was subsequently held in other cases to be a defect, upon a very doubtful construction of the statute. *Baikie v. Chandless* (1811) 3 Campb. (Eng.) 17, where Lord Ellenborough said that an attorney is only liable for *crassa negligencia*.

### IV. Measure of damages.

The measure of damages due from an attorney to his client for negligence in passing as clear a title encumbered with liens is the amount necessary to pay off the liens.

*Jacobsen v. Peterson* (1908) 91 N. J. L. 404, 103 Atl. 983, affirmed in (1918) — N. J. —, 105 Atl. 894; *Fay v. McGuire* (1897) 20 App. Div. 569, 47 N. Y. Supp. 286; *Gardner v. Wood* (1902) 37 Misc. 93, 74 N. Y. Supp. 750; *Lawall v. Groman* (1897) 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69; *Whiteman v. Hawkins* (1878) L. R. 4 C. P. Div. (Eng.) 18, 39 L. T. N. S. 629, 27 Week. Rep. 262.

That the purchaser of land sells it at a higher price than he paid for it, including the amount of a judgment negligently overlooked by his attorney when he bought it, will not save the attorney from liability to his client for the amount of the judgment. *Jacobsen v. Peterson* (N. J.) supra.

The measure of damages where liens have been overlooked in examining title for one proposing to take a mortgage on property is the amount necessary to clear off those liens, and the cause of action accrues at once. The mortgagee need not await the result of foreclosure; he may recover the difference in value between the security that his attorneys actually obtained for him and that which they undertook to obtain. *Fay v. McGuire* (1897) 20 App. Div. 569, 47 N. Y. Supp. 286, affirmed in (1900) 162 N. Y. 644, 57 N. E. 1109.

One lending on mortgage, whose attorney has overlooked a prior mortgage, may recover from him without alleging the irresponsibility of the mortgagor; his cause of action ac-

crues at once for accepting a security which is not a first lien. *Gardner v. Wood* (1902) 37 Misc. 93, 74 N. Y. Supp. 750.

In *Lawall v. Groman* (1897) 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69, supra, the court said: "The argument for the third ground of nonsuit that it has not yet been shown that plaintiff has suffered any damage would not be without force if the question were new, inasmuch as she took the mortgage as security only, and the mortgagor when called upon may pay the debt, or, the mortgage being sued out, the property may bring enough to cover it. But the law is settled the other way. Plaintiff is entitled to the security she contracted for, and may recover the difference in value between that and what she actually got. The cause of action is the breach of duty, not the damages, which are only an incident."

It will be seen that in the reported case (*TRIMBOLI v. KINKEL*, ante, 1385) it is held that where an attorney employed to examine a title for a purchaser passes a defective title he will be liable to his client, who resells, for commissions paid to the broker on the resale, and the expenses of examination of the title reimbursed the intending purchaser on the resale.

#### V. Statute of Limitations.

The Statute of Limitations runs in favor of an attorney who examined title for an intending purchaser, from the date on which he makes an incorrect report to his client. *Lilly v. Boyd* (1883) 72 Ga. 83; *Maloney v. Graham* (1912) 171 Ill. App. 409.

The cause of action accrues on breach, not on discovery. See *Short v. McCarthy* (1820) 3 Barn. & Ald. 626, 106 Eng. Reprint, 789, 22 Revised Rep. 503, supra, I. For cases holding that the cause of action, where liens are overlooked, accrues without awaiting the ultimate outcome, see supra, IV.

#### VI. Miscellaneous.

A declaration against an attorney for an intending purchaser for fail-

ure to report encumbrances on the property should state in particular what the encumbrances were. *Elder v. Bogardus* (1843) Hill & D. Supp. (N. Y.) 116.

Neglect of duty to an intending purchaser, and fraud, may be joined in one complaint. *Currey v. Butcher* (1900) 87 Or. 380, 61 Pac. 631.

Equity has no jurisdiction of an action against an attorney for want of care and skill in examining a title for a lender. *British Mut. Invest. Co. v. Cobbold* (1875) L. R. 19 Eq. (Eng.) 627, 44 L. J. Ch. N. S. 332, 32 L. T. N. S. 251, 23 Week. Rep. 487. So in *Luke v. Bridges* (1700) Prec. in Ch. 146, 24 Eng. Reprint, 70, the court refused to charge in equity one who had lent his client's money on encumbered security.

"The specific employment to examine a title does not, in itself, include the duty or obligation of satisfying liens; it is discharged by fully ascertaining and reporting thereon." *Josephthal v. Heyman* (1876) 2 Abb. N. C. (N. Y.) 22.

It may be noted that it has been held that a claim against an attorney for failure to exercise due care and skill in the examination of title for his client survives against his personal representatives under the New Jersey statute. *Tichenor v. Hayes* (1879) 41 N. J. L. 193, 32 Am. Rep. 186. So, under the New York statute. *Elder v. Bogardus* (1843) Hill & D. Supp. (N. Y.) 116.

In *Knights v. Quarles* (1820) 2 Brod. & B. 102, 129 Eng. Reprint, 896, 4 J. B. Moore, 532, 52 Revised Rep. 659, the court, in sustaining a declaration in assumpsit by an administrator of a purchaser, against the attorney who had examined the title on the purchase, for accepting a defective title, said that while the intestate might have sued in case or assumpsit, the administrator was limited to assumpsit.

In an action against an attorney for slander of title, the court, in sending back the case for a new trial, said: "We can see no reason why a lawyer, though employed to examine a title and agreed upon by both par-

ties, may not be guilty of slandering the title the same as anybody else, if he falsely and maliciously declares it bad when he knows it to be good, or could have ascertained the fact by the use of ordinary skill and diligence. Of course, if his contract was to pass upon the title only as it was shown in the abstract furnished him, and he did this truly, or with such skill and care as ordinarily skilful and prudent attorneys would use in such a case, then he would not be liable if the abstract was at fault, though the deed records might show a perfect title. Ordinarily a title by limitation is not shown in an abstract, and an attorney, under a contract to pass upon the title as shown by such abstract, would not be required to consider such a title, or even justified in doing so, unless the evidence thereof should be very full and accurate on all the legal points that could be raised on such a title."

*Hines v. Lumpkin* (1898) 19 Tex. Civ. App. 556, 47 S. W. 818.

In *Wittenbrock v. Parker* (1894) 102 Cal. 93, 24 L.R.A. 197, 41 Am. St. Rep. 172, 36 Pac. 374, T., an attorney acting for mortgagor and mortgagee in drawing a release of part of the mortgaged premises, by mistake and inadvertence, drew it so as to release the mortgage entirely, and it was executed by the mortgagee. Later the mortgagor applied for a loan to a third party who employed T.'s partner to examine the title, and he reported it good, knowing nothing about the actions of his partner in regard to the property, and the loan was made to the new lender on mortgage. It was held that the new lender was not charged with notice of the mistake, and that the old mortgagee must suffer, his own negligence in signing the release contributing to his loss.

B. B. B.

THOMAS E. STUBBS, Appt.,

v.

CITY OF ROCHESTER, Respt.

*New York Court of Appeals — July 15, 1919.*

(226 N. Y. 516, 124 N. E. 137.)

**Evidence — source of typhoid infection.**

1. That a city's contaminated water supply was the source of typhoid fever in a citizen may be found from the fact that he drank water near the point of contamination, that some sixty other cases developed in that vicinity, that his habits were such as to tend to exclude another probable source, while his physician testified that such contamination was the source of his illness.

[See note on this question beginning on page 1402.]

**Appeal — nonsuit — inferences from evidence.**

2. A plaintiff nonsuited at the close of his case is entitled to the most favorable inferences deducible from the evidence.

**Evidence — burden of proof — cause of typhoid fever.**

3. One seeking to hold a city liable

for injury by typhoid fever, alleged to have been contracted from defendant's polluted water system, is not bound to eliminate all other possible causes of the disease to establish defendant's liability.

[See 22 R. C. L. 150, 151.]

(Hiscock, Ch. J., and Chase and McLaughlin, JJ., dissent.)

**APPEAL** by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a trial term for Monroe County (Hubbs, J.) in defendant's favor, in an action brought to recover damages alleged to have been sustained by plaintiff from drinking contaminated water from defendant's domestic service. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John Van Voorhis' Sons, for appellant:

A city, in furnishing water for compensation, enters on an enterprise in which it becomes liable for negligence as if it were the proprietor of a private business.

Oakes Mfg. Co. v. New York, 206 N. Y. 221, 42 L.R.A.(N.S.) 286, 99 N. E. 540.

The defendant was guilty of negligence as a matter of law.

Stubbs v. Rochester, 163 App. Div. 249, 148 N. Y. Supp. 804.

It was a question of fact for the jury to determine whether or not the plaintiff contracted typhoid fever from drinking contaminated water.

Sauter v. New York C. & H. R. R. Co. 66 N. Y. 50, 23 Am. Rep. 18, 5 Am. Neg. Cas. 208; Lyons v. Second Ave. R. Co. 89 Hun, 374, 35 N. Y. Supp. 372, 12 Am. Neg. Cas. 391, affirmed in 152 N. Y. 654, 47 N. E. 1109; Purcell v. Lauer, 14 App. Div. 33, 43 N. Y. Supp. 988, 2 Am. Neg. Rep. 57; People v. Benham, 160 N. Y. 402, 55 N. E. 11.

Mr. Charles L. Pierce with Mr. B. B. Cunningham, for respondent:

Plaintiff's case as to how he contracted his typhoid rests wholly upon conjecture.

Ruback v. McCleary, Wallin & Crouse, 220 N. Y. 188, 115 N. E. 449; Link v. Sheldon, 136 N. Y. 9, 32 N. E. 696; Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 90, 47 N. E. 971, 3 Am. Neg. Rep. 711; Weber v. Third Ave. R. Co. 12 App. Div. 512, 42 N. Y. Supp. 789.

Plaintiff did not make out a case in negligence.

Stubbs v. Rochester, 163 App. Div. 245, 148 N. Y. Supp. 804.

Hogan, J., delivered the opinion of the court:

This action was brought by plaintiff to recover damages alleged to have been sustained by him due to drinking contaminated water from the defendant's domestic service.

During the year 1910, and for many years prior thereto, the defendant under legislative authority was engaged in the business of selling water to its inhabitants. A duty

was imposed on the commissioner of public works to provide an abundant supply of wholesome water for public and private use, to devise plans and sources of water supply, to plan and supervise the distribution of water through the city, and to protect it against contamination. The city has two systems of water supply: One for potable water brought by it from Hemlock lake, some distance south of the city, to reservoirs near the city, and thence distributed by gravity to consumers. That system is known as the Hemlock system. The second or Holly system for fire purposes in the business district, the water being pumped from the Genesee river near the center of the city into a separate set of distributing pipes. The Holly system carried a pressure of from 60 to 70 pounds to the square inch, which in case of fire was increased to 130 pounds. The pressure in Hemlock system was about 50 pounds to the square inch. The Erie canal ran through the city. A number of lift bridges, including one at Brown street, crossed the same. The bridges were raised by admitting water under pressure to a cylinder, forcing a piston out and raising the platform of the bridge. The pipes furnishing water to the cylinders were Y-shaped, one branch being connected with the Hemlock system and the second branch with the Holly system. Gates were installed in each pipe at a point about 20 feet back from the place of connection with the "Y" pipe to control the flow of waters therein. If the gates in both pipes were open at one time both systems would discharge water into the "Y" pipe. If one gate was closed the discharge would be confined to the other pipe. The employees of the city had possession of the wrenches or keys by which these gates could be opened or closed, the

water for operating the bridge being furnished by the city.

A check valve was installed in the Hemlock pipe at a point between the gate and the piston pipe, for the purpose of preventing the water from the Holly system entering the pipe of the Hemlock system, as it otherwise would when the gates in both pipes were open, because of the greater pressure in the Holly system. Thus, when the pressure of the water is toward the piston pipe the valve will open and permit the water to flow freely, but when the stronger pressure is from the opposite direction the valve closes and remains closed so long as the greater pressure remains. When closed, the water from the Holly system is prevented from entering the Hemlock system pipes.

Above the point where the defendant pumps water from the Genesee river into the Holly system mains a large quantity of sewage from villages and public institutions is discharged into the Genesee river, and at times water from the Erie canal overflows into the river. The evidence disclosed that a number of drains from buildings in the city also discharged into the river. The water used for the purpose of operating the lift bridges is shut off in the fall of the year, at the close of navigation on the Erie canal, and turned on when navigation is resumed, usually about May. In the year 1910 the gates of the two systems located near the Brown street bridge were opened by direction of the superintendent of waterworks of the city. In June, 1910, numerous complaints were received by the superintendent from inhabitants, consumers of the Hemlock water, residing or employed in the vicinity of Brown street bridge, in substance that the water was roily, dirty, and had an offensive odor. No attention was given the matter of complaints until one resident called upon the health commissioner of the city, and the latter accompanied the complainant to her home, observed the condition of the water, took a sample

of the water from the faucet, and observed that it looked and smelled badly. He thereupon had it analyzed by a chemist, which analysis disclosed a serious condition of contamination. The health officer thereupon notified the public through the newspapers not to drink the water without boiling it, continued his investigation, collected water from a number of houses, and caused an analysis to be made of same, which disclosed contamination, and he thereupon notified the water department that the Hemlock water was contaminated. The latter department started an investigation on October 2d, upwards of three months after many complaints had been made to it, and, upon arrival at the Brown street bridge, discovered the source of contamination to be at that point, and that water from the Holly system was being discharged through the Hemlock system pipes. The water was thereupon shut off, and a few days later the discovery was made that there was no check valve in the pipe of the Hemlock system, and the waters of the two systems commingled and were being furnished to consumers in that locality as potable waters.

The plaintiff, a resident of the city of Rochester, and a machinist, was employed by a firm whose place of business was at the corner of Allen and Platt streets, about one block from the Brown street bridge. The factory was supplied with Hemlock lake water for drinking purposes. Plaintiff drank the water from time to time, using his individual drinking glass. He was taken ill September 6, 1910, with typhoid fever, and was sick in bed for six weeks and unable to work for some twelve weeks. Asserting that his illness was caused by reason of drinking contaminated water supplied by the city, he seeks to recover damages by reason thereof. The evidence disclosed upon the trial clearly established that the water furnished by the defendant for potable purposes in the locality of

the Brown street bridge was contaminated. The negligence of the defendant charged is that it carelessly and negligently permitted poisonous and polluted water from the Genesee river to flow through the Holly system mains and pipes into the mains and pipes of the Hemlock system, thereby polluting and contaminating the Hemlock water, rendering the same dangerous to life and health of the inhabitants of the city, in violation of its duty to furnish pure and wholesome water; a failure to inspect the pipes from time to time to discover whether or not the check valve was in place and operating, and failure to exercise diligence in a discovery of the nature and source of the contamination, following many complaints as to the condition of the water. The facts adduced upon the trial were ample to permit a consideration of the question of negligence of the city by a jury, and, if found by a jury, to sustain such finding. It is argued by counsel for the city that plaintiff's case as to how he contracted typhoid fever rests wholly upon conjecture. Upon the appeal to the appellate division after the first trial the latter court reversed the judgment recovered by plaintiff upon that ground. 163 App. Div. 245, 148 N. Y. Supp. 804. Upon the appeal to the appellate division in the case under review, two of the justices who concurred for reversal on the first appeal, on the ground stated, dissented from the decision affirming the nonsuit at trial term, presumptively indicating that the evidence upon the second trial had been supplemented by additional testimony, and rendered the earlier decision distinguishable from the present record.

The important question in this case is, Did the plaintiff produce evidence from which inference might reasonably be drawn that the cause of his illness was due to the use of contaminated water furnished by defendant? Counsel for respondent argues that, even assuming that the city may be held liable to plaintiff

for damages caused by its negligence in furnishing contaminated water for drinking purposes: (a) The evidence adduced by plaintiff fails to disclose that he contracted typhoid fever by drinking contaminated water; (b) that it was incumbent upon the plaintiff to establish that his illness was not due to any other cause to which typhoid fever may be attributed for which defendant is not liable. The evidence does disclose several causes of typhoid fever, which is a germ disease, the germ being known as the typhoid bacillus, which causes may be classified as follows:

First. Drinking of polluted water. Second. Raw fruits and vegetables in certain named localities, where human excrement is used to fertilize the soil, are sometimes sources of typhoid infection. Third. The consumption of shellfish, though not a frequent cause. Fourth. The consumption of infected milk and vegetables. Fifth. The housefly in certain localities. Sixth. Personal contact with an infected person by one who has a predilection for typhoid infection and is not objectively sick with the disease. Seventh. Ice, if affected with typhoid bacilli. Eighth. Fruits, vegetables, etc., washed in infected water. Ninth. The medical authorities recognize that there are still other causes and means unknown. This fact was developed on cross-examination of physicians called by plaintiff.

Treating the suggestions of counsel in their order: (a) That the evidence fails to disclose that plaintiff contracted typhoid fever by drinking contaminated water. The plaintiff, having been nonsuited at the close of his case, is entitled to the most favorable inferences deducible from the evidence. That plaintiff, on or about September 6th, 1910, was taken ill, and very soon thereafter typhoid fever developed, is not disputed. That he was employed in a factory located one block distant from the Brown street bridge, in

Appeal—  
nonsuit—  
inferences  
from evidence.

which Hemlock lake water was the only supply of water for potable and other purposes, and that the water drawn from faucets in that neighborhood disclosed that the water was roily and of unusual appearance is not questioned. And no doubt prevails that the Holly system water was confined to the main business part of the city for use for fire purposes and sprinkling streets, and is not furnished for domestic or drinking purposes.

The evidence of the superintendent of waterworks of the city is to the effect that Hemlock lake water is a pure wholesome water, free from contamination of any sort at the lake, and examinations of the same are made weekly; that the Holly water is not fit for drinking purposes, taken as it is from the Genesee river. Further evidence was offered by plaintiff by several witnesses, residents in the locality of Brown street bridge, who discovered the condition of the water at various times during July, August, and September, and made complaint to the water department of the condition of the same. Dr. Goler, a physician and health officer of the city, was called by plaintiff, and testified that in September, when complaint was made to him by a resident of the district, he went to the locality, visited houses in the immediate neighborhood, found that the water drawn from the faucet of the Hemlock supply looked badly and smelled badly. He took a sample of the water to the laboratory, and had it examined by a chemist, who found that it contained an increase in solids, and very many times,—that is, twenty to thirty times,—as much chlorine or common salt as is found in the domestic water supply; the presence of chlorine in excessive quantities indicates contamination in that quantity, bad contamination, and usually sewage contamination. Further examination followed in the district. Water was collected from various houses and a large number of samples, perhaps less than one hundred, but over twenty-five. The

examination continued, and the wedge of the city outlined by the river and city line and Magne street had the domestic water supply contaminated in the same way. An examination of the water of the Holly system disclosed the same, very similar in quantity, of chlorine or common salt contents as the domestic water supply in the houses in the immediate neighborhood of Oak and Frank streets; but further north from what was eventually the point of greatest contamination the amount of chlorine grew less. About the following day, the source of contamination having been discovered, the doctor made an investigation as to the reported cases of typhoid fever in the city in the months of August, September, and October, for the purpose of determining the number of cases, where the cases came from, what gave rise to it, and he stated that in his opinion the outbreak of typhoid was due to polluted water, contaminated, as he discovered afterwards, by sewage. In answer to a hypothetical question embracing generally the facts asserted by plaintiff, the witness testified that he had an opinion as to the cause of the infection of plaintiff, and such opinion was that it was due to contaminated water.

Dr. Dodge, of the faculty of the University of Rochester, a professor of biology, also bacteriologist of the city of Rochester, about October 1st made an analysis of samples of water taken from No. 58 Warehouse street, and from the Holly system, corner of Oak and Platt streets. The analysis of the water from Warehouse street disclosed the number of bacteria to be 880 cubic centimeter. The analysis of the Holly water disclosed 4,000 bacteria cubic centimeter. An analysis of the Hemlock water at the university disclosed approximately 150 to 200. While his examination did not disclose any colon bacillus, it did disclose some evidence of the same. Dr. Brady, the physician who attended the plaintiff, and Dr. Culkin, both testified that in their opinion



the plaintiff contracted typhoid fever from drinking polluted water.

Plaintiff called a witness who resided on Brown street, about two minutes' walk from the bridge, and proved by her that she drank water from the Hemlock mains in the fall of 1910, and was ill with typhoid fever. Thereupon counsel for defendant stipulated that fifty-seven witnesses whom the plaintiff proposed to call will testify that they drank water from the Hemlock taps in the vicinity of the district west of the Genesee river and north of Allen street in the summer and fall of 1910, and during said summer and fall suffered from typhoid fever, that in view of the stipulation such witnesses need not be called by plaintiff, and the stipulation shall have the same force and effect as though the witnesses had been called and testified to the facts.

The plaintiff resided with his wife some 3 miles distant from the factory where he was employed. The water consumed by him at his house outside the infected district was Hemlock water. The only water in the factory was Hemlock water, and he had there an individual cup from which he drank. He was not outside of the city during the summer of 1910. Therefore the only water he drank was in the city of Rochester.

A table of statistics as to typhoid fever in the city of Rochester for the years 1901-1910, inclusive, was produced by the health officer, and received in evidence. That exhibit was the subject of comment in the opinion of Justice Foote upon the first appeal. The fact is evident from a perusal of his opinion that upon the first trial plaintiff did not undertake to establish the number of cases of typhoid fever in the district where the water was contaminated as compared with the total number of cases in the city in 1910, which evidence was supplied upon this trial. The statistics disclose that the number of typhoid cases in the city in 1910 was 223, an excess of fifty cases of any year of the nine

years preceding. Recalling that complaints as to water commenced in the summer of 1910, and, as shown by the evidence, that typhoid fever does not develop until two or three weeks after the bacilli have been taken into the system, in connection with the fact that the source of contamination was not discovered until October, the statistics disclose that of the 223 cases of typhoid in the city in the year 1910, 180 cases appear during the months of August, September, October, and November, as against forty-three cases during the remaining eight months, thirty-five of which were prior to August, and eight in the month of December, two months after the source of contamination of the water was discovered.

The evidence on the trial discloses that at least fifty-eight witnesses, residents of the district, drank the contaminated water and suffered from typhoid fever, in addition to plaintiff; thus one third of the 180 cases during the months stated were shown to exist in that district.

Counsel for respondent asserts that there was a failure of proof on the part of plaintiff, in that he did not establish that he contracted disease by drinking contaminated water, and, in support of his argument, cites a rule of law that when there are several possible causes of injury, for one or more of which a defendant is not responsible, plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which defendant was responsible. He submits that it was essential for plaintiff to eliminate all other of seven causes from which the disease might have been contracted. If the argument should prevail and the rule of law stated is not subject to any limitation, the present case illustrates the impossibility of a recovery in any case based upon like facts. One cause of the disease is stated by counsel to be "personal contact with typhoid carriers or other persons suffering with the disease, whereby bacilli are received

and accidentally transferred by the hands or some other portion of the person or clothes to the mouth." Concededly, a person is affected with typhoid some weeks before the disease develops. The plaintiff here resided 3 miles distant from his place of employment, and traveled to and from his work upon the street car. To prove the time when he was attacked with typhoid, then find every individual who traveled on the same car with him, and establish by each one of them that he or she was free from the disease, even to his or her clothing, is impossible. Again, the evidence disclosed that typhoid fever is caused by sources unknown to medical science. If the word of the rule stated is to prevail, plaintiff would be required to eliminate sources which had not yet been determined or ascertained. I do not

**Evidence—  
burden of proof  
—cause of  
typhoid fever.**

believe the rule stated to be as inflexible as claimed for. If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable, the party has complied with the spirit of the rule.

The plaintiff was employed in the immediate locality where the water

was contaminated. He drank the water daily. The consumption of contaminated water is a very frequent cause of typhoid fever. In the locality there were a large number of cases of typhoid fever, and near to sixty individuals who drank the water and had suffered from typhoid fever in that neighborhood appeared as witnesses on behalf of plaintiff. The plaintiff gave evidence of his habits, his home surroundings, and his method of living, and the medical testimony indicated that his illness was caused by drinking contaminated water. Without reiteration of the facts disclosed on the trial, I do not believe that the case on the part of plaintiff was so lacking in proof as matter <sup>—source of typhoid infection.</sup>

of law that his complaint should be dismissed. On the contrary, the most favorable inferences deducible for the plaintiff were such as would justify a submission of the facts to a jury as to the reasonable inferences to be drawn therefrom, and a verdict rendered thereon for either party would rest, not in conjecture, but upon reasonable possibilities.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Cardozo, Pound, and Andrews, JJ., concur.

Hiscock, Ch. J., and Chase and McLaughlin, JJ., dissent.

## ANNOTATION.

### Right to recover damages from municipality or water company for injuries resulting from furnishing impure water.

- I. Scope of note, 1402.
- II. Private corporation:
  - a. General rule, 1402.
  - b. Application of rule, 1404.
- III. Municipal corporation, 1405.

#### I. Scope of note.

This note is limited to the right to recover damages from a water corporation, whether municipal or private, for injuries resulting from the use of impure water furnished by it. It does not discuss other remedies for

compelling a water corporation to furnish pure water, nor does it deal with impure water treated as a nuisance, or with the quantity or sufficiency of supply.

#### II. Private corporation.

##### a. General rule.

A water supply corporation is not an insurer of the purity of the water furnished by it for public consumption, or of its freedom from infection,

but is bound to use reasonable care and diligence in providing pure and wholesome water that is at all times free from any infection or contamination which renders the water unsafe and dangerous to individuals, or unsuitable for domestic purposes, and is liable for injury resulting from its failure to do so. *Hayes v. Torrington Water Co.* (1914) 88 Conn. 609, 92 Atl. 406; *Jones v. Mount Holly Water Co.* (1915) 87 N. J. L. 106, 93 Atl. 860; *Kohlmeyer v. Ohio Valley Water Co.* (1914) 58 Pa. Super. Ct. 63; *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265. See also dictum in *New Haven Water Co. v. Russell* (1912) 86 Conn. 361, 85 Atl. 636, as to the duty to furnish wholesome water. And see *Pefferv. Pennsylvania Water Co.* (1908) 221 Pa. 578, 70 Atl. 870, wherein an injunction against the furnishing of unwholesome water was granted.

But in the absence of culpable negligence no liability attaches. *Buckingham v. Plymouth Water Co.* (1891) 142 Pa. 221, 21 Atl. 824.

In *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265, the court said: "No reason is perceived for saying that a mere distributor of water for a compensation should be held liable as a guarantor of its quality. It is not a commodity kept for sale in the strict sense of the term, but is free to everyone, in nature's reservoirs, like light and air. It is taken directly or indirectly from a common source of supply. The immediate source, as in this case, is usually selected in advance and fixed by contracts, leaving the mere service of a carrier to be performed, of taking the water from such source and distributing it to the consumers. To say that the person or corporation performing that service shall be burdened with an implied warranty of the quality of the thing carried and distributed . . . would burden such public service in a way that would be destructive of private enterprise in that line, and render public enterprise

in the same direction so attended with dangers as to discourage a service that has become a necessity in all communities of any considerable size, and which promotes to a high degree the welfare and happiness of individuals in communities great or small. If distributors of water under public franchises be held strictly accountable for the exercise of ordinary care not to place before their customers an unwholesome article under circumstances liable to induce persons, in the exercise of ordinary care, to use it for drinking or other domestic purposes in ignorance of the dangers attending the use, and held liable for deceit in such transactions, and the law be firmly administered along those lines, the safety of individuals, as affected by public water service will be as well promoted as is consistent with the continuance of such service, whether performed by strictly public or by quasi public agencies.

. . . If defendant knew, or from the situation ought to have known, the water it was distributing was dangerous for domestic use, from some cause not discoverable ordinarily by the exercise of reasonable care, it owed the duty to its customers of disclosing that danger, and a failure so to do, knowing that such customers were liable to use the water through ignorance of its character, was a fraud in law, rendering the defendant liable to legal damages to any person injured by such fraud without fault on his part, and it was also a failure of duty amounting to actionable negligence as well; to which the same liability is incident."

"Water is a necessity of life, and one who undertakes to trade in it and supply customers . . . is bound to use reasonable care to see that whatever is supplied for drink . . . shall be reasonably pure and wholesome, and that negligently furnishing water which is deleterious to the human body or health will furnish a valid cause of action to a customer injured by the use of the water." *Jones v. Mount Holly Water Co.* (1915) 87 N. J. L. 106, 93 Atl. 860.

"The duty which a water company

owes to the public and to its customers is that of exercising reasonable care and diligence in providing an adequate supply of wholesome water at all times. . . . Such a corporation is not the guarantor of the purity of its water, or its freedom from infection." *Hayes v. Torrington Water Co.* (1914) 88 Conn. 609, 92 Atl. 406.

The obligation of a water company is to furnish water that is ordinarily and reasonably free from such infection or contamination as causes water to be unsuitable for domestic purposes and unsafe and dangerous to health and life, and a company is bound to exercise diligence in the effort to preserve its water supply from pollution. *Kohlmeyer v. Ohio Valley Water Co.* (1914) 58 Pa. Super. Ct. 63.

In *Stein v. State* (1861) 37 Ala. 123, a prosecution under an indictment for furnishing an impure public supply of water, it was held that scienter must be alleged.

*b. Application of rule.*

In *Kohlmeyer v. Ohio Valley Water Co.* (1914) 58 Pa. Super. Ct. 63, it appeared that a water company obtained its water supply from wells. During low water, the company connected its pipes with a river, polluted with the sewerage of a near-by city, for a period of fourteen hours. During this period the plaintiff's child, who had previously been in good health and had been given only wholesome food on the day of the alleged injury, drank some of the water furnished by the water company. Shortly afterwards the child was taken sick, and as a consequence died. It was held that the water company was liable in damages for the death of the child.

Where there are visible and continuous conditions existing on a watershed, such as highways and farmhouses, and the character of the run-off from the watershed is such as to make it possible that infected matter from the highways and farmhouses will find its way into the water supply, it then becomes the duty of the water corporation to take steps to purify its water, or at least to take steps to ascertain by more frequent examinations whether or not the water

is fit, at all times, for domestic use. *Hayes v. Torrington Water Co.* (1914) 88 Conn. 609, 92 Atl. 406, wherein the court said: "Such a corporation is not a guarantor of the purity of its water or of its freedom from infection, but it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist, or which could have been known or foreseen by the exercise of such care; and if the exercise of such care would have disclosed a reasonable probability of such infection, then it becomes the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances of the case, reasonably proper and necessary to protect the community which it serves from the risk of infection."

In *Jones v. Mount Holly Water Co.* (1915) 87 N. J. L. 106, 93 Atl. 860, it appeared that the plaintiff's children became ill from drinking impure water supplied by the defendant water company. The watershed, covering many miles in area, was not under the immediate supervision of the company, but the sources of pollution were so open and above the surface that it was found to be a reasonable inference that the company knew, or ought to have known, of the existing condition. In an action to recover money expended because of the sickness, and for loss of time, it was held that the defendant was liable. The court said: "Negligently furnishing water which is deleterious to the human body or health will furnish a valid cause of action to a customer injured by the use of the water. Actual notice or knowledge of the unwholesomeness of the water of the defendant company was not an essential element to be proven in order to establish the defendant's liability; it was sufficient if there was testimony tending to show that the defendant, in the exercise of reasonable care, might have discovered the unwholesomeness and dangerous condition of the water."

But in *Buckingham v. Plymouth Water Co.* (1891) 142 Pa. 221, 21 Atl. 824, a water company was held not liable for its failure to know that a case of typhoid fever existed on property not controlled by the company, a mile and a half above the point from which it derived its supply. The remote possibility that its water system might have been infected thereby was held to be insufficient to charge actionable negligence.

In *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265, it appeared that the fact was widely and publicly stated and believed that the typhoid epidemic was caused by drinking the water of the defendant. This fact was discussed in the papers, and, further, there had been sickness from typhoid in plaintiff's immediate family. At no time did the plaintiff use any precautions in his use of the defendant's water, but continued its use in his accustomed manner. It was held that since plaintiff had knowledge of the dangerous condition of the defendant's water, the recovery of damages was precluded by his contributory negligence. The court said: "Though the conduct of the defendant be held wrongful on the ground of either fraud or negligence, if the deceased knew, or under the circumstances ought to have known, the dangerous condition of the water, yet used it with the consequence complained of, no legal liability thereby attached to the defendant. If the deceased knew, and he is charged with knowledge of what a man of ordinary intelligence under the circumstances ought to have known, then he was not deceived, whatever may have been the conduct of the defendant; and for the same reason he is chargeable with contributing to the result complained of, by his own want of care."

In *Gosser v. Ohio Valley Water Co.* (1914) 244 Pa. 59, 90 Atl. 540, Ann. Cas. 1915C, 685, it appeared that the water furnished by the defendant company was polluted, and that the plaintiff's intestate died of typhoid fever, but there was no evidence that

he drank the water more than once or twice before his illness, and just previous thereto he was away from home. The direction of a judgment for the defendant was sustained.

In *Race Bros. v. Pennsylvania Water Co.* (1896) 7 Pa. Dist. R. 71, it appeared that the plaintiffs operated a steam laundry. The water furnished by the defendant company was so impure because of mud and sediment that a large quantity of water was used solely to cleanse the filter in their laundry. The use of clean pure water was imperative in their business. When the water bill was presented the plaintiffs demanded a rebate for the extra water used in cleansing the filter. This the company refused, and, to prevent the water from being shut off, the plaintiffs under protest paid the bill in full. In an action to recover the amount paid for water used in cleansing filter, it was held that plaintiffs were entitled to a deduction of the amount charged for extra water used in cleansing the filter, while the water was "visibly and manifestly impure from mud or other sediment." Compare *Oakes Mfg. Co. v. New York* (1912) 206 N. Y. 221, 42 L.R.A. (N.S.) 286, 99 N. E. 540, and *Scottish Ontario & M. Land Co. v. Toronto* (1898) 29 Ont. Rep. 459, stated at length *infra*, III.

### III. Municipal corporation.

When a municipality voluntarily engages in selling and distributing water to customers for its local advantage or profit, it enters the field of ordinary private business, and has the same rights and is subject to the same liabilities as private corporations or individuals with respect to damages from impurity of the water. *Keever v. Mankato* (1910) 118 Minn. 55, 33 L.R.A. (N.S.) 339, 129 N. W. 158, Ann. Cas. 1912A, 216, 1 N. C. C. A. 187; *Lockwood v. Dover* (1905) 73 N. H. 209, 61 Atl. 32; *Danaher v. Brooklyn* (1890) 119 N. Y. 241, 7 L.R.A. 592, 23 N. E. 745. And see the reported case (*STUBBS v. ROCHESTER*, ante, 1396).

In *Lockwood v. Dover* (1905) 73 N. H. 209, 61 Atl. 32, negligence was alleged in that the defendant municipi-

pal corporation failed to clean out its water pipes or to provide means whereby they could be cleaned out, and that in consequence thereof foreign and decayed matter became lodged in the city's pipes, entered the pipes leading to the plaintiff's dwelling, and was there drunk by the plaintiff's intestate, causing him to sicken and die. It was held that the defendant was liable.

In *Keever v. Mankato* (1910) 113 Minn. 55, 33 L.R.A.(N.S.) 339, 129 N. W. 158, Ann. Cas. 1912A; 216, 1 N. C. C. A. 187, the plaintiff alleged that the defendant municipal corporation negligently allowed its water supply in its waterworks system to become infected and polluted, that by reason thereof the water became imminently dangerous to life and health, and that the plaintiff's intestate contracted typhoid fever by drinking the water, and died in consequence. On demurrer it was held that the defendant municipal corporation was liable. The court said: "The first essential question is whether the city is exempt because it was carrying out a governmental function, or whether it is liable because it operated the waterworks in its private or corporate function, . . . which capacity the city may voluntarily assume for business purposes and for its own advantage to conduct certain operations, and is held responsible for negligence therein. . . . It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why its citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged. As Elliott, J., said in *East Grand Forks v. Luck* (1906) 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 Ann. Cas. 1015; 'When the municipality enters the field of ordinary private business, it does not exercise governmental powers.

Its purpose is not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not, in either case, exercising a municipal function. . . . When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as private corporations or individuals.'"

But a municipal corporation has been held not to be liable for injuries received from the drinking of impure water from a free public well, whose supply was not connected with the municipal system, but was received from surface waters, when neither failure on its part to keep the well properly cleaned out nor notice to it that the water therein had become impure was shown, and when there were no circumstances to cause suspicion as to the impurity of the water. *Danaher v. Brooklyn* (1889) 51 Hun, 563, 4 N. Y. Supp. 312, affirmed in (1890) 119 N. Y. 241, 7 L.R.A. 592, 23 N. E. 745. Wherein the court said: "We do not think that the well in question was any part of the general system of water supply for the city. These public wells were isolated and independent contrivances for local convenience. The city derived no revenue from any of them. There was no element of private business enterprise about them. . . . Undoubtedly, where a city supplies for domestic use, and receives pay, it is bound to furnish wholesome water, and is liable if it does not, but this is not such a case." In affirming the decision (119 N. Y. 250), the court assumed that had there been any negligence on the part of the defendant corporation, damages might have resulted, saying: "The city was not an insurer of the quality of the water and bound under all circumstances to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks,

and public buildings; and it owed the duty of reasonable diligence to care for it, as it was bound to care for such other property."

In *Milnes v. Huddersfield* (1883) L. R. 12 Q. B. Div. (Eng.) 443, 53 L. J. Q. B. N. S. 443, 50 L. T. N. S. 73, 32 Week. Rep. 265, a municipal corporation was held not to be liable for injuries to a consumer due to lead poisoning, received from using the water supplied him by the corporation, where it appeared that the corporation, on application of the plaintiff and the owner of the house in which he dwelt, laid lead service pipes, which were prescribed by its by-laws and specified by the owner of the house, from its mains to the house, at the expense of the plaintiff and his landlord, and the pipes, when laid, became the property of the landlord. In that case it was admitted that defendant's water supply was

pure and wholesome up to the point where it entered the lead pipes of the plaintiff, and became impure only from those pipes.

In *Oakes Mfg. Co. v. New York* (1912) 206 N. Y. 221, 42 L.R.A. (N.S.) 286, 99 N. E. 540, it was held that if the water furnished by a municipality is wholesome for general consumption and ordinary industrial purposes, the municipality is not liable because of its unfitness for the needs of a single industry. In that case it was held that there was no liability to the owner of a dye factory for damage to its product because of the presence of chlorine in the water.

In *Scottish Ontario & M. Land Co. v. Toronto* (1898) 29 Ont. Rep. 459, affirmed in (1899) 26 Ont. App. Rep. 345, it was held that a municipality was not liable for damage to an elevator caused by sand from the public water supply. A. S. M.

## RE OPINION OF THE JUSTICES.

*Maine Supreme Judicial Court — August 25, 1919.*

(— Me. —, 107 Atl. 705.)

**Statute — referendum conferring right to vote upon women.**

1. A legislative act granting to women the right to vote for presidential electors is within the operation of a constitutional amendment requiring submission to the voters, upon request, of any act, bill, resolve, or resolution passed by the legislature.

[See note on this question beginning on page 1417.]

**Voters — power to determine qualifications.**

2. The power to determine the qualifications of voters for the election of a

President of the United States rests in the state legislature under the Federal Constitution.

[See 9 R. C. L. 982, 986.]

**REQUEST** by the governor for the opinion of the Justices of the Supreme Judicial Court as to the necessity of submitting by referendum to the qualified voters of the state an act conferring right to vote upon women.

*Affirmative answer returned.*

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned justices of the supreme judicial court, having considered the question propounded by you under date of July 9, 1919, concerning the necessity of submitting by referendum to the qualified vot-

ers of the state a certain act of the legislature of Maine, entitled "An Act Granting to Women the Right to Vote for Presidential Electors," respectfully submit the following answer:

The request contains certain recitals of fact, the substance of which

is that the above statute was passed by the concurrent action of both branches of the legislature and was duly approved by the governor; that the legislature adjourned without day on April 4, 1919, and within ninety days thereafter petitions, apparently bearing the requisite number of signatures, were filed with the secretary of state, requesting that this act be referred to the people under amendment 31 of article 4 of the Constitution of Maine, known as the initiative and referendum amendment.

### Question.

Is the effect of the act of the legislature of Maine of 1919, entitled "An Act Granting to Women the Right to Vote for Presidential Electors," approved by the governor on March 28, 1919, suspended by valid written petitions of not less than 10,000 electors, addressed to the governor and filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that it be referred to the people, and should the act be referred to the people as provided in article 4 of the Constitution of Maine, as amended by amendment 31, adopted September 14, 1908?

### Answer.

This question we answer in the affirmative. In our opinion this legislative act comes within the provisions of the initiative and referendum amendment, and should be referred to the people for adoption or rejection by them.

Statute—  
referendum  
conferring right  
to vote upon  
women.

To solve this problem it is necessary to pursue the same general course as in deciding the question concerning the prohibitory amendment to the Federal Constitution, by an examination, first, of the provisions and requirements of the Constitution of the United States relating to this subject-matter, and, second, of the provisions and re-

quirements of the Constitution of Maine.

The first question that naturally arises is this: Where, under the Federal Constitution, is lodged the power of determining in what manner presidential electors shall be chosen and of prescribing the qualifications of the voters therefor?

It was competent for the people of the United States, in creating the compact known as the Federal Constitution, to lodge this power wherever they saw fit. It was a matter wholly within their discretion. It is a well-known historical fact that there was a long and spirited debate in the constitutional convention over this very question; that is, the method to be adopted in electing the chief magistrate of the nation. Many plans were submitted, such as election by Congress, by the people at large, by the chief executives of the several states, and by electors appointed by the legislatures. 1 Elliot, Debates, 208, 211, 217, 262.

Finally the following provisions, which were presented by Gouverneur Morris for the special committee, were adopted by the convention after much discussion, and were incorporated in article 11 of the perfected instrument, where they stand unchanged to-day, viz.:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress," etc. Art. 2, § 1, subd. 2.

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States." Art. 2, § 1, subd. 4.

These two subdivisions comprise all the provisions of the Federal Constitution applicable to the point in issue here. Under § 1, subd. 4, Congress is given the power to determine the date of holding presidential elections and of the meeting of the electors, but that marks the limit of its constitutional power.



(— Me. —, 107 Atl. 705.)

Re Green, 134 U. S. 377, 33 L. ed. 951, 10 Sup. Ct. Rep. 586. All other powers in connection with this subject are expressly reserved to the states. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Pope v. Williams*, 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573.

In the case last cited the Supreme Court of the United States says: "The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."

The word "appoint" as employed in subdivision 2 has been interpreted to be sufficiently comprehensive to include the result of a popular election and to convey the broadest powers of determination. *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. ed. 869, 874, 13 Sup. Ct. Rep. 3.

The language of § 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states. "Each state shall appoint in such manner as the legislature thereof may direct" are the significant words of the section, and their plain meaning is that each state is thereby clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the

Federal government, except, of course, in case of attempted discrimination

Voters—  
power to  
determine  
qualifications.

as to race, color, or previous condition of servitude under the 15th Amendment. The clause, "in such manner as the legislature thereof may direct," means simply that the state shall give expression to its will, as it must of necessity, through its lawmaking body, the legislature. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of

5 A.L.R.—89.

choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen.

But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed. Nor was it designated by the Federal Constitution as a mere agency or representative of the people to perform a certain act, as it was under article 5 in ratifying a Federal amendment, a point more fully discussed in the answer to the question concerning the Federal prohibitory amendment. — Me. —, 107 Atl. 673. It is simply the ordinary instrumentality of the state, the legislative branch of the government, the lawmaking power, to put into words the will of the state in connection with the choice of presidential electors. The distinction between the function and power of the legislature in the case under consideration, and its function and power as a particular body designated by the Federal Constitution to ratify or reject a Federal amendment, is sharp and clear and must be borne in mind.

It follows, therefore, that under the provisions of the Federal Constitution the state, by its legislative direction, may establish such a method of choosing its presidential electors as it may see fit, and may change that method from time to time as it may deem advisable; but the legislative acts, both of establishment and of change, must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed, and can be valid and effective only when enacted in compliance therewith.

In the exercise of the power thus conferred by the Federal Constitution, various methods of electing

presidential electors were adopted in the early days by the several states, as set forth in detail in *McPherson v. Blacker*, 146 U. S., at pages 29 to 35, 36 L. ed. 875-877, 13 Sup. Ct. Rep. 3.

In our own state the same holds true to a certain extent. Prior to 1847, the legislative direction expressed itself in the form of a joint resolution, passed every fourth year, at the session immediately preceding a presidential election. These resolves had the force of law, and, with the exception of those of 1820 and 1824, they were uniformly presented to and were approved by the governor.

Prior to 1840, the district prevailed in whole or in part. Res. 1820, chap. 19; 1824, chap. 76; 1828, chap. 23; 1832, chap. 65; 1836, chap. 9. In 1840 (Res. chap. 55) ten electors at large were provided for, and since that time the electors have been chosen at large upon a single ballot. This method was followed in 1844. Res. 1844, chap. 295.

Under the Resolves of 1820, 1824, and 1828, the qualifications of voters for representatives and senators to the legislature were made the qualifications of voters for presidential electors. By the Resolves of 1832 and 1836, the qualifications of voters for representatives alone were made the test, and by the Resolve of 1840 this was changed to qualifications of voters for senators alone.

The legislature of 1847 directed for the first time by a general act, instead of by a quadrennial resolve, the manner in which the voters should proceed in the election of presidential electors (Pub. Laws 1847, chap. 26), and, following the resolves of 1840 and 1844, prescribed the qualified voters therefor to be "the people of this state qualified to vote for senators in its legislature." This qualification established by the Act of 1847 has been preserved in all the subsequent revisions. Rev. Stat. 1857, chap. 4, § 79; Rev. Stat. 1871, chap. 4, § 78; Rev. Stat. 1883, chap.

4, § 86; Rev. Stat. 1903, chap. 6, § 123; Rev. Stat. 1916, chap. 7, § 57. And such was the law of this state when the act in question (chapter 120 of the Public Laws of 1919) was passed. The qualification of voters for senators, as well as for representatives, is fixed by the Constitution of Maine as "every male citizen of the United States of the age of twenty-one years and upwards," etc. Art. 2, § 1. Therefore, prior to the Act of 1919, only male citizens could vote for presidential electors. It is clear that this act, extending this privilege to women, constitutes a change in the method of electing presidential electors, and is a virtual amendment of Rev. Stat. 1916, chap. 7, § 57, not in express terms, but by necessary implication.

In other words, this state, during the century of its existence prior to 1919, had by appropriate legislative act or resolve directed that only male citizens were qualified to vote for presidential electors. By the Act of 1919 it has attempted to change that direction, by extending the privilege of suffrage, so far as presidential electors are concerned, to women. Had this act been passed prior to the adoption of the initiative and referendum amendment in 1908, it would have become effective, so far as legal enactment is concerned, without being referred to the people; but now under amendment 31 such reference must be had, if the necessary steps therefor are taken.

The language of that amendment is as follows: "No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency," etc.

None of the exceptions applies

(— Me. —, 107 Atl. 705.)

here. Section 17 provides that upon written petition of not less than 10,000 electors, filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that "one or more acts, bills, resolves, or resolutions, or part or parts thereof, passed by the legislature, not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves, or resolutions . . . shall not take effect until thirty days after the governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election."

It is evident that the act in question falls within the terms and scope of this amendment. This is an ordinary legislative act, a bill in the form prescribed by amendment 31. It is entitled "An Act Granting," etc. The enacting clause is, "Be it enacted by the people of the state of Maine." It was presented to the governor for his approval, and was signed by him, as required by § 2 of part third of article 4 of the Constitution of Maine, viz.: "Every bill or resolution having the force of law, to which the concurrence of both houses may be necessary, . . . which shall have passed both houses, shall be presented to the governor, and if he approve, he shall sign it," etc.

It has been published as chapter 120 of Public Laws of 1919.

This is not a mere joint resolution, addressed to the governor, asking for the removal of a public official, as in *Moulton v. Scully*, 111 Me. 428, 89 Atl. 944, nor is it a joint resolution ratifying an amendment to the Federal Constitution, as in the other question propounded to us herewith, in neither of which cases did the referendum attach, because neither resolution had the force of law. This is the public statute of

a lawmaking body, and is as fully within the control of the referendum amendment as is any other of the 239 public acts passed at the last session of the legislature, excepting, of course, emergency acts. It is shielded from the jurisdiction of that referendum neither by the state nor by the Federal Constitution. In short, the state through its legislature has taken merely the first step toward effecting a change in the appointment of presidential electors; but, because of the petitions filed, it must await the second step, which is the vote of the people. The legislative attempt in this case cannot be fully effective until "thirty days after the governor shall have announced by public proclamation that the same has been ratified by a majority of the electors voting thereon at a general or special election."

It follows that, for the reasons already stated, this question is answered in the affirmative.

Very respectfully,

Leslie C. Cornish.  
Albert M. Spear.  
George M. Hanson.  
Warren C. Philbrook.  
Charles J. Dunn.  
John A. Morrill.  
Scott Wilson.  
Luere B. Deasy.

#### NOTE.

The question whether an act of the state legislature ratifying a proposed Federal constitutional amendment, or other act under provision of the Federal Constitution, is subject to a state referendum, is discussed in the note, post, 1417. The decision in the reported case (*RE OPINION OF JUSTICES*, ante, 1407) is the only one dealing with the right to a referendum upon an act of the state legislature under the provision of the Federal Constitution empowering the state legislature to prescribe the qualifications of voters for presidential electors.

## RE OPINION OF THE JUSTICES.

*Maine Supreme Judicial Court — 1919.*

(— Me. —, 107 Atl. 673.)

**Constitution — amendment — referendum — necessity.**

1. A legislative resolution ratifying a proposed amendment to the Federal Constitution submitted by joint resolution of Congress to the states for ratification is not within a provision of the state Constitution requiring submission to the vote of the people of every bill or resolution having the force of law.

[See note on this question beginning on page 1417.]

**— Federal — law for amendment.**

2. Ratification of a proposed amendment to the Constitution of the United States is wholly governed by the provisions of that Constitution.

[See 6 R. C. L. 35.]

**— power of President.**

3. A proposed amendment to the Federal Constitution need not be presented to the President for approval or veto.

[See 6 R. C. L. 29, 30.]

**— character of action by Congress.**

4. Congress in proposing an amendment to the Federal Constitution is not acting strictly in the exercise of ordinary legislative power.

**— character of action by legislature.**

5. A state legislature in ratifying a proposed amendment to the Federal Constitution is not acting strictly in the discharge of legislative duties.

**— character of Constitution.**

6. The Constitution of the United States is a compact made by the peo-

ple, and not by the states in their sovereign capacity.

[See 6 R. C. L. 18.]

**— machinery for amendment of Constitution.**

7. In the matter of the amendment of the Federal Constitution the people divested themselves of all the authority, and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions.

[See 6 R. C. L. 24.]

**— resumption of power by people.**

8. The people of a state cannot resume by a referendum amendment to their state Constitution any power over the ratification of proposed amendments to the Federal Constitution which they had placed in the legislature or a ratifying convention.

[See 6 R. C. L. 24.]

**REQUEST** by the governor for the opinion of the Justices of the Supreme Judicial Court upon questions relating to the ratification of the 18th Amendment to the Constitution, and the necessity of submitting by referendum the ratifying resolve of the legislature to the qualified voters of the state. *Negative answer returned.*

To the Honorable Carl E. Milliken,  
Governor of Maine:

The undersigned, justices of the supreme judicial court, having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the 18th Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the legislature to the qualified voters of the state, respectfully submit the following answer:

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-fifth Congress of the United States on December 3, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States, which amendment provides that after one year from the ratification thereof the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United

States and all territory subject to the jurisdiction thereof, for beverage purposes, is thereby prohibited.

This amendment, thus adopted by joint resolution of Congress, was proposed to the legislature of Maine of 1919 for ratification, and was ratified by a joint resolve of the senate and house of representatives; the concluding paragraph, after reciting all the preliminary steps, being of the following tenor: "Therefore resolved that the legislature of the state of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the secretary of state of the state of Maine notify the Secretary of State of the United States of this action of the legislature by forwarding to him an authenticated copy of this resolve."

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the secretary of state, requesting that this resolve be referred to the people under amendment 31 of article 4 of the Constitution of Maine, known as the initiative and referendum amendment, the question is now asked of the justices whether this joint resolve of the legislature of Maine, ratifying an amendment to the Federal Constitution, proposed by and duly submitted for ratification by the Congress of the United States, is subject to the provisions of amendment 31, and therefore must be referred to the people under the facts existing in this case.

#### Answer.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Constitution of the United States was complete, final, and conclusive, so far as the state of Maine

was concerned, when the legislature passed this resolve.

Our reasons are as follows: The subject-matter of the action of the legislature under consideration is a proposed amendment to the Constitution of the United States, the proposal —Federal-law  
for amendment. and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows: "Art. 5. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . ."

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways:

First, from Congress, by joint resolution, whenever two thirds of both Houses deem it necessary.

Second, from the states, whenever two thirds of the legislatures of the several states may request that a national constitutional convention be called for that purpose, in which case Congress must call such a convention.

All the Federal amendments which have thus far been adopted have been proposed in compliance with the first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the

sole control of the two houses, and is independent of all executive action. The signature of the President

—power of President.

is not necessary, and it need not be presented to

him for approval or veto. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644; *State ex rel. Wineman v. Dahl*, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418. Nor is Congress, in proposing constitutional amendments,

—character of action by Congress.

strictly speaking, acting in the exercise of ordinary

legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by article 5, before quoted. The people, through their Constitution, might have designated some other body than the two Houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

First, by the legislatures of three fourths of the several states; or,

Second, by constitutional conventions held in three fourths thereof; and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the legislature in three fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the legislature of Maine.

Here, again, the state legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties

—character of action by legislature.

and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article 5. The people, through their Constitution, might have clothed the senate alone, or the house alone, or the governor's council, or the governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the legislature; that is, the legislative assembly.

It is a familiar, but none the less fundamental, principle of constitutional law that the

Constitution of the United States is a

—character of Constitution.

compact made by the people of the United States to govern themselves as to general objects in a certain manner, and this organic law was ordained and established, not by the states in their sovereign capacity, but by the people of the United States. The preamble, "We, the people," so states, and such is the fact. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440. It is equally well settled that it was competent for the people to invest the Federal government, through the Constitution, with all the powers which they might deem necessary or proper, and to make those powers, so far as conferred, supreme, to prohibit the states from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to Federal or state government. *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97. Whether a certain power has been conferred either expressly or by reasonable

implication upon the national government, or has been reserved to the states or to the people themselves, must depend upon the construction of the language of the Constitution governing that particular subject-matter.

It admits of no doubt that in the matter of amendment which is governed by article 5, the people divested themselves of all authority, and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions.

This view has the sanction, not only of reason, but of authority. Mr. Iredell, in the North Carolina convention which ratified the Federal Constitution, in discussing this ratifying clause, said: "By referring this business to the legislatures, expense would be saved, and in general, it may be presumed, they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is, therefore, left discretionary." 4 Elliot, Debates, 176 177.

This discretion, under the terms or article 5, is to be exercised by Congress.

In *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. ed. 401, 407, the Supreme Court of the United States, in emphasizing the supremacy of the Constitution, said: "It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two thirds of both houses shall propose them, or when the legislatures of two thirds of the several states shall call a convention for proposing amendments, which in either case become valid,

to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three fourths of the several states, or by convention in three fourths of them, as one or the other mode of ratification may be proposed by Congress. . . . Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it."

A well-known writer on constitutional law, after tracing the history and the scope of article 5, concludes as follows: "Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people, either in legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." 2 Watson, Const. p. 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal government, that, according to their admitted and accepted practice, if a state legislature has once ratified a Federal amendment, a subsequent legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the 14th Amendment, and by New York with reference to the 15th; but the proclamation of the Secretary of State for the United States was issued, announcing the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescission by subsequent legislatures. The attempted rescission was ignored. 2 Watson, Const. p. 1315.

If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much

less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject-matter.

It follows, from what has been said, that even if the people of Maine, by adopting in 1908 the initiative and referendum amendment of our state Constitution, had attempted to assume or regain the power of ratification of proposed amendments to the Federal Constitution, by exercising a supervisory authority over the state legislature in that respect, such attempt would

—resumption of  
power by  
people.

have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by article 5, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify Federal amendments. The authority is elsewhere.

But the people, by the adoption of the initiative and referendum amendment, did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Me. 428, 446, 89 Atl. 944, and it was there held that the design of the initiative and referendum was to make the lawmaking power of the legislature not final, but subject to the will of the people, and to confer that power in the last analysis upon the people themselves. And the court adds: "This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act, or a resolve having the force of law. This is shown clearly and conclusively by the language of § 2 of part third of article 4, under the general head of 'Legislative Power.' 'Every bill or resolution having the force of law to which the concurrence of both houses may be necessary, . . . which shall have

passed both houses, shall be presented to the governor, and if he approve, he shall sign it,' etc. The referendum applies, and was intended to apply, only to acts or resolves of this class, to 'every bill or resolution having the force of law,' that is, to what are commonly known as legislative acts and resolves, which are passed by both branches, are usually signed by the governor, and are embodied in the legislative acts and resolves, as printed and published. And the words 'No act or joint resolution of the legislature,' etc., before quoted, in the referendum amendment, must be construed in the light of the context, considering all the sections and parts and articles together, as meaning 'no act or joint resolution of the legislature having the force of law.' This is the simple and plain interpretation of simple and plain language."

In the application of that rule of construction this court held in that case that a joint address to the governor on the part of both branches of the legislature, calling for the removal of a public officer, was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution, ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by article 5 of the Federal Constitution to perform that particular act. The principles laid down in *Moulton v. Scully* are decisive of this point.

The supreme court of Oregon, in a case decided on April 29, 1919, passed upon this branch of the question, where this same Federal amendment was involved, and held that the term, "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed



laws. *Herbring v. Brown*, — Or. —, 180 Pac. 328.

In conclusion, it may be said that not only have all previous amendments to the Federal Constitution been ratified by two thirds of the legislatures of the several states, but this particular 18th Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by Federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this 18th Amendment had been duly ratified by the legislatures of three fourths of the states, including by name the state of Maine, and therefore certifying, in pursuance of U. S. Rev. Stat. § 205, Comp. Stat. § 303, that the amendment aforesaid has be-

come valid to all intents and purposes, as a part of the Constitution of the United States. See appendix to pt. 2, 40 Stat. at L.

The construction which we adopt is evidently the same which the Federal authorities have placed upon the Federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

We have the honor to remain,

Very respectfully,

[Signed] Leslie C. Cornish.

Albert M. Spear.

George M. Hanson.

Warren C. Philbrook.

Charles J. Dunn.

John A. Morrill.

Scott Wilson.

Luere B. Deasy.

## ANNOTATION.

**Ratification of amendments to Federal Constitution or other acts of the state legislature under provision of Federal Constitution as subject to state referendum.**

- I. Redistricting state for congressional purposes, 1417.
- II. Prescribing qualifications of voters for presidential electors, 1421.
- III. Ratifying proposed Federal constitutional amendment, 1421.

### *I. Redistricting state for congressional purposes.*

An act of the state legislature redistricting the state for congressional purposes has been held to be subject to a referendum provided by state laws. *State ex rel. Davis v. Hildebrandt* (1916) 94 Ohio St. 154, 114 N. E. 55, affirmed in (1916) 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; *State ex rel. Schrader v. Polley* (1910) 26 S. D. 5, 127 N. W. 848. The contention of the parties is well stated by the South Dakota court as follows: "The contention of the defendant is that chapter 223, Laws 1909, is in all things the same as any other law; that it is subject to the same constitutional limitations as to the manner of passage, and approval, veto, and

referendum, as any other law that may be passed by the legislature. While, on the other hand, the relator contends that under § 4, art. 1, U. S. Const., the legislature only is authorized and empowered to act in the creation of congressional districts; that the governor has no veto power, nor the people any referendum power, under the state Constitution, over such action of the members of the legislature, and, when a majority of the members of the legislature consent and vote to divide the state into congressional districts, the governor has no veto power over such action; and that such action is not subject to referendum vote of the people, under the power reserved in the people over the passage of laws, by § 1, art. 3, S. D. Const., on the theory that the governor, who exercises the veto power, and the people, who exercise the referendum power, are not a part of the legislature, and because the power granted by the United States Consti-

tution says that the time, place, and manner of holding elections for representatives in Congress shall be prescribed in each state by the legislature thereof. It is the contention of the relator that, when the Federal Constitution gave power to the 'legislature,' this power so given could not be delegated to the people. In these contentions we are of the opinion that the defendant is in the right."

Both Federal and state constitutional provisions are involved in this question. The Federal constitutional provision relating to this subject is as follows: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; and the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." U. S. Const. § 4, art. 1. Section 1 of article 2 of the Constitution of Ohio as amended September 3, 1912, which was involved in *State ex rel. Davis v. Hildebrant* (Ohio) *supra*, is as follows: "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the Constitution and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly except as hereinafter provided; and independent of the general assembly to propose amendments to the Constitution and to adopt or reject the same at the polls." Section 1, article 3, of the South Dakota Constitution which was involved in *State ex rel. Schrader v. Polley*, provides that "the legislative power shall be vested in the legislature which shall consist of a senate and a house of representatives, except that the people expressly reserve to themselves the right to propose measures, . . . and also the right to require that any of the laws which the legislature may have

enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions)."

The South Dakota court takes the view that the above provision of the Federal Constitution was not a grant of power to the states, but a grant of power to Congress at any time to make or alter the time, places, and manner prescribed by the states. The court says: "When the Federal Constitution said: 'The times, place and manner of holding elections for Representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulation,' power was not delegated to the state legislature, or to the state itself, to regulate such elections, because the state already in its sovereign capacity possessed that power, and the Federal Constitution simply left that power with the state, where it already reposed; but, for a purpose, power was delegated to Congress to at any time by law make or alter the time, place, and manner of holding such elections prescribed by the state. 'In determining the proper construction to be placed on this clause of the Federal Constitution, it is important to inquire, first, What was the object of the framers of that instrument in grafting into it such a provision? Why was it deemed necessary and proper? It is hardly possible that there can be two opinions in regard to this. The convention had provided for a Federal Senate and House of Representatives, in which the legislative power of the proposed government was to reside. The effective organization and continuance of these bodies were necessary to the very existence of the government under the plan proposed. To have a Senate and House of Representatives it was necessary that members thereof must be elected at regular and stated periods; and it was argued with great force that a majority of the states, becoming

refractory, might, by the simple act of refusing to provide the times, places, and manner of holding elections for Senators and Representatives, thereby defeat the election of these officers, suspend the action, destroy the power, and even blot out the existence of the Federal government. It became necessary, therefore, —absolutely necessary,—to secure the continued existence and effectiveness of the Federal government, to reserve to Congress the power at any time by law to make or alter such regulations. The object was to secure to the Federal government, for its own safety, the due election of these officers; not to confer upon the states, or any department thereof, any powers whatever, or to interfere in any way with them in their mode of electing these officers, as long as the exercise of this power was left to the states. The object manifestly was simply to leave to the states the power to determine the times, places, and manner of holding these elections, until Congress saw proper to exercise the power conferred upon it for that purpose.' *Baldwin v. Trowbridge*, 2 Bartlett, Contested Elec. Cas. 46. It will be observed that Congress has no power to pass an act providing what any state shall do in regard to such elections, but Congress itself may prescribe the time, place, and manner of holding such elections, and when Congress does so act the law of the state stands aside, but until Congress does so act the state in its sovereign capacity, acting under its own Constitution, may regulate such elections."

Assuming that the Federal constitutional provision is a grant of power, a question arising in determining whether an act of the state legislature redistricting the state for congressional purposes is subject to the referendum as provided by state laws is, What constitutes the "legislature," within the meaning of the Federal constitutional provision? The supreme court of Ohio in *State ex rel. Davis v. Hildebrant* (1916) 94 Ohio St. 154, 114 N. E. 55, supra, thus concisely states the question: "Does the term 'legislature,' as used in article 1,

§ 4, of the Federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend, and repeal the laws of the state, including the power reserved to the people empowering them to 'adopt or reject any law' passed by the general assembly under the provisions of § 1, art. 2, of the Constitution of Ohio?"

Answering the question the Ohio court, in the above case, says, after reviewing the state constitutional provisions above set out: "These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the senate and house of representatives, the people of Ohio have by the aforesaid provisions of their Constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum.' While article 1, § 4, of the United States Constitution, is controlling upon the states in so far as it grants the legislatures of the states authority to prescribe the times, places, and manner of holding elections, this is the quantum of the Federal grant. The character of the legislature, its composition, and its potency as a legislative body are among the powers which are, by article 10 of said Constitution, 'expressly reserved to the states respectively, or to the people.' . . . Under the reserved power committed to the people of the states by the Federal Constitution, the people by their state organic law, unhindered by Federal check or requirement, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio Con-

stitution, prior to the adoption of the amendment of 1912, provided that the 'legislative power' of the state should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. . . . The constitutional provision relating to the election of Congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two chambered body, or whether the functions of the latter be curbed by a popular vote, or its enactments approved by a referendum vote."

The South Dakota court, in the above case, discusses the question as follows: "We are also of the opinion that the word 'legislature,' as used in § 4, art. 1, of the Federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the Federal Constitution refers to the 'legislature' in the sense of its being the legislative department of the state, whether it is denominated a legislature, general assembly, or by some other name. Under § 1, art. 3, of the state Constitution, it will be observed, the people of this state have reserved to themselves as a part of the lawmaking power, the right to vote by referendum upon any law passed by the legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are 'such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state

government, or its existing state institutions.' It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and the legislature is only empowered to act in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dict.; Webster's Dict; 18 Am. & Eng. Enc. Law, 822; 25 Cyc. 182), and which, in this state, under § 1, art. 3, S. D. Const., includes the people. Therefore we are of the opinion that in the passage of this act dividing the state into two congressional districts, by the lawmaking power of this state, it was necessary that such law be passed according to the constitutional provisions of this state, and that the referendum was applicable thereto."

A second reason for holding the law subject to the referendum is discussed as follows by the Ohio court: "However, there is another valid reason why the writ should be denied in this case. While article 1, § 4, of the United States Constitution, commits to state legislatures the right to prescribe the times, places, and manner of holding elections, that article expressly reserves to the Congress full and complete control of that subject. If there be any conflict between the legislative and congressional provisions upon that subject, the latter control, and the law of Congress supercedes any law or regulation upon the subject made by the state legislature. The concluding sentence of the article is as follows: 'But the Congress may at any time by law make or alter such regulation.' Recurring now to the provisions of the Act of Congress of August 8, 1911, chapter 5, § 4, it was stipulated that the representative to Congress should be elected by the districts 'now prescribed by law until

such state be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in § 3 of this act.' Under the constitutional provision that Congress might at any time by law make or alter regulations prescribed by the state legislature, it had full power to direct, as it did, that Congressmen should be elected by the districts prescribed by the laws of the various states. The Congress could, under its supervisory control granted by article 1, § 4, of the United States Constitution, require that a legislature must act with an eye to the referendum. It could require legislative action in accordance with local state Constitutions. This Congress did, in its Apportionment Law of August 8, 1911, when it recognized as lawful newly created districts after the state had been 'redistricted in the manner provided by the laws thereof.' Section 4 of the original act as introduced in Congress contained, after the word 'redistricted,' the following language: 'By the legislature thereof in the manner herein prescribed.' When the bill came before the Senate of the United States, Mr. Burton, Senator from Ohio, offered an amendment, which was passed, striking out that language, and inserting in lieu thereof the words found in the present act, to wit: 'In the manner provided by the laws thereof and in accordance with the rules enumerated in § 3 of this act.' This action was taken by the Senate advisedly, and for the purpose of meeting such a situation as we have in Ohio, where the initiative and referendum are employed under state Constitutions." The court then discusses at length the debates in Congress over the act in question, which make it clear that Congress intended to make the Redistricting Act of the state legislature subject to the referendum.

The Ohio case was appealed to the Supreme Court of the United States. That court held [(1916) 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708] that the power of the state to apply the referendum to an act redistricting the state for congressional purposes is, so far as the state Constitution is

concerned, a question for the state court, the decision of which is not reviewable by the Federal Supreme Court; that whether or not a state has ceased to maintain a republican form of government because of its adoption of the initiative and referendum is a political question, not a judicial one, and solely for Congress to determine, and this being true, where Congress has recognized the referendum as a part of the state legislative power, for the purpose of creating congressional districts, there is no objection to such legislation from the Federal Constitution. It was held that Congress, by providing in the Apportionment Act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. § 152, Fed. Stat. Anno. 2d ed. p. 502), that the redistricting of a state for congressional purposes should be made by each state in the manner provided by the laws thereof, manifestly intended that where, by the state Constitution and laws, the referendum is treated as a part of the legislative power, the power thus constituted should be held and treated as a state legislative power for the purpose of creating congressional districts by law. The right to a referendum on the act of the legislature was accordingly upheld.

## *II. Prescribing qualifications of voters for presidential electors.*

This question is discussed in RE OPINION OF JUSTICES (reported herewith) ante, 1407.

## *III. Ratifying proposed Federal constitutional amendment.*

Upon the right to a referendum upon the act of a state legislature ratifying a proposed amendment to the Federal Constitution there is a difference of opinion. Some courts hold that such act of the state legislature is not subject to the referendum (Whittemore v. Terral (1919) — Ark. —, 215 S. W. 686; RE OPINION OF JUSTICES (reported herewith) ante, 1412; Herbring v. Brown (1919) — Or. —, 180 Pac. 328); other courts hold that it is (State ex rel. Mullen v. Howell (1919) — Wash. —, 181 Pac. 920). It is generally understood that the

supreme court of Ohio has rendered a decision in accord with this view, but at the time of the preparation of this note no report of that decision is available. The right to a referendum in such a case raises two questions: (a) Whether the state Constitution provides for a referendum; and (b) whether there is power in a state to provide for such a referendum.

The Arkansas and Oregon decisions, —and the Maine decision in part,—are based upon the proposition that the constitutional provisions in these states reserving referendum powers were not intended to apply to a resolution of the state legislature ratifying a Federal constitutional amendment.

The provision of the Oregon Constitution reserving referendum powers (which is substantially similar to the provision of the Arkansas Constitution) is as follows: "Section 1. The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives, but the people reserve to themselves . . . power at their own option to approve or reject at the polls any act of the legislative assembly." A provision relating to the method of exercising the referendum is as follows: "Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum was demanded." Another provision is as follows: "The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act." The question was treated by the court as being what was meant by the terms "bill" and "act," and it is discussed as follows: "To ascertain what is meant by the terms 'bill' and 'act,' as used in the amendments quoted above, we must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed. The word 'bill' occurs in § 1 of article 4 of the

original Constitution, where it is said, 'The style of every bill shall be, "Be it enacted by the legislative assembly of the state of Oregon," and no law shall be enacted except by bill,' thus indicating that a 'bill' is a proposed law; a document in the form of a law presented to the legislature for enactment. The same word is used in §§ 18 and 19 of article 4, and § 15 of article 5, and in the same sense as above indicated. We come now to the term 'act,' as used in the Constitution. In § 20 of article 4 we find the following: 'Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.' In § 21, art. 4, the following occurs: 'Every act and joint resolution shall be plainly worded,' etc. In § 22 of the same article, it is ordained: 'No act shall ever be revised or amended by mere reference to its title,' etc. And in § 28 it is prescribed: 'No act shall take effect until ninety days from the end of the session,' etc. No one can read these excerpts without at once arriving at the conclusion that, as referred to in the Constitution, the term 'bill' imports a document in the form of a law, presented to the legislature for enactment, and that the term 'act,' as there used, means a bill which has been enacted by the legislature into a law. That the framers of the Constitution intended to preserve the well-known distinction between 'acts' and 'joint resolution' is indicated in § 21, *supra*, wherein it is required that 'acts' and 'joint resolutions' shall be plainly worded. The initiative and referendum amendments were passed and should be construed in the light of the construction put upon the terms 'bill' and 'act' by the instrument they proposed to amend, and, taking this view, it must be held that as a joint resolution is neither a bill nor an act it is not subject to the referendum. Counsel for petitioner suggest that the term 'measures,' used in the amend-

ment, enlarges the scope of the powers reserved beyond the express reservation; but this is evidently not the purpose with which that term is employed. As before observed, there are two powers reserved: (1) The power to propose laws and amendments to the Constitution, and to enact or reject them at the polls; and (2) the power to enact or reject at the polls any act of the legislative assembly. The subject-matter upon which these powers may be exercised, namely, initiative laws, constitutional amendments, and acts of the legislature referred to the people, are thereafter referred to collectively as 'measures,' merely as a matter of convenience and to avoid frequent enumeration of the powers reserved, and not with the intent to include other and different powers within the scope of the amendment. Had it been the intent of the framers of the referendum amendment to go beyond these express reservations, it would have been easy and natural for them to have said so. To give the amendment the effect contended for by petitioners, we would have to read into the reservation the words, 'and resolutions,' making it read, 'The people reserve to themselves power . . . to approve or reject at the polls any act (or joint resolution) of the legislative assembly,' and where the amendment requires that the referendum petition shall be filed within ninety days 'after the final adjournment of the legislature which passed the bill,' we would be required to judicially amend the section so as to make it read 'within ninety days after the final adjournment of the legislature which passed the bill (or joint resolution.)' We are not prepared to go into the business of amending the Constitution to meet supposed hardships, and must hold that the referendum cannot be invoked in the present instance."

The Washington decision, on the other hand, assumes that the people intended and expressed their intention in the Constitution, of subjecting to the referendum an act of the legislature ratifying an amendment to the Federal Constitution. The Wash-

ington Constitution, as expressed by the court, implies "in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights, or limit or extend their political liberties, for they wrote an exception saying that a referendum may be ordered in all cases 'except such laws as may be necessary for the immediate preservation of the public need, health, or safety, support of the state government and its existing public institutions.'" The Washington court discusses the question as follows in the majority opinion: "Addressing ourselves to the first contention of the respondent, Is the resolution an act, bill, or law within the meaning of those terms as employed in our Constitution—whether the people intended an act, bill, or law to be statutes enacted by the legislature, or whether they meant action by the legislature which affected them as law? No cases have been cited, and we may confidently say that there is none, holding to a rule of strict construction where the power of the whole people is in question. It is a rule, become axiomatic by long-continued reiteration, that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction; that is to say, the power of the legislative body, or the people, if exercising that function, will not be abridged by the courts, or suffered to be abridged by others, if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. . . . Wherefore the purpose of the people in adopting the 7th amendment is a proper subject to be considered. Did they intend to grant any exceptions other than those enumerated in the 7th amendment? If this were an ordinary case of statutory construction, we have no doubt that we could all agree that we would look first to the old law, the mischief, and the remedy. It is more important in considering a question involving, the first of all, the sovereign rights of the citizen,—the right to speak ulti-

mately and finally in matters of political concern,—that we should measure the power reserved by the former condition. It is well known that the power of the referendum was asserted not because the people had a wilful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will. They endeavored to, and did,—unless we attach ourselves to words and words alone, reject the idea upon which the referendum is founded, and blind ourselves to the great political movement that culminated in the 7th Amendment,—make reservation of the power to refer every act of the legislature, with only certain enumerated exceptions. Guided by these considerations, we are satisfied that the people used the words, ‘act, bill, or law,’ in no restricted sense, but in a sense commensurate with the political evil they sought to cure. And why should not the amendment be a law within the meaning of the 7th amendment? No reason is assigned other than that ‘law,’ as there used, is synonymous with ‘bill’ or ‘act.’ We may well argue, and be within sound rules, that if the people had so intended they would not have used the word ‘law’ at all, as was done in the state of Oregon. We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders pro tanto the sovereignty of the state, gives to the Federal government a right to enact laws and to enforce them through the Federal courts, and it will deny the citizen the protection of some of those guaranties that we have written out of the travail of time into our own Bill of Rights. Upon construction we hold that the amendment to the Constitution of the United States is a law, within the meaning of the 7th amendment, and is subject to referendum.”

Assuming that the people of a state did intend to subject the act of their legislature ratifying a proposed Fed-

eral constitutional amendment, to the referendum, the question arises as to the power to do this. That there is no power to do this is the position taken in *RE OPINION OF JUSTICES* (reported herewith) ante, 1412, while the opposite conclusion is reached in *Washington*.

The method prescribed by the Federal Constitution for its amendment is set out in full in *RE OPINION OF JUSTICES* (reported herewith) ante, 1412; in brief, it provides for ratification by the “legislatures” of three fourths of the states, or by conventions in three fourths thereof, as one or the other mode may be proposed by Congress. In proposing the 18th Amendment, Congress prescribed ratification by the legislatures. The question therefore is, according to the *Washington* court, what constitutes the legislature of a state for the purpose of ratifying a proposed amendment to the Federal Constitution? In holding that the referendum is a part of the legislature, the *Washington* court says: “It is argued that inasmuch as article 5 of the Constitution of the United States provides that a proposed amendment ‘shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof,’ etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word ‘legislatures,’—if that word, and that alone, is the alpha and omega of our inquiry,—it follows that the controversy is at an end; but we are cited to no instances where a great question involving the political rights of a people has been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law. . . . It may be set down as a truism that the Congress of the United States has no concern in the manner in which the people of the several states pass upon the proposed amendments. It is the act of ratification or rejection by the legislative power in a state, and



not the manner of doing, that makes for the result to be accomplished. It may be true that it might have been provided that amendments could be made directly by Congress, and the submission of amendments for ratification or rejection by the legislatures of the several states at all was a matter of grace upon the part of the whole people, when the Constitution was adopted; but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had then provided, or might thereafter provide, and, when so regarded, as a compact between the states and the Federal government. It is provided in the Federal Constitution that proposed amendments shall be ratified by the legislatures of the states, or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the Constitution used the words 'legislatures' and 'conventions' as terms describing then-present institutions, for it is well known that at the time the Constitution was adopted some of the states did not have legislative assemblies. Article 5 can mean no more than this: That no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention, or such other method as might thereafter be adopted by the people in the several states. If we hold that the words 'legislatures' and 'conventions' do not control the plain purpose and spirit of article 5,—that is, that the people shall pass upon a proposed amendment by their representatives, if that be the plan provided by them at the time of its submission, or, if not, under such other plan of expressing their will as may not be offensive to the Federal Constitution,—we are on solid ground. For the framers of the Constitution had well in mind,—for they had lived in that time when our political system was being fash-

5 A.L.R.—90.

ioned into concrete form,—they understood, as we sometimes forget, that 'the theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority.' Cooley, *Const. Lim.* 6th ed. p. 39. Wherefore it may be said that it is the meaning and intent of article 5 that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote, under the referendum clause of a state Constitution, would be contrary to the provisions of article 5 unless it can be said, under sound rules of construction, that the referendum is offensive to the Constitution of the United States. . . . One of the important ideas governing the framers of the national Constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that Constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the 'legislatures' or 'conventions' of three fourths of the states, than that. Certainly it was and is of no concern to the others what sort of legislature any particular state has, so long as it conforms to the scheme of a republican form of government."

Much reliance is placed by the Washington court upon the Ohio and South Dakota decisions, *supra*, to the effect that an act of the state legislature redistricting the state for congressional purposes is subject to the referendum. *State ex rel. Schrader v. Polley* (1910) 26 S. D. 5, 127 N. W. 848; *State ex rel. Davis v. Hildebrandt* (1916) 94 Ohio St. 154, 114 N. E. 55, *supra*, I.

See distinction made by the Maine court in *RE OPINION OF JUSTICES* (reported herewith) ante, 1412, between an act of the state legislature ratifying a proposed Federal amendment and an act prescribing qualifications for presidential electors. W. A. E.

**EZRA S. EATON et al., Exrs., etc., of Charles Eaton, Deceased,**  
v.  
**ELLA F. EATON.**

*Massachusetts Supreme Judicial Court — June 30, 1919.*

(233 Mass. 351, 124 N. E. 37.)

**Husband and wife — power to defeat antenuptial agreement.**

1. A man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of the wife.

[See note on this question beginning on page 1436.]

**Courts — jurisdiction — consent.**

2. Consent or waiver by the parties cannot confer jurisdiction over a cause which is not vested in the court by law.

[See 7 R. C. L. 1039, 1043.]

**— duty of court.**

3. The court must consider the question of its jurisdiction of its own motion.

[See 7 R. C. L. 1043.]

**Injunction — against violation of agreement.**

4. Equity has jurisdiction to enjoin a widow at the suit of the executors from interfering with the probating of her husband's will in violation of her antenuptial agreement.

[See 13 R. C. L. 1042.]

**Contract — implied condition.**

5. It is a necessary implication of every valid contract with covenants binding each party that neither will interfere to prevent performance by the other.

[See 6 R. C. L. 1020.]

**Family settlement — enforceability.**

6. Contracts made after decease of a testator as to the disposition of property received under the will between legatees, heirs at law, and others having a pecuniary interest therein are recognized as valid and are enforceable in equity.

[See 9 R. C. L. 130, 131.]

**Executor and administrator — duty of probate.**

7. Persons named in a will as executors have the specific duty to present and seek to have allowed the instrument purporting to be the last will of deceased.

[See 11 R. C. L. 53.]

**Appeal — conclusiveness of findings.**

8. Findings of fact by a chancellor, supported by evidence, are conclusive on appeal.

[See 2 R. C. L. 203 et seq.]

**— refusal to make findings.**

9. Refusal to make requested findings of facts in an equity case presents no question for the appellate court.

**— question presented in equity appeal.**

10. A bill of exceptions in equity presents only questions of law.

[See 2 R. C. L. 140.]

**Injunction — denial — violation of agreement.**

11. Equity will refuse to enjoin a wife from interfering with the probate of her deceased husband's will, where he has violated his antenuptial agreement to will her a specified proportion of his property, by giving it to strangers before death.

[See 13 R. C. L. 1045.]

**EXCEPTIONS** by plaintiffs to rulings of the Supreme Judicial Court for Essex County, made during the trial of a suit brought to enjoin defendant from contesting the allowance of a certain instrument as the will of her deceased husband, from petitioning for a widow's allowance, and to compel specific performance of a certain antenuptial agreement. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Whipple, Sears, & Ogden, Boyd B. Jones, and Arthur M. Boal, for plaintiffs:

The terms of the will are a full and exact performance by the testator of the antenuptial agreement.

Denholm v. McKay, 148 Mass. 434, 12 Am. St. Rep. 574, 19 N. E. 551.

The gifts, contracts, and transactions between the testator and his three sons are not in violation of the antenuptial agreement.

Redman v. Churchill, 230 Mass. 415, 119 N. E. 953; Leonard v. Leonard, 181 Mass. 458, 92 Am. St. Rep. 426, 63 N. E. 1068; Chase v. Redding, 13 Gray, 418; Marshall v. Berry, 13 Allen, 43; Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Shepherd v. Shepherd, 196 Mass. 179, 81 N. E. 897.

The antenuptial agreement is a formal instrument under seal, showing careful thought in its preparation, and terms greatly extending and varying the meaning of the language used should not be implied.

Aspdin v. Austin, 5 Q. B. 683, 114 Eng. Reprint, 1407, 13 L. J. Q. B. N. S. 155, 8 Jur. 355, Dav. & M. 515; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Arthur v. Baron De Hirsch Fund, 58 C. C. A. 67, 121 Fed. 791; Amalgamated Gum Co. v. Casein Co. of America, 146 Fed. 900; Zorkowski v. Astor, 156 N. Y. 393, 50 N. E. 983; Caverly-Gould Co. v. Springfield, 83 Vt. 396, 76 Atl. 39; Harper v. Hassard, 113 Mass. 187; Brown v. Fales, 139 Mass. 21, 29 N. E. 211; Bradlee v. Southern Coast Lumber Co. 193 Mass. 378, 79 N. E. 777; Tubbs v. Cummings Co. 200 Mass. 555, 86 N. E. 921; McDonough v. Almy, 218 Mass. 409, 105 N. E. 1012, Ann. Cas. 1915D, 855.

Testator's rights under the antenuptial agreement should not be measured by his intent or motive.

Redman v. Churchill, 230 Mass. 415, 119 N. E. 953; Leonard v. Leonard, 181 Mass. 458, 92 Am. St. Rep. 426, 63 N. E. 1068; Marsch v. Southern New England R. Corp. 230 Mass. 483, 120 N. E. 120; Spade v. Lynn & B. R. Co. 168 Mass. 288, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566.

Plaintiffs are entitled to an injunction against the defendant from further contesting Mr. Eaton's will.

Sullings v. Richmond, 5 Allen, 187, 81 Am. Dec. 742; Sullings v. Sullings, 9 Allen, 234; Tarbell v. Tarbell, 10

Allen, 278; Paine v. Hollister, 139 Mass. 144, 29 N. E. 541; Collins v. Collins, 212 Mass. 131, 98 N. E. 588; Nathan v. Nathan, 166 Mass. 294, 44 N. E. 221; Bailey v. Dillon, 186 Mass. 247, 66 L.R.A. 427, 71 N. E. 538; Dexter v. Codman, 148 Mass. 422, 19 N. E. 517; Bartlett v. Slater, 182 Mass. 208, 65 N. E. 73; Williams v. Bank of United States, 2 Pet. 96, 7 L. ed. 360; Tasker v. Bartlett, 5 Cush. 359; United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Butterfield v. Byron, 153 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; Marvel v. Phillips, 162 Mass. 399, 26 L.R.A. 416, 44 Am. St. Rep. 370, 38 N. E. 1117; Eliot Nat. Bank v. Beal, 141 Mass. 566, 6 N. E. 742.

An antenuptial agreement whereby a woman agrees to accept a testamentary provision in lieu of dower, or in bar of statutory rights in her husband's estate, is valid, and a court of equity will enforce it.

Vincent v. Spooner, 2 Cush. 467; Sullings v. Richmond, 5 Allen, 187, 81 Am. Dec. 742; Tarbell v. Tarbell, 10 Allen, 278; Jenkins v. Holt, 109 Mass. 261; Freeland v. Freeland, 128 Mass. 509; Paine v. Hollister, 139 Mass. 144, 29 N. E. 541; Collins v. Collins, 212 Mass. 131, 98 N. E. 588.

If an agreement not to contest a will is valid and enforceable both in law and equity, an antenuptial agreement not to contest a will is of like character.

Leach v. Fobes, 11 Gray, 506, 71 Am. Dec. 732; Seaman v. Colley, 178 Mass. 478, 59 N. E. 1017; Blount v. Wheeler, 199 Mass. 338, 17 L.R.A.(N.S.) 1036, 85 N. E. 477; Baxter v. Treasurer, 209 Mass. 459, 95 N. E. 854; Ellis v. Hunt, 228 Mass. 44, 116 N. E. 956.

Parties to an agreement containing mutual and dependent covenants agree with each other, by implication, if not expressly, that they will not seek to prevent performance by the other.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349; Aspdin v. Austin, 5 Q. B. 683, 114 Eng. Reprint, 1407, 13 L. J. Q. B. N. S. 155, 8 Jur. 355, Dav. & M. 515; Tasker v. Bartlett, 5 Cush. 359; Eliot Nat. Bank v. Beal, 141 Mass. 566, 6 N. E. 742; Butterfield v. Byron, 153 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; Marvel v. Phillips, 162 Mass. 399, 26 L.R.A. 416, 44 Am. St. Rep. 370, 38 N. E. 1117.

If the agreement in question is a valid and enforceable contract, the persons named as executors in the will and the heirs at law of Mr. Eaton have

capacity to maintain this suit for specific performance, because otherwise the contract would not be enforceable, and also because they have a real interest in the subject-matter.

*Ellis v. Hunt*, 228 Mass. 39, 116 N. E. 956; *Parker v. New England Trust Co.* 215 Mass. 226, 102 N. E. 427.

Messrs. C. F. Choate, Jr., and J. D. Colt for defendant.

Rugg, Ch. J., delivered the opinion of the court:

This suit in equity is brought by the persons named as executors in an instrument purporting to be the last will of Charles S. Eaton, late of Marblehead, who deceased in October, 1917, to enjoin the defendant, his widow, from contesting the allowance of the instrument as such last will, and from petitioning for a widow's allowance, and to compel her to perform specifically the terms of a certain antenuptial agreement executed between her and the deceased a day or two prior to their marriage in 1909.

The defendant filed a demurrer for want of equity, amongst other causes, and appealed from an interlocutory decree overruling it. The same matter was set up in answer. The defendant in open court has waived her demurrer. Under these circumstances it is necessary only to consider whether the court has jurisdiction of the subject-matter.

**Courts—jurisdiction—consent.** Consent or waiver by the parties cannot confer jurisdiction over a cause which is not vested in the court by law. It is the duty of the court to consider that point of its own motion. *Peabody v. Boston*, 115 Mass. 383; *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 196 Mass. 458, 462, 14 L.R.A.(N.S.) 561, 82 N. E. 671, 13 Ann. Cas. 510; *Fourth Nat. Bank v. Mead*, 214 Mass. 549, 102 N. E. 69; *Boston Bar Asso. v. Casey*, 227 Mass. 46, 50, 116 N. E. 541.

The bill sets out an antenuptial agreement, executed in due form, according to the terms of which the

defendant agreed to accept certain testamentary provisions to be made in her behalf by the deceased, in place of all other claims upon his estate, and alleges that the deceased complied with all the stipulations of that agreement on his part to be performed, and made and executed a will wherein all the obligations to the defendant under the antenuptial contract have been met; that the deceased, by nominating them executors under the will, imposed upon them the duty of presenting the will for allowance, and that in the attempt to perform that duty they find themselves obstructed wrongfully by the defendant in defiance of her covenant with the deceased. The prayer of the bill in substance and effect is that the obstacle in the way of their performance of duty caused by this unlawful conduct of the defendant may be removed. This presents a case, under the circumstances, within the jurisdiction of a court in equity. It is a necessary implication of every valid contract with covenants binding each party that neither will interfere to prevent performance by the other. *Hebert v. Dewey*, 191 Mass. 403, 410, 77 N. E. 822; *Bailey v. Marden*, 193 Mass. 277, 279, 79 N. E. 257; *Tighe v. Maryland Casualty Co.* 218 Mass. 463, 468, 106 N. E. 135. It is an implied term of the antenuptial agreement here in issue that the defendant will not contest any will made by the deceased, provided he carried out that agreement in all its parts. Such an agreement, after it has been fulfilled by the one agreeing or reserving to himself the right to execute a will, entitles his representatives to specific performance in equity. *Sullings v. Richmond*, 5 Allen, 187, 81 Am. Dec. 742; *Tarbell v. Tarbell*, 10 Allen, 278; *Jenkins v. Holt*, 109 Mass. 261; *Paine v. Hollister*, 139 Mass. 144, 29 N. E. 541. Contracts made after the decease of a testator, as to the

**Injunction—against violation of agreement.**

**Contract—implied condition.**

disposition of property received under the will, between legatees, heirs at law, and others having a pecuniary interest therein, are recognized as valid and are enforced in equity. *Ellis v. Hunt*, 228 Mass. 39, 116 N. E. 956, and cases there collected. The heir at law of a deceased person, who has entered into an antenuptial contract as to the share to be received by his wife from his estate, may enforce specific performance of the contract. *Collins v. Collins*, 212 Mass. 131, 98 N. E. 588.

The case at bar falls within the principle of these decisions. The plaintiffs, although not yet appointed by the probate court as executors, have the specific duty to present and seek to have allowed the instrument purporting to be the last will of the deceased. They have sufficient interest to invoke the aid of equity against one who, under these circumstances, hinders them in the discharge of that duty, contrary to the terms of her contract with the deceased.

The case was heard on its merits by a justice of this court, who made findings of fact incorporated in the record and ordered the bill to be dismissed. The case comes here on exceptions by the plaintiffs. The pertinent facts as thus found are that the deceased, a widow of about fifty-two years, having three sons, became engaged to be married to the defendant, then a widow of about thirty-eight years, in 1909. The deceased had established and was the sole proprietor of a restaurant in Boston known as "Thompson's Spa." He was a man of unusual business ability and of more than average literary accomplishments, as well as of great foresight and determination in pushing through to a conclusion whatever he resolved upon. His business income from the time of his engagement until his death averaged not less than \$100,000 per year. His

other property was at least \$180,000. In contemplation of his approaching marriage, the deceased conceived the idea of an antenuptial agreement, which he proposed to the defendant. It is conceded that this agreement was fairly made. After appropriate recitals, its essential terms enabled and bound him, provided the defendant became and continued his lawful wife and survived him: (1) To make such disposition of personal effects as he chose; (2) to give to such persons or purposes as he might name legacies not exceeding 10 per cent in value of his real and personal estate, as ascertained by the probate inventory; (3) to divide the residue into equal parts, one more in number than there were surviving children and issue of any deceased child taking by right of representation, one part to the defendant, one part to each surviving child, and one part to the issue of each deceased child by right of representation, the share of the defendant to be held by trustees on a spendthrift trust, the net income thereof to be paid to her during life; (4) to accept and receive from the estate of the defendant, in case he survived her, only that which might be willed to him. The defendant covenanted that, in case the deceased performed the stipulations resting on him under the agreement, she would accept the same in full of dower and other rights which otherwise she might claim from his estate. Three sons survived the deceased. He left no child or children of a deceased child. Article 4 of the instrument offered for probate as the will of the deceased, after a recital in part of the provisions of the antenuptial agreement, and an assertion that it is made in pursuance of the terms of that agreement, establishes a spendthrift trust of one-fourth share of the remainder of his estate for the benefit of the defendant during her life, with a gift over. The sale of his interest in the Spa as soon as may be done without unreasonable loss is directed by article 6. It there

is provided that his sons or any of them shall be given a preference over other prospective purchasers to the extent of permitting them to purchase at the same price offered by any bona fide purchaser, payment to be made wholly or in part by their unsecured notes bearing interest not exceeding 4 per cent, pending the settlement of his estate.

The plaintiffs contend that this will, with all its antecedent and concurrent facts, constitutes a performance of the antenuptial agreement. The defendant contends that the deceased intentionally violated that agreement during his life by giving to his sons, for the purpose of defeating its covenants, a very large and substantial part of his estate.

It is not necessary to narrate the biographical details of the married lives of the deceased and the defendant. It is enough to say that, having been married in 1909, an estrangement came in 1914, followed by a separation, the deceased leaving the defendant at a house built at Pasadena, California, by him after the marriage, at an expense, including furnishings, of approximately \$175,000, to which the defendant had contributed \$20,000, being substantially all of her estate. After a few months he returned to his home in this commonwealth, and later filed a libel for divorce, which was pending unheard at the time of his death. During the period of his married life with the defendant before the estrangement, the deceased made to her valuable gifts, and was most generous in expenditure for her dress and travel, but not in amounts beyond or inconsistent with his ample income. From the time of the estrangement until the execution of the instrument offered for probate, the mind of the deceased "was centered upon the predominant purpose of so dealing with his property as to increase in so far as possible the share of his sons therein, in rectification of what he considered the financial wrong done to them by the antenuptial agreement."

In execution of that predominant purpose, with the full knowledge of the antenuptial agreement and its relation to his testamentary rights, he deliberately did three main things: (1) He caused to be organized a corporation for the ownership of the Pasadena property, the ultimate result thereby accomplished, without setting forth its various steps, being the indirect acquisition by his three sons through holdings of capital stock of an indebted corporation, of property worth at least \$150,000, with an annual rental value of from \$10,000 to \$12,000 for \$90,000, the share of each son in even that payment having been made by his noninterest-bearing note. (2) He sold stocks owned by him at the date of the antenuptial agreement, and out of the proceeds, probably combined with other investments or current income from the Spa, between October, 1914, and August, 1917, gave to his three sons sums aggregating \$170,577.42. (3) In November, 1915, he formed a partnership of the business of the Spa with his two older sons. This business then was worth at least \$550,000, exclusive of the good will, and, on uncontradicted evidence, was worth as a whole, independently of leasehold or other rights in realty, from \$800,000 to \$1,000,000. The share of each of the sons was one seventh, both in assets and profits, and of the deceased, five sevenths. In August, 1917, the share of each son was increased to one sixth, and that of the deceased diminished to four sixths. At the same time the deceased and these two sons agreed with the third and youngest son that he should become a partner and be given a one-sixth interest by the deceased in 1922, provided this son should earn his right to it by faithful and diligent service in connection with the business at a salary commensurate with his work. Pursuant to this arrangement the two older sons in 1917, including salaries fixed at \$15,000, each received \$66,000 from the business of the

Spa. There was no past consideration for the copartnership, and the sons contributed to it no capital. The interest of each was a pure gift from the deceased. The two elder sons, as surviving partners of the Spa, would have the exclusive right to possession of the firm's assets and to liquidation of its capital. In this connection the provisions of article 6 of the will confer upon them a dominating position respecting that business.

The finding of the single justice touching this matter is that the contracts of partnership were entered into for the ulterior purpose of rendering nugatory, as far as possible, the stipulations of the antenuptial agreement as to equality of participation and distribution of the residue, as well as to enrich the sons at the expense of his wife, and that these agreements and transfers were "fraudulent and testamentary in character, although not testamentary in form," and were made for the purpose of evading the antenuptial contract. It is further found that "the taking of the sons Ezra and Malcolm into partnership was not a gift out and out of one seventh, subsequently enlarged to one sixth, to each of them, freed from any possible control by himself. He was to share, and shared during the remainder of his life, in his proportion of the net profits from the whole business. It is only upon his death and a winding up or settlement of the partnership affairs that his interest, as distinguished and separate from theirs, and the rights of Charles [the youngest son], can be ascertained and sold under article 6 of the will, the sons or any of them at such sale to be given the preference, if they so desire, over 'any other prospective purchasers.'" Several changes in will and codicil were made during the period of estrangement, the practical effect of which was not to increase and probably was to diminish the defendant's testamentary share in the estate of the deceased.

The findings of fact must be accepted as final. It is plain that they are supported by the evidence. That the conduct of the deceased was deliberately designed is manifest, not only from all the circumstances, including his general intelligence and intellectual acumen, but especially from his refusal to accept and follow the advice of the one who had been his attorney for many years and who drew the antenuptial contract, to the effect that under its terms he could not give interests as partners in the Spa to his sons, and his resort to the counsel of others.

The refusals to make certain findings of fact requested by the plaintiffs present no question of law. The single justice saw the witnesses and observed their manner of testifying, and was in a better position than anyone else can be to pass upon their credibility. A bill of exceptions in equity presents only questions of law. Kennedy v. Welch, 196 Mass. 592, 594, 88 N. E. 11; Malden & M. Gaslight Co. v. Chandler, 209 Mass. 354, 357, 95 N. E. 791. It was the province of the single justice to make a final determination touching the facts put in issue by the pleadings. Requests for findings of fact in such connection have slight, if any, relevancy at this stage of the case. See Warfield v. Adams, 215 Mass. 506, 520, 102 N. E. 706.

The precise question presented is whether, when a man has made an antenuptial contract with a woman, who in reliance thereon becomes his wife, to give her by will a share of his estate equal to that to be given by will to others, the husband lawfully may, by deliberate design, for the express purpose of diminishing the money value of the testamentary provision for the wife, make lavish gifts from his estate to others during his life. That question never

Appeal—conclusiveness of findings.

—refusal to make findings.

—question presented in equity appeal.

before has arisen for adjudication in this court.

It was held in *Redman v. Churchill*, 230 Mass. 415, 119 N. E. 953, reviewing and affirming earlier decisions, that a husband who was under no contractual obligation to his wife has "the right to dispose of his personal property during his lifetime without her consent, and she cannot impeach a gift made by him as a fraud upon her because made to prevent her from acquiring any portion of it." It was held in *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89, that a wife under no antenuptial covenants may make a present transfer of all her personal property to a trustee, retaining a beneficial interest to herself during life with gift over to a third person on her death, and reserving the right of variation by subsequent appointment, even though all this is done for the express purpose of preventing her husband from sharing in her estate. Those decisions do not reach to the point now to be determined, because no antenuptial contract was involved in either of them. The intent of a donor is of no consequence in such a case, because the right of the relict in the property of the deceased spouse is purely the creature of statute. Each is entitled to that which the statute establishes, and to nothing more, and the statute says nothing about intent. The fact alone is controlling.

The decisions are uniform, so far as we are aware, to the effect that where there is an antenuptial contract, and the parties to the marriage have voluntarily elected not to depend upon the provisions of the law, but upon the terms of an express agreement, a different rule applies. Such parties are not absolutely free to give away their property at their own volition. The reason for a different rule doubtless is that, where a man and woman who are to become husband and wife undertake to establish the rights of each in the property of the other by contract, they are held to reasonableness and good faith in its exe-

cution. The contract is of course to be interpreted according to its words. No contract is to be construed in conformity to the mere unexpressed expectation of the parties to it. Hope of the one or apprehension of the other not written into the agreement constitutes no part of its obligation. There are, however, certain implications which arise out of the nature of the transaction, where a man and woman, in contemplation of marriage, attempt to settle by contract their respective property rights in the estate of the first to decease. The participants in an antenuptial contract do not stand at arm's length with reference to each other. Their relation is one of highest trust and confidence. It demands the utmost good faith on the part of each. This is not only a necessary concomitant of the execution of such an instrument, but the performance of its stipulations must also be in the same spirit. Without analyzing further the grounds for a different rule governing the rights of parties to an antenuptial contract from that which governs the rights of a husband and wife unaffected by such contract, it is enough to say that the substantially universal consensus of common-law courts to that effect is a sufficient basis for its existence, recognition, and acceptance. What that rule is has been differently phrased by judges of eminence. One of the most frequently quoted statements is that of Lord Chancellor Brougham in *Logan v. Wienholt*, 7 Bligh, N. R. 1, 5 Eng. Reprint, 674, upon which the plaintiffs strongly rely. That was a case where, amongst other matters, an uncle, after reciting the intended marriage of his niece, covenanted upon her marriage to give by will to her or to the issue of her marriage as much as he gave by will to anybody else. The marriage took place. Thereafter the uncle bought estates with life use to himself and remainder to persons other than the niece and her issue. It was with reference to those facts that it was said



at page 53: "Now, upon due consideration of the authorities and principles of law, I take the rule touching these matters to be this: If a person covenants or agrees, or in any manner validly binds himself to give to A. by his will as much as to any other, he may put it out of his power to do so by giving all in his lifetime; or if he binds himself to give A. as much as B. by his will, he may in his lifetime give B. what he pleases, so as his will shall give A. as much as his will gives B.; but then, the gifts which he makes in his lifetime to B. must be out and out; for if, to defraud or to defeat the obligation which he has entered into, he gives to B. any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that obligation, and to prevent his escaping, as it were, from his own contract, this gift to B. shall be taken as testamentary—shall be taken as if included in the will—and the subject-matter of it shall be brought back and made the fund out of which to perform the obligation; at all events it shall be made the measure for calculating and ordering the performance of, or dealing with, the claim arising under that obligation."

To the same general effect see *Fortescue v. Hennah*, 19 Ves. Jr. 67, 34 Eng. Reprint, 443, 12 Revised Rep. 137, and *Johnson v. Hubbell*, 10 N. J. Eq. 332, 337, 6 Am. Dec. 773.

It is manifest from the reasoning and decision of *Kelley v. Snow*, ubi supra, that such reservation of income for life and gift over of remainder at the death of the donor as was before the court in *Logan v. Wienholt* is not "testamentary" in any true sense. There is nothing essentially testamentary in the act of a man making a present gift of his property to a trustee, reserving income for life to himself with re-

mainder at his death to third persons. A man free from legal requirement to anybody respecting the disposition of his property may give it in that or a similar way, and such remainder vests at once in the remainderman. An instrument of that sort need not be executed with the formality required for a will. Apart from any agreement, and having regard to the Statute of Wills, the arrangement before the court in *Logan v. Wienholt* contravened no principle of law. *Kelley v. Snow*, ubi supra. But a court of equity laid hold of those facts and invalidated that arrangement in *Logan v. Wienholt*, simply because it was unreasonable, or fraudulent, or lacking in good faith, or in violation of the implications of the agreement, and treated the disposition as "testamentary" in nature. The underlying justification for such interference by equity is that the act was designed to and would accomplish, if permitted to stand, the defeat of the obligation of the covenants and frustrate the fair performance of the contract. It also is to be noted that in that case the attempted gifts were held contrary to the contract. It was not necessary to state with fullness and precision the converse of the rule whereby gifts would be held valid. The rule was put with more comprehensiveness and accuracy by Lord Hatherley, while Vice Chancellor Wood, in a case involving a covenant in a marriage settlement for the benefit of his son by a father in these words: "It is true that, notwithstanding the covenant, the father might have disposed of the whole of his property in his lifetime, provided such disposition were not made in fraud of or for the purpose of defeating his covenant, as it was in *Jones v. Martin*, 6 Bro. P. C. 437, 2 Eng. Reprint, 1184, more fully reported in 5 Ves. Jr. 266, note, 31 Eng. Reprint, 582, reversing 3 Anstr. 882, 145 Eng. Reprint, 1070." *Eyre v. Monro*, 3 Kay & J. 305, 309, 69 Eng. Reprint, 1124.

These words are quoted with approval and followed in *Keays v. Gilmore*, Ir. Rep. 8 Eq. 290, 294, 295, 22 Week. Rep. 465. The rule as stated by Lord Hatherley was foreshadowed in *Gregor v. Kemp*, 3 Swanst. 404, note, 36 Eng. Reprint, 926. The facts there were that Joan Kemp covenanted to will one fourth part of her estate for the benefit of A. Repenting of the terms of her agreement, she sought by present gifts to transfer £1,000 to others. The Lord Chancellor was of opinion that the disposition was in fraud of the covenant. He agreed that, notwithstanding the agreement, Mrs. Kemp was not restrained from disposing of any of her estate in any way in her lifetime, and had full power over it, "with this single exception, viz., she was restrained from making a distribution on purpose to defeat the covenant." The rule of Lord Hatherley was adumbrated by the still earlier decision of *Webster v. Milford*, 2 Eq. Cas. Abr. 362, 363, where the Lord Chancellor is reported to have said in substance, though with brevity, that under marriage articles it is not in the power of the husband purposely to defeat the articles by alienation or gift of his property. See in this connection *Randall v. Willis*, 5 Ves. Jr. 262, 31 Eng. Reprint, 577, and *Jones v. Martin*, supra. In *Dickinson v. Seaman*, 193 N. Y. 18, 24, 25, 20 L.R.A. (N.S.) 1154, 85 N. E. 820, the query was put whether, under a marriage agreement, the deceased husband "could give away all his property to his own relatives and thus defeat the antenuptial contract altogether." And it was said: "Assuming that he could not do this because it would be unreasonable, it is further asked where the line is to be drawn between the power to give away all and to give away nothing. That line is to be drawn where the courts always draw it when they can, along the boundary of good faith. If the decedent had given away property with furtive intent, for the purpose of defeating the antenuptial contract and of defraud-

ing the plaintiff, the gift would have been void."

In *Van Duyne v. Vreeland*, 12 N. J. Eq. 142, an agreement by an uncle that he would take into his family an infant nephew and give him property at the death of the uncle and his wife was the subject of inquiry. It there was said: "The defendant Vreeland had a perfect right to dispose of the property as he pleased, provided he did not make a disposition of it to take effect after his death which would have been a fraud in law, or constructive fraud upon the agreement, whether he intended it as a fraud or not, or a disposition of it for the sole purpose of defrauding the complainant and depriving him of the benefit of his agreement, which would have been an actual and positive fraud."

In *Austin v. Davis*, 128 Ind. 472, 12 L.R.A. 120, 25 Am. St. Rep. 456, 26 N. E. 890, it was recognized that under agreement for adoption of and testamentary gift to a child there was a limitation upon the right to make gifts to other persons during life; that they must not be made for the purpose of defrauding the child, and must be "made in good faith."

Several of the decisions to which reference has been made involved agreements touching the disposition of property by will for persons who were not either the husband or the wife of the testator. There is at least as strong ground for holding that such agreements between persons in contemplation of marriage impose restrictions upon the right to give away property to others as there is for reaching such a conclusion as to like agreements made between persons not in contemplation of marriage.

Apart from the authority of decided cases, and on reason, there appears to us to be no sound distinction between an out-and-out gift by the covenantor under an antenuptial agreement for the purpose of defeating the agreement, and a present gift to a third person for the

same purpose, of the principal of a fund or estate, with reservation of income or use to the giver for life, there being no clause in the agreement expressly covering the point. The one manner of giving is no more testamentary in its essence than the other, using the word testamentary with accuracy of meaning. If regard be had to the effect upon the wife, it is the same in either event. If regard be had to the effect upon the donor, he suffers no more by making such a gift of remainder than if he carried out his agreement. The effect upon him, however, is an immaterial factor. The antenuptial agreement, so far as concerns the wife, is not made for the benefit of the husband. His testamentary power is affected, sometimes by restriction, sometimes, as in the case at bar, by enlargement. The purpose of the covenantor in case of either manner of giving is to prevent the operation of the agreement upon his property, to the end that he may accomplish a detriment to his wife. The cases which hold that a settlement with reservation of life estate to the donor, and remainder over, is bad, rest upon the proposition that it is a fraud upon the marriage agreement, perpetrated to defeat its obligation. It well may be that such settlement is proof positive of a purpose fraudulent as against the marriage agreement. It is, however, equally a fraud upon that obligation, and equally designed to defeat the covenant, to make a present gift for that purpose. Harm to the covenantee follows equally in each case, whatever may be the form of the gift. The circumstances under which an antenuptial contract is made import a purpose that it shall confer real rights and impose substantial obligations. It is an implied term of such an agreement that it shall be fairly carried out, and that it shall not be performed in hate, trickery, perversity, or distrust. The inference rationally to be drawn from the conditions attendant upon an antenuptial agree-

ment is that it is designed to give something of value to the wife, and that it is not an empty form. It is more consonant with the situation to infer that if the parties intend that power shall be reserved to the husband wholly or in large measure to deprive the wife of property rights by making gifts for that purpose during life, and thus leave nothing or much less than might rationally have been expected for the will to operate on, it should be expressed in the instrument, than it is to deduce the reservation of such power contrary to the whole spirit of the instrument and the nature of the transaction. The right secured to the wife by implication is that she shall be treated fairly and rationally in the matter of distribution of his property by the husband by gifts during his life. The true rule, fairly to be deduced from the weight of authority and resting on sound reason, is that a man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, may, without breaking his agreement, make gifts during his life in good faith and reasonable amount, having regard to all the circumstances; but he cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of his wife. The motive in such a case affects the validity of the transaction because it determines "the extent of a privilege to infringe upon the admitted right of another." *Leonard v. Leonard*, 181 Mass. 458, 461, 92 Am. St. Rep. 426, 63 N. E. 1069. The adoption of any other rule, in substance, would put it in the power of a husband to strip himself during life of all his property, make his antenuptial agreement a barren instrument, and leave his wife penniless. A result like that would be contrary to every inference arising

Husband and wife—power to defeat antenuptial agreement.

from the relation of the parties and the purpose of an agreement.

The conclusion here reached is somewhat analogous to many classes of cases where equity in the interest of good faith and fair dealing enjoins contrary conduct either by mandate or restraint. For example, prohibition of use of information, acquired through employment, to harm of employer (*Essex Trust Co. v. Enwright*, 214 Mass. 507, 47 L.R.A.(N.S.) 567, 102 N. E. 441; *Aronson v. Orlov*, 228 Mass. 1, 5, 116 N. E. 951); protection of vendee of good will against setting up of a rival business by vendor (*Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228; *Foss v. Roby*, 195 Mass. 292, 10 L.R.A.(N.S.) 1200, 81 N. E. 199, 11 Ann. Cas. 571); and appropriation of appointed property to payment of debts of appointor (*Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889)—all are equi-

table doctrines, ingrafted on written instruments silent upon the subject, because consonant with fundamental ethical rules of right and wrong.

The findings of fact bring the case at bar fairly within this principle. A court of equity will refuse any relief by injunction upon such facts.

**Injunction—  
denial—  
violation of  
agreement.**

The stipulation signed by the three sons and the persons named in the will as executors, purporting to relinquish some of the preferential rights of the sons in the partnership and agreeing that the interest of the deceased therein may be sold under order of court, has no bearing upon the question whether the antenuptial agreement has been performed by the deceased.

It follows from what has been said that all the plaintiffs' requests for rulings were denied rightly. No error is disclosed on this record.

Exceptions overruled.

## ANNOTATION.

**Agreement that one's share in estate shall be equal to share of certain other person as affected by gift to latter during lifetime of decedent.**

I. General rule, 1486.

II. Application of rule:

a. Qualified gift, 1437.

b. Unqualified gift, 1440.

### *I. General rule.*

An agreement to make such a disposition of property by will that one person shall receive an equal portion of the property with others does not affect the testator's right of disposing of the property during his lifetime. But if he disposes of the property or any portion of it to any one of the persons contemplated by the agreement, retaining a life interest in himself, or makes an absolute gift with the express purpose of defeating the agreement, such a disposition of the property will be treated as testamentary for the purpose of securing to the beneficiary of the agreement a share of the estate equal to that so given. *Rogers v. Schlottback* (1914)

167 Cal. 35, 158 Pac. 728; *Whiton v. Whiton* (1899) 179 Ill. 32, 53 N. E. 722; *Logan v. Wienholt* (1833) 7 Bligh, N. R. 1, 5 Eng. Reprint, 674, 1 Clark & F. 611, 6 Eng. Reprint, 1046; *Fortescue v. Hennah* (1812) 19 Ves. Jr. (Eng.) 67, 34 Eng. Reprint, 443, 12 Revised Rep. 137; *Jones v. Martin* (1798) 5 Ves. Jr. 266, note, 31 Eng. Reprint, 582, 6 Bro. P. C. 437, 2 Eng. Reprint, 1184, reversing (1797) 3 Anstr. 882, 145 Eng. Reprint, 1070; *Gregor v. Kemp* (1722) 3 Swanst. 404, note, 36 Eng. Reprint, 926. And see the reported case (*EATON v. EATON*, ante, 1426).

While the courts give effect to such agreements when the testator has disposed of the property to the other legatees, still the courts will not give effect to the agreement if the executors are the sole parties defendant in the action. In such an action the legatees are necessary parties. *Jones v.*

How (1850) 7 Hare, 267, 68 Eng. Reprint, 109, 19 L. J. Ch. N. S. 324, 14 Jur. 145, 9 C. B. 1, 137 Eng. Reprint, 790. In that case it appeared that on the marriage of a daughter a father agreed to give to her, by deed or will, an equal portion of his estate with his other children. The father in his lifetime sold property to a son, who gave a note for the amount. The father was to be paid the interest on this note during his lifetime, and at his death the son was to accept the note as a gift. Later the married daughter died. The father died leaving a will and codicil whereby his estate was left to trustees to sell and divide the proceeds between his widow and his surviving daughter. In an action by the husband of the married daughter against the trustees, to account for the real and personal estate which testator left at his death and the bonds and obligations given by the testator during his lifetime to any of his children, it was contended, among other things, that property which the testator parted with during his lifetime, reserving to himself a life interest, should be treated as part of his estate at his death. The court of common pleas certified that there was not a good cause of action against the executors of the decedent. The residuary legatees were necessary parties. This certificate was confirmed by the high court of chancery.

## II. *Application of rule.*

### a. *Qualified gift.*

In *Jones v. Martin* (1798) 5 Ves. Jr. 266, note, 31 Eng. Reprint, 582, 6 Bro. P. C. 437, 2 Eng. Reprint, 1184, reversing (1797) 3 Anstr. 882, 145 Eng. Reprint, 1070, it appeared that a father covenanted on his daughter's marriage, to leave to her at his death an equal share of personalty with his son. At that time the father possessed considerable property, both real and personal. Subsequently he sold his real property. The proceeds of the sales were converted into bank shares. These shares, which amounted to more than the son's share as fixed by the settlement, were transferred to the son during the father's lifetime. The

dividends on the shares were paid to the father and mother during their lives and to the survivor of them. The son, during the life of the father, sold the bank stock without the father's knowledge, and bought some other stock which paid a larger dividend, but the father was paid the same dividend as he had received from the bank stock. The father died leaving a will which recited the provisions of the marriage settlement. His personal estate, however, amounted to very little. In an action brought after the father's death by the daughter and her husband, for an accounting and an equal distribution of the father's estate in accordance with the terms of the marriage settlement, the court held that, while the covenant did not restrict the father's powers to alter or change the nature of the property or to indulge in a free and unlimited expenditure of his means, he could not be partial toward one child. It was said: "This covenant was stated by the counsel for the respondent to be vague and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements. Many marriages are entered into on such covenants, and they are not inexpedient. They are entitled to favorable consideration. Such a covenant holds out a prospect that the party who marries into a family shall continue a member of that family; and it provides, as it were, a pledge that he shall be considered, and may consider himself, part of such family till the death of the person who enters into the covenant. But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child before another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not, however, exercise his power by an act which is to take

effect, not against his own interest, but only at a time when his interest will cease. . . . The father did not mean to part with his property in his stock. Had he wanted any part of it in the course of his life, he might have called upon his son for what his wants required; who, perhaps, would not have been very well pleased with such a requisition. . . . Here also the property continued to answer all the father's own purposes during his life. If a father will be partial, and will give a preference, he must give against himself; and not make a mere reversionary gift. He should immediately feel himself so much poorer for his gift. If he is willing to suffer that, let him then yield to the impulse of his partiality. But if a father may effectuate his purpose by anything short of this, it will furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants, which ought to be most honorably observed."

In *Fortescue v. Hennah* (1812) 19 Ves. Jr. 67, 34 Eng. Reprint, 443, it appeared that a father, on the marriage of one of his daughters, made a settlement whereby he agreed to give her one half of his estate on his death, the other half to go to the other daughter. On the marriage of the other daughter he made a settlement on her, reciting the previous agreement. After making a will in accordance with the first marriage settlement the father conveyed his property to the daughter who was last married. Several months later he died. In an action for a discovery of the disposition made by the testator during his lifetime for the benefit of defendants, the court held that, while a person who agrees to make a certain disposition of his property by will may dispose of it during his lifetime, if he makes a disposition of the property reserving a life interest in himself, though by an irrevocable instrument, it amounts to a fraud. It was said: "The custom of London, like a covenant of this description, attaches only upon the property which the freeman has at his death. During his life he has full liberty to dispose of

his personal property in any manner he thinks fit; yet it has been held that a disposition by a freeman that is not to take effect until after his death, though by an irrevocable instrument, is a fraud upon the custom."

In *Logan v. Wienholt* (1833) 7 Bligh, N. R. 1, 5 Eng. Reprint, 674, it appeared that on the marriage of his niece, an uncle executed a bond with a penalty whereby he promised, if he died unmarried, to give and bequeath to his niece and the issue of the marriage a certain amount of money, and as much in money as he should by his will give and bequeath to any one of his next of kin. Later his illegitimate daughter intermarried with his nephew. He thereupon during his lifetime converted a large part of his personal estate into realty, and by several transactions conveyed it to the nephew and his wife, reserving a life estate to himself in some instances. He also assigned certain stocks, bonds, and mortgages to his nephew. The nephew and his wife were to pay him the interest and dividends on such mortgage and stock. He later died, leaving by will a certain amount of money to the issue of his niece's marriage, his niece being dead. In an action to enforce specifically the bond and for an accounting of all the real and personal property purchased, settled, assigned, transferred, or conveyed by the uncle, the court held that if a person makes an agreement to make a certain disposition of his property by will, he may make an out-and-out gift of same during his life, but may not convert personal property into real estate and make a gift of the real property so as to evade the agreement. The reservation of a life interest in the personalty transferred, and of a life interest in the realty conveyed, was held to be evidence that it was fraudulently done. The Lord Chancellor said: "Now, upon due consideration of the authorities and principles of law, I take the rule touching these matters to be this: If a person covenants, or agrees, or in any manner validly binds himself, to give to A. by his will as much as to any other, he may put it out of his

power to do so by giving all in his lifetime; or, if he binds himself to give to A. as much as B. by his will, he may in his lifetime give B. what he pleases, so as his will shall give A. as much as his will gives B.; but then the gifts which he makes in his lifetime to B. must be out and out; for if, to defraud or to defeat the obligation which he has entered into, he gives to B. any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon the obligation, and to prevent his escaping, as it were, from his own contract, this gift to B. shall be taken as testamentary,—shall be taken as if included in the will,—and the subject-matter of it shall be brought back and made the fund out of which to perform the obligation; at all events it shall be made the measure for calculating and ordering the performance of, or dealing with the claim arising under, that obligation. The proposition which I have now stated appears to me to apply equally to all kinds of conveyances, whether by the sale of land to evade the performance of an agreement, where the agreement was to give as much land to A. as B. shall have; or by purchase of land, where the object was to defeat the agreement to give such an equal share of personalty; or by conveyance of land, either originally possessed or purchased afterwards; or by assignment of securities; or by the transfer of moneys, or other personal chattel,—provided those conveyances, assignments, or transfers were made, not out and out, but with a reservation on the part of the person bound, and that those transfers, conveyances, and assignments conferred not in all respects the real, but only, in whole or part, an apparent right to the property; and the distinction is always to be taken between the pretense, or the appearance, and the reality. Such contrivance, in parallel cases under the Bankrupt Laws, is treated and dealt with as a badge of fraud, and must here, having the same tendency and

effect, be subject to the same rule. The hand of equity will not be stayed by any such contrivances." A concurring opinion was rendered by Lord Plunkett, wherein he said: "I quite concur in the opinion that Daniel Birkett the elder, after entering into this contract, was not at liberty, for the purpose of evading the contract, either to make any present disposition of his personal property or to convert his personal property into real estate. The cases referred to by the noble Lord on the woolsack are not exactly the same in circumstances as the present; but the principle established by them furnishes precise grounds on which to proceed in arriving at the proposed conclusion. It is perfectly true that this case does not resemble the cases cited in all the particulars. In this case it was quite competent for Daniel Birkett the elder to have disposed of the entire of his property by any gift in his lifetime. The case contemplated by the contract is the making a disposition by his will; and the provision is that if he should make a disposition by his will, and give a larger sum to any one person than that which he gave to Sarah Wienholt, by will or in some other way, she should be entitled to compensation to that amount. The provision is against the disposition by the will. If Daniel Birkett the elder had chosen to convert his entire personal property into real estate, and had left it to descend to his heir at law, no person could have found fault with it. The principle of the cases cited by the noble Lord applies to this case; for they go the length of establishing this rule that if he makes a disposition in his lifetime of his personalty, or changes his personalty by purchasing real estate, if that is done for the purpose of evading the performance of the special contract which he had entered into, and enabling him to make a disposition which is, in effect, a testamentary disposition, although it purports to be an act *inter vivos*, that shall not be done, and shall be corrected by the established principles of the court. That being so, his reserving a life interest to himself in

the personal property which he transfers, or his reserving to himself a life interest in the real estate which he buys, making that real estate the subject of disposition by virtue of the residuary clause in his will,—all this shall be evidence that it is fraudulently done, and for the purpose of defeating the contract which he had entered into.”

In *Duckett v. Gordon* (1860) 11 Ir. Ch. Rep. 181, it was held that under a marriage settlement whereby a father recited that he was desirous of giving his daughter a child's share of his estate, which could not be ascertained until his death, where the daughter died in the lifetime of the father, any sum which had been advanced to other children should be added to the father's assets.

In *Keays v. Gilmore* (1873) Ir. Rep. 8 Eq. 294, 22 Week. Rep. 465, it appeared that before the marriage of his son, a father wrote a letter to the father of the intended wife, stating that at his death he would give to his son one half of his business and a child's share of what he would then be worth. During the lifetime of the father he assigned a mortgage to the son, reserving a power of revocation which was not exercised. The father also advanced other property to other children at different periods in his lifetime. When he died he left a will whereby 1 shilling was left to his son in full of all claims, and his other property, after all debts were paid, was divided between his widow and other children. It was held that the other children were not bound to bring into account the advancements made to them till the son should bring into account and give credit for the mortgage assigned to him.

*b. Unqualified gift.*

In *Gregor v. Kemp* (1722) 3 Swanst. 404, note, 36 Eng. Reprint, 926, it appeared that a mother, in consideration of the marriage of her son, covenanted to give, devise, or grant, by will or otherwise, to him, his executors or administrators, one fourth part of all the real and personal property of which she should be seised or to which she should be entitled at the time of her

death. Three days before the mother's death she drew up an instrument in writing empowering a friend of hers to pay to two of her three daughters a specified portion each of a certain sum of money and the balance was to be divided between her grandchildren. At the same time she signed an order on her banker to pay the friend the money standing to her account. The mother died, and a short time thereafter the son died. Shortly thereafter a daughter, his sole issue, also died. The widow remarried. In an action for an accounting and for the payment of a fourth part of the money so given away by the later instrument, the court held that a person who had covenanted to make a certain disposition of her property by will could not dispose of it so as to defeat the agreement, and that the later gift was in the nature of a *donatio mortis causa*. The court said: “The Lord Chancellor [Macclesfield] was of opinion that the disposition was in fraud of the articles. He agreed that, notwithstanding the articles, Mrs. Kemp was not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception, viz., she was restrained from making a distribution on purpose to defeat the covenant, which it is here fully proved she did; for she was unwilling her estate should go to strangers, and the disposition is a plain fraud; it was the intent of the articles that it should be for strangers, for it is to him, his executors, etc.; therefore, if he should think proper to make his wife executrix, as he did, it was designed for her benefit. But supposing this disposition had not been with this avowed design to evade the articles, yet he should have thought it, as it is circumstanced, a *donatio mortis causa*, and not good; for otherwise articles of this nature will signify nothing, if they are thus eluded by a disposition a day or two before death; and in this case she puts the greatest part of the money into the hands of the trustees named in her last will, so that seems to have the air of a will. The plaintiff, therefore, must have the



full fourth part of the estate after debts paid; but this disposition is good to affect the remaining three parts of her estate, and must be satisfied out of it to the several defendants."

But in *Willis v. Black* (1824) 1 Sim. & Stu. 525, 57 Eng. Reprint, 208, reversed in (1828) 4 Russ. 170, 38 Eng. Reprint, 769, 7 L. J. Ch. 3, it appeared that a father, on the marriage of one of his daughters, settled a sum of money on her and her husband and their issue. He also agreed to settle on his daughter, her husband, and their issue, by his will or otherwise, as great a share of his property as he should, by will or otherwise, provide for any of his other children. This provision was to take effect on the death of the survivor of himself and wife. The father made several gifts to some of his children, but none to the married daughter during his lifetime. He subsequently died, leaving a will whereby he provided for an equal distribution of his property between all his children. In an action for specific performance of the settlement, and for an accounting of all sums of money advanced and paid by the testator during his lifetime, the court held that by the terms of the settlement the married daughter was entitled to take only such share as any of the other children were entitled to in the event of death. The testator, therefore, retained full power during his life to make a present disposition of any part of his property to any of his other children. It was said: "The question upon this covenant is whether it was the intention of the testator to bind himself to give to Mr. and Mrs. Formby as large a share of his property as he should at any time devise or give to any other of his younger children, or only as large a share of his property as any other of his younger children should, by his gift or devise, become entitled to at his death, or at the death of the survivor of himself and his wife. The expressions in the first clause of the covenant may be considered as ambiguous; but it is clear in the second clause that Mr. and Mrs. Formby were only to take such part or share as any other of his

younger children should become entitled to in the event of his death; and he had, therefore, full power during his life to make a present disposition of any part of his property to any of his younger children. The language of his will shows that this was his own conception of the covenant."

The reported case (*EATON v. EATON*, ante, 1426) holds that when a man has made an antenuptial contract with his prospective wife, who in reliance thereon becomes his wife, to give her by will a share of his estate equal to that to be given by will to others, the husband may not deliberately and intentionally give away during his life any part of the estate, intending thereby to diminish the testamentary provision of his estate to his wife.

In *Whiton v. Whiton* (1899) 179 Ill. 32, 53 N. E. 722, it appeared that the wife of a testator had received more than she was entitled to receive under the will of her deceased husband. Desiring to procure more money, she made a request therefor of the executors, but was refused unless she procured the consent of her two sons and her daughter. She had already threatened to disinherit her two sons. The two sons thereupon refused to consent to the payment of such sum unless she made, executed, and delivered a will, devising and bequeathing all the property of which she might die possessed to her three children, share and share alike. The mother finally agreed to this, and made, executed, and delivered a will containing such a provision. An order for the payment of the sum she desired was then consented to by her two sons. About a month prior to her death she gave all of her property to her daughter, who thereafter took care of her. In an action for an account of the property so given to the daughter, and for specific performance of the agreement, the court held that, while an agreement to make a certain disposition of property by will could not be specifically enforced during the lifetime of the decedent, still equity could require those on whom the legal title had descended to convey in accordance with the terms of the contract.

This right could not be defeated by any conveyance of the property in the lifetime of the testator not in accordance with the terms of the agreement, unless the rights of bona fide purchasers intervened. A gift to the daughter in violation of the terms of the agreement was in fraud of the rights of the two sons, and must be regarded, in order to defeat the fraud, as a testamentary disposition of the property. It was said: "Is an agreement based upon a valuable consideration to make a particular disposition of property by will binding upon the person making it? In *Parsons on Contracts*, vol. 3, p. 407, it is said: 'It is obvious that an agreement to make a certain disposition of property by last will is one which, strictly speaking, is not capable of a specific execution,—not in the party's lifetime,—because any testamentary instrument is by its nature revocable, and after his death it is no longer possible to make his last will. Yet it has been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement by requiring those upon whom the legal title has descended to convey the property in accordance with its terms, and the court will not allow this post mortem remedy to be defeated by any devise or conveyance in the lifetime inconsistent with the agreement, unless, indeed, rights of purchasers deserving of protection should intervene. But if one contracts to devise, and during his life conveys the land away, equity sometimes requires his representatives to make full compensation. As a general rule it may be said that, where a specific performance would be decreed as between original parties to a contract, it will be decreed as between all who claim under them, unless intervening equities would make the decree operate injustice towards these parties.' . . . The agreement between the complainants and their mother, Louise L. Whiton, being for a valuable consideration moving from the complainants to her, and the will being executed, was binding upon her. . . . The gift of Mrs. Whiton to her daughter, the defendant, was made in

fraud of the rights of complainants, and cannot be regarded as an absolute disposition of her property, but was testamentary in character. An examination of the evidence impresses us that it was the intention of Mrs. Whiton by this attempted gift, to prevent her estate becoming subject to this agreement between herself and the complainants, and was intended to defeat it. It was a fraud on complainants, and must be regarded as testamentary for the purpose of defeating the fraud. In *Logan v. Wienholt* (1833) 7 Bligh, N. R. 57, 5 Eng. Reprint, 694, 1 Clark & F. 611, 6 Eng. Reprint, 1046, the Lord Chancellor, after quoting from *Jones v. Martin* (1798) 8 Bro. P. C. 242, 3 Eng. Reprint, 560, says: 'His Honor here lays down the principle to which I have adverted, that if, in substance and effect, the conveyance defeats or defrauds the obligation entered into, and is done with that object, having that tendency, producing that effect, though not in form testamentary, it is to be dealt with as if, in fact, it were testamentary, for the purpose of protecting the right, for the purpose of defeating the fraud, for the purpose of securing to the party, under the agreement, the right to that part of the estate to which he is entitled.' The authorities seem to hold that any disposition of property subject to such an agreement, made by a person during life for the purpose of effecting a testamentary disposal of the same, cannot defeat the agreement. . . . It is apparent that the real object and design of transferring all her property was to defeat the agreement with complainants, and in view of the nature and character of the transfer, and the circumstances under which it was made, it was testamentary in character."

In *Rogers v. Schlotterback* (1914) 167 Cal. 35, 138 Pac. 728, it appeared that on the adoption of a child it was agreed with the father of the child, by the family adopting it, that the child would be taken into the family to share equally with their child. A will was made by the foster father, dividing his estate between the foster child and

his own child. After the foster mother's death the foster father went to live with his daughter and granddaughter. While living with them the foster father executed a deed of gift of all his real property to his daughter and granddaughter, reserving a life estate for himself. Subsequently he made another will whereby he bequeathed but \$5 to the adopted son, after making other bequests of much larger sums. An action was brought by the adopted son, and continued by his heirs and administrators, to enforce specifically the contract between the foster father and the natural father by subjecting certain property held by such grantees and distributees to the claims of the adopted son under the contract. The court held that during the life of the foster parent the adopted son had no cause of action against him, as the agreement was not to give the property conveyed, but only an equal share of all he should leave at his death. It was, however, held that, since there was no intervening right of a third person who had taken in good faith, the courts would treat the gift of all the real property to the foster father's daughter and granddaughter as a mere testamentary disposition, so that the gift would be brought back and made a fund out of which to perform the agreement. The court said: "That such an oral contract may be specifically enforced in favor of the promisee who has performed his part thereof is thoroughly established in this state. We are speaking, of course, without reference to the recent amendments of §§ 1624, Civil Code, and 1973 of the Code of Civil Procedure, relative to contracts of this character. Such amendments, adopted long after the alleged contract was fully executed on the part of James Taylor Rogers and whatever rights he had thereunder were vested, constitute something more than a mere rule of evidence. As was held by the lower court, they can have no application to the case at bar. The doctrine of this court as to the enforcement of such contracts has been so fully and clearly stated and affirmed in such cases as *Owens v. McNally* (1896) 113

Cal. 444, 33 L.R.A. 369, 45 Pac. 710, and *McCabe v. Healy* (1902) 138 Cal. 81, 70 Pac. 1008, as to render extended discussion of the proposition unnecessary here. Suffice it to say, if such a contract may fairly be said to be clearly and satisfactorily shown, if it is clear, certain, and definite in its terms, and if specific performance would not be harsh and oppressive and unjust to innocent third parties (see *Owens v. McNally* (Cal.) supra), the contract, even when resting in parol, will be enforced, 'not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement.'

. . . What James Taylor Rogers was entitled to, in the event that he survived William H. Rogers, was one half of all the property that William H. Rogers might leave. In view of the construction given by the trial court to the agreement, which we consider warranted, we are of the opinion that in determining what property was left the court properly included the land given to Mrs. Carter and Mrs. Schlott-erback by the deed of gift. But James Taylor Rogers had no enforceable right under his contract in regard to such land, or any other property, prior to the death of William H. Rogers. Whatever rights he had under the contract, in so far as 'heiring and sharing' in the property are concerned, accrued only on the death of William H. Rogers, and only in regard to such property as may properly be held to come within the scope of the contract; i. e., property left by William H. Rogers. He had no right of action of any character against William H. Rogers and his grantees at any time during the life of said Rogers, except that possibly he might have maintained an action in equity to obtain a decree protecting him against future possible injury to his rights, as was done in *Vanduyne v. Vreeland* (1858) 12 N.J. Eq. 153, where

the chancellor said that 'if this court does not interfere now for the protection of the complainant, and secure this property at the death of Vreeland, it may have passed into the hands of a bona fide purchaser, and the complainant then be remediless.' The case just referred to was, however, one where the conveyance was clearly and unmistakably in violation of the agreement; as the plaintiff was entitled thereunder to all the property that the deceased might leave. But the sole object of any such action is to protect the complainant against the intervening rights of third parties, the obtaining of precautionary relief. The failure to bring such an action and obtain such relief could in no way prejudice the rights of James Taylor Rogers where, as here, there are no intervening rights of third parties. His right to maintain any action to

enforce the contract accrued only upon the death of William H. Rogers. And we think, in line with what was said in *Johnson v. Hubbell* (1855) 10 N. J. Eq. 332, 66 Am. Dec. 773, that under such circumstances as appear in regard to the conveyance to Mrs. Carter and Mrs. Schlotterback, which warrant a conclusion that the gift was in the nature of a testamentary disposition, 'in order to protect the agreement or obligation . . . courts of equity will treat this gift in the same manner as if it were purely testamentary, and were included in the will,' with the result that 'the subject-matter of the gift will be brought back and made the fund out of which to perform the obligation.' We are speaking, of course, only of a case where there is no intervening right of any third party who has taken in good faith." R. C. L.

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C. OLIVIA SABINE, Appt.,

v.

MAGGIE S. PAINE, Impleaded, etc., Respt.

*New York Court of Appeals — May 14, 1918.*

(223 N. Y. 401, 119 N. E. 849.)

**Bills and notes — usury — effect of Negotiable Instruments Law.**

The provision of the Negotiable Instruments Law that a holder in due course holds the instrument free from any defect of title of prior owners and free from defenses available to prior parties does not repeal the provisions of the General Business Law, making all notes reserving usury void, so as to permit enforcement of a usurious note by a bona fide holder for value.

[See note on this question beginning on page 1447.]

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APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment in favor of defendant in an action on a promissory note. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Mr. Joseph P. Tolins for appellant.

Mr. J. Elmer Melick, with Messrs.

Hitchings & Dow, for respondent:

Plaintiff was not a holder in due course of the note in suit.

*Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E.

402; *Haddock, B. & Co. v. Haddock*, 192 N. Y. 499, 19 L.R.A.(N.S.) 136, 85 N. E. 682; *Re Mueller*, 15 App. Div. 67, 44 N. Y. Supp. 280; *O'Connor v. Dunnigan*, 158 App. Div. 334, 143 N. Y. Supp. 373; *Cunningham v. Davenport*, 147 N. Y. 43, 32 L.R.A. 373, 49 Am. St. Rep. 641, 41 N. E. 412.

Usury is still a valid defense to ac-

tions on negotiable instruments, unaffected by the Negotiable Instruments Law, and this defense was fatal to plaintiff's recovery.

Schlesinger v. Lehmaier, 191 N. Y. 69, 16 L.R.A.(N.S.) 626, 123 Am. St. Rep. 591, 83 N. E. 657; Grannis v. Stevens, 216 N. Y. 583, 111 N. E. 263; Meaker v. Fiero, 145 N. Y. 165, 39 N. E. 714; Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360.

Collin, J., delivered the opinion of the court:

The action is upon a promissory note in the sum of \$2,100, made by the defendant and owned by the plaintiff. The note was payable, four months after its date, to the order of Eugene F. Vacheron. It was delivered to him as the agent of the defendant, for the purpose of having it discounted for her. He, after indorsing it, transferred it to the plaintiff for the sum of \$1,850. Under the evidence and the decision of the appellate division, this appeal presents the single question, Is a usurious promissory note enforceable by a holder in due course?

The Negotiable Instruments Law (Consol. Laws, chap. 38) enacts:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Section 96.

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 91.

When the Negotiable Instruments Law was enacted, it was an established rule of law in this state and many other jurisdictions that a

holder of a note void by virtue of a statutory declaration because of usury, who became such before the maturity of the note for value and without notice of the usury, could not enforce the note. The rule is an exception to the general principle that a negotiable instrument in the hands of an innocent holder who had received it in good faith in the ordinary course of business, for value, and without notice of a defense, is not invalid and is enforceable by the holder. The general principle has been stated: "The bona fide holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition, which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect." 1 Dan. Neg. Inst. 6th ed. § 197.

The rule constituting an exception to it rests upon the legislative intention and enactment. An instrument which a statute, expressly or through necessary implication, declares void, strictly speaking, is a simulacrum only. It is without legal efficacy. It cannot obligate a party or support a right. In Claflin v. Boorum, 122 N. Y. 385, 388, 25 N. E. 361, we said: "A note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade."

The rule has general recognition in judicial opinion. Eastman v.

Shaw, 65 N. Y. 522; Vallett v. Parker, 6 Wend. 615; Harper v. Young, 112 Pa. 419, 3 Atl. 670; Kendall v. Robertson, 12 Cush. 156; Eagle v. Kohn, 84 Ill. 292; Sondheim v. Gilbert, 117 Ind. 71, 5 L.R.A. 432, 10 Am. St. Rep. 23, 18 N. E. 687; Bohon v. Brown (Union Nat. Bank v. Brown) 101 Ky. 354, 38 L.R.A. 503, 72 Am. St. Rep. 420, 41 S. W. 273; Birmingham Trust & Sav. Co. v. Curry, 160 Ala. 370, 135 Am. St. Rep. 102, 49 So. 319; Snoddy v. American Nat. Bank, 88 Tenn. 573, 7 L.R.A. 705, 17 Am. St. Rep. 918, 13 S. W. 127; German Bank v. De Shon, 41 Ark. 331, and cases cited. The fact that the holder when he took the paper did not know that it had had no inception, that no prior party could sue upon it, and that he was loaning money upon it, does not affect the rule. He is bound to know the character of the paper he is dealing in. Eastman v. Shaw, 65 N. Y. 522, 530; Miller v. Zeimer, 111 N. Y. 441, 18 N. E. 716.

The statutes of this state fix the rate of interest upon the loan or forbearance of money at \$6 upon \$100 for one year, and at that rate, for a greater or less sum, or for a longer or shorter time, forbid the taking of a greater rate, and provide: "All bonds, bills, notes, . . . where-upon or whereby there shall be reserved or taken, . . . any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the

same to be surrendered and canceled." General Business Law (Consol. Laws, chap. 20) §§ 370, 371, 373.

The statute is peremptory and unequivocal in enacting that a usurious obligation is absolutely void.

The legislature did not, by enacting § 96 of the Negotiable Instruments Law, intend to abrogate the rule we have stated.

The statute declaring the usurious instrument void is not repealed, expressly or through implication. The court is, under its command, to declare it void, enjoin prosecution of it, and order it to be surrendered and canceled, whenever satisfactory proof of its usurious character appears. It is a pretense, and ineffectual as a source of obligation or of right. It is unsubstantial and, within the intendment of the Negotiable Instruments Law, is not a negotiable instrument, and cannot be acted upon or affected by it. Section 96 is a declaration of the general principle stated by us, and has not relevancy to the rule which is an exception to it.

Our conclusion is in harmony with judicial decisions of other states. Perry Sav. Bank v. Fitzgerald, 167 Iowa, 446, 149 N. W. 497; Eskridge v. Thomas, 79 W. Va. 322, L.R.A.1918C, 769, 91 S. E. 7; Lawson v. First Nat. Bank, 31 Ky. L. Rep. 318, 102 S. W. 324; Geo. Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353; Citizens' Bank v. Crittenden Record-Press, 150 Ky. 634, 150 S. W. 814; Twentieth Street Bank v. Jacobs, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Cuddeback, Cardozo, Pound, Crane, and Andrews, JJ., concur.

**Bills and notes—usury—effect of Negotiable Instruments Law.**

## ANNOTATION.

## Negotiable Instruments Law as affecting defense of usury.

- I. In general, 1447.
- II. As against bona fide purchaser of paper which had its inception in hands of prior party guilty of usury, 1447.
- III. As against one taking paper at usurious discount in ignorance of fact that it had no prior inception, 1448.

*I. In general.*

Two situations relating to usury, so far as that defense has been urged against those designated as bona fide holders, are presented, which it is intended to discuss in the present note. In other words, the usury which has been urged as a defense has been of two classes, viz.: (a) Usury between the original parties to instrument, not participated in by the purchaser thereof; and (b) usury in the purchase of a bill or note which has, without the purchaser's knowledge, no inception prior to the purchase. The reported case (*SABINE v. PAINE*, ante, 1444) is of the latter class.

It has been held in cases governed by the Negotiable Instruments Act that the defense of usury is available as against one not a bona fide holder. *Bruck v. Lambeck* (1909) 63 Misc. 117, 118 N. Y. Supp. 494; *Kass v. Blumberg* (1913) 142 N. Y. Supp. 544; *Keene v. Behan* (1905) 40 Wash. 505, 82 Pac. 884.

*II. As against bona fide purchaser of paper which had its inception in hands of prior party guilty of usury.*

There is a difference of judicial opinion as to the effect of the provisions of the Negotiable Instruments Act with reference to bona fide holders, upon the availability of the defense of usury against such a holder. It is the view of some courts that that act does not relieve a bona fide holder of the defense of usury, where a general statute makes usurious contracts void. *Crusins v. Siegman* (1913) 81 Misc. 367, 142 N. Y. Supp. 348. But see other New York cases *contra*, infra. *Eskridge v. Thomas*

(1916) 79 W. Va. 322, L.R.A.1918C, 769, 91 S. E. 7.

This is the theory of the reported case, although the facts of that case bring it within the class discussed in subdivision III. infra.

This has also been held where the statute relating to usury, while not expressly making the usurious contract void, has been construed by the court to have this effect. *Perry Sav. Bank v. Fitzgerald* (1914) 167 Iowa, 446, 149 N. W. 497.

The provision of the Negotiable Instruments Act which has been relied upon to relieve a bona fide holder of the defense of usury is that providing that the holder in due course holds the instrument "free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon" Consol. Laws, chap. 38, § 96. The reasoning by which the courts arrive at the above conclusion is, in brief, that thus to relieve a bona fide holder of the defense would be in effect to repeal the general statutory provisions relating to usury. Such statutory provisions not being directly repealed by the Negotiable Instruments Act, it is necessary to bring into operation the doctrine of repeal by implication, which is not favored. The courts therefore conclude that the general statutory provisions must be given effect. *Perry Sav. Bank v. Fitzgerald* (Iowa) supra.

Entering into the provisions of the Negotiable Instruments Act more specifically, it has been stated that the clause of that act that a holder in due course takes "free from defenses available to prior parties among themselves" must be construed in connection with the law as it existed prior to the enactment thereof. In a state in which usury is treated as in the nature of a forfeiture, and properly urged against the contract,

into whosoever hands it may pass, it is stated that usury is in the nature of a defense which is not "available to prior parties among themselves" alone, but is available as between the maker of the instrument and the world. A fair construction of this provision of the Negotiable Instruments Act is held to be that a holder in due course is protected against such defenses as are available between prior parties, but takes the instrument subject to any defense that the parties thereto may have, under the law then in force, urged against the instrument in the hands of third parties. *Ibid.*

The provision of the Negotiable Instruments Act that a holder in due course may enforce payment of the instrument against all parties liable thereon has been stated to mean that payment of the instrument may be enforced in the full amount thereof against parties claiming as a defense thereto that the title of the indorser was defective, or a defense which was only available between the prior parties thereto. *Ibid.*

On the contrary, it is the view of some courts, even in jurisdictions in which usurious contracts are declared void by statutes, that the Negotiable Instruments Law does relieve a bona fide holder of the defense of usury. *Wood v. Babbitt* (1907) 149 Fed. 818; *Klar v. Kostniuk* (1909) 65 Misc. 199, 119 N. Y. Supp. 683; *Ernst Oeser & Co. v. Behrend* (1915) 89 Misc. 891, 151 N. Y. Supp. 878; *Broadway Trust Co. v. Manheim* (1905) 47 Misc. 415, 95 N. Y. Supp. 93; *Laughlin, J., in Schlesinger v. Kelly* (1906) 114 App. Div. 546, 99 N. Y. Supp. 1083, and *Willard Bartlett, J., in Schlesinger v. Gilhooly* (1907) 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138, are of this opinion.

Apparently the decision in *Emanuel v. Misiicki* (1914) 149 N. Y. Supp. 905, to the effect that usury is not an available defense against a bona fide holder, is under the Negotiable Instruments Law.

In *Horowitz v. Wollowitz* (1908) 59 Misc. 520, 110 N. Y. Supp. 972, the defense of usury in the inception of

the note was held not available to an indorser of a negotiable note under the Negotiable Instruments Law, on the theory that, under the Negotiable Instruments Law, "every indorser who indorses without qualification warrants to all subsequent holders in due course; . . . (2) that the instrument is at the time of his indorsement valid and consistent." This provision of the Negotiable Instruments Law runs in favor only of holders in due course; one not a holder in due course cannot claim any advantage thereunder. *Bruck v. Lambeck* (1909) 63 Misc. 117, 118 N. Y. Supp. 494. In *Bruck v. Lambeck* (N. Y.) *supra*, the indorsers were accommodation parties and original parties to the instrument, and for this reason also this provision of the Negotiable Instruments Law was held not applicable.

Knowledge of usury was held to preclude the holder of a negotiable instrument from becoming a holder in due course in an action against an indorser in *Kass v. Blumberg* (1913) 142 N. Y. Supp. 544.

It appears from the foregoing that there is a conflict in the New York cases as to the effect of the Negotiable Instruments Act, upon the defense of usury against a bona fide holder. The decision in the reported case (*SABINE v. PAINE*, ante, 1444) settles this question if the question there decided, as stated by the court, is taken in its broad meaning. For the court states that the case presents the single question, "Is a usurious promissory note enforceable by a holder in due course?" It is a fact, however, that the party designated in the reported case as a holder in due course was the party guilty of the usury. Such a party, although designated a holder in due course, does not occupy as favorable a position as a bona fide holder of a bill or note on which usury was exacted by a prior party.

*III. As against one taking paper at usurious discount in ignorance of fact that it had no prior inception.*

Where negotiable paper which has had no valid inception is negotiated



at a usurious discount to one who has no knowledge of the lack of inception, the courts are not agreed whether the transaction is usurious. To come within the scope of this discussion it is necessary that the transaction be regarded as usurious, and the question herein annotated does not arise in those jurisdictions in which the transaction is not regarded as usurious. It has been held that the Negotiable Instruments Law has not changed or affected the rule that such a transaction is usurious. *Strickland v. Henry* (1901) 66 App. Div. 23, 73 N. Y. Supp. 12; *Oppikofer v. Murphy* (1911) 146 App. Div. 581, 131 N. Y. Supp. 168; *Simpson v. Hefter* (1904) 42 Misc. 482, 87 N. Y. Supp. 243.

The court in the reported case (*SABINE v. PAINE*, ante, 1444) does not discuss the question whether the purchase at a usurious discount, of a note which has had no valid inception, is usurious, where the purchaser had no knowledge of the lack of inception, but treats such a transaction as usurious and regards the purchaser as a bona fide holder. The court thus states the question to be decided, as follows: "Is a usurious promissory note enforceable by a holder in due course?" It seems clear that the Negotiable Instruments Act does not affect the rights of such

a holder, for the act only frees a holder in due course from "any defect of title of prior parties" and "defenses available to prior parties among themselves," while the defense in the reported case was a defense based upon a usurious exaction by the party against whom it was urged. There is a clear distinction between such a case and one in which the usury was between prior parties, neither participated in by the purchaser nor known to him. These questions are very clearly distinguished in *Kennedy v. Heyman* (1918) 183 App. Div. 421, 170 N. Y. Supp. 828, where, in an action by the purchaser of an accommodation note from the accommodated party at a usurious discount against the maker, whose contention was that the note was void for usury, cases dealing with usury exacted of the maker by his immediate transferee, where the note had thereafter come into the hands of the bona fide holder in due course, were urged upon the court as precluding the defense. In answer to this argument, the court distinguishes the two questions and states that the question in the case at bar was whether a party "whose receipt of a note constituted its inception can recover thereon if it be tainted with usury exacted by him at such inception." W. A. E.

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STATE OF MINNESOTA EX REL. RICHARD S. WILCOX, Appt.,

v.

ANNA M. RYDER, Respt.

---

SAME, Appt.,

v.

C. E. GILBERT et al., Respts.

---

SAME, Appt.,

v.

A. M. WHITFORD et al., Respts.

*Minnesota Supreme Court—June 12, 1914.*

(126 Minn. 95, 147 N. W. 953.)

**Nuisance — abatement in equity.**

1. Independently of statute, the jurisdiction of equity extended to abate-

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Headnotes by BROWN, J.

ment of nuisances long prior to the enactment of Laws 1913, chap. 562, relating to abatement of bawdyhouses, and the legislature had power, subject only to constitutional limitations, to extend such jurisdiction to the general subject-matter of such act.

[See note on this question beginning on page 1474.]

**Statute — presumption of constitutionality.**

2. In the enactment of statutory law, the legislature is presumed to have intended to keep within constitutional bounds, and, unless a statute is unconstitutional beyond a reasonable doubt, it must be sustained.

[See 25 R. C. L. 1000.]

**Nuisance — bawdyhouse — abatement statute — character.**

3. Laws 1913, chap. 562, held intended by the legislature to be a civil, as distinguished from a penal, act, especially in view of the fact that, when it was enacted, the criminal aspect of maintenance of bawdyhouses was already fully covered by existing statutes which had not resulted in efficient repression of the evil aimed at.

[See 25 R. C. L. 1012.]

**Jury — suppression of nuisance — right.**

4. Since the constitutional right to jury trial merely preserves such right as it existed when the Constitution was adopted, and is inapplicable to actions based upon equitable causes of action or for equitable relief alone, Laws 1913, chap. 562, being manifestly intended to repress the nuisance of bawdyhouses by equitable attack upon the property of those engaged in or abetting them, and not to punish offenders by infliction of personal penalties, except as for contempt, does not violate the constitutional guaranty of jury trial merely because the thing declared a nuisance, and against which the remedies of the act are provided, would, in its maintenance, have constituted a crime at the time of the adoption of the Constitution.

[See 16 R. C. L. 209, 210.]

**Nuisance — abatement — character of act.**

5. The act is not penal, either in its general aspect, or in its details, with reference to forfeiture and sale of personal property used in maintaining the nuisance, the closing to all purposes, for one year, of premises in which the lewd business is carried on, the imposition of a money exaction against the property and persons participating in the nuisance, or otherwise; and hence it neither violates the

Constitution, as denying jury trial in criminal proceedings, nor contravenes constitutional limitations as to excessive fines and unusual punishments, right to be confronted by witnesses, testifying against oneself, and bills of attainder and ex post facto laws.

[See 12 R. C. L. 130; 25 R. C. L. 1086.]

**Equity — suppression of nuisance — jury.**

6. Viewed as a civil action, proceedings under the act, being equitable, do not require a jury trial, and the court, having properly assumed jurisdiction thereof, had power to grant full relief, incidental as well as primary.

[See 20 R. C. L. 483-485.]

**Statute — partial invalidity — effect.**

7. Section 7 of the act relating to the right of the owner of the premises to obtain release thereof by giving bond and paying costs is unnecessarily drastic, but the other sections are not affected thereby, even if it be held invalid.

[See 25 R. C. L. 1003.]

**Forfeiture — power to enforce.**

8. The act is not invalid as entailing unconstitutional forfeitures of estate upon conviction for an offense, the legislature having power to provide for specific forfeitures for specific acts, including total destruction, in a proper case, of property per se innocent; nor does it authorize summary forfeitures and penalties without sufficient notice and hearing.

[See 6 R. C. L. 478-480; 12 R. C. L. 124.]

**Constitutional law — police power.**

9. The act, in its remedial details as well as its general purpose, is a proper exercise of the police power, under the test that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion.

[See 6 R. C. L. 236 et seq.]

**Statutes — construction — upholding constitutionality.**

10. If the language used in a statute is reasonably susceptible of two constructions, one rendering it constitutional and the other not, the former

must be adopted although the other is the more natural.

[See 25 R. C. L. 1002.]

**Jury — abatement of nuisance — effect of providing penalty.**

11. A provision in a statute providing for the abatement of bawdyhouses as a public nuisance, or a penalty to be imposed as part of the proceedings, upon the property and the accused, and entered and collected as a tax up-

on the property, and applied, so far as necessary, to payment of costs, does not render the statute penal so as to entitle accused to trial by jury.

[See 25 R. C. L. 1086.]

**Evidence — knowledge of use of property — presumption.**

12. The owner of property is presumed to know the business conducted thereon.

[See 10 R. C. L. 874.]

**APPEAL** by plaintiff from judgment of the District Court for Ramsey County (Dickson, J.) in plaintiff's favor in part only, in separate actions brought for the abatement of bawdyhouses. *Reversed in part.*

The facts are stated in the opinion of the court.

Messrs. Richard D. O'Brien and Patrick J. Ryan for appellant.

Messrs. Thomas J. Newman, James Cormican, James Schoonmaker, William F. Hunt, S. J. Donnelly, and Harry Weiss, for respondents:

The punishments prescribed by the act are not only designated by the legislature as a penalty, but they also come within the ordinary meaning of the word.

13 Am. & Eng. Enc. Law, 2d ed. 1, 2.

Defendants are guaranteed a jury trial by the Constitution.

Whallon v. Bancroft, 4 Minn. 109, Gil. 70; Mille Lacs County v. Morrison, 22 Minn. 178; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; Peters v. Duluth, 119 Minn. 96, 41 L.R.A.(N.S.) 1044, 137 N. W. 390; Kennedy v. Raught, 6 Minn. 235, Gil. 155; State ex rel. Erickson v. West, 42 Minn. 147, 43 N. W. 845; United States v. Choteau, 102 U. S. 611, 26 L. ed. 249; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Gilfillan v. Ryder, 22 Minn. 87; North Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 580, 14 Mor. Min. Rep. 294; Campbell v. State, 171 Ind. 702, 87 N. E. 212; State v. Murphy, 71 Vt. 127, 41 Atl. 1037; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Kirkland v. State, 72 Ark. 171, 65 L.R.A. 76, 105 Am. St. Rep. 25, 78 S. W. 770, 2 Ann. Cas. 242; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870.

The act is void under art. 1, § 5, of the Constitution, for the reason that it imposes an excessive fine and inflicts an unusual punishment.

Robison v. Miner, 68 Mich. 549, 37 N. W. 21.

A statute which authorizes a conviction of crime upon a presumption alone, without proof of the crime denounced by the law, is unconstitutional as depriving the accused of trial by jury, and also as depriving him of his property, and liberty without process of law.

Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; 8 Cyc. 820; People v. Lyon, 27 Hun, 180; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; State v. Kartz, 13 R. I. 528; People v. Toynbee, 2 Park. Crim. Rep. 490; Wynehamer v. People, 13 N. Y. 378; People ex rel. Raymond v. Warden, 82 Misc. 525, 143 N. Y. Supp. 912.

The legislature has no power to declare property to be a public nuisance which is not a nuisance per se, and provide for the abatement of the nuisance by a destruction or forfeiture of the property.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Dunn v. Burleigh, 62 Me. 24; State v. Robbins, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 611, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898; Lawton v. Steele, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, 152 U. S. 139, 38 L. ed. 389, 14 Sup. Ct. Rep. 499; Clement v. Rabbach, 62 Misc. 27, 115 N. Y. Supp. 162; State v. Derry, 171 Ind. 18, 131 Am. St. Rep. 237, 85 N. E. 765; San Antonio v. Salvation Army, — Tex. Civ. App. —, 127 S. W. 860.

Brown, J., delivered the opinion of the court:

Three separate actions under Laws 1913, p. 815, chap. 562, for abatement of bawdyhouses. The complaints were sufficient in form and substance to authorize full relief under the statute, and all defendants, except Towne, upon whom no service of summons was made, answered to the following effect: Defendant Gilbert admitted that she resided in and worked as housekeeper of the house claimed to be a nuisance, but denied the other allegations of the complaint. Defendant Drewry admitted ownership of the premises, alleged the leasing thereof to one Harrigan, and denied acquaintance or dealings with defendant Gilbert, and knowledge or notice of her occupancy of the premises or the use thereof alleged. Defendant Ryder admitted ownership, occupancy and control of the building, and denied all other allegations. Defendant Whitford, charged with maintenance of the house, denied the charge, and defendant Towne, alleged to be the owner thereof, did not appear. The court found that defendants Whitford and Ryder were engaged as claimed, that defendant Harrigan was lessee from defendant Drewry and owned the personal property used therein, defendant Gilbert being his housekeeper, aiding and abetting in the conduct of the business, and, further, that defendant Drewry, by the exercise of reasonable diligence, could have ascertained and known of the use made of such premises. No findings were made against defendant Towne. Plaintiff was found entitled to injunctions perpetually restraining all defendants, except Towne, from further conducting or maintaining the public nuisances alleged, but no other relief, and appealed from the judgments entered accordingly.

Defendants' point as to insufficiency of the assignments of error is overruled because nonprejudicial, and we proceed to the merits. All questions raised hinge upon the

constitutionality, effect, and construction of the act referred to, which, being too voluminous to quote in full, may be summarized as follows:

Sec. 1. "Whosoever shall erect, establish, continue, maintain, use, own, or lease" any building, etc., used for lewdness, etc., is guilty of a nuisance, and such building, etc., and also the movable personalty so used itself, constitute a nuisance subject to abatement as such.

Sec. 2. "An action in equity" to perpetually enjoin the nuisance and to restrain all parties from maintaining or allowing it may be maintained in the name of the state upon relation of the county attorney or any citizen of the county, defendants to be served as in other actions, and the court, or judge in vacation, "shall," without requiring bond, allow a temporary injunction, if satisfied by affidavits or other evidence previously ordered to be produced, of the existence of the nuisance, and, upon application for such writ, an ex parte restraining order may issue, restraining all persons from interfering with the movable property used in conducting the nuisance, the same to be served by handing to and leaving with the person in charge of the property or residing in the premises a copy thereof, or by posting a copy on the premises, etc., or by both. The serving officer shall forthwith make return into court and also inventory the movable property. Three days' written notice shall be given defendants of the hearing of the application for the temporary injunction, which, however, issues as a matter of course if the case be continued upon their application. Defendants notified shall serve answers before date set for hearing, and extension of time to answer, though allowable by the court, shall not prevent issue of a temporary writ. Injunction granted binds all defendants throughout the judicial district, and its violation constitutes contempt.

Sec. 3. Action is triable as other

actions in the district court. Evidence of general reputation of the place is admissible to prove existence of the nuisance, and "shall be prima facie evidence" thereof, and of knowledge thereof and acquiescence and participation therein by all persons in possession of the property used in conducting the same or having any interest therein.

Sec. 4. Contempt in proceedings under the act or in violating any injunction or restraining order issued thereunder is punishable after summary trial, "by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the county jail not less than three nor more than six months or by both fine and imprisonment."

Sec. 5. Upon proof, in either the equity action or in a criminal proceeding in the district court, of the existence of the nuisance, an order of abatement shall be entered as part of the judgment in the case, directing removal of all the movable personalty referred to, and sale of such thereof as belongs to defendants notified or appearing, and also "the effectual closing of the building or place against its use for any purpose" for one year unless sooner released. Owners of unsold personalty must appear and claim same within ten days after the order of abatement is made, and prove innocence "to the satisfaction of the court" of knowledge of said use thereof, and also inability to have acquired such knowledge by reasonable care and diligence; every defendant being presumed to have known the general reputation of the place. If their innocence is thus established, the property shall be delivered to them, but otherwise sold. Breaking, entering, or using the place so closed constitutes contempt.

Sec. 6. Upon establishment of the existence of a nuisance in a criminal proceeding in a court not having equitable jurisdiction, the county attorney shall promptly proceed "to enforce the provisions and penalties" of the act, and conviction in

the criminal proceedings, unless reversed, is conclusive against defendant therein as to the existence of the nuisance. Money collected under the act is payable to the county treasurer, and the proceeds of the sale of the personalty are applicable to payment of costs, except as thereafter stated in the act.

Sec. 7. The owner of the premises may obtain its release by payment of all costs of the proceedings and giving bond with certain prescribed conditions looking to abatement, but such will not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

Sec. 8. Upon issue of a permanent injunction under the act, there shall be imposed upon the building and the ground upon which the same is located, and against the person or persons maintaining the nuisance, and the owner or agent of the premises, a "penalty of \$300," such penalty to be imposed as a part of the proceedings, and returned to the county auditor and entered "as a tax upon the property and against the persons upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a lien on the land upon which lien was imposed until fully paid." Payment of said penalty does not relieve persons or property from other penalties provided by law. It is collectable as provided by the tax laws so far as applicable, and when collected is applicable to payment of any deficiency in the costs of the action and abatement on behalf of the state, after application of the proceeds of the personal property thereto, the remainder of proceeds from both sources to be distributed the same as fines for keeping houses of ill fame, except that 10 per cent shall be paid as an attorney's fee to the attorney representing the state.

Sec. 9. Where the owner or agent of the premises is not a party and does not appear, the \$300 penalty is nevertheless to be imposed against

the persons served or appearing and against the property. "But before such penalty shall be enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein." Rev. Laws 1905, §§ 4111, 4112, providing for substituted service, are applicable to proceedings under the act. The record owner "for the purposes of taxation" is presumed to be the true owner, and unknown persons interested may be made parties by so designating them and service by publication as provided in said § 4111. "Any person having or claiming such ownership, right, title or interest, and any owner or agent in behalf of himself and such owner, may make, serve and file his answer therein within twenty days after such service and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall by order fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment as the case may require" [Gen. Stat. 1913, § 8725], but other parties to the action shall not be affected thereby.

1. Bawdyhouses were public nuisances at common law. 1 Wood, Nuisances, 3d ed. § 29. They are also made such by statute. Gen. Stat. 1913, § 8759. Maintenance thereof, wilful refusal or omission to perform any legal duty relating to their removal, or letting or permitting the use of any building, knowingly for such purpose, constitutes a misdemeanor. Section 8760. By § 8712 keepers of such resorts are declared guilty of felony, and those who let buildings knowingly for such use, or who permit the same, are made guilty of misdemeanor. Section 8085 includes such places as nuisances, and authorizes persons injuriously affected thereby to maintain actions for injunction and abatement. These statutes had been in force for years prior to the Act of 1913. Likewise,

at an early date, equity assumed jurisdiction to enjoin and abate public nuisances. As said by Mitchell, J., in *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255.

"It is now well settled that a court of equity may, in a proper case, take jurisdiction of public nuisances in civil actions for their abatement, and to enjoin their maintenances.

"This jurisdiction is grounded upon the greater efficacy and promptitude of the remedies administered in such actions, enabling the court to restrain nuisances that are threatened or in progress, as well as to abate those already in existence, and effect their final suppression by injunction, which will often also prevent a multiplicity of suits."

See also 35 Am. St. Rep. 674, note.

Furthermore, eliminating the questions involved in the constitutional guaranty of jury trial, the broad power of the legislature to extend the bonds of equity jurisdiction as well as to regulate procedure, is well established. 16 Cyc. 29. Hence it cannot be doubted that, independently of statute, jurisdiction exists in equity to abate nuisances, or that the legislature had power, subject to constitutional limitations, to enlarge the same so as to include the general subject-matter of the act here involved; nor can the general justification of the act as a matter of legislative discretion under the police power fairly be questioned, for it is a matter of common knowledge that the criminal acts cited did not result in efficient repression or suppression of the evil aimed at. It is idle, therefore, to claim that the legislature intended to enact another penal statute. Likewise, it is manifest that any successful assault upon the act must be directed against some one or more of its details as to procedure or relief as con-

Nuisance—  
abatement in  
equity.

—bawdyhouse—  
abatement  
statute—  
character.

travelling constitutional guaranties; and in this connection we must not be unmindful of the presumption

**Statute—presumption of constitutionality.**

that the legislature intended to keep within constitutional bounds and enact a valid law, nor of the rule that, unless a statute is unconstitutional beyond a reasonable doubt, it must be sustained. 3 Dunnell's Dig. (Minn.) §§ 8929, 8931.

2. Coming now to consideration of the several grounds of attack made upon the act, we will first discuss defendants' claim of right to jury trial, their contention in this connection being that the provisions relating to forfeiture and sale of personalty, closing the house for one year, and the \$300 penalty, are penal, prescribing punishments for offenses, or else, if not penal, are of such character that, in either event, they were entitled to trial by jury, which the legislature could not dispense with, either by clothing prosecution and punishment for an offense in the livery of equity or by giving equitable form to legal relief. To sustain this position, they cite *Kennedy v. Raught*, 6 Minn. 235, Gil. 155; *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N. W. 845; *Mille Lacs County v. Morrison*, 22 Minn. 178, and cases from other jurisdictions to like effect, and also decisions of this court regarding the right to jury trial in civil actions. We will not, however, review these cases; for, conceding they establish the general propositions to which they are cited, and that the provisions attacked could not be sustained as penal enactments, they are nevertheless clearly distinguishable and are not inconsistent with the conclusions which we have reached.

The constitutional provision regarding right to jury trial merely preserves such right as it existed when the Constitution was adopted. *Peters v. Duluth*, 119 Minn. 96, 101, 41 L.R.A. (N.S.) 1044, 137 N. W. 390. It is inap-

**Jury—suppression of nuisance—right.**

plicable to actions based upon equitable causes of action or to obtain equitable relief alone. *Dunnell, Pr.* (Minn.) § 582; *Koeper v. Louisville*, 109 Minn. 519, 124 N. W. 218. Since, therefore, a review of the act as a whole leads irresistibly to the conclusion that its purpose is repression of the evil, to be worked out by equitable attack upon the property of those engaged in or abetting it, and not punishment of the offenders by infliction of personal penalties, except as for contempt of court, the contention that, because the thing itself, the lewd place, declared a nuisance by the act, would, in its maintenance, have constituted a criminal offense at the time of the adoption of the Constitution, a jury trial is indispensable, has no foundation, and is thus answered by the authorities: "The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate a nuisance." *Carleton v. Rugg*, 149 Mass. 550, 553, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55.

So also in *State v. Murphy*, 71 Vt. 127, 136, 41 Atl. 1038, the court

said: "The respondent contends that the statute is in conflict with provisions of the Constitution of the state, particularly article 10 of the Declaration of Rights, which provides, 'that in all prosecutions for criminal offenses, a person hath a right to . . . a speedy public trial by an impartial jury of his country; . . . nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers.' This claim is made, disregarding the distinction between a proceeding to abate a nuisance, which relates simply to the property which in its use constitutes the nuisance, and a prosecution of the respondent for the crime of maintaining it."

And in *Mugler v. Kansas*, 123 U. S. 623, 670, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 302, Mr. Justice Harlan said: "The state having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a preceeding against the property used for forbidden purposes, while the other is for the punishment of the offender."

See also *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 88, where the earlier cases are exhaustively reviewed, and *State ex rel. Collins v. Marshall*, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

Defendants attack particularly the \$300 penalty imposed by § 8, on the ground stated, insisting that penalties are regarded as punishments for infractions of law, and statutes imposing them as penal. But, in considering this section, and all others, we are bound to hold that if the language used is reason-

ably susceptible of two constructions, one rendering the enactment constitutional, and the other not, the former must be adopted, though the latter be the more natural. 3 Dunnell's Dig. (Minn.) § 8931. While the act designates the \$300 exaction as a "penalty," the same section clearly indicates it is to be imposed, treated, and collected as a tax. There is no magic in words, and the use of "penalty" is not decisive. Terminology is not necessarily decisive, and the legislature might well have been in doubt as to the appropriate word with which to designate the exaction. After all, the legislative intent is what we seek, and the nature of the thing is more important than its name. In *Hodge v. Muscatine County*, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237, the court had under consideration the Iowa cigarette law, whereby a tax of \$300 per annum was assessed, "against every person . . . and upon the real property, and the owner thereof," whereon cigarettes, etc., were sold, or kept with intent to sell, the same to be a perpetual lien upon both personal and real property used in connection with the business. The supreme court of Iowa sustained the law (*Hodge v. Muscatine County*, 121 Iowa, 482, 488, 67 L.R.A. 624, 104 Am. St. Rep. 304, 96 N. W. 970), observing in the course of its opinion: "It [the \$300] is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein . . . Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it invalid."

Statutes—construction—upholding constitutionality.

Jury—abatement of nuisance—effect of providing penalty.

The Supreme Court of the United States approved this holding, saying (196 U. S. page 279): "It is not easy to draw an exact line of



demarcation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a 'tax,' and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution we cannot go far afield in treating it as a tax rather than a penalty. . . .

The act itself provides in terms that such tax shall be an addition to all other taxes and penalties, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord, indicates that it is in the nature of a tax rather than a penalty."

We consider this case in point and follow its lead, being impelled to such course both by reason and by the authoritative pronouncement of the Federal Supreme Court upon an exaction to which the assessment imposed by § 8 is closely analogous in so many of its essential features, including failure to provide proceedings appropriate for the enforcement of a penalty, particularly in that no punishment is imposed for nonpayment of the assessment.

The act as a whole differs in no material respect from the numerous statutes regulating liquor traffic by equitable actions for injunction and abatement, universally held valid notwithstanding denial of jury trial thereunder. We hold it not penal, which disposes of defendants' main

Nuisance—  
abatement—  
character of act.

contention regarding right to trial by jury, and likewise of their points based upon the constitutional provisions relating to excessive fines and unusual punishments, the right to be confronted by witnesses, testifying against oneself, bills of attainder, and ex post facto laws. As to their claim of right to jury trial, even if the action be held civil in all its details, it is sufficient to say that in its main features the proceeding is unquestionably equi-

5 A.L.R.—92.

table, and that when a court of equity properly assumes jurisdiction of the cause for one purpose it acquires it for all and grants full relief. 1 Dunnell's Dig. (Minn.) § 3138; 1 Pom. Eq. Jur. 237; State ex rel. Collins v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

Equity—sup-  
pression of  
nuisance—jury.

3. It is claimed that § 7 violates Const. art. 1, § 8, providing that every person "ought to obtain justice freely and without purchase," etc., in that the right of the owner of the premises to appear for the purpose of obtaining the release of his property is unduly fettered by imposition of conditions as to giving of bond and payment of costs. We are not now required to determine the validity of this part of the section. It relates merely to a collateral matter, and, if void, would not affect the other provisions. It is unnecessarily drastic, and probably invalid. See Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

Statute—  
partial in-  
validity—effect.

4. Defendants invoke article 1, § 7, of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, and § 11, providing that no conviction shall work forfeiture of estate. It is not necessary to consider the latter; for, as we have seen, proceedings under the act are not criminal, and it is settled that by due process of law specific forfeitures may be imposed for specific acts, including even total destruction of property per se innocent, when such fairly tends and is reasonably necessary to accomplish a legitimate purpose under the police power. Daniels v. Homer, 3 L.R.A. (N.S.) 997, and note (139 N. C. 219, 51 S. E. 992). See also Patson v. Pennsylvania, 232 U. S. 138, 38 L. ed. 539, 34 Sup. Ct. Rep. 281.

Forfeiture—  
power to  
enforce.

As to due process of law, defendants claim that summary forfeitures are imposed without sufficient notice

and hearing. We do not, however, so construe the act. It prescribes notice to everyone and makes provision for a full hearing before final judgment upon and disposition of the matters involved; nor does it authorize relief against anyone not proved to be a participant, either active, or by consent or acquiescence. The provision of § 5, making lack of reasonable care or diligence equivalent to notice of the uses to which the property is being put, does not negative this conclusion, for ignorance due to negli-

**Evidence—  
knowledge of  
use of property—  
presumption.**

gience is the equivalent of notice. Furthermore, the owner of property is presumed to know the business conducted thereon. *Hodge v. Muscatine County*, supra.

5. Finally, is the act in its remedial details a proper exercise of police power? The subject-matter being within such power, the test is reasonableness, which involves a dual limitation, positive and negative, namely, adaptability to the end sought and absence of excessiveness — the measure must, on the one hand, tend to accomplish the purpose of its adoption, and, on the other, must not go beyond the reasonable demands of the occasion.

**Constitutional  
law—police  
power.**

In our opinion the remedies provided by the act stand the test. "A large discretion is necessarily vested in the legislature, to

determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *State ex rel. Beek v. Wagener*, 77 Minn. 483, 495, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 635.

Upon all points involved in the cases before us, the act is sustained as constitutional. The objections based upon the effect accorded evidence of the general reputation of the place in establishing the existence of the nuisance, etc., and the presumptions declared in § 5, more properly belong in the discussion in *State ex rel. Robertson v. New England Furniture & Carpet Co.* (*State ex rel. Robertson v. Lane*) 126 Minn. 78, 52 L.R.A. (N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549.

Judgments reversed in so far as they fail to award plaintiffs, as against the answering defendants, the additional relief prayed and the trial court is directed to proceed in accordance with this opinion.

#### NOTE.

The decision in the reported case (*STATE EX REL. WILCOX v. RYDER*, ante, 1449) sustaining a statute conferring jurisdiction on equity to enjoin or abate a nuisance is in accord with the majority view, as appears from the note on that question beginning on page, 1474, post.

LUTHER MARVEL, Appt.,

v.

STATE OF ARKANSAS EX REL. W. J. MORROW, Deputy Prosecuting Attorney for Johnson County.

*Arkansas Supreme Court — March 5, 1917.*

(127 Ark. 595, 193 S. W. 259.)

**Equity — conferring jurisdiction to abate nuisance.**

Since equity has jurisdiction to abate public nuisances the legislature

may declare the illegal sale of intoxicating liquors to be such nuisance and confer jurisdiction upon the equity courts to abate it.

[See note on this question beginning on page 1474.]

(Wood and Hart, JJ., dissent.)

**APPEAL** by defendant from a decree of the Chancery Court for Johnson County (Sellers, Ch.) overruling a demurrer to a petition filed to abate the liquor nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Covington, Reynolds, & Reynolds, for appellant:

The mere fact that there is a law against engaging in the sale of intoxicating liquors, even conceding that the keeping or engaging in the sale of such liquors is a nuisance, is no ground for the interposition of a court of equity.

High, Inj. 23; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 95, 55 Am. St. Rep. 717, 35 Atl. 636; Neaf v. Palmer, 103 Ky. 496, 41 L.R.A. 219, 45 S. W. 506; M. & L. R. R. Co. v. Woodruff, 26 Ark. 649; Moore v. Duncan, 27 Ark. 157; Shaul v. Duprey, 48 Ark. 331, 3 S. W. 366; State v. Vaughan, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 Ann. Cas. 277.

The legislature did not have authority to confer jurisdiction upon the chancery courts to abate a public nuisance as defined by the act.

Hester v. Bourland, 80 Ark. 145, 95 S. W. 992; Hempstead v. Watkins, 6 Ark. 318, 42 Am. Dec. 696; Ashley v. Little Rock, 56 Ark. 391, 19 S. W. 1058; Lyric Theater v. State, 98 Ark. 437, 33 L.R.A.(N.S.) 325, 136 S. W. 174; Terrell v. Wright, 87 Ark. 218, 19 L.R.A.(N.S.) 174, 112 S. W. 211; High, Inj. 4th ed. § 20; Worlds' Columbian Exposition v. United States, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; People v. Condon, 102 Ill. App. 449; State v. Vaughn, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 Ann. Cas. 277; Rider v. Leatherman, 85 Ark. 230, 107 S. W. 996; United States Exp. Co. v. State, 99 Ark. 636, 35 L.R.A.(N.S.) 879, 139 S. W. 637.

Messrs. John D. Arbuckle, Attorney General, and T. W. Campbell, Assistant Attorney General, for appellee.

Smith, J., delivered the opinion of the court:

By the decree of the chancery court of Johnson county, appellant

was enjoined from selling intoxicating liquors illegally in a building owned by him in the town of Hartman, in said county. The suit was brought in the name of the state, on the relation of the prosecuting attorney. A demurrer to the petition was filed and overruled. It is now said this demurrer should have been sustained because the petition did not allege that the nuisance affected any public property or public civil rights; nor that the criminal processes were inadequate to afford relief; nor that there was no adequate remedy at law. The petition did not contain these allegations, and such allegations are not required under the statute under which this proceeding was had. The court below made an order directing the abatement of the business conducted by appellant upon the ground that it was a public nuisance under Act No. 109, Acts 1915, page 408, and the appeal taken from that order questions the constitutionality of that act.

Sections 1 and 2 of this act read as follows:

"Section 1. That the conducting, maintaining, carrying on or engaging in the sale of intoxicating liquors in violation of the laws of this state, in any building, structure or place within this state, and all means, appliances, fixtures, appurtenances, materials and supplies used for the purpose of conducting, maintaining, or carrying on such unlawful business, or occupation, are hereby declared to be public nuisances, and may be abated under the provisions of this act.

"Section 2. That jurisdiction is

hereby conferred upon the chancery and circuit courts of this state to abate the public nuisances defined in the first section of this act, upon petition in the name of the state, upon relation of the attorney general, or any prosecuting attorney of the state, or without the concurrence of any such officer, upon the relation of five or more citizens and freeholders of the county wherein such nuisances may exist, in the manner herein provided."

Other sections of the act make effective the sections quoted.

It is insisted upon the authority of *Hester v. Bourland*, 80 Ark. 145, 95 S. W. 992, and *United States Exp. Co. v. State*, 99 Ark. 633, 35 L.R.A.(N.S.) 879, 139 S. W. 637, that the act in question is unconstitutional.

In the case of *Hester v. Bourland*, supra, it was held that the legislature could vest chancery courts only with jurisdiction in matters of equity, and that all other jurisdiction is vested in other courts, and that the legislature is without power to divest or change this jurisdiction, and that any law passed for that purpose would be unconstitutional and void. And it was also there held that election contests for nominations are not matters of equity, and have never been so considered, and the act of the legislature vesting chancery courts with jurisdiction as to them is unconstitutional and void.

Other cases to the same effect are: *Gladish v. Lovewell*, 95 Ark. 619, 130 S. W. 579; *German Nat. Bank v. Moore*, 116 Ark. 490, 173 S. W. 401; *Walls v. Brundidge*, 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696.

This court has had frequent occasion to consider the jurisdiction of courts of equity to abate nuisances, and in these cases familiar principles have been announced as controlling the action of the court in the decision of those cases. These cases have held that a court of equity will not lend its aid by in-

junction, for the enforcement of right or the prevention of wrong in the abstract, disconnected with any injury or damage to the person seeking the relief, and that the petition for an injunction should generally show some primary equity in aid of which the injunction is asked. The court has also had before it suits to abate public nuisances, and our case of *State v. Vaughan*, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 Ann. Cas. 277, has become one of the leading cases on this subject. In this case, upon a review of the authorities, it was held that a suit would not lie at the instance of the state to restrain a public nuisance unless the nuisance sought to be abated was one touching civil property rights or privileges of the public, or affecting the public health.

The case of *Lyric Theater v. State*, 98 Ark. 437, 33 L.R.A.(N.S.) 325, 136 S. W. 174, reaffirmed the doctrine of the *Vaughan Case*, supra.

At the time of the enactment of the Act of 1915, supra, the laws of this state, as announced in the decisions cited, may be summarized as follows: The jurisdiction of chancery courts was fixed by the Constitution of 1874, beyond the power of the legislature to enlarge or diminish. Courts of chancery were not authorized to restrain acts constituting a public nuisance unless the acts constituting the nuisance affected the civil or property rights or privileges of the public, or the public health.

The act in question made the business of selling intoxicating liquors illegally in any building, structure, or place within this state a public nuisance, and enjoined upon the chancery and circuit courts of the state the duty of abating them. Is the act void?

We think this act is not open to the objection which was made and sustained to the act involved in the case of *Hester v. Bourland*, supra. That was an act to provide for the

contesting of primary elections. The court there pointed out that election contests for nominations are not matters of chancery jurisdiction, and had never been so considered, and it was, therefore, held that the act of the legislature which attempted to vest chancery courts with jurisdiction as to them was unconstitutional and void.

The subject-matter of this legislation,—the abatement of nuisances,—however, has always been within the jurisdiction of courts of chancery. In 2 Story's Equity Jurisprudence, 13th ed. § 921, it is said: "In regard to public nuisances the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth."

These courts have imposed various conditions upon the exercise of this jurisdiction, but have always asserted the existence of the jurisdiction.

The act in question has not conferred upon the chancery courts of this state any additional jurisdiction. It has merely prescribed a new condition upon which this ancient jurisdiction may be exercised. The act is remedial in its nature, and, while the legislature cannot enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the legislature to prescribe the procedure for the exercise of this jurisdiction and to prescribe new conditions under which that jurisdiction may be exercised. The legislature has not conferred the jurisdiction

Equity—con-  
ferring juris-  
diction to abate  
nuisance.

tion upon the chan-  
cery court to abate  
public nuisances.

This jurisdiction they have always had.

The jurisdiction of all the courts is fixed by the Constitution as appears from the above-cited cases. But this jurisdiction may be applied to new conditions if the legislature so elects. For instance, the jurisdiction of justices of the peace in matters of damage to personal

property is limited by the Constitution to suits for damages not exceeding \$100. The legislature might create a cause of action for damages to personal property which did not exist at the time of the adoption of the Constitution of 1874. If this was done, a suit to compensate these damages in a sum not to exceed \$100 could be brought in the court of a justice of the peace. This would not be an enlargement of the jurisdiction of a justice of the peace. It would be a mere creation of a new condition upon which that jurisdiction would operate. We are of the opinion that this is what the legislature did here.

It follows, therefore, that the demurrer was properly overruled, and the decree so ordering is affirmed.

Hart, J., dissenting:

I dissent from the judgment in this case because I think the principles of law announced are in conflict with the established law of this state. The opinion of the majority, in my opinion, in effect overrules several of our prior decisions.

The act under consideration makes the business of selling intoxicating liquors in violation of the laws of this state in any building a public nuisance, and this part of the act is but declaratory of the law as it already existed. The authorities are in conflict as to whether or not a chancery court has jurisdiction to abate a nuisance by injunction where no civil or property rights are involved. We need not review these authorities, for our court has held that injunction is not the proper remedy.

In the case of *State v. Vaughan*, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 Ann. Cas. 277, the court said: "It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance, where the nuisance is one arising from the illegal, immoral, or pernicious acts of men, which for the time being make the property devoted to such

use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery."

The holding of the court in that case has also been approved in several later decisions which are cited in the majority opinion.

In the case of *State v. Ehrlick*, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935, the supreme court of West Virginia, in an able and exhaustive opinion in which many of the authorities on both sides of the question are reviewed, held that equity had no jurisdiction to abate a public nuisance by injunction at the instance of the state, where no property or personal rights are involved.

In some of the states it has been held that the legislature may confer upon the chancery courts jurisdiction to abate by injunction public nuisances, where no property or civil rights are involved, but under the construction given to our Constitution the legislature can neither enlarge nor diminish the jurisdiction of chancery courts. *Hester v. Bourland*, 80 Ark. 145, 95 S. W. 992; *Gladish v. Lovewell*, 95 Ark. 618, 130 S. W. 579; *Walls v. Brundidge*, 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980.

Under our Constitution, the jurisdiction of equity, like that of law, is of a permanent and fixed character, and courts of equity have only such jurisdiction as they could properly exercise at the time of the adoption of the Constitution. As we have already seen, they did not have the power to abate, by injunction, public nuisances, where no property or civil rights are involved.

The opinion of the majority attempts to distinguish these decisions from the present one by saying that equity has always had jurisdiction over public nuisances, and that the statute in question is only a statute regulating the practice in chancery courts. It occurs to me that this is reasoning in a circle. As we have already seen, this court has repeatedly held that chancery courts have no jurisdiction to abate public nuisances where no property or personal rights are involved. So it will be readily seen that the statute grants an additional power to the chancery court which it could not exercise before the statute in question was passed. Such has been the interpretation by the American courts, including the Supreme Court of the United States. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, the statute involved expressly conferred jurisdiction upon chancery courts to prevent the use of real estate in the manufacture of intoxicating liquors. It declared all places where intoxicating liquors were manufactured or sold in violation of the act to be public nuisances and authorized a suit in the name of the state to abate them by injunction. This was recognized to be a jurisdiction created by statute.

So, too, in *State v. Ehrlick*, supra, it was recognized that the legislature of that state, within the constitutional limits of its powers, might grant to courts of equity the power to abate a public nuisance where no property or civil rights are involved.

This statute conferred upon circuit courts the same jurisdiction that is given to chancery courts; and has been construed in the case of *Hickey v. State*, 123 Ark. 180, 184 S. W. 459. We did not there construe it as a statute regulating the practice in circuit courts, but expressly stated that, under the act, the circuit court was given the power to abate the nuisance by injunction.

All the cases that I have read

which uphold the power of chancery courts to abate public nuisances by injunction where no civil or property rights are involved proceed on the theory either that equity has always had jurisdiction to abate all public nuisances regardless of the fact whether or not civil or property rights are involved; or that the legislature has the power to confer such jurisdiction upon chancery courts.

As we have already pointed out, this court has held that chancery courts have no power to abate public nuisances by injunction except where property or civil rights are involved, and has also held that the legislature has no power to enlarge or diminish the jurisdiction of chancery courts. I think that the statute in question confers upon the chancery court a jurisdiction which it did not possess before the statute was enacted.

The views I express make the statute void, as it confers jurisdiction upon the chancery courts, but it by no means follows that the whole statute should fail. It is evident that the statute is divisible, and that

it would have been passed even if the jurisdiction in the premises had not been conferred upon the chancery court. This is apparent from the fact that jurisdiction to abate the nuisance in question was conferred upon the circuit courts, and the jurisdiction of the circuit court to abate nuisances under this act by injunction was upheld in the case of *Hickey v. State*, supra. The reason is that all jurisdiction was parceled out and distributed by the Constitution, and the jurisdiction not expressly granted to some other court, or authorized to be granted, is reserved to the circuit courts.

I am authorized by Mr. Justice Wood to state that he concurs in this dissenting opinion.

#### NOTE.

The decision in the reported case (*MARVEL v. STATE*, ante, 1458) sustaining a statute conferring jurisdiction on equity to enjoin or abate a nuisance is in accord with the majority view, as appears from the note on that question beginning on page 1474, post.

CLARENCE H. HEDDEN, Respt.,

v.

THOMAS J. HAND, Appt.

*New Jersey Court of Errors and Appeals — June 20, 1910.*

(Hadden v. Hand, — N. J. —, 107 Atl. 285.)

#### Constitutional law — power to confer criminal jurisdiction on equity.

1. The legislature cannot confer upon courts of equity power to abate public nuisances where the Constitution provides that courts of law and equity shall continue with like powers and jurisdictions as if the Constitution had not been adopted.

[See note on this question beginning on page 1474.]

#### Statutes — constitutionality of title.

2. An amendment of a title, "An Act Declaring All Buildings within or upon Which Acts of Lewdness, Assignment, or Prostitution Are Permitted or Occur, to Be Nuisances to Be Abated in Chancery," so as to read, "An Act Declaring All Buildings and Places within or upon Which Acts of Lewdness, As-

signation, or Prostitution or the Habitual Sale of Intoxicating Liquor in Violation of Law Are Permitted," to be nuisances to be abated in chancery, is not sufficient to bring a prosecution for abatement of a liquor nuisance in chancery within the title as required by the Constitution.

[See 25 R. C. L. 866.]

**Nuisance — power of equity to abate.**

3. Equity has no jurisdiction to abate a bawdyhouse as a public nuisance at the suit of an individual.

[See 14 R. C. L. 380; 20 R. C. L. 474-476.]

**Courts — power to confer jurisdiction upon.**

4. The legislature may lawfully confer upon the court of chancery the injunctive power in a new class of cases to which such remedy is appropriate, or extend the jurisdiction of the court to a class of cases which, by their nature,

may come properly within the sphere and application of equitable principles. [See 7 R. C. L. 1030.]

— power to deprive of jurisdiction.

5. The legislature cannot deprive a court of jurisdiction conferred upon it by the Constitution.

**Jury — deprivation of trial by.**

6. Giving chancery jurisdiction to punish and abate a nuisance punishable by indictment at common law deprives accused of his constitutional right to presentment by grand jury and trial by jury.

[See 16 R. C. L. 211.]

(White, J., dissents.)

**APPEAL** by defendant from an order of the Court of Chancery denying a motion to strike out a bill filed to enjoin the maintenance of a nuisance. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John A. Matthews and Henry L. Grosken, for appellant:

The offense charged in the bill of complaint constitutes a public nuisance, indictable at common law, and, in New Jersey, punishable by fine and imprisonment in the state prison.

State v. Williams, 30 N. J. L. 102; State v. Anderson, 40 N. J. L. 224.

The court of chancery will not administer the criminal law of the state, nor will it enjoin a public nuisance, at the suit of a private citizen, unless he suffers, either in his person or his property, some special injury which is peculiar to himself and not as one of the public.

16 Am. & Eng. Enc. Law, 2d ed. 363; Humphreys v. Eastlack, 63 N. J. Eq. 136, 51 Atl. 775; Van Wagenen v. Cooney, 45 N. J. Eq. 25, 16 Atl. 689; Atty. Gen. v. New Jersey R. & Transp. Co. 3 N. J. Eq. 136; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530; Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75, 86 Am. Dec. 252; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; People ex rel. L'Abbe v. District Ct. 26 Colo. 386, 46 L.R.A. 850, 58 Pac. 604; Ocean City Asso. v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914; Heber v. Portland Gold Min. Co. — Colo. —, L.R.A.1918D, 681, 172 Pac. 12.

The act of the legislature of the state of New Jersey entitled, "An Act Declaring All Buildings and Places Wherein or upon Which Acts of Lewdness, Assignment, or Prostitution Are Permitted to Occur, to Be Nuisances, and Pro-

viding for the Abatement Thereof by the Court of Chancery," and the act amendatory thereto, which attempt to confer such jurisdiction upon the court of chancery, are ineffective and invalid, being contrary to the Constitution of the state of New Jersey and to the Constitution of the United States.

North Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 530, 14 Mor. Min. Rep. 294; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870; Atty. Gen. v. Cleaver, 18 Ves. Jr. 217, 34 Eng. Reprint, 299; Carpenter v. Easton & A. R. Co. 26 N. J. Eq. 168.

The acts are contrary to article 1, ¶ 9, of the state Constitution in that they subject the defendant to a trial for a criminal offense without a presentment or indictment of a grand jury.

State v. Anderson, 40 N. J. L. 224; Atlantic City v. Rollins, 76 N. J. L. 254, 69 Atl. 964; State v. Rodgers, 90 N. J. L. 60, 99 Atl. 931; Heber v. Portland Gold Min. Co. — Colo. —, L.R.A.1918D, 681, 172 Pac. 12; People ex rel. L'Abbe v. District Ct. 26 Colo. 386, 46 L.R.A. 850, 58 Pac. 604.

The amendatory act is contrary to the Constitution in that the object of said act is not expressed in its title.

Sawter v. Shoenthal, 83 N. J. L. 499, 83 Atl. 1004, 81 N. J. L. 197, 80 Atl. 101.

Said acts are further objectionable because they authorize the taking of property without due process of law.

Daugherty v. Thomas, 174 Mich. 371,



45 L.R.A. (N.S.) 699, 140 N. W. 615, Ann. Cas. 1915A, 1163.

Mr. Arthur T. Vanderbilt, for respondent:

The court of chancery has jurisdiction (independently of the statutes under review) to enjoin and abate the nuisances enumerated in the statutes.

Wood, Nuisances, 3d ed. § 29; 14 Cyc. 484, 486; 9 Am. & Eng. Enc. Law, 509; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1; State ex rel. Board of Health v. E. I. Dupont de Nemours Powder Co. 79 N. J. Eq. 81, 80 Atl. 998; Atty. Gen. v. Richards, 2 Anstr. 603, 145 Eng. Reprint, 980, 8 Revised Rep. 632; Atty. Gen. v. Cambridge Consumers' Gas Co. L. R. 4 Ch. 71, 38 L. J. Ch. N. S. 94, 19 L. T. N. S. 508, 17 Week: Rep. 145.

The subject-matter of the acts under review is appropriate to the jurisdiction of the court of chancery.

State v. Anderson, 40 N. J. L. 224; N. H. 39, 18 L.R.A. 646, 25 Atl. 588; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Hutchinson Twp. v. Filk, 44 Minn. 536, 47 N. W. 255; Greenwich Twp. v. Easton & A. R. Co. 24 N. J. Eq. 217, affirmed in 25 N. J. Eq. 565; State ex rel. Board of Health v. Bergen County, 46 N. J. Eq. 173, 18 Atl. 465; Hutchinson v. State, 39 N. J. Eq. 569; Hitchner v. Richman, 74 N. J. L. 234, 65 Atl. 856; State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215; Davis v. Auld, 96 Me. 559, 53 Atl. 118; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641.

The acts in question, being appropriately administered by chancery, are not unconstitutional in not providing for trial by jury.

Wood v. Tallman, 1 N. J. L. 153; Eilenbecker v. District Ct. 134 U. S. 31, 40, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215; State ex rel. Wilcox v. Gilbert, 126 Minn. 95, ante, 1449, 147 N. W. 953; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; State v. Murphy, 71 Vt. 127, 41 Atl. 1037; State ex rel. Rhodes v. Saunders, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588; State ex rel. Collins v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; Davis v. Auld, 96 Me. 559, 53 Atl. 118; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641.

The acts under review are not repugnant to ¶ 9 of article 1 of the state Constitution.

Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. 59 N. J. Eq. 49, 46 Atl. 208; Atty. Gen. v. New Jersey R. & Transp. Co. 3 N. J. Eq. 136, 16 Atl. 689; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Davis v. Auld, 96 Me. 559, 53 Atl. 118; State ex rel. Wilcox v. Gilbert, 126 Minn. 95, ante, 1449, 147 N. W. 953; Eilenbecker v. District Ct. 134 U. S. 31, 83 L. ed. 801, 10 Sup. Ct. Rep. 424.

The fact that the acts under review do not require knowledge on the part of the owner of the unlawful use of the premises does not render the acts unconstitutional. The owner is presumed to know the business conducted thereon.

Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237; Board of Health v. Eastlack, 68 N. J. L. 585, 52 Atl. 999; Com. v. Howe, 13 Gray, 26; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; State v. Jordan, 72 Iowa, 377, 84 N. W. 285; Shear v. Green, 73 Iowa, 688, 36 N. W. 642.

Sections 8-11 of the act are clearly within the legislative power over nuisances.

Berry v. De Maris, 76 N. J. L. 301, 70 Atl. 337; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Smith v. Maryland, 18 How. 71, 15 L. ed. 269.

The amendment of 1918 does not contravene article 4, § 7, ¶ 4, of the Constitution.

Allison v. Corker, 67 N. J. L. 596, 60 L.R.A. 564, 52 Atl. 362; Union Twp. v. Rader, 39 N. J. L. 509; State ex rel. Walter v. Union, 33 N. J. L. 350; Easton & A. R. Co. v. Central R. Co. 52 N. J. L. 267, 19 Atl. 722; Kirkpatrick v. New Brunswick, 40 N. J. Eq. 51; State ex rel. Bumsted v. Govern, 47 N. J. L. 373, 1 Atl. 835; Seaside Realty Co. v. Atlantic City, 76 N. J. L. 819, 71 Atl. 912; Beatrice v. Edminson, 54 C. C. A. 601, 117 Fed. 427; Dyker Meadow Land & Improv. Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222; Wallace v. Bradshaw, 54 N. J. L. 178, 23 Atl. 759; Sawyer v. Shoenthal, 88 N. J. L. 499, 83 Atl. 1004.

Kalisch, J., delivered the opinion of the court:

The complainant filed his bill of complaint as a resident of the city of Newark, in the county of Essex, in

the court of chancery, charging that Thomas J. Hand, on June 22 and 30, on July 7 and 14, on August 18, on September 15, 1918, and continuously for some time prior thereto, did keep and maintain a certain building for the purpose of lewdness, assignation, and prostitution, and the habitual sale of intoxicating liquors in violation of law, and wherein other indecent and disorderly acts are permitted and occur. The complainant prayed that an injunction may issue directed to Thomas J. Hand, and to the owner and lessor of the premises and their agents, perpetually enjoining them, their agents and lessees, from maintaining and permitting such nuisance, and likewise enjoining the removal of any furniture, furnishings, musical instruments, or other personal property, except clothing, from said building, pending the final hearing of the cause.

A restraining order was issued in pursuance of the prayer, subject to further order of the court.

A motion was made to strike out the bill on the ground that the legislative acts upon which the legal efficacy of the bill depended are unconstitutional. This motion was denied, and hence this appeal.

The sole basis of the bill is the Act of 1916 (Pamph. Laws p. 315) as amended in 1918 (Pamph. Laws p. 739).

The Statute of 1916 is entitled: "An Act Declaring All Buildings and Places Wherein or upon Which Acts of Lewdness, Assignation or Prostitution Are Permitted or Occur to Be Nuisances, and Providing for the Abatement Thereof by the Court of Chancery."

The Statute of 1918 is amendatory of the title of and provisions of the Act of 1916, and by § 1 amends the title so as to read: "An Act Declaring All Buildings and Places Wherein or upon Which Acts of Lewdness, Assignation or Prostitution or the Habitual Sale of Intoxicating Liquor in Violation of Law Are Permitted or Occur to Be Nuisances and Providing for the

Abatement Thereof by the Court of Chancery."

The evident purpose of this amendment was to add to the category of acts mentioned as nuisances in the title of the Act of 1916 the habitual unlawful sale of intoxicating liquor.

The other provisions of the Statute of 1916, amended by the later act, are: Section 8, which makes provision that, where the disorderly house consists of the habitual unlawful sale of intoxicating liquor, such liquor may be removed and shall be destroyed as soon as may be when no longer required for evidence; § 9, which excepts intoxicating liquors from the operation of the clause of this section relating to fees to be allowed to the officer for removing and selling movable property; and § 10, which excludes intoxicating liquors from coming within the purview of the section.

On this branch of the case counsel of appellant first contends that the amendatory act is in violation of article 4, § 7, ¶ 4, of the Constitution of New Jersey, in that the object of the act is not expressed in its title.

In support of this contention it is argued, in substance, that the title of the original act was made to fit its object as then created, and that the effect sought to be attained by the amendatory act was to enlarge the scope of the original, so that its provisions would become applicable to a new subject-matter not embraced within the language or meaning of its title or body, namely, by adding to its category of acts denounced as nuisances "the habitual sale of intoxicating liquors in violation of law," of which there is no premonition in the title of either act.

In so far as the title of the Act of 1918 is concerned in its relation to the introduction into its body of the provision of the habitual sale of intoxicating liquors in violation of law as a new subject-matter to be embraced within the scope and operation of the Act of 1916, it is plain

that the amendatory statute does not express this object in its title.

Its title is palpably deceptive and misleading. It gives notice that its object is to amend the title and provisions of an act, etc. It is silent in what respect the title is to be amended, and leaves it open to belief that all the provisions of the Act of 1916 are to be amended. The original act contains fourteen sections, of which five were amended. The title of the later statute gives no notice that it was to contain a provision in its body which in effect would broaden the Act of 1916 so as to extend the jurisdiction of the court of chancery to cases where the nuisance consists of "the habitual sale of intoxicating liquor in violation of law."

In support of the constitutionality of the amendatory act it is strenuously argued by counsel of respondent that the legislation impugned does not attempt to ingraft on the original statute incongruous matter, since both acts deal with nuisances and provide identical remedies, and that the act and amendment would be valid if it were merely "an act concerning nuisances and the abatement thereof in chancery."

The statement that both acts deal with nuisances and provide identical remedies is not quite accurate. The amendments, in some respect, provide a different procedure where the nuisance complained of is created by the habitual unlawful sale of intoxicating liquor from that pursued in cases of nuisance provided for in the original act.

Further, the argument addressed to us ignores the vital circumstance that the title of the statute under discussion limits the invoking of the action of the court of chancery to certain acts which are specifically mentioned and denominated in the title as nuisances, and which, according to unquestioned and settled statutory construction, by necessary implication excludes all other public nuisances at common law from the operation of the act.

The present statute in its title

differs from a situation where such title is general and broad enough to include within its terms congruous matter dealt with by the amendment.

The title, by reason of its specific restrictive language, in the present instance, violates a fundamental rule of the constitutional mandate, in that it fails to give notice of the effect of the legislation to one conversant with the existing state of the law. *Sawter v. Shoenthal*, 83 N. J. L. 501, 83 Atl. 1004. The reasoning of Mr. Justice Swayze, speaking for this court in the case cited, is peculiarly applicable here. At page 503 of 83 N. J. L. he says: "If now we look at the essential character of this legislation, it is plain that the legislature's object was to tax transfers of property occurring upon the death of the owner, or made in contemplation of his death, or to take effect at or after his death. The original legislation reached only certain kinds of transfers. The amendment of 1906 sought to make this more general, and to reach all transfers in such cases. In common parlance all were spoken of as inheritance taxes, and if the title of the Act of 1894 had read, 'An Act to Tax Estates and Inheritances,' it would have been broad enough to include the matter of the Act of 1906," etc.

And so in the case sub judice, if the title of the Act of 1916 had read, "An Act Concerning Nuisances and the Abatement Thereof in Chancery," it would not only have been broad enough to include the unlawful habitual sale of intoxicating liquor, as well as any other public nuisance, such as gaming houses, resorts for thieves, idlers, disorderly persons, etc., which, though they are congruous with the subject-matter of the Act of 1916, being public nuisances, are nevertheless excluded from the operation of the statute by reason of its specific title. The Act of 1918, by reason of its defective title, is inoperative and unenforceable.

Statutes—constitutionality of title.

The elimination of this statute from the case on account of the constitutional defect pointed out removes one of the basic grounds upon which the complainant's bill and the action of the court below rested.

The legality of the proceedings under review must therefore derive its sole support from the original Act of 1916.

The constitutionality of that statute is also questioned on two principal grounds which may be summed up as follows: (1) That the statute contains unconstitutional provisions, and which provisions are so interwoven with other sections of the act that those which are unconstitutional cannot be excised without rendering the entire statute inoperative; (2) that the legislation in itself is unconstitutional, in that it attempts to confer upon the court of chancery jurisdiction of a subject-matter of a purely criminal character.

The interesting questions raised by counsel of appellant as to the constitutionality of several provisions of the statute involving fundamental propositions which may affect more or less the validity of the whole act need not be considered and decided on this appeal, for the reason that there is a prime fundamental question which goes to the validity of the entire statute, and that is whether the legislature overstepped the bounds of its constitutional limitations in attempting to confer jurisdiction upon the court of chancery of the subject-matter dealt with by the act. Thus it becomes important to consider first the purpose and nature of the statute.

The fixed purpose of the statute, evidenced by its title, is to declare certain buildings or places in or upon which the acts specified in the title are permitted or occur, to be nuisances, and to be abated in the court of chancery.

The 1st section of the act substantially follows its title. The specific violations denounced therein are nuisances, indictable and pun-

ishable at common law and under the Crimes Act. The 3d and 4th sections of the statute confer power and authority on the prosecutor of the pleas or any resident of the county where the nuisance is alleged to exist, to maintain an action in the court of chancery to abate and prevent such nuisance, and provide that the action shall be brought in the name of the prosecutor, and that it shall be unnecessary to allege or prove special damage. The 5th and 6th sections make the further provision that the action shall be commenced by filing a verified bill of complaint and the issue of subpoena, and that all proceedings in such action shall be in accordance with the usual practice in the court of chancery; that the chancellor, being satisfied of the sufficiency of the bill, shall issue an order to show cause on a certain day why an injunction should not issue against the defendant in accordance with the prayer of the bill, with restraint of the alleged nuisance and the removal of any furniture, furnishings, musical instruments, or other personal property, except clothing, from such building or place complained of until further order of the court, and that on the return of the rule, if the chancellor is satisfied of the sufficiency of the proofs submitted, he shall issue a temporary injunction, without bond, enjoining and abating the nuisance in accordance with the restraint prayed for. Then follow provisions for the carrying into effect the final decree of the court of chancery that the nuisance be abated by a forfeiture of the personal property found on the premises, the disuse of the premises for any purpose for one year unless sooner released by the court of chancery, etc., and a further provision that the violation or disobedience of either any injunction or order provided for by the act shall be punishable as a contempt of court, by a fine not less than \$200 nor more than \$1,000, or by imprisonment in the county jail for not less than one month nor

more than six months, or by both fine and imprisonment.

Thus it follows, as a matter of course, after a temporary injunction has been issued, or an order made in the case, an allegation that the nuisance still continues may, on proof thereof, be heard in a summary manner, and be punished as a contempt of court, by fine and imprisonment. But the startling feature of the operation of the statute is that the temporary restraint makes the removal of any personal property (except clothing), no matter how innocuous in character it may be, whether it be the portrait of a family ancestor or a copy of the Holy Scriptures, punishable by fine and imprisonment.

It is difficult from a plain reading of the statute to escape the conclusion that it attempts to add to the equitable powers possessed by the court of chancery, the power to deal with a certain class of criminal cases by the writ of injunction and the summary process of contempt.

Apparently recognizing an insuperable obstacle in the way of upholding the constitutionality of the statute in view of the provision of article 6, § 1, that "the judicial power shall be vested" in the courts enumerated, amongst which is the court of chancery, "as now exist," and of article 10, § 1, which, among other things, declares, "The several courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this Constitution had not been adopted," counsel of respondent argues and urges most strenuously that the court of chancery possessed the jurisdiction at common law to enjoin and abate the nuisances specified in the statute. This assertion necessarily raises the inquiry, To what extent has the court of chancery exercised jurisdiction over nuisances prior to the adoption of our Constitution?

The jurisdiction of a court of equity to control and afford relief in a case where the nuisance is a public one and indictable, at the suit of a

private individual who has suffered an injury from such nuisance beyond that sustained by the general public, cannot be successfully questioned. An examination of the cases, in which the elements of a public and indictable nuisance were present, will disclose that the potent factor that induced a court of equity to exercise jurisdiction and to give relief was not for the purpose of suppressing a public nuisance, but to redress a private wrong done to the individual, and who sought relief from the court on the allegation that unless the nuisance was enjoined he would suffer irreparable injury.

There is some confusion in the cases as to what Lord Hardwicke decided in *Baines v. Baker*, 1 Ambl. 158, 27 Eng. Reprint, 105. This case is also reported anonymously in 3 Atk. 750, 26 Eng. Reprint, 1230, but not as clearly and fully as in *Ambler*. On a bill for injunction to stay building an inoculation hospital for people infected with smallpox very near the houses of several tenants of the plaintiff, Lord Hardwicke, at page 159, said: "Bills of this sort are founded on being nuisance at common law. If a public nuisance, it should be in the name of the attorney general, and then it would be for his consideration, whether he would file such an information or not; and that was the case for stopping a way behind the exchange in the city. Lord King recommended it to the attorney general, to prefer an information in the King's bench, to try whether it was a nuisance or not."

The motion for an injunction was denied. In a much later case, decided in 1799, *London v. Bolt*, 5 Ves. Jr. 129, 31 Eng. Reprint, 507, it appears that there were several old houses on Snow hill which were to be pulled down to improve the city, and were empty, and that the defendant took them as temporary warehouses for storing sugar, which he had introduced in such quantities that two of the houses had actually fallen and the others were in the

most imminent danger. An application was made to Lord Chancellor Loughborough for an injunction to prevent the defendant from putting any more sugar in the houses, and, in granting the injunction, the Lord Chancellor, at page 130, said: "But I can only order the injunction upon the petition. I cannot order anything to be done, and it will be necessary to do more; as shoring up the houses, and removing the sugar. I shall make the order upon the petition; but it seems to me the Lord Mayor can apply a much more proper and effectual remedy. Can there be a doubt that it is within his office, upon presentment of the ward that these houses are a public nuisance, to order the nuisance to be abated, the houses to be shored up, and the weight removed? . . . The chief magistrate by his general jurisdiction has authority to abate a nuisance in a public street, to shore up the houses under the direction of a surveyor, and make it safe for the public. I can interfere only as between landlord and tenant."

These remarks contain an express disavowal of any power residing in a court of equity to abate a nuisance. It is also noticeable that the nuisance dealt with was one affecting the safety of a public highway for travel, and there can be no question that such a nuisance, upon application of the attorney general, could be properly made the basis of granting preventive relief, by injunction.

The case of *Atty. Gen. v. Cleaver*, 18 Ves. Jr. 210, 34 Eng. Reprint, 297, was one where an information was filed by the attorney general, at the relation of several inhabitants of Battersea and Chelsea, to restrain the defendants from manufacturing soap or black ash, etc. The defendants were under an indictment for maintaining a public nuisance, which had been removed to the King's bench for trial. Lord Eldon refused the injunction, and took occasion to say, at page 217: "The case cited by Lord Hardwicke, as having occurred before Lord King,

was an information here by the attorney general against a public nuisance by stopping a highway. Analogous to that there have been many cases in the court of exchequer of nuisance to harbors, which are a species of highway; and if the soil belongs to the Crown there is one species of remedy for that: the Crown may abate the obstruction, as it is upon the King's soil. Where it is not upon the King's soil, but merely a public nuisance to all the King's subjects, though the suit may be in the same form, the law is laid down in treatises, particularly by Lord Hale, '*De Portibus Maris*' . . . that upon the ground of public nuisance, and not as an obstruction upon the King's soil, it is a question of fact which must be tried by a jury; and, though the suit may be entertained, the court would be bound to try the fact by the intervention of a jury."

In the later case of *Crowder v. Tinkler*, 19 Ves. Jr. 617, 34 Eng. Reprint, 645 (decided in 1816) the plaintiff filed a bill to restrain the defendants from completing a building to be used for storing large quantities of gunpowder, alleging that the defendants kept on their premises a dangerous quantity of powder, liable to cause explosion, and thus endangered their lives and property, and that the plaintiffs intended to proceed against the defendants to abate and remove the new building, and that the danger of explosion was so imminent that the court should immediately interfere. Lord Eldon, at page 619, said: "I incline to think that an injunction may be granted in this case, not of nuisance, but of danger to property."

And, at page 621, he further said: "Where the subject of complaint is matter of public nuisance the attorney general alone can sue; but it is going too far to say, particularly without more materials than can be had on motion, that if a plain nuisance is attended with particular and special injury to an individual, producing irreparable damage, that

individual shall not be at liberty to come here, unless the attorney general chooses to accompany him."

This case is cited in *Chase v. Revere House*, 232 Mass. 88, 122 N. E. 162, in an opinion of the supreme court of Massachusetts, as supporting the statement made by that court at page 94 of 232 Mass., that "the jurisdiction of a court of equity over the abatement and suppression of a nuisance, whether public or private, is settled, and may be exercised although the nuisance is made by statute an indictable offense."

A careful reading of *Crowder v. Tinkler*, supra, will show clearly that it does not support such a view. The theory on which the preventive relief was granted was the danger imminent to the property of private individuals of being destroyed by an explosion and producing irreparable injury to their private interests. As to the abatement of the public nuisance, it is clear, from a reading of the case, that the Lord Chancellor held that such a result would only be properly accomplished by an indictment and a trial in a court of law.

"The greater part of these acts which are indictable as common nuisances cannot, from their nature, be cognizable in a court of equity." 2 *Waterman's Eden*, Inj. 2d ed. 264. In a note to the text, gaming houses, bawdyhouses, and public nuisances of a like character are mentioned as not coming within the cognizance of a court of equity.

In *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, Chancellor Kent, at page 378, said: "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate."

This case is cited with approval in *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227. At page 240 of 104 Mass., Gray, J., said:

"This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common-law side of this court or of the other courts of the commonwealth."

No instance can be found in the English reports, nor in the reports of this country, in states where the common law prevailed and still prevails, where a court of equity has ever taken cognizance of a case of a public nuisance founded purely on moral turpitude.

It is clear that, if the legislature may bestow on the court of chancery jurisdiction to grant an injunction and abate a public nuisance of a purely criminal nature, then there can be no valid argument against the power of the legislature to confide the entire Criminal Code of this state to a court of equity for enforcement. It is apparent that such a court would render nugatory the provisions of the Constitution, which guarantee the right of a presentment by a grand jury, and a trial by jury, to one accused of crime.

Before leaving this topic it may serve a useful purpose to refer to the case of *State ex rel. Circuit Atty. v. Uhrig*, 14 Mo. App. 413, in which the opinion contains a compendium of the grounds on which the jurisdiction of a court of equity was exercised in cases of public nuisance. It divides public nuisances into three classes of cases: "(1) To restrain purprestures of public highways or navigations. . . . (2) To restrain threatened nuisances dangerous to the health of a whole community. . . . (3) To restrain ultra vires acts of corporations injurious to public right;" and that "the exercise of equity jurisdiction in these three classes of cases is an exception to a . . . rule . . . that a court of equity has no jurisdiction in matters of crime."

Our examination into the state of the common law relating to the jurisdiction of a court of equity of a public nuisance of the character before us, prior to the adoption of our Constitution, leads us to the conclusion that a court of equity never possessed or attempted to exercise such jurisdiction in this state. Atty. Gen. ex rel. Holtz v. Heishon, 18 N. J. Eq. 410.

Now as to the constitutionality of the act in attempting to give authority to the court of chancery to abate the specified public nuisances.

The authority to abate a public nuisance resided solely in the courts of criminal jurisdiction at common law.

All common nuisances are regularly punishable by fine and imprisonment; but, as the removal of the nuisance is the chief end of the indictment, the court will adapt the judgment to the nature of the case. Where, therefore, the nuisance is stated in the indictment to be continuing, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own cost. 2 Rolle. Abr. 84; 1 Hawk. P. C. chap. 75, ¶ 14; Rex v. Pappineau, 1 Strange, 686, 93 Eng. Reprint, 784; Taggart v. Com. 21 Pa. 527; 2 Archbold, Crim. Pr. & Pl. 1772, note.

In State v. Morris & E. R. Co. 23 N. J. L. 360, Green, Ch. J., at page 370, said:

"The principal object of an indictment for a nuisance is to compel it to be abated; and regularly a part of the judgment upon conviction is that the nuisance be abated." 1 Chitty, Crim. Law, 716; Rex v. Stead, 8 T. R. 142, 101 Eng. Reprint, 1312.

"A similar judgment was rendered in the case of State v. King, in the Passaic oyer and terminer, which has since been affirmed in the court of errors and appeals."

There is no doubt that the legislature may lawfully confer on the

court of chancery the injunction power in a new class of cases to which such remedy is appropriate, or to extend the jurisdiction of the court to a class of cases which, by their nature, may come properly within the sphere and application of equitable principles, but that is an entirely different situation from the one which confronts us here.

The present case is not one extending the jurisdiction of the court of chancery to a new class of cases which have arisen and call for the application of the equitable powers of that court. What we are met with is a legislative attempt to abstract from and to shear the supreme court of a common-law power and prerogative right vested in it by the Constitution, and an attempt to transfer to and settle such power on a court of equity.

This surely cannot be lawfully done.

The supreme court is not only an appellate court in all cases from the inferior courts of civil and criminal jurisdiction, but is also a court of original jurisdiction in civil and criminal cases. An indictment for public nuisance is cognizable in that court. The indictment may be removed from the oyer and terminer or quarter sessions to the supreme court, and the accused tried there, and, upon conviction, the judgment may be fine or imprisonment, or both, and that the nuisance be abated. If the indicted party is tried in the oyer and terminer or quarter sessions on an indictment for maintaining a public nuisance, and is convicted, he may have his writ of error out of the supreme court and there have the judgment against him reviewed.

It is manifest that the statute in its operation and effect deprives the supreme court of its inherent right to pass on the question whether the facts proven constitute a public nuisance, and, if so, should be abated. For the important fact can-

Courts—power to confer jurisdiction upon.

Nuisance—power of equity to abate.

Constitutional law—power to confer criminal jurisdiction on equity.



not be ignored that the order to abate a public nuisance is part of a common-law judgment rendered on a conviction upon an indictment for maintaining a public nuisance. As no writ of error can be properly sued out of the supreme court for a review of the decree of the court of chancery, it follows that the supreme court is deprived of one of its inherent prerogative rights. And this result is brought about by bringing the cognizance of a common-law crime within the jurisdiction of a court of equity, to be dealt with according to the procedure of that court in enforcing the penalties of the statute prescribed for the offense. Such an obvious evasion of constitutional authority will not be tolerated. *Entries v. State*, 47 N. J. L. 140. In *State, Flanagan, Prosecutor, v. Plainfield*, 44 N. J. L. 118, Van Syckel, J., at page 124, said: "There can be no contraction of the sphere within which the supreme court may dispense its prerogative writs except by extinguishing the tribunals to which they may be sent. A law is equally without authority whether it in express terms, or by its operation and effect, takes away or diminishes the inherent power of the court."

A most comprehensive and lucid exposition of this doctrine is to be found in an opinion by Beasley, Chief Justice, speaking for this court, in *Jersey City v. Lembeck*, 31 N. J. Eq. 255.

Keeping in view that the maintenance of disorderly house was a crime at common law and was punishable and abatable in the courts of criminal jurisdiction only, it is clear that the effect of making such a crime punishable and abatable in the court of chancery is to deprive a defendant of his constitutional right to have an in-

dictment preferred against him by a grand jury of the county in which such nuisance is alleged to exist, and a trial by jury. It is idle to entertain the thought for a single moment that the legislature can change the nature of an offense by changing the forum in which it is to be tried. *Palys v. Jewett*, 32 N. J. Eq. at page 318.

Article 1, § 9, of the Constitution declares that "no person shall be held to answer a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace," etc.

In *State v. Anderson*, 40 N. J. L. 224, Beasley, Ch. J., after stating that the keeping of a disorderly house is a crime indictable at common law, at page 227, in commenting on this constitutional provision, pointedly said: "The purpose of this clause was to prevent the bringing of any citizen under the reproach of being arraigned for crime before the public, unless, by a previous examination taken in private, the grand inquest had certified that there existed some solid ground for making the charge."

In conclusion, it may be mentioned that the authority attempted to be conferred by the legislature on the court of chancery to abate a public nuisance of the character specified in the statute can be more effectually exercised by the inherent power possessed by the criminal courts, as established in this state.

We think the motion of counsel of appellant, made in the court below, to strike out the bill of complaint on the ground that the statutes upon which it is founded are unconstitutional, should have prevailed. The order denying the motion is reversed, and the Court of Chancery is directed to decree a dismissal of the bill.

White, J., dissents.

Jury—deprivation of trial by.

5 A.L.R.—93.

## ANNOTATION.

### Constitutionality of statute conferring on chancery courts power to abate public nuisances.

- I. Introduction, 1474.
- II. General rule:
  - a. In general, 1474.
  - b. Deprivation of jury trial, 1480.
  - c. Due process, 1483.

#### 1. Introduction.

The present note is confined to the validity of statutes conferring jurisdiction upon equity to abate or enjoin a public nuisance, and does not consider generally the power of equity in this regard in the absence of statute. In the absence of statute prescribing the jurisdiction, the power of equity to enjoin or abate a public nuisance is by some courts limited to cases in which there is some interference with property rights. These courts regard the remedy furnished by the criminal law as adequate for the abatement of the nuisance. This is the view adopted in (*HEDDEN v. HAND* (reported herewith) ante, 1463, although the court seems to approve an equitable jurisdiction not strictly limited in this way, for it quotes with apparent approval a statement from *State ex rel. Circuit Atty. v. Uhrig* (1883) 14 Mo. App. 413, which recognizes the jurisdiction of equity to abate certain public nuisances, such as obstructions to highways or navigation, nuisances dangerous to the health of the whole community, and ultra vires acts of corporations injurious to public right. But it is held that public nuisances of the character of a liquor nuisance or bawdyhouse may not be abated in equity,—at least, not in the absence of some interference with property rights.

While, as just said, this note does not deal generally with this question, that is, the power of equity to abate or enjoin a public nuisance in the absence of statute, it appears that upon the point there is a difference of opinion. It has been held, without reference to the effect on property rights, that equity has jurisdiction in a suit by the state, and in the absence of

statute, to abate or enjoin a liquor nuisance, although the acts constituting the nuisance amount to a crime. *Walker v. McNelly* (1904) 121 Ga. 114, 48 S. E. 718; *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, see *infra*. Prize fighting may be enjoined, although it constitutes a crime. *Columbian Athletic Club v. State* (1895) 143 Ind. 98, 28 L.R.A. 727, 52 Am. St. Rep. 407, 40 N. E. 914. Equity may enjoin the owners of property from permitting the holding of a prize fight on the property, although the owner would be guilty of a misdemeanor in permitting the fight. *Com. v. McGovern* (1908) 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261. A bull-fighting arena may be enjoined, although the offenders are punishable in the criminal courts. *State ex rel. Crow v. Canty* (1907) 207 Mo. 439, 15 L.R.A. (N.S.) 747, 123 Am. St. Rep. 393, 105 S. W. 1078, 18 Ann. Cas. 787. The right of the state to maintain a suit in equity, independently of statute, to enjoin the maintenance of a bawdyhouse nuisance is affirmed in *State ex rel. Ford v. Young* (1917) 54 Mont. 401, 170 Pac. 947. The foregoing citations are not exhaustive, nor are cases included therein which hold to the contrary, and in accord with the reported case, as to the jurisdiction of equity in the absence of statute. They are cited here only for the purpose of showing the divergence of judicial opinion.

#### II. General rule.

##### a. In general.

Coming now to the power of the legislature to confer upon a court of equity power to abate or enjoin a nuisance, it is apparent that a court which takes the view that in the absence of statute equity has jurisdiction to abate a public nuisance, although it may be a crime, would sus-

tain a statute which conferred such jurisdiction. This is the view taken in one case in which the power of the legislature to confer upon equity jurisdiction to abate bawdyhouses is sustained. *People ex rel. Thrasher v. Smith* (1916) 275 Ill. 256, L.R.A.1917B, 1075, 114 N. E. 31. The jurisdiction of a court of equity to enjoin the maintenance of a public nuisance at the suit of attorney general or state's attorney, even though such maintenance was punishable by indictment, was sustained in the absence of a statute expressly conferring such power in this jurisdiction, in the previous case of *Stead v. Fortner* (1912) 255 Ill. 468, 99 N. E. 680. And this is true of other cases in this state. The power of equity to abate a nuisance in the absence of statute is affirmed also, in *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273 (decided under a state statute) where the court discusses the power of equity as follows: "Equally untenable is the proposition that proceedings in equity for the purpose indicated in the 13th section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so-called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so-called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future, whereas

courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

Assuming that equity will not abate or enjoin a public nuisance in the absence of an interference with property rights, it does not follow that a statute conferring such jurisdiction is invalid. The decision in (*HEDDEN v. HAND* (reported herewith) ante, 1463, that such a statute is unconstitutional, is contrary to all other reported decisions—and, as appears hereafter, there are a considerable number of them—on this question. Although not referred to in the reported case, a previous decision of the court of chancery of New Jersey, which was affirmed without opinion by the court of errors and appeals (*State ex rel. Board of Health v. Diamond Mills Paper Co.* (1902) 63 N. J. Eq. 111, 51 Atl. 1019, affirmed in (1902) 64 N. J. Eq. 793, 53 Atl. 1125), is not necessarily in conflict with the reported case, but seems to fall within that class of exceptional cases in which, the court in the reported case recognizes, equity had jurisdiction. The rule as to the power of the legislature to authorize a court of equity to enjoin or abate a public nuisance, however, is quite broadly stated. *State ex rel. Board of Health v. Diamond Mills Paper Co.* (N. J.) supra. In that case, an injunction was sustained on a bill filed in the name of the state, on the relation of the state board of health, to prohibit the defendant from discharging its factory refuse into a river from which a city of the state obtained its supply of water, under a statute prohibiting the drainage of sewage or factory refuse into the waters of any river, above the point from which any city or town obtained its supply of water for domestic use, and providing for a penalty for violation of the act, or for injunction proceedings in a court of chancery. It was objected in this case

as in *HEDDEN v. HAND*, that the legislature could not vest the court of chancery with jurisdiction over the matter. In answer to this contention, it is stated that "all it has done is to give an alternative remedy by injunction. That the legislature may direct the exercise of the injunction power by this court, in a new class of cases to which the remedy is appropriate, seems to me clear. The legislature not infrequently extends the jurisdiction of courts, both of law and of equity, to new cases, and it assigns them to the one court or the other, in conformity with the remedy each is accustomed to administer. . . . It is true that heretofore the rule in equity has been not to exercise its jurisdiction to restrain nuisances unless a serious public injury has been shown to exist, an injury not remediable in the ordinary tribunals. *Grey ex rel. Morris & C. Dredging Co. v. Greenville & H. R. Co.* (1900) 59 N. J. Eq. 387, 46 Atl. 638. The reason is that the remedy at law has been found adequate. Here, however, we are dealing not with the jurisdiction ordinarily exercised by this court, but with a jurisdiction conferred by statute. To deny the constitutional validity of the act is to assert that the legislature cannot afford what is undoubtedly an appropriate remedy for a new and threatening wrong; that it may, indeed, punish, but that it cannot prevent." The court then refers to a number of cases, and concludes that "these cases prove that, where the state is concerned, the presence of actual injury is not an essential element of chancery jurisdiction—an element without whose presence the court is powerless to act. If this be true in one class of cases, I see no reason why, in an analogous class, requiring a like remedy, the legislature may not provide it." No question as to the right of a trial by jury arose in this case; the penalty for a violation of the act was fixed by the statute at a specified sum for each offense, and it was provided that this might be recovered before a justice of the peace in a summary proceeding, the

injunction proceeding being an alternative remedy.

As just stated, with the exception of *HEDDEN v. HAND* (reported herewith) ante, 1463, the courts have uniformly sustained the constitutionality of statutes conferring upon courts of equity power to abate a public nuisance, although the acts constitute a crime and no property rights are invaded.

**United States.**—See *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, *supra* (injunction against the maintenance of a brewery, an act which was a misdemeanor).

**Alabama.**—*Fulton v. State* (1911) 171 Ala. 572, 54 So. 688 (intoxicating liquor nuisance).

**California.**—*People ex rel. Bradford v. Barbieri* (1917) 33 Cal. App. 770, 166 Pac. 812, approved in *People v. Casa Co.* (1917) 35 Cal. App. 194, 169 Pac. 454 (abatement of bawdyhouses).

**Colorado.**—*Gregg v. People* (1918) — Colo. —, 176 Pac. 483 (abatement of bawdyhouse).

**Illinois.**—See *People ex rel. Thresher v. Smith* (1916) 275 Ill. 256, L.R.A. 1917B, 1075, 114 N. E. 31, *supra*.

**Iowa.**—*Littleton v. Fritz* (1885) 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; *Pontius v. Winebrenner* (1885) 65 Iowa, 591, 22 N. W. 646; *Pontius v. Bowman Bros.* (1885) 66 Iowa, 88, 23 N. W. 277; *Martin v. Blattner* (1886) 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; *State v. Jordan* (1887) 72 Iowa, 377, 34 N. W. 285 (all involving intoxicating liquor sales).

**Maine.**—*Davis v. Auld* (1902) 96 Me. 559, 53 Atl. 118.

**Massachusetts.**—*Carleton v. Rugg* (1899) 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55 (intoxicating liquor sales); *Chase v. Revere House* (1919) 232 Mass. 88, 122 N. E. 162 (bawdyhouse).

**Minnesota.**—*STATE EX REL. WILCOX v. RYDER* (reported herewith) ante, 1449, approved in *State ex rel. Robertson v. Wheeler* (1915) 131 Minn. 308, 155 N. W. 90 (bawdyhouse).

**Mississippi.**—*State v. Marshall* (1911) 100 Miss. 626, 56 So. 792, Ann.

**Cas. 1914A, 484** (intoxicating liquor sales).

**Nebraska.**—State ex rel. English v. Fanning (1914) 96 Neb. 123, 147 N. W. 215, affirmed on rehearing on this point in (1914) 97 Neb. 224, 149 N. W. 413 (bawdyhouse).

**New Hampshire.**—State ex rel. Rhodes v. Saunders (1889) 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588 (liquor nuisance).

**Texas.**—Ex parte Allison (1906) 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870 (gaming); Ex parte Allison (1906) 48 Tex. Crim. Rep. 684, 3 L.R.A.(N.S.) 622, 90 S. W. 492, 13 Ann. Cas. 684 (gaming); Clopton v. State (1907) — Tex. Civ. App. —, 105 S. W. 994 (bawdyhouse); Burckell v. State (1907) 47 Tex. Civ. App. 393, 106 S. W. 190 (liquor nuisance). The procedure in this state authorized a jury trial in equity cases. See comment, *infra*.

**Vermont.**—State v. Murphy (1898) 71 Vt. 127, 41 Atl. 1037 (intoxicating liquor sales; decided under a constitutional provision authorizing the legislature to create a court of chancery with such power "as shall appear for the interest of the commonwealth").

**Wisconsin.**—State ex rel. Atty. Gen. v. Stoughton Club (1916) 163 Wis. 362, 158 N. W. 93 (intoxicating liquor sales).

See *Gragg v. State* (1918) — Okla. —, 175 Pac. 201, *infra*, II. b.

Some courts have not considered whether the acts constituting the nuisance also constitute a crime, but have sustained such statutes without reference to this fact. **MARVEL v. STATE** (reported herewith) ante, 1458.

Some of the statutes do not expressly confer upon courts of equity the power to abate the nuisance, but confer such power upon courts generally. *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. By necessary implication, however, the chancery court was vested with jurisdiction by the statute involved in *Mugler v. Kansas*, for it was provided that an action to "abate and perpetually enjoin" the nuisance may be brought.

A statute making horse racing a

misdemeanor punishable by a fine and imprisonment, and providing also that it shall be competent for any citizen of the state to file an information in a court, whereupon it shall be the duty of the court to issue a temporary restraining order, was sustained over the objection that the act embraced two distinct subjects of legislation, viz., the creation of misdemeanors, prescribing punishment therefor, and the creation of certain civil remedies, authorizing the institution of civil suits and prescribing the rules of procedure therein, in *State ex rel. Duensing v. Roby* (1895) 142 Ind. 168, 33 L.R.A. 213, 51 Am. St. Rep. 174, 41 N. E. 145.

The reasoning by which the courts sustain the constitutionality of such statutes is best expressed in the language of the courts. "It is not easy to perceive," says the court in *Littleton v. Fritz* (1885) 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19, "why the lawmaking power may not authorize the suppression of the saloon nuisance by injunction because no property rights are involved. It was always allowable to enjoin the obstruction of a public highway or a navigable stream by an action in equity at the suit of the public. This was done because it was claimed that a property right in the public was involved, and such proceedings were authorized without the aid of any statute. Such nuisances are detrimental to the public, because they obstruct travel and impede navigation. But the damages to the public are no more susceptible of computation than the injuries to the public by the unlawful maintenance of a saloon." The court in *MARVEL v. STATE* (reported herewith) ante, 1458, admits the proposition that courts of chancery are not authorized to restrain acts constituting a public nuisance unless the act constituting the nuisance affects the civil or property rights or privileges of the public, or the public health; but a distinction is made between the existence of chancery jurisdiction and the condition upon which the jurisdiction will be exercised, and it is stated that the subject-matter of the legislation involved, that is, the abatement of nui-

sances, has always been within the jurisdiction of courts of chancery. See argument, ante.

In *State v. Marshall* (1911) 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434, a constitutional provision gave the chancery court full jurisdiction in all matters of equity. The statute conferred upon the chancery court authority to suppress as a nuisance any place of business where intoxicating liquors were sold unlawfully, and by proper judgment and orders to punish and restrain the violators thereof. In discussing the constitutionality of this statute, the court states that if the chancery court has jurisdiction of this cause it acquires it under the above constitutional provision, and asks the question whether there is any subject of equitable jurisdiction in the controversy at bar. The statute is then cited, and it is stated that "the act under which this suit is brought is not a criminal statute, and does not authorize criminal prosecutions. Criminal proceedings are confined to other statutes and to other courts. The whole of the statute is addressed to the abatement of the nuisance declared by the statute, and the recovery of the penalties provided for its violation. . . . The right to enjoin a public nuisance is no new subject of equitable jurisdiction. 4 Pom. Eq. Jur. § 1349. By the act the unlawful sale or gift of intoxicating liquors is declared to be such, and it was clearly within the constitutional power of the legislature to so declare. Because a person may be prosecuted criminally for maintaining or conducting a public nuisance, this fact cannot prevent the right of an equity court to enjoin, and particularly when the law expressly gives that right. . . . When a business is a public nuisance, no matter how it gets to be such, whether inherently so or made so by law, the court of chancery has power to enjoin."

In answer to the objection that an action in equity, authorized by a statute, cannot be maintained because the legislature has no power to enforce a criminal law by a civil action, it has been said that one maintaining

a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him; and it is stated that it "ought not to be claimed that a statute is unconstitutional which merely provides a remedy which was available without the statute. And it must be remembered that the defendant is not convicted and punished for a crime by the injunction. It belongs to that class of remedies which may properly be provided by statute to aid in the administration of preventive justice. It stays the arm of the wrongdoer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offense and suppress what the law declares to be a nuisance. . . . Defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by a civil process, demands in effect that the court must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. Such rule would not command the respect or approval of anyone." *Littleton v. Fritz* (1885) 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641.

The court, in *People ex rel. Bradford v. Barbieri* (1917) 33 Cal. App. 770, 166 Pac. 812, speaking of an act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation, or prostitution are held to occur, and providing for the abatement and prevention of such nuisances by injunction or otherwise, says: "The Abatement Act is only in furtherance of the policy of the state as established by the sections of the Penal Code above adverted to, and differs in a general sense from those sections only in that, unlike those sections, its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame, as that designation is commonly understood, and other like places, where acts of lewdness and

prostitution are habitually practised and carried on as a business. The act, in other words, represents only the concrete application of the state's power of police, and, preferably to the courts of criminal jurisdiction, invokes the aid of the civil courts as the most certain instrumentality for the suppression of an evil which has been by the legislature deemed of so pernicious a nature, in its effect upon society, as to have actuated that body in denouncing its practice as a public crime. That it is within the competence of legislative authority to invest the civil courts with such power or jurisdiction is an unquestioned and unquestionable proposition, and in assigning to the equity side of our courts the exercise of that power the legislature acted with manifest wisdom, since, by reason of their peculiar constitution and the nature of their remedial power, the equity courts may, with an alacrity equal to the efficacy of the operation of their judicial pronouncements, afford the relief to which the public are entitled under the act under whose provisions this proceeding was initiated and its object consummated in the court below. But the power in a court of equity to abate nuisances, whether public or private, has always been among the most conspicuous of the legal attributes of that tribunal, and the power specially conferred upon it by the act in question is new or novel to that forum in this state, only in the nature of the particular subject to which it is thus authorized to be applied. The remedy provided is as ancient as chancery itself, and the fact that the particular nuisance, against the maintenance or existence of which the act authorizes equity to apply the force of its remedial power, is itself a crime, and a law remedy thus provided for its extinction, is no argument against the legality, or even propriety, of placing it within the cognizance of that jurisdiction. Quite to the contrary, the fact that the act of maintaining the nuisance is itself a crime, which would, if it were not in and of itself already one, class it as a nuisance *per se*, furnishes the most forcible

reason for authorizing the interposition of equity, to the end that its suppression may speedily and effectually be accomplished—a result which experience has demonstrated may not be expected from the courts of criminal jurisdiction, whose proceedings, more from the system itself than from the course of the ministers of the law in conducting those tribunals, are too often characterized by delays and mistrials, and whose judgments involve only the imposition of mere penalties, without, as is more frequently true than not, having the effect of permanently abating the nuisance itself."

The court in *STATE EX REL. WILCOX v. RYDER* (reported herewith) ante, 1449, discusses the jurisdiction of equity independently of the question involved in the constitutional guaranty of a jury trial. See *supra*.

In answer to the objection against issuing a temporary injunction that there could be no injunction until after a conviction for unlawful sale of intoxicating liquor, the court, in *Littleton v. Fritz* (1885) 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641, states that the action in equity is independent of criminal prosecutions, and it is wholly immaterial whether the defendant has been convicted or not; that the law denounces the unlawful maintenance of a saloon or dram shop as a nuisance, and empowers a court of equity to enjoin and prevent it; that, this being so, there is no power to repair the injury which may be done by the maintenance of the nuisance from the commencement of the action until its final decree, and for that reason a temporary injunction is authorized by the law.

As above stated, proceedings in equity are authorized independent of an invasion of property rights. It has been held that a statute which authorizes the action in equity to be brought by any citizen of the county, without a showing that he is especially damaged by the nuisance, is valid. *Littleton v. Fritz* (1885) (Iowa) *supra*; *Davis v. Auld* (1902) 96 Me. 559, 53 Atl. 118; *Ex parte Allison* (1906) 99 Tex. 455, 2 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870. The statute involved in *Carleton*

v. Rugg (1889) 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55, *supra*, provided for equitable jurisdiction upon information filed by the district attorney, or upon the petition of not less than ten legal voters. The petition involved in that case was filed by legal voters.

*b. Deprivation of jury trial.*

The specific attack that has been quite generally directed against statutes conferring jurisdiction upon equity to abate public nuisances is that such a statute violates the constitutional guaranty of a trial by jury. That such a statute does not violate this guaranty is uniformly held, except in the reported case.

United States.—Mugler v. Kansas (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Alabama.—Fulton v. State (1911) 171 Ala. 572, 54 So. 688.

Iowa.—Littleton v. Fritz (1885) 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Pontius v. Winebrenner (1885) 65 Iowa, 591, 22 N. W. 646; Pontius v. Bowman Bros. (1885) 66 Iowa, 88, 23 N. W. 277; Martin v. Blattner (1886) 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; State v. Jordan (1887) 72 Iowa, 377, 34 N. W. 285.

Massachusetts.—Carleton v. Rugg (1889) 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Chase v. Revere House (1919) 232 Mass. 88, 122 N. E. 162.

Minnesota.—STATE EX REL. WILCOX v. RYDER (reported herewith) ante, 1449, approved in State ex rel. Robertson v. Wheeler (1915) 131 Minn. 308, 155 N. W. 90.

Mississippi.—State v. Marshall (1911) 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

Nebraska.—State ex rel. English v. Fanning (1914) 96 Neb. 123, 147 N. W. 215, affirmed on rehearing in (1914) 97 Neb. 224, 149 N. W. 413.

Vermont.—State v. Murphy (1898) 71 Vt. 127, 41 Atl. 1037.

Wisconsin.—State ex rel. Atty. Gen. v. Stoughton Club (1916) 163 Wis. 362, 158 N. W. 93.

See State ex rel. Rhodes v. Saunders

(1889) 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588, *infra*.

A statute authorizing the abatement of a liquor nuisance is held in *Gragg v. State* (1918) — Okla. —, 175 Pac. 201, to provide a proceeding equitable in nature, and to be constitutional, although not providing for a jury trial.

The reasoning upon which such statutes are held not to violate the guaranty of a jury trial is: First, that such statutes do not relate to criminal law; second, that the guaranty of a trial by jury, which is interpreted to mean the jury trial as it existed at common law or at the adoption of the Constitution, and which, as thus interpreted, excludes equitable actions, does not prevent all changes.

As to the first ground: In *Gregg v. People* (1918) — Colo. —, 176 Pac. 483, the court, in answer to the objection that such a statute was unconstitutional because there was no jury trial provided, states: "Keeping a bawdy-house is a statutory offense, and was a crime at common law. If this is a criminal action, defendant was entitled to trial by jury, but it is not a criminal action. It is a civil action in equity, by injunction to restrain defendant from permitting the keeping of such a house on his premises, and to abate the nuisance. The equitable action is in aid of the criminal statute. Anyone subject to prosecution under the Criminal Code for keeping a bawdyhouse, and anyone permitting it to exist on his premises, is subject to injunction under the civil action. Since the purpose of the statute is not the infliction of punishment against the offender, that being left to the criminal law, but the suppression of the unlawful keeping, the claim that keeping a bawdyhouse is a criminal offense under the statute makes no difference; therefore, there can be no successful assault upon the statute because it provides a civil action to enjoin the violation of a criminal statute. The power of the legislature to thus extend the bounds of equity jurisdiction, as well as to prescribe the procedure, is well established." A distinction similar to that made in the Colorado case is made



in *Stead v. Fortner* (1912) 255 Ill. 468, 99 N. E. 680, where it is stated that "a court exercising equitable jurisdiction will not restrain by injunction the commission of illegal or immoral acts, and will not enjoin one engaged in the sale of liquor from making sales which are punishable by the criminal law. But that is not the object of this suit. The law has a double purpose,—to punish the persons committing an illegal act, and to prohibit the use of property for illegal purposes,—and these are separate and distinct. Punishment for the act is a fine or imprisonment, or both, but it is not the sale or keeping for sale of liquor that constitutes the nuisance, but it is the keeping of a place which the general assembly has determined to be dangerous to the health, morals, safety, and welfare of the public." There was, however, in the Illinois case, no question of the constitutionality of the statute conferring equity jurisdiction. In *Carleton v. Rugg* (1889) 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55, the court says that the argument that "by a process in equity for the abatement of an alleged common nuisance," consisting of the illegal sale of intoxicating liquor, the accused are liable to be deprived of their property immunities and privileges otherwise than by the judgment of their peers or the law of the land, is fallacious in that it disregards the distinction "between a proceeding to abate a nuisance, which looks only to the property that, in the use made of it, constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested." A statute referred to, however, provided for a trial by jury in every case in equity in which that mode of trial is deemed by the court to be desirable, and the court states that in cases in equity in

which defendants have a constitutional right to such a trial, the courts secure it to them. *Carleton v. Rugg* is approved in *Chase v. Revere House* (1919) 232 Mass. 88, 122 N. E. 162.

The decision in *State v. Murphy* (1898) 71 Vt. 127, 41 Atl. 1037, was made under a constitutional provision authorizing the legislature to create a court of chancery with such power "as shall appear for the interest of the commonwealth." In answer to the objection that the statute conferring power upon a court of equity to abate a nuisance conflicted with the constitutional guaranty of a trial by jury, the court states that "this claim is made disregarding the distinction between a proceeding to abate a nuisance, which relates simply to the property which, in its use, constitutes the nuisance, and a prosecution of the respondent for the crime of maintaining it. The proceedings are different. A proceeding against the respondent for violating the injunction would be no more a criminal proceeding than would one against him for violating an injunction in a civil proceeding, or in a proceeding in reference to a private nuisance."

In *State v. Marshall* (1911) 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434, a statute declaring that the chancery courts shall have authority to suppress as a nuisance any place of business where there is an unlawful sale of intoxicating liquor, and by proper judgments and orders punish and restrain the violators thereof, is stated not to attempt to confer on the chancery court any power to inflict punishment under the criminal laws of the state.

The court in *Fulton v. State* (1911) 171 Ala. 572, 54 So. 688, regards it as "settled beyond dispute that the legislature may declare any place kept and maintained for the illegal manufacture, sale, or other unlawful disposition of such prohibited liquors to be a common nuisance, and to authorize and provide for the abatement and injunction thereof by a proceeding in a court of equity. Such statutes have uniformly been held not to deprive the citizen of trial by jury, and not

to be an attempt by the legislature to enforce a criminal law by a civil action."

We now come to the second reason. As briefly stated above, it is a general theory that the right of trial by jury that is guaranteed by the Constitutions of the various jurisdictions is the right as it existed at common law, or at the time of the adoption of the particular Constitution. There being no right of trial by jury in an equitable proceeding under the common law, there is no violation of the guaranty in not providing a jury trial in actions in equity under the statutes. And it is held that the guaranty of trial by jury as it existed at common law, or at the time of the adoption of the particular Constitution, does not mean that the right of trial by jury must remain as it was at the adoption of the Constitution in every case. Thus it has been held not necessary "to examine the laws in force at the time the Constitution was adopted, and hold that in every case which was then triable by a jury the right to such trial remains inviolate. Such a construction of the constitutional provision involves too narrow a view of legislative power. It being conceded that equity had jurisdiction in cases of nuisance, we can see no invasion of the rights of the citizen by an act of the legislature extending it to cases where no distinct property right is involved, and we may say here that the distinction sought to be made between nuisances where property rights are involved, and where they are not, is very limited, narrow, and ill-defined." *Littleton v. Fritz* (1885) 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641. Again it has been stated: "But it has not been shown that, for the suppression of nuisances, the power of the legislature to provide a civil remedy by injunction in equity is limited to such kinds of nuisance as had been invented when the Constitution was adopted, or those that had been attacked in that way." *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588.

Under the Texas procedure, in

which law and equity are blended, the right of trial by jury exists, whether the remedy be legal or equitable. On this theory, a statute vesting courts of equity with jurisdiction to enjoin gaming, prohibited by the laws of the state, was sustained in *Ex parte Allison* (1906) 99 Tex. 455, 2 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870. The court says that before the injunction can be made perpetual under the statute it is the right of the defendant to have the jury act upon the facts. Similar holdings appear in *Ex parte Allison* (1905) 48 Tex. Crim. Rep. 634, 3 L.R.A. (N.S.) 622, 90 S. W. 492, 13 Ann. Cas. 684, and *Clopton v. State* (1907) — Tex. Civ. App. —, 105 S. W. 994. It is said in *State ex rel. Rhodes v. Saunders* (1889) 66 N. H. 39, 15 L.R.A. 646, 25 Atl. 588, that, although there is no constitutional right to a jury in a nuisance case, there is no legal reason why the existence of the nuisance may not be tried by jury.

There is such a suggestion in *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, also decided under a statute providing that "all places where intoxicating liquors are manufactured, sold, bartered, or given away, in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery, in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court, having jurisdiction, finding such place to be a nuisance under this section," the same shall be abated. The court states that "the statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was not whether a place kept and maintained for purposes forbidden by the statute was, per se, a nuisance,—that fact being conclusively determined by the statute itself,—but whether the place in question was so kept and maintained. If proof upon that point is not full or sufficient, the court can refuse an injunction or postpone ac-

tion until the state first obtains the verdict of a jury in her favor. In this case it cannot be denied that the defendant kept and maintained a place that is within the statutory definition of a common nuisance."

There is no violation of the requirement that punishment shall not be inflicted without indictment by grand jury, in finding and imprisoning a defendant in the exercise of the power to fine and imprison for contempt in violating an injunction against a nuisance, since the punishment of contempt, whether the proceeding therefor be regarded as criminal or civil, may be had without indictment by a grand jury. *State v. Jordan* (1887) 72 Iowa, 377, 34 N. W. 285. That no constitutional guaranty is denied one who has been enjoined from maintaining a nuisance under a statute authorizing an injunction for this purpose, in refusing a jury trial upon a hearing for contempt for violation of the injunction, has been held. *Nichols v. State* (1913) 8 Okla. Crim. Rep. 550, 129 Pac. 673; *Brunson v. State* (1913) 8 Okla. Crim. Rep. 665, 129 Pac. 1110. The question as it relates to contempt, however, is not within the scope of this discussion.

*c. Due process.*

Such a statute does not violate the due process of law guaranty. *Fulton v. State* (1911) 171 Ala. 572, 54 So. 688; *STATE EX REL. WILCOX v. RYDER* (reported herewith) ante, 1449, approved in *State ex rel. Robertson v. Wheeler* (1915) 131 Minn. 308, 155 N. W. 90; *State ex rel. English v. Fanning* (1914) 96 Neb. 123, 147 N. W. 215, affirmed on rehearing in (1914)

97 Neb. 224, 149 N. W. 413. A proceeding in equity complies with the requirement as to due process of law. *McLane v. Leicht* (1886) 69 Iowa, 401, 29 N. W. 327; *State v. Jordan* (1887) 72 Iowa, 377, 34 N. W. 285; *State ex rel. Atty. Gen. v. Stoughton Club* (1916) 163 Wis. 362, 158 N. W. 93. The court, in *Fulton v. State* (1911) 171 Ala. 572, 54 So. 638, says: "Nor does authorizing such proceedings in a court of equity to abate or enjoin such nuisance, or to authorize the seizure of such property so used for the sole purpose of thus committing crime, deprive the citizen of the right of trial by jury, or take his property for public use without compensation. Courts of equity have always and everywhere been accorded that jurisdiction or power, without violating any constitutional right. Such statutes and such proceedings have always been held to be due process of law, where the owner of the property and the business is given or accorded the right to due notice and to defend in a court of equity, as is usually provided in such courts in similar proceedings."

"Persons dealing in intoxicating liquors have no vested right in a jury trial in order to determine whether or not their place of business is a public nuisance. For such purpose an action in equity constitutes due process of law." *State ex rel. Atty. Gen. v. Stoughton Club* (1915) 163 Wis. 362, 153 N. W. 93.

Such a statute must, however, provide for a hearing and opportunity to defend. *Fulton v. State* (Ala.) *supra*.  
W. A. E.

P. CURTIS KO EUNE COMPANY

v.

MANAYUNK YARN MANUFACTURING COMPANY, Appt.

*Pennsylvania Supreme Court — February 25, 1918.*

(260 Pa. 340, 103 Atl. 720.)

**Corporation — power of president to employ help.**

1. The president of a corporation has authority to contract for the services of an insurance adjuster where the by-laws make him the chief execu-

tive, with general control of its business and affairs, in the recess of the board of directors.

[See note on this question beginning on page 1485.]

**Damages — breach of adjustment contract — salvage.**

2. The amount due an insurance adjuster for breach by the property owner of its contract employing him to aid in the adjustment of a fire loss for a

certain percentage of the adjustment is not affected by the fact that the owner receives money for damaged goods sold by the insurer to a salvage company.

**APPEAL** by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County (Barratt, P. J.) in an action brought to recover under a written contract for payment of a commission upon the amount recovered for services as adjuster of a fire loss. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles B. Joy, for appellant:

Under the by-laws, the vice president had no authority to bind the corporation by the contract in question.

De Forest v. Northwest Townsite Co. 236 Pa. 125, 84 Atl. 674, 241 Pa. 78, 88 Atl. 293; Clarkson v. Keystone Oil Cloth Co. 8 Pa. Dist. R. 593; Pennsylvania R. Co's Appeal, 80 Pa. 265; Patton v. Ligonier Coal Co. 12 Pa. Dist. R. 456; Millward-Cliff Cracker Co's Estate, 161 Pa. 157, 28 Atl. 1072; Twelfth Street Market Co. v. Jackson, 102 Pa. 269.

A benefit derived from an unauthorized contract does not create a liability.

Clarkson v. Keystone Oil Cloth Co. 8 Pa. Dist. R. 593; Twelfth Street Market Co. v. Jackson, *supra*.

A corporation is not bound by the acts or declarations of individual members when not convened or sitting as a board of directors.

Allegheny County Workhouse v. Moore, 95 Pa. 408; 1 Eastman, Priv. Corp. p. 179; Stoystown & G. Turnp. Road Co. v. Craver, 45 Pa. 386; Rittenhouse's Estate, 140 Pa. 172, 21 Atl. 254.

Mr. Albert L. Moise for appellee.

Walling, J., delivered the opinion of the court:

The plaintiff corporation's business is that of an adjuster of fire losses for the assured; defendant is a manufacturing corporation with a factory located at Manayunk. On April 10, 1916, the factory building and contents were badly damaged by fire. Plaintiff's president came the next morning and requested that his company be employed to repre-

sent defendant in the adjustment of its loss with the fire insurance companies. The matter was discussed at length, defendant being represented by its president, vice president, and another director; and a written agreement was made, employing plaintiff to advise and assist defendant in the settlement of the insurance claims for a commission of 5 per cent of the amount of adjustment. Defendant's name was affixed to the agreement by its vice president, in the presence and, as the jury found, by the direction of its president. It was not done at a meeting of the board, although a majority of the directors were present. Plaintiff at once took active steps to carry out the contract; but at a special meeting of defendant's board, held later the same day, said agreement was repudiated by an informal resolution, on the allegation that it had been executed without authority. Of this action plaintiff was promptly notified, and directed to quit the work and surrender the agreement. It was thus prevented from carrying out the contract. Defendant thereafter adjusted the loss at \$35,762.51. Plaintiff sued for breach of said agreement and recovered a verdict for the 5 per cent less the cost of the completion of the contract. Defendant appealed.

Defendant's by-laws provide: "The president shall be the chief executive officer and head of the company, and in the recess of the board of directors shall have the

general control and management of its business and affairs."

This agreement was made during such recess, and the court below

Corporation—  
power of  
president to  
employ help.

held that it was within the power of the president. We agree with that conclusion.

He was vested, not only with the implied authority of the chief executive of the corporation, but also given large express powers. The urgent business of the company then was to adjust the fire loss, and the president might properly employ expert assistance for that purpose, as he might under like circumstances employ an attorney or a collection agency. Here the question is not whether the implied powers of the president would enable him to bind the corporation by such a contract, but whether he could do so by virtue of the authority expressly given him in the by-laws. In our opinion he could; otherwise he would not have "control

and management of its business and affairs." It having been determined as a matter of law that the president had authority to execute the agreement, and as a matter of fact that he did execute it, plaintiff was entitled to recover, as the breach was admitted, and no fraud or bad faith is alleged. So it is not necessary to decide whether plaintiff's case was strengthened by the fact that a majority of defendant's directors were present when the agreement was made.

Under the contract plaintiff was entitled to its commission on the amount of the adjustment, and that was not affected by the fact that \$2,746.50 thereof was paid defendant by the Philadelphia

Damages—  
breach of  
adjustment  
contract—  
salvage.

Waste Company for damaged goods bought of the insurance companies.

The assignments of error are overruled, and the judgment is affirmed.

### ANNOTATION.

#### Power of president of a corporation to employ, control, or discharge agents or subordinates.

- I. Introduction, 1485.
- II. Power virtute officii, 1486.
- III. Power as general manager or active business head, 1488.
- IV. Inference from usage, custom, or habit, 1491.
- V. Effect of by-laws or resolutions, 1492.

##### *I. Introduction.*

No general principle can be deduced from the cases in which this question is presented, as the decision in the particular case must be read in the light of the attitude which the court adopts with respect to the widely divergent theories as to the implied powers of presidents of corporations in general, which range all the way from the strict rule of *Wait v. Nashua Armory Asso.* (1891) 66 N. H. 581, 14 L.R.A. 356, 49 Am. St. Rep. 630, 23 Atl. 77, that the president of a corporation has no implied authority, as such, but, like other agents, he must derive his power from the board of

directors, or from the corporation, and of *Brush Electric Light & P. Co. v. Montgomery* (1896) 114 Ala. 433, 21 So. 960, that, in the absence of evidence touching the scope of the authority of the president of a corporation, it cannot be presumed that he had any other or greater power than any other director, to the rule laid down in *Jones & D. Co. v. Crary* (1908) 234 Ill. 26, 84 N. E. 651, that generally a corporation acts through its president, and through him executes its contracts and agreements, and, in the absence of proof to the contrary, he will be presumed to have authority to represent the corporation, and the assertion in *Hastings v. Brooklyn L. Ins. Co.* (1893) 138 N. Y. 473, 34 N. E. 289, that "the president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify."

The question of the president's power over contracts for the employment of attorneys is not treated herein, but is reserved for future discussion.

## *II. Power virtute officii.*

There are a few cases in which contracts of employment or agency have been held to be within the authority of a president merely by virtue of his office. *Trawick v. Peoria & Ft. C. Street R. Co.* (1896) 68 Ill. App. 156; *Model Clothing House v. Hirsch* (1908) 42 Ind. App. 270, 85 N. E. 719; *White v. Elgin Creamery Co.* (1899) 108 Iowa, 522, 79 N. W. 283; *Hardy v. Tittabawassee Boom Co.* (1883) 52 Mich. 45, 17 N. W. 235; *Teele v. Consolidated Amusement Co.* (1907) 102 N. Y. Supp. 666. And see *infra*, V., *Hurricane Twp. Gravel Road Co. v. Bradley* (1918) — Mo. App. —, 204 S. W. 1113.

To the contrary are *Northwestern Packing Co. v. Whitney* (1907) 5 Cal. App. 105, 89 Pac. 981; *Great Southern Acci. & Fidelity Co. v. Guthrie* (1913) 13 Ga. App. 288, 79 S. E. 162; *Johnson v. Sage* (1896) 4 Idaho, 758, 44 Pac. 641; *Jackson Brewing Co. v. Canton* (1907) 118 La. 823, 43 So. 454; *Mathias v. White Sulphur Springs Asso.* (1897) 19 Mont. 359, 48 Pac. 624; *Wait v. Nashua Armory Asso.* (1891) 66 N. H. 581, 14 L.R.A. 256, 49 Am. St. Rep. 630, 23 Atl. 77.

As between corporation and employee, the making of contracts of employment was said to be within the scope of the president's authority in *Model Clothing House v. Hirsch* (1908) 42 Ind. App. 270, 85 N. E. 719.

And in *Hardy v. Tittabawassee Boom Co.* (1883) 52 Mich. 45, 17 N. W. 235, the president and superintendent of a boom company were held to have power to hire the necessary laborers to carry on the business except as restricted by the directors.

And the president of a corporation was held to have the power to employ a cashier and bookkeeper for the corporation for the term of one year in *Trawick v. Peoria & Ft. C. Street R. Co.* (Ill.) *supra*. See also *infra*, V., *Arkadelphia Lumber Co. v. Asman* (1907) 85 Ark. 568, 107 S. W. 1171;

*Carney v. New York L. Ins. Co.* (1900) 162 N. Y. 453, 49 L.R.A. 471, 76 Am. St. Rep. 847, 57 N. E. 78.

And in *Teele v. Consolidated Amusement Co.* (1907) 102 N. Y. Supp. 666, the president of a corporation was held to have authority to employ accountants to go over the company's books. See also *infra*, V., *Warfield v. Wire Wheel Corp.* (1918) 184 App. Div. 687, 172 N. Y. Supp. 890.

The fact that the services of an accountant in auditing the corporate books were rendered to and accepted by the corporation with the knowledge and consent of its president, apparently in the ordinary course of its business, is sufficient evidence of the authority of the president of the corporation to contract for such services. *Reardon v. Richmond Land Co.* (1913) 21 Cal. App. 357, 131 Pac. 894.

But the president of an armory corporation has no implied power to employ architects to prepare plans and specifications for a proposed armory. *Wait v. Nashua Armory Asso. (N. H.) supra*.

And the president of a corporation organized to acquire title to a town site and to buy lands and build buildings cannot, merely by virtue of his office, be deemed to have had implied authority to act in entering into a contract with an architect to draw plans for an expensive new building for the company. *Mathias v. White Sulphur Springs Asso.* (1897) 19 Mont. 359, 48 Pac. 624. The court pointed out that the circumstances did not show that the president was in the active conduct and management of the business of the corporation, as in the case of *Ceeder v. H. M. Loud & Sons Lumber Co.* (1891) 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575 (*infra*, III.), or that he had full control of its business, or was the principal stockholder in the company, as in *Crowley v. Genesee Min. Co.* (1880) 55 Cal. 273, 4 Mor Min. Rep. 71 (*infra*, III.), that, as president, he had express authority to contract for plans for new buildings to be erected without first obtaining the sanction of the board of directors, as in *Siebe v. Hendy Mach. Works* (1890) 86 Cal. 390, 25 Pac. 14,

or that he had general authority to act for the board of trustees, or that it was the president's custom to exercise like powers in the face of the public, or that the company held him out to the public as possessing the power to order plans for new buildings, or to contract for the same, or that the corporation or any director thereof either knew of, or received and retained the plans, or in any manner availed itself of the work or ratified the president's act. Referring to *Wait v. Nashua Armory Asso. (N. H.) supra*, and *Wilson Sewing Mach. Co. v. Boyington (1874) 73 Ill. 534*, both of which were characterized as suits to recover for services as architects in drawing plans, in which the defense was the lack of authority in the president to bind the corporations, the court said that the supreme court of New Hampshire held to the strict doctrine that no such authority was incident to the office of president, while the supreme court of Illinois adopted a somewhat contrary and more liberal view, and added: "But a careful examination of the facts in the Illinois case discloses that it appeared on the trial that the president was the executive manager of the corporation and principal stockholder thereof, and that he, together with another man, also a manager and superintendent, ordered the plans for the corporation."

The president of a creamery company will be presumed, in the absence of evidence to the contrary, to have had authority to empower an agent to contract to pay persons furnishing milk a specified price per pound for the butter made therefrom. As the head of the corporation which of necessity must act through some agency, the natural inference is that the president had been endowed with the power to direct its operation and manage the transactions for which it was organized. *White v. Elgin Creamery Co. (1899) 108 Iowa, 522, 79 N. W. 283.*

The president and secretary of a mining corporation have no power to appoint an agent "to take charge, manage, lease, and make such settle-

ments, and collect and pay out all moneys coming to this company that are necessary for the economical management of this company's affairs," without being themselves authorized so to do by order or resolution of the board of directors, duly adopted by said board. *Johnson v. Sage (1896) 4 Idaho, 758, 44 Pac. 641.*

The president of a corporation whose business is, by Cal. Civ Code, § 305, to be exercised, conducted, and controlled by a board of directors, has no authority by virtue of his office, to make a contract for the corporation, giving certain commission merchants the handling "of all the salted salmon" packed by the corporation during the year. *Northwestern Packing Co. v. Whitney (1907) 5 Cal. App. 105, 89 Pac. 981.*

The president of a corporation has no authority, as such, to appoint agents to sell stock for the corporation. *Great Southern Acci. & Fidelity Co. v. Guthrie (1913) 18 Ga. App. 288, 79 S. E. 162.*

The president of a railroad company has no implied authority to give a power of attorney for the sale of its bonds. *Titus v. Cairo & F. R. Co. (1874) 37 N. J. L. 98.*

The president of a corporation may be presumed to have had the power to enter into negotiations looking to a sale of real property owned by it, and, as incidental thereto, procuring agencies to make the negotiations effective, —especially where he has treated the corporation as his individual property. *Skinner Mfg. Co. v. Douville (1907) 54 Fla. 251, 44 So. 1014.*

Prima facie the president of a private corporation has authority to employ an agent to effect a sale of its lands, and if the corporation, in a suit against it by such agent to recover his commissions for effecting a sale under such employment, desires to show that the president has no authority to employ him for that purpose, it is defensive matter within its peculiar knowledge that it must prove if it desires advantage therefrom. *McGehee Lumber Co. v. Tomlinson (1913) 66 Fla. 536, 63 So. 919.*

But where the charter of a corpora-

tion provides that all its corporate powers shall be exercised, and all its business managed by a board of directors, and that the board shall define the duties of the president and other officers, and it does not appear that the duties of those officers have ever been defined, the president has no authority to employ a broker for the purchase of real estate, nor to delegate any such authority to the secretary. *Jackson Brewing Co. v. Canton* (1907) 118 La. 823, 43 So. 454.

And the president of a manufacturing company could not be presumed to have had authority to employ brokers on behalf of the corporation, to sell a mill and quarry which were a part of the corporation's manufacturing equipment. *McCorry v. John C. Wiarda & Co.* (1912) 149 App. Div. 863, 134 N. Y. Supp. 667.

The president of a railway corporation has no implied power to contract in its behalf for services in procuring contractors to build the railroad. *Risley v. Indianapolis, B. & W. R. Co.* (1874) 1 Hun (N. Y.) 202.

The president of a construction company would have to be expressly authorized before he could bind the corporation by an agreement to pay a man engaged in the life insurance business, for unspecified personal services rendered and to be rendered, one half of the profits to arise out of the building of a bridge for a municipality in case the corporation should be awarded the contract, which called for the expenditure of millions of dollars. *Chard v. Ryan-Parker Constr. Co.* (1918) 182 App. Div. 455, 169 N. Y. Supp. 622.

The president of a corporation has no legal power or authority to deplete the coffers of the corporation by instructing the treasurer to refuse to accept from a subscriber to the capital stock the payment of his subscription. *Potts v. Wallace* (1892) 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196.

It will not be assumed that the president of a corporation had authority to contract to pay for unearned wages of an employee, or to waive performance of the latter's con-

tract of employment. *Wray v. Tilden Saw Co.* (1917) 198 Mich. 461, 164 N. W. 545.

A corporation which has employed the owner of certain inventions as general manager is not bound by the promise of its president, upon discharging him, that he would be paid the royalties provided for in the contract of employment in case of the termination of the contract, where there is no evidence that the president was authorized by the company to make this promise, or to put the construction upon the contract that had been made. *Johnson v. Union Switch & Signal Co.* (1891) 27 Jones & S. 169, 13 N. Y. Supp. 612.

The president of a railway company has no authority, as such, to promise an employee that the company, which had issued all its stock and bonds, would give him 2 per cent of its bonds and \$25,000 worth of its stock if he would decline an offer of other employment and remain in its service until the road should be sold. *Minshull v. New Jersey Terminal R. Co.* (1908) 76 N. J. L. 684, 71 Atl. 663.

### *III. Power as general manager or active business head.*

Where the president is also the general manager or active business head of the corporation there is practically no dissent from the view that, ordinarily, contracts of employment or agency are within the scope of his authority.

**United States.**—*Egbert v. Sun Co.* 126 Fed. 568; *Bassick v. Aetna Explosives Co.* (1917) 246 Fed. 974.

**Arizona.**—*Little Butte Consol. Mines Co. v. Girard* (1912) 14 Ariz. 9, 123 Pac. 309.

**Arkansas.**—*Arkansas Amusement Asso. v. Higgins* (1910) 96 Ark. 493, 132 S. W. 635.

**California.**—*Crowley v. Genesee Min. Co.* (1880) 55 Cal. 273, 4 Mor. Min. Rep. 71; *Pettibone v. Lake View Town Co.* (1901) 134 Cal. 227, 66 Pac. 218; *Hoffman v. Guy M. Rush Co.* (1915) 27 Cal. App. 167, 149 Pac. 177.

**Connecticut.**—*Vincent v. S. Alexander's Sons Co.* (1912) 85 Conn. 512, 84 Atl. 84.



**Iowa.**—*Seevers v. Cleveland Coal Co.* (1916) 179 Iowa, 235, 159 N. W. 194.

**Michigan.**—*Ceeder v. H. M. Loud & Sons Lumber Co.* (1891) 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; *Neal v. Novelty Leather Works* (1917) 198 Mich. 598, 165 N. W. 681.

**New York.**—*Oakes v. Cattaraugus Water Co.* (1894) 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461; *Warfield v. Wire Wheel Corp.* (1918) 184 App. Div. 687, 172 N. Y. Supp. 390; *Lee v. Pittsburgh Coal & Min. Co.* (1877) 56 How. Pr. 373.

**Pennsylvania.**—*P. CURTIS Ko EUNE Co. v. MANAYUNK YARN MFG. Co.* (reported herewith) ante, 1483.

**Wisconsin.**—*McElroy v. Minnesota Percheron Horse Co.* (1897) 96 Wis. 317, 71 N. W. 652; *Meating v. Tigerton Lumber Co.* (1902) 113 Wis. 379, 89 N. W. 152.

The president of a small business corporation in charge of its business is presumed to have authority to employ the necessary help. *Vincent v. S. Alexander's Sons Co.* (Conn.) supra.

The president and secretary in the active control and management of the business of the corporation may employ the necessary help to carry it on. *Little Butte Consol. Mines Co. v. Girard* (Ariz.) 123 Pac. 309.

A contract of employment made on behalf of a corporation by the president, who exercised very general authority in the conduct of the corporation's affairs, binds the corporation,—especially where, upon the faith of the contract, the employee gave up his former position to accept employment under such contract. *Egbert v. Sun Co.* (Fed.) supra.

An admission that a person was president, superintendent, and general manager of a mining company, with full control of its business, is sufficient evidence of his authority to make a contract for work, labor, and service upon the property of the corporation. It is unnecessary to show any vote or other corporate act. *Crowley v. Genesee Min. Co.* (Cal.) supra.

Evidence that the president of a  
5 A.L.R.—94.

lumber company had for two years been the acting head of the corporation would justify a jury in finding that he had authority to hire a cook for a logging camp operated by the corporation. *Meating v. Tigerton Lumber Co.* (Wis.) supra.

The president of a lumber company who is in the active conduct and management of the business must be deemed to have the authority to employ sawyers for the season, there being no evidence of any limitation upon the president's power with respect to the employment of men, or of any conferring of authority upon any particular person with reference to such employment. *Ceeder v. H. M. Loud & Sons Lumber Co.* (Mich.) supra.

An amusement corporation was held liable in *Arkansas Amusement Asso. v. Higgins* (Ark.) supra, to a carpenter, for work done by him at the request of the president of the corporation, upon a theater operated in the name of such corporation, the evidence warranting a finding that the corporation had permitted itself to be held out as the owner and operator of the theater, and that the president was its general manager with authority to do all that was necessary in conducting the business undertaken.

The president and general manager and active head of a corporation, as well as majority stockholder, could employ an auditor or accountant to go over the company's books, where they were in bad shape through lack of system. *Warfield v. Wire Wheel Corp.* (1918) 184 App. Div. 687, 172 N. Y. Supp. 390.

The employment of a general agent is within the scope of the authority of the president and general manager of a manufacturing corporation. *Neal v. Novelty Leather Works* (1917) 198 Mich. 598, 165 N. W. 681.

The president who is the general manager of a coal and mining company, the business of which was mining, shipping, and selling coal, is presumed to have authority to create an agency for the sale of the coal. *Lee v. Pittsburgh Coal & Min. Co.* (1877) 56 How. Pr. (N. Y.) 373.

The president of a mining company, who is permitted for years to hold himself out to the world as the general manager and director of its business, has authority to appoint an agent for the sale of coal at a distance from the company's headquarters and give him authority to indorse paper taken on the sale of coal as an agent of the company. *Marine Bank v. Butler Colliery Co.* (1889) 23 N. Y. S. R. 319, 5 N. Y. Supp. 291.

The president and general manager of a corporation engaged in selling real property on commission is acting within the scope of his authority in employing an agent to advertise and to solicit prospective buyers, and in agreeing for the corporation as to payment for such services. *Hoffman v. Guy M. Rush Co.* (1915) 27 Cal. App. 167, 149 Pac. 177.

The president and general manager, having also direct authority from the person who, with himself, owned practically all the capital stock, to sell certain lands owned by the corporation situated some distance from its main office, has the authority to use the ordinary means to find a purchaser, including the appointment of someone to do so. *Seever v. Cleveland Coal Co.* (1916) 179 Iowa, 235, 159 N. W. 194.

See also *supra*, II., *Skinner Mfg. Co. v. Douville* (1907) 54 Fla. 251, 44 So. 1014; *infra*, V., *Pettibone v. Lake View Town Co.* (1901) 134 Cal. 227, 66 Pac. 218.

Power to employ real estate agents to negotiate an exchange of farm property for city real estate was within the apparent authority of the president of a corporation, where he owned all the stock except six shares nominally held by relatives or employees who made up the board of directors, and where the corporate affairs for a number of years had been conducted by the president and his predecessor in office without any apparent objection or proceedings by its stockholders or directors, except one meeting to fill vacancies in the board of directors, and where for upwards of two years negotiations for the sale of the corporate property through such real es-

tate agents had been conducted by the president or his predecessor as substantially the only persons interested. *McElroy v. Minnesota Percheron Horse Co.* (1897) 96 Wis. 317, 71 N. W. 652.

The employment of brokers to sell explosives for a company engaged in their manufacture, and an agreement to sell gun cotton at a reasonable and fair market price and allow the difference to an arm's-length negotiator for his profit or compensation, is an ordinary incident of the business, and, as such, is within the apparent power of the corporation acting through its president, who was charged with the management of the corporation. *Bassick v. Aetna Explosives Co.* (1917) 246 Fed. 974.

Where the acting president of a railroad company was empowered to effect the sale of old rails, he has presumed authority to promise commissions on the sale thereof. *Northern C. R. Co. v. Bastian* (1859) 15 Md. 494.

The president of a water company in full charge of its business has authority to contract for the corporation to pay for services rendered in securing right of way, hydrant rental, placing investments, etc. *Oakes v. Cattaraugus Water Co.* (1894) 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461.

But the president and general manager of a corporation has no authority to sell treasury stock, or to determine the price for which such stock is to be sold, or to employ an agent to find purchasers for the stock. Such transactions are not within the scope of the business which either a president or a general manager was, by virtue of his office, qualified to transact for the corporation. *Rattray v. Wickersheim Implement Co.* (1913) 36 Cal. App. 253, 171 Pac. 964.

Contracting to pay commissions for the sale of additional stock in order to secure fresh capital is not an ordinary transaction of a corporation within the implied powers of the president, acting as general manager. *Re Continental Engine Co.* (1916) 148 C. C. A. 74, 234 Fed. 58.

The president of an oil cloth com-

pany, even if intrusted as its chief officer with the management of its business, has no power without authority from the board of directors to employ a person to sell capital stock of the corporation on commission. *Clarkson v. Keystone Oil Cloth Co.* (1899) 23 Pa. Co. Ct. 189. "It may be," said the court, "that the president of this company exercised such extensive powers in the management of its affairs that the authority to sell stock through agents appointed by him vested in him; but there is no presumption in favor of any such inference in the absence of a declaration showing what acts he was accustomed to do with the approval and acquiescence of his board of directors."

The president of a corporation, even if authorized to act as superintendent or general manager of the company in the conduct of its ordinary and routine business, possessed no power, without express authority from the directors, to employ a person to render services to the company in and about the business of making and selling its mortgage bonds. *East Cleveland R. Co. v. Everett* (1900) 19 Ohio C. C. 205, 10 Ohio C. D. 493, disapproving (1897) 15 Ohio C. C. 181, 8 Ohio C. D. 210, *infra*, V.

Where the president of a corporation has power to hire employees and conduct the corporation's business he may increase the salary of such employees in order to retain them in the corporation's employ. *Model Clothing House v. Hirsch* (1908) 42 Ind. App. 270, 85 N. E. 719.

But see *infra*, V., *McGowan v. Finola Mfg. Co.* (1913) 120 Md. 335, 87 Atl. 694.

An agreement by an explosives company to pay \$300,000 for services in partly assisting to close a well-developed negotiation involving \$6,400,000 is nothing more or less than a gift which neither the president charged with the management of the business nor the board of directors had any power to authorize. *Bassick v. Aetna Explosives Co.* (1917) 246 Fed. 974.

It is not within the apparent power of the president charged with the management of an explosives com-

pany to arrange with a broker to be kept in the dark as to the market price of a commodity, for the sale of which the broker is to be compensated by "overage." *Ibid.*

An oral contract for the employment of an advertising manager for a year, which was void under the Statute of Frauds because it was to begin at a future date, may be ratified and renewed after such date by the president and general manager of the employing company, who made the first invalid contract. *San Antonio Light Pub. Co. v. Moore* (1907) 46 Tex. Civ. App. 259, 101 S. W. 867.

The president of a corporation who is in fact as well as in name its chief executive officer, and who hired a woman to solicit business for the corporation, she taking orders from no one but him, and receiving pay for her services from the corporation, could bind the corporation by a letter taking her oral contract of employment out of the Statute of Frauds. *Truskett v. Rice Bros. Live Stock Commission Co.* (1915) — Mo. App. —, 180 S. W. 1048.

#### IV. Inference from usage, custom, or habit.

The authority of the president of a small business corporation in charge of its business to employ the necessary help may arise from his having assumed and exercised the power under circumstances from which his agency will be implied. *Vincent v. S. Alexander's Sons Co.* (1912) 85 Conn. 512, 84 Atl. 84.

The mere circumstance that the president of a corporation has once had some repairs or remodeling done by an architect upon a building belonging to the company is not enough to warrant the presumption that he had the power to act as its managing agent in entering into a contract with an architect to draw plans for an expensive new building for the company. *Mathias v. White Sulphur Springs Asso.* (1897) 19 Mont. 359, 48 Pac. 624.

The president of a corporation and its secretary, who, with two others, constituted the directors and stockholders, must be deemed to have had

authority to bind the corporation by employing a real estate broker for the sale of real property, even though there was no resolution of the board of directors authorizing the officers to do so, where the other two directors know that the broker was acting in the matter and made no objection, and where the contract of sale was ratified in writing by all of the directors and stockholders. *Merigold v. Twentieth Century Theater & Amusement Co.* (1916) 199 Ill. App. 285.

See also, *supra*, III., *McElroy v. Minnesota Percheron Horse Co.* (1897) 96 Wis. 317, 71 N. W. 652; *infra*, V., *Pettibone v. Lake View Town Co.* (1901) 134 Cal. 227, 66 Pac. 218.

*V. Effect of by-laws or resolutions.*

The president may, of course, be given authority over contracts of this character by corporate by-law or by resolution of the board of directors.

**United States.**—*Coulter v. Independent Order of Foresters* (1909) 166 Fed. 805; *Fleitmann v. John M. Stone Cotton Mills* (1911) 108 C. C. A. 444, 186 Fed. 466; *Quicksilver Min. Co. v. Anderson* (1917) 157 C. C. A. 363, 245 Fed. 67.

**Alabama.**—*Alabama Securities Co. v. Dewey* (1908) 156 Ala. 530, 47 So. 55.

**Arkansas.**—*Arkadelphia Lumber Co. v. Asman*, 85 Ark. 568, 107 S. W. 1171.

**California.**—*Pettibone v. Lake View Town Co.* (1901) 134 Cal. 227, 66 Pac. 218.

**Colorado.**—*Arapahoe Cattle & Land Co. v. Stevens* (1889) 18 Colo. 534, 22 Pac. 823.

**Louisiana.**—*Ballard v. Thompson* (1916) 139 La. 267, 71 So. 505.

**Missouri.**—*Hurricane Twp. Gravel Road Co. v. Bradley* (1918) — Mo. App. —, 204 S. W. 1113.

**New York.**—*Bogart v. New York & L. I. R. Co.* (1907) 118 App. Div. 50, 102 N. Y. Supp. 1093, affirmed in (1908) 191 N. Y. 550, 85 N. E. 1106.

**Pennsylvania.**—*P. CURTIS KO EUNE Co. v. MANAYUNK YARN MFG. Co.* (reported herewith) ante, 1483.

And it is not necessary, in order to confer such power upon him, that it should be delegated at a meeting of all the directors, or that any record

thereof should be made. The only essential thing is that he have authority from the majority of the board of directors. There is no reason why such authority cannot be given orally as well as in writing. *Mobile, J. & K. C. R. Co. v. Hawkins* (1909) 163 Ala. 565, 51 So. 37.

Conversely, his authority may be limited by the action of the directors. *McGowan v. Finola Mfg. Co.* (1913) 120 Md. 335, 87 Atl. 694; *Humphrey v. Onaway-Alpena Teleph. Co.* (1918) — Mich. —, 170 N. W. 1; *Collier v. Consolidated R. Lighting & Refrigerating Co.* (1904) 70 N. J. L. 313, 57 Atl. 470.

A requested instruction to the effect that directors alone could manage the corporate business is properly refused in an action against the corporation for work and labor done, where the by-laws of the corporation provide that the president has power to appoint competent persons to act as servants and employees of the company. *Alabama Securities Co. v. Dewey* (1908) 156 Ala. 530, 47 So. 55.

A resolution of the board of directors of a boom company "that the wages for laboring men employed by the boom company for the present season be started at \$2 per month higher than was started at last year, and that the men signing contracts to remain during the entire season have added, at the close of the season, 15 per cent to their wages," is in no sense a limitation upon the powers of the corporation by its president or superintendent to employ other laborers or persons than those intended or alluded to therein, upon such terms as they may think necessary for the interest of the company. *Hardy v. Tittabawassee Boom Co.* (1883) 52 Mich. 45, 17 N. W. 235.

A resolution of the board of directors of a road company, making its president "superintendent in charge of the construction of the road" with authority to act for the board in all matters pertaining to the details of the work, is sufficient to justify the submission to the jury of the question whether he had authority to employ a person to furnish teams for scraping,

apart from the fact that the president, as such, was clothed with authority to do such acts as are customarily and usually done by presidents of similar corporations. *Hurricane Twp. Gravel Road Co. v. Bradley* (1918) — Mo. App. —, 204 S. W. 1118.

The authority to employ a sales manager by the year is conferred upon the president of a corporation by a by-law providing that "the president shall be the chief executive officer of the company. It shall be his duty to direct and control the affairs of the company and to exercise the same supervising power over all departments that is usually exercised by the presiding officer of incorporated associations. All instructions emanating from him shall be taken by subordinates as having received the sanction of the directory," although, under another by-law, all officers other than the president, vice president, secretary, and treasurer "shall hold their positions at the pleasure of the directory." *Arkadelphia Lumber Co. v. Asman* (Ark.) supra.

A contract for the employment during life of a person to act in a medical capacity for a life insurance company is not within the authority conferred upon the president and actuary by a by-law empowering them to "appoint, remove, and fix the compensation of each and every person, except agents, employed by the company," where the members of the board of trustees, to whom the management and control of the corporation are given, hold office only for four years each. *Carney v. New York L. Ins. Co.* (1900) 162 N. Y. 453, 49 L.R.A. 471, 76 Am. St. Rep. 347, 57 N. E. 78.

The employment of an exclusive local sales agent is within the authority of the president of a corporation engaged in selling lands, where such president was empowered by general resolution of the board of directors to make conveyances, and, without objection from anyone, personally conducted the business of the corporation, executing deeds, making land contracts, delivering them, and collecting the purchase price. *Pettibone v. Lake*

*View Town Co.* (1901) 134 Cal. 227, 66 Pac. 218.

A provision in the by-laws that the president shall "make all contracts for the company" empowers him to enter into a contract on behalf of the corporation, by which, in consideration of a subscription to the capital stock, the subscribers are constituted the exclusive selling agents for the corporation, and the corporation is given the right to terminate the agency on sixty days' notice, but only on condition of repurchasing such stock at par. *Fleitmann v. John M. Stone Cotton Mills* (1911) 108 C. C. A. 444, 186 Fed. 466.

The president of a manufacturing corporation who, under its by-laws, was the chief executive officer and head of the company, with "general control and the management of its business and affairs" in the recess of the board of directors, may, during such recess, employ an insurance adjuster to adjust a loss by fire of the corporation's factory building and contents. *P. CURTIS KO EUNE Co. v. MANAYUNK YARN MFG. Co.* (reported herewith) ante, 1483.

A by-law provision that the appointment and discharge by the president of agents and employees shall be subject to the approval of the board of directors does not prevent the president, who was also general manager and active head of a corporation as well as majority stockholder, from employing by a contract terminable at will, at a salary exceeding his own, an auditor or accountant to go over the company's books, which were in bad shape through lack of system. *Warfield v. Wire Wheel Corp.* (1918) 184 App. Div. 687, 172 N. Y. Supp. 390.

But conceding that, under the generally recognized powers of the president and general manager of a corporation to obligate it in the transaction of its usual and ordinary business arising in the course of its conduct, such president had authority to hire an expert accountant to conduct a special audit of the financial affairs of the corporation, his powers in that particular were evidenced by a resolution of the board of directors, fixing

the conditions and duration of such employment. *Humphrey v. Onaway-Alpena Teleph. Co.* (1918) — Mich. —, 170 N. W. 1.

The president and secretary of a cattle and land company, having been empowered by resolution of the board of directors to purchase ranches with the horses and stock thereon, have power to give stock of the company as a commission for procuring a loan to make such purchase. *Arapahoe Cattle & Land Co. v. Stevens* (1889) 13 Colo. 534, 22 Pac. 823.

A resolution of the board of directors of a mining corporation that the president who was the directing head of the corporation should furnish a complete specification showing itemized costs, possible earnings, etc., of a proposed electric railway designed to reduce the expenses of the corporation in the matter of hauling its ores and supplies, and incidentally of earning money out of passenger traffic, gave him at least implied authority to employ a person to secure the necessary rights of way and franchises and subscriptions to the capital stock, even though the construction of the railway may have been beyond the charter powers of the corporation. *Quicksilver Min. Co. v. Anderson* (1917) 157 C. C. A. 363, 245 Fed. 67.

The president and secretary of a corporation cannot be said to have been authorized to sell the corporation mortgage bonds and, a fortiori, were not empowered to employ another person to do so because the board of directors, after entering upon the records its approval of the action of the executive committee in negotiating, under its special authority and direction, a portion of such bonds, and after giving to the executive committee full authority to sell all the bonds that remained undisposed of at a specified price, adopted a resolution by which authority was expressly conferred upon the president and secretary to make, execute, and deliver the bonds so sold by the executive committee to the purchaser, and further authorized the said president and secretary "to dispose of" said bonds and use the proceeds realized there-

from for the purpose of canceling an existing corporate mortgage. *East Cleveland R. Co. v. Everett* (1900) 19 Ohio C. C. 205, 10 Ohio C. D. 493, disapproving (1897) 15 Ohio C. C. 181, 8 Ohio C. D. 210, where such resolution was held to be a confirmation of the previous action of such president and secretary in employing a broker to negotiate a sale of such bonds.

A person who is the president and treasurer of a corporation and the owner of nearly all its stock, and who, as president, had, under the by-laws, the general and active management of the business, is not authorized to bind the corporation to pay a commission for the sale of his own stock. *Demarest v. Spiral Riveted Tube Co.* (1904) 71 N. J. L. 14, 58 Atl. 161.

Where the board of directors of a business corporation elects a president and authorizes him "to appoint any and all managers, clerks, and other employees deemed necessary by him for the work of the corporation, and to fix salaries and compensation of all parties so employed," the president has the power under the authority so conferred to fix the compensation of any officer within such reasonable limits as his judgment may suggest. *Ballard v. Thompson* (1916) 139 La. 267, 71 So. 505.

But the power to fix the salary of all officers and employees of a corporation having been actually exercised by the board of directors as to the corporate secretary, and the amount to be received by him for the performance of his duties as an officer of the company having been thus designated, any attempt to augment such salary by the president alone, without the knowledge or consent of the board, must be held ineffective, although the secretary and president together own a majority of the corporate stock, and the president has practically the entire charge of the business. *McGowan v. Finola Mfg. Co.* (1913) 120 Md. 335, 87 Atl. 694.

The president of a railway company has authority to direct its consulting engineer, appointed by the board of directors at a salary thereafter to be fixed by the board, to perform serv-

ices for the company in connection with the solution of certain engineering problems, and thus bind the company to pay the reasonable value of his services, where the by-laws provide that the president shall be the chief executive officer and head of the company in all its operations and shall supervise all other officers and all departments of the road in every respect. *Bogart v. New York & L. I. R. Co.* (1907) 118 App. Div. 50, 102 N. Y. Supp. 1093, affirmed in (1908) 191 N. Y. 550, 85 N. E. 1106.

The supreme chief ranger or president of a fraternal order who had employed a state manager or deputy ranger for a term which was to expire at the next meeting of the order's supreme court may remove such official in the interests of the order prior to that time, where the laws of the order give the supreme chief ranger general superintendence and management of

its affairs, with power to appoint from time to time such subordinates as the interest of the order may require, who shall perform such duties as may be assigned to them by him or by the executive council, and, although declaring that the persons employed by the chief ranger shall receive a salary or allowance "from time to time," determined by him or by the executive council, provide that he shall have power to remove and discharge from time to time any person he may so have appointed or employed. *Coulter v. Independent Order of Foresters* (1909) 166 Fed. 805.

The acts of a de facto board of directors of a corporation in employing a general sales agent could not be annulled by the president alone. *Collier v. Consolidated R. Lighting & Refrigerating Co.* (1904) 70 N. J. L. 313, 57 Atl. 470. W. W. N.

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**T. W. PHILLIPS GAS & OIL COMPANY, Appt.,  
v.**

**HILLIS LINGENFELTER et al., School Directors of Oliver Township,  
Jefferson County, et al.**

*Pennsylvania Supreme Court — January 4, 1910.*

(262 Pa. 500, 105 Atl. 888.)

**Schools — deed to district — effect of words "for school purposes only."**

The insertion in a deed of a parcel of land to a school district upon which to erect a schoolhouse of the words "for school purposes only" does not restrict the title of the district or prevent its leasing the property for the production of oil and gas.

[See note on this question beginning on page 1498.]

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**APPEAL** by plaintiff from a decree of the Court of Common Pleas for Jefferson County (Corbet, P. J.) dismissing a bill filed to enjoin the drilling of an oil and gas well on a certain tract of land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. C. Benscoter and T. C. Campbell, for appellant:

Where the owner of a larger tract of land conveys a small portion thereof to a school district "for school purposes only," the deed does not convey the oil and gas under the land conveyed.

*Henderson v. Hunter*, 59 Pa. 335; *Slegel v. Lauer* (*Slegel v. Herbine*) 148

Pa. 243, 15 L.R.A. 547, 23 Atl. 996; *Lazarus v. Morris*, 212 Pa. 128, 61 Atl. 815; *Mulligan v. School Dist.* 241 Pa. 206, 88 Atl. 362; *Kirk v. King*, 3 Pa. St. 436; *Scheetz v. Fitzwater*, 5 Pa. 126; *Rankin Regular Baptist Church v. Edwards*, 204 Pa. 216, 53 Atl. 770; *Riggs v. New Castle*, 229 Pa. 490, 140 Am. St. Rep. 733, 78 Atl. 1037; *Beaver*

Twp. School Dist. v. Burdick, 51 Pa. Super. Ct. 496; Connellsville & State Line R. Co. v. Markleton Hotel Co. 247 Pa. 565, 93 Atl. 635, Ann. Cas. 1916E, 1213; Curtis v. Board of Education, 43 Kan. 138, 23 Pac. 98.

Messrs. W. L. McCracken, W. T. Darr, and George J. Wolfe, for appellees:

The word "only," or the phrase "for school purposes only," is not a limitation of the estate, but expressive of the purpose for which school districts might acquire land under the act in force when the grant was made.

Griffitts v. Cope, 17 Pa. 96; Brendle v. German Reformed Congregation, 33 Pa. 415; Seebold v. Shitler, 34 Pa. 133; Slegel v. Lauer (Slegel v. Herbine) 148 Pa. 236, 15 L.R.A. 547, 23 Atl. 996; Sellers Chapel M. E. Church's Petition, 139 Pa. 61, 11 L.R.A. 282, 21 Atl. 145; Riggs v. New Castle, 229 Pa. 490, 140 Am. St. Rep. 783, 78 Atl. 1037; Kerlin v. Campbell, 15 Pa. 500; First M. E. Church v. Old Columbia Public Ground Co. 103 Pa. 608; Wilkes-Barre v. Wyoming Historical Soc. 134 Pa. 616, 19 Atl. 809; Rankin Regular Baptist Church v. Edwards, 204 Pa. 216, 53 Atl. 770.

Brown, Ch. J., delivered the opinion of the court:

On September 29, 1880, Andrew Smith, the owner of a tract of 176 acres of land in Oliver township, Jefferson county, conveyed by deed to the school directors of the said township, and their successors in office,  $\frac{1}{2}$  acre of the same, "for school purposes only." Following this purchase a schoolhouse was erected on the lot, which has been used as such ever since. After the death of Smith the successors to his title to the 176-acre tract executed an oil and gas lease, dated July 27, 1915, to the T. W. Phillips Gas & Oil Company; the description of the leased premises including the  $\frac{1}{2}$  acre conveyed to the school district. The lessee entered into possession of the tract and drilled two wells upon it, neither, however, being upon the half-acre tract. The first well, drilled in 1915, was being operated at the time this proceeding was instituted in the court below; the other, drilled in 1917, had been abandoned as unproductive. On Janu-

ary 13, 1917, the school directors of Oliver township executed an oil and gas lease of the  $\frac{1}{2}$ -acre tract to Frank Galbraith, who assigned it to George E. Wearing on December 8 of the same year. Wearing began the drilling of a well under this lease, and on April 4, 1918, the T. W. Phillips Gas & Oil Company filed a bill in the court below against him and the school district, praying for an injunction enjoining the drilling of an oil or gas well on the  $\frac{1}{2}$ -acre tract and for an accounting for any oil or gas which might have been produced under the lease to Galbraith. The averment in the bill upon which the prayers were based was that the gas and oil under the half-acre tract had not been conveyed by Smith to the school district, but remained in him and passed to the complainant, as the lessee of the oil and gas under the entire 176-acre tract. A preliminary injunction was granted, but, upon hearing on bill and answer, was dissolved, and the proceeding dismissed, on the ground that the title of the school district to the half acre was an absolute fee. On this appeal the question for consideration is: Did the school district of Oliver township, by the deed of 1880 from Andrew Smith, take title to the oil and gas under the  $\frac{1}{2}$ -acre tract?

It is conceded by learned counsel for appellant that under the Act of May 8, 1854 (P. L. 617), regulating the common school system of the state, at the time of the conveyance by Smith to the school directors of Oliver township they had capacity to purchase the lot in fee simple, but the contention is that in view of the words in the grant, "for school purposes only," the intention of the grantor in executing the deed and of the grantees in accepting it was that an absolute fee was not to pass, and effect ought not to be given to that intention. Those words are neither preceded nor followed by any condition, restraint upon alienation, or clause of forfeiture for any cause, and, but for their appearance



in the deed, the validity of the lease under which Wearing claims would not be questioned; for the right expressly given by the statute to the school district was not only to purchase the lot, but to sell the whole or any part of it and reinvest the proceeds for school purposes. The words upon which the appellant relies as debasing the fee are merely superfluous, and not expressive of any intention of the parties to the conveyance as to the effect to be given to it. The directors of the school district could not have purchased the lot for any other purposes than that named in the deed,

Schools—deed to district—effect of words “for school purposes only.”

and their acceptance of it with the insertion in it of the words, “for school purposes only,” was a needless admission by them that they were acting within the powers conferred upon them by the act of assembly. It was simply that, and nothing more, and the deed, in all other respects admittedly conveying an absolute estate, is not affected by them. But one of our many cases need be cited in support of this. In *Riggs v. New Castle*, 229 Pa. 490, 140 Am. St. Rep. 733, 78 Atl. 1037, we said: “In *Slegel v. Lauer* (*Slegel v. Herbine*) 148 Pa. 236, 15 L.R.A. 547, 23 Atl. 996, it is said: ‘The mere expression of a purpose will not of and by itself debase a fee. Thus a grant in fee simple to county commissioners of land “for the use of the inhabitants of Delaware county to accommodate the public service of the county” was held not to create a base fee; . . . as also a grant to county commissioners and their successors in office of a tract of land with a brick courthouse thereon erected, “in trust for the use of said county, in fee-simple;” the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a courthouse, jail, and office for the safe-keeping of the records. . . . Similarly, a devise of land to a religious

body in fee “there to build a meetinghouse upon” was held to pass an unqualified estate; . . . as also a grant to a congregation “for the benefit, use, and behoof of the poor of . . . the congregation . . . forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and if occasion shall require a place to bury their dead.” . . . Most of the cases on the subject under discussion are reviewed in the opinion of Judge Endlich from which we have just quoted, and which is reported and expressly approved by this court in the case last cited. It is there pointed out that this court has ruled more than once that a declaration in a grant to a corporation that land is conveyed for certain purposes does not necessarily import a limitation of the fee. To again quote from that opinion: ‘Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant. As was said, in the case of *Griffitts v. Cope*, 17 Pa. 96: “The use to which the granting clause declares that this land is to be applied is of the character which the law requires. . . . The presumption would therefore appear fair and obvious that by that declaration the deviser merely meant to make the grant lawful upon its face.” And in *Brendle v. German Reformed Congregation*, 33 Pa. 415: “What then is the efficacy of the declaration that the congregation holds the land for the use of its poor, for a church, and for a burial ground? Nothing, except to show that they hold it for a purpose for which the law allows congregations to hold land. Not to limit their own title, but to recognize the uses allowed by law.” . . . In *First M. E. Church v. Old Columbia Public Ground Co.* 103 Pa. 608, we stated: ‘The authorities show that the recital of the consideration and the statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate.’ The

subject is also discussed in *Wilkes-Barre v. Wyoming Historical Soc.* 134 Pa. 616, 19 Atl. 809, and in *Sellers Chapel M. E. Church's Petition*,

139 Pa. 61, 11 L.R.A. 282, 21 Atl. 145."

Decree affirmed at the cost of the appellant.

## ANNOTATION.

### Oil and gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used.

- I. Streets and public highways, 1498.
- II. Railroad rights of way, 1501.
- III. School purposes, 1501.
- IV. Charitable institutions, 1502.
- V. Religious purposes, 1502.

#### Scope.

The present annotation is of course confined to cases where there was a conveyance of the fee as distinguished from a mere easement.

#### *I. Streets and public highways.*

Where the fee to land has been granted or dedicated to the public for use as a street or highway, the rule is that subterranean deposits of minerals pass with the fee and do not remain in the grantor or abutting owner. *Matthiessen & H. Zinc. Co. v. La Salle* (1885) 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; *Union Coal Co. v. La Salle* (1891) 136 Ill. 119, 12 L.R.A. 326, 26 N. E. 506, affirming (1889) 34 Ill. App. 93; *Des Moines v. Hall* (1868) 24 Iowa, 234; *Hawesville v. Hawes* (1869) 6 Bush (Ky.) 232, 7 Mor. Min. Rep. 193; *West Pittston v. Clear Spring Coal Co.* (1907) 22 Pa. Dist. R. 190.

In *West Pittston v. Clear Spring Coal Co.* (Pa.) *supra*, where a specific piece of land was conveyed to a borough by metes and bounds, it was held that the title was neither reduced to a conditional fee nor limited to the use of the surface only, so as to exclude underlying oil and gas, by a declaration in the deed that the land should be used for "street purposes only." It was said that the quoted words were merely descriptive of the use which it was intended the grantee should make of the land, and that even though such words be regarded as effective to reduce the title from an unconditional fee simple to a conditional estate, defeasible on breach of the

condition, "there is nothing in the language of the deed to sever in title the underlying coal from the surface." Elaborating, it was further said: "The land was conveyed without stint, and that included everything to the center of the earth. The title of the coal was just as completely in the plaintiff as the title to the surface, but the title being now assumed to be on condition subsequent, and therefore liable to be defeated or terminated whenever the event happened which would destroy the title, its operation would extend simultaneously to surface and coal. It cannot be held that because the municipality would have no right to sell or to mine the underlying coal, or that because no interference would result with the specific use of the thing granted by a subterranean mining trespass so long as the surface was sufficiently upheld, that therefore such a trespass would be *damnum absque injuria*. To this argument it is sufficient reply to assert the fact that the underlying coal was conveyed to the plaintiff by a deed sufficient to make the coal absolute property of plaintiff, on which nobody may trespass without consequent legal liability and damages."

And in *Des Moines v. Hall* (1868) 24 Iowa, 234, where the owner of land platted the same and did "convey to Polk county for the use of the public the streets and alleys as marked on the within plat, and dedicate the same to the public," and the dedicatory statute declared that the plat was equivalent to a "deed in fee simple of such portion of the land as is therein set apart for public use," it was held that neither the grantor nor a third person claiming under him had a right to remove subterranean deposits of coal lying within the limits of the plat-

ted streets and alleys. Dillon, Ch. J., among other things, said: "It is claimed by the defendant that only the surface of the streets is set apart for the public. This we do not believe to be a true view of the statute. Cannot the city excavate and remove the surface? Who doubts it? If it meets in so doing with a valuable quarry of stone or gravel, may it not use or sell the stone or gravel? Why not? Can the adjacent owner claim the subterraneous stone or gravel and sand, on the ground that it does not interfere with the present use of the street? If he cannot, has he any better right to the coal? If the coal is his, may he, if he has never parted with his right to it, not claim it and the right to mine it, though this should interfere with the work of actual municipal improvement? If the coal is his, his property, how can the city deprive him of it? To recognize such a right in the adjoining owner is to deprive the city of that full and ample control over the streets which it was the purpose of the statute to confer upon the municipal government. It is argued that the city has no power to engage in mining operations, and that to hold that it, and not the adjacent lot holder, owns the coal, is to tie up valuable mines so that no one can get the benefit of them. It is true that without express or plain authority a city could not buy or lease lands to carry on the business of mining. It cannot engage in quarrying and selling stone as an independent business. But if it needs stone for public improvements, it may lease or perhaps buy land containing stone, and quarry them. Clearly it may take them from its own streets. If it has a coal mine under its streets, why, if it can do it profitably, may it not raise the coal and sell it, or allow others to do so, receiving rent or other compensation? We see no good reason. It being understood, of course, that the right of public and safe passage upon the street is not to be thereby obstructed or impaired. By way of illustration, we may inquire whether the city might not maintain an action against the defendant, or against any adjoining lot owner, if he should,

without the consent of the city, take from the streets any earth, stone, sand, or gravel? If this material were taken from the surface of the street, none could doubt that the city might sue and recover the value of the material thus taken, or the damage thereby done. Is it different if the material be taken from beneath the present level or grade of the street? It seems to us not. Is a distinction to be taken between material of this character and coal? May the adjoining lot owner take the one as of right, and be held a wrongdoer if he takes the other? Upon what principle can such a distinction rest? The true view is that when land has been dedicated under the statute without reservation, and the plat has been recorded and accepted in cases where an acceptance is necessary, the dedicator or his grantee has no special proprietary rights in the soil composing the streets, but the dominion of the streets passes to the public authorities. No other view gives effect to the strong language of the statute that 'the acknowledgment and recording of such a plat is equivalent to a deed in fee simple of the portion of the land set apart for public use.' It is plain from this language that such a dedicator parts with all of his special property rights in the streets just as effectually as does an ordinary grantor, with perhaps the exception of a right of reverter to him or his assignee, in case the street should be vacated. . . . After such a dedication, he has no more right to interfere with the street than a stranger. If the city could maintain this action against a stranger, it can equally maintain it against the dedicator or his grantee. And this view is clearly maintainable without holding, as the defendant supposes we must, that the city corporation may engage in the business of mining. But on this point we need add nothing to what has been before said. Again, the defendant makes this argument: He asserts the undeniable proposition that a city cannot alien or sell its public streets. He then says if it cannot sell the whole street it cannot sell part of it, that is, the coal under it,

and thus divert it from the purposes for which dedicated. It is undoubtedly true that the primary idea of a street is for the purpose of a way, a place upon which the public have a right to pass. This right the city may not destroy or unreasonably abridge. It could not take coal from the streets, or authorize others to do so, if this should interfere with the paramount and dominant right of the public to the use of the street as a highway. But if, in subjection to this, the city can make a profitable use of the sub-jacent material of the street, why may it not do so? But it is enough in this case to hold that, as against the adjoining lot owner or original dedicatory, the city has full control over the whole street, and not simply over the surface, and that it can maintain an action against any person who, without its permission, removes any material from the body of the street, whether such material be superficial or subterranean. Allowing the city to use the coal in its streets, and prohibiting others from doing thus against the city's consent, is a very different thing from allowing a city to sell or dispose of its streets, or property, or franchises which it holds in trust for the public. At common law, the dedication of land for streets was of the use simply. The statute changes this, makes the dedication extend to soil, and the soil includes, of course, the minerals therein. It is an inaccurate and mistaken use of the term 'fee simple' to limit it to a mere use. It is a correct and proper use of the word to express the idea of the right or title to the soil."

So in *Hawesville v. Hawes* (1869) 6 Bush (Ky.) 232, 7 Mor. Min. Rep. 193, where the owner of land conveyed a portion thereof for the express purpose of a county seat, and for that purpose only, but the dedicatory statute in effect declared that the land embraced by the streets, etc., vested absolutely in the town trustees, it was held that such trustees owned the underlying coal and could maintain an action against the grantor's heirs who had removed the same.

And in *Matthiessen & H. Zinc Co. v.*

*La Salle* (1885) 117 Ill. 411, 2 N. E. 406, 8 N. E. 81, where the dedicatory statute declared that the making and recording of a plat vested a base fee simple of the lands designated as streets and highways in the public, it was held that the adjoining owner could not mine coal under such a street, even though such mining would in no way injure the street as such, and this even though it be assumed that there was a possibility of future reverter to such owner in the event of abandonment. And in *Union Coal Co. v. La Salle* (1891) 136 Ill. 119, 12 L.R.A. 326, 26 N. E. 506, affirming (1889) 34 Ill. App. 93, upon similar facts, it was expressly held that a city having the legal title to the land in its streets could maintain trespass for the removal of underlying coal by adjoining owners, although no actual damage had been done to the surface.

But it has been held that where the deed or dedicatory statute merely grants the fee of the "street," as distinguished from the fee to the "land," "ground," or "premises," to the public, the grant does not pass the underlying minerals so as to deprive the one making it of the right to extract such minerals so far as it can be done without interfering with the street uses. *Leadville v. Bohn Min. Co.* (1906) 37 Colo. 248, 8 L.R.A. (N.S.) 422, 86 Pac. 1038, 11 Ann. Cas. 443. The court in answering the question, What interest or estate in the streets and alleys in question was vested in the grantor? said: "Section 6 of the Act of 1877 (Gen. Laws 1877, chap. 100) provides that 'all avenues, streets, alleys, parks, and other places designated or described as for public use on the map or plat of any city or town, or of any addition made to such city or town, shall be deemed to be public property, and the fee thereof be vested in such city or town.' By virtue of this section, the fee of the streets being vested in the city, it is necessary for the purposes of this case to determine what constitutes a street as therein contemplated. . . . We think it clear that the legislature intended by the use of the term 'street' to vest in the city such estate or interest as is reasonably

necessary to enable it to utilize the surface, and so much of the ground underneath as might be required for laying gas pipes, building sewers, and other municipal purposes. In other words, the legislature used the term 'fee,' not according to its technical legal meaning, but as vesting in the city a complete, perpetual, and continuous title to the space designated as streets, so long as it used them for the purpose intended. . . . It seems clear to us, therefore, that the intent and purpose of our statute is to clothe the city in its governmental capacity with the entire title to the streets, as such, for public use, and not for the 'profit or emolument of the city.' It was plainly the intention of the dedicator to part with the title to so much of its property only as was necessary to effectuate the purpose of establishing certain streets and alleys designated and described upon the plat for public use, and to clothe the city with the absolute title thereto for that purpose only, and not to vest it with any estate or interest in the ores that may exist thereunder."

### *II. Railroad rights of way.*

In *Rice v. Clear Spring Coal Co.* (1898) 186 Pa. 49, 40 Atl. 149, it was held that under a grant of land in fee upon condition that it be used for railroad purposes, the conveyance amounted to a fee in both surface and underlying coal.

### *III. School purposes.*

The decision in the reported case (*T. W. PHILLIPS GAS & OIL CO. v. LINGENFELTER*, ante, 1495) is to the effect that the mere insertion in a deed of land to a school district of the words, "for school purposes only," did not restrict or limit the title of the district, and that it took a fee-simple title to the property, including subterranean oil and gas deposits. This was upon the theory that the insertion of the clause, "for school purposes only," was merely an admission by the grantees that they, in purchasing the property, were acting within the powers conferred upon them by statute. It was further held that the district trustees, having a fee-simple title

to the underlying oil and gas, and having statutory authority to buy and sell the whole or a part of such land, could lease it for the production of such minerals.

In *Herald v. Board of Education* (1909) 65 W. Va. 765, 31 L.R.A. (N.S.) 588, 65 S. E. 102, which appears to have been the only other case to have passed upon the right of a school district holding land under a deed declaring the conveyance to be for school purposes, to execute a lease of the property for the production of oil and gas, it seems that the court was of opinion that the district acquired title to the underlying gas and oil, but that it could not convey the same except as authorized by statute. For instance, Brannon, J., in speaking for the majority of the court in holding that the lease in question was unauthorized because beyond the power of the board, said: "The deed conferring title in this case says that the lot is conveyed for the use of free schools. That would seem to say that the lot must be retained for that purpose. So far as it goes, that language tends in that direction; but I do not place great stress on that language in the deed; for I am ready to say that the board could dispose of that lot if it would prove unsuitable, and put its proceeds into another lot. That would be in subservience to the trust upon which the lot is held. I do not deny the power of the board to even dispose of the lot, so it be in furtherance of education, and appropriate to the execution of the duties of the board in the work of education. That is the object of that grant of power. It does not mean that it can divert the lot from school purposes to purposes foreign to that object, no more than it could divert the taxes paid by the people." And Miller, President, in dissenting on the ground that the board had authority to make the lease, and in connection with the use in the deed of the declaration that the grant was for school purposes, said: "These words of the grant are merely descriptive of the purposes for which the land was purchased, not a limitation upon the power of alienation incident to owner-

ship,—the *jus disponendi*. Under no circumstances could the land ever revert to the grantor."

*IV. Charitable institutions.*

See *Des Moines v. Hall* (1868) 24 Iowa, 234 (also set out and quoted *supra*, I.), wherein it was said that grants of the fee of lands for charitable purposes are in the same category as grants of the fee of highways,

and that it would be unreasonable to allow the grantor to go upon the ground and strip it of its coal.

*V. Religious purposes.*

In *Des Moines v. Hall* (1868) 24 Iowa, 234, the court applied the rule laid down in the next preceding subdivision to lands the fee of which has been granted for religious purposes.

G. J. C.

GEORGE C. MACAN, JR.,

v.

SCANDINAVIA BELTING COMPANY, Appt.

*Pennsylvania Supreme Court—April 21, 1919.*

(264 Pa. 384, 107 Atl. 750.)

**Estoppel — testimony in former case.**

1. Testimony of a stockholder of a corporation, in an action to which it only was a party, that he had transferred a contract to it, which fact was found otherwise, does not estop him from suing on the contract in his individual capacity.

[See note on this question beginning on page 1505.]

**Judgment — res judicata — stockholder of corporation.**

2. A judgment against a corporation is not *res judicata* against a large stockholder of the corporation in his individual capacity, who is not individually made a party to the action.

[See 15 R. C. L. 1033-1035.]

**— question not considered.**

3. A judgment is not conclusive upon a question not considered in the action.

[See 15 R. C. L. 977 et seq.]

**Evidence — record of judgment.**

4. To determine the ground of decision in an action the record in it may be examined.

[See 15 R. C. L. 1048.]

**— record of testimony in former suit — conclusiveness.**

5. Testimony of a party to a suit in a former suit between strangers is admissible in the pending action only to affect his credibility, not to establish its truth.

**Estoppel — inconsistent positions — different action.**

6. One who avoids liability on a contract to an alleged assignee on the ground that no assignment had been made is estopped to set up the alleged assignment in an action by the alleged assignor to enforce the contract.

[See 10 R. C. L. 702.]

**Damages — breach of contract — lost profits.**

7. The measure of damages for breach of an exclusive contract conferring right to sell a certain manufacturer's products is the value of the contract at the time of breach, which may be estimated by the anticipated profits if it reasonably appears that they would have been realized if the contract had been carried out, and were lost by its breach.

[See 8 R. C. L. 452, 454.]

**Evidence — proof of lost profits.**

8. Absolute certainty of data upon which to estimate profits lost by breach of a contract is not necessary to justify their allowance as damages for the breach.

[See 8 R. C. L. 649.]

APPEAL by defendant from a judgment of the Court of Common Pleas for Northampton County (Stewart, P. J.) in favor of plaintiff in an action

brought to recover damages for breach of an exclusive sales agency contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Robert A. Stotz and F. W. Edgar for appellant.

Messrs. Aaron Goldsmith and Kirkpatrick & Maxwell for appellee.

Frazer, J., delivered the opinion of the court:

A judgment was entered on a verdict for plaintiff in a suit to recover damages for breach of an exclusive sales-agency contract, and defendant appeals. The defenses were:

(1) The contract was rightfully terminated because plaintiff failed to perform his part; (2) plaintiff transferred, or assigned, the contract to a corporation known as the Macan, Jr., Company, of which plaintiff was president and stockholder, and if a right to damages accrued they belonged to the company, and not to plaintiff; and (3) the questions involving the merits of the claim were determined in favor of the present defendant in a former proceeding between defendant and the Macan, Jr., Company, a corporation. 258 Pa. 261, 101 Atl. 997.

The contract in question was entered into in 1912 between plaintiff individually and the Scandinavia Belting Company, whereby the former was given the exclusive right to sell belting for the latter in certain designated territory, there being a provision that the agreement should continue in force "while the agent does an annual total sale of \$40,000." The contract was turned over to the Macan, Jr., Company, a corporation formed by plaintiff with others, and business transacted thereunder until May 1, 1914, at which time defendant rescinded the contract, alleging as reason for such action failure of the agent to sell the required amount of belting, and that he had dealt in other brands of textile belting, contrary to the terms of the agreement. At that time a balance was due the Scandinavia Company on a book account for belting purchased, and suit was insti-

tuted against the Macan, Jr., Company to collect the unpaid amount, to which a counterclaim was interposed for damages, based on alleged wrongful rescission of the contract. The answer of the Scandinavia Company was that George C. Macan, Jr., individually, was the owner of the contract, and not the Macan, Jr., Company; consequently there could be no set-off by the company for damages for breach of its terms. The trial judge charged the jury they must be satisfied the Macan, Jr., Company was the assignee and owner of the contract; otherwise they need not consider the case further, so far as the set-off was concerned; and, if they found the agreement had not been assigned to the corporation, a verdict in favor of plaintiff should be returned, the amount of its claim being admitted. The jury found for plaintiff with the statement attached to the verdict that defendant's claim was disallowed, for the reason they did not believe the Macan, Jr., Company was the owner of the contract. The court struck out this part of the finding, and entered a verdict generally for plaintiff. The present action by Macan individually for damages for breach of the contract followed the termination of that case, and it is now contended the former proceeding is conclusive as to the merits of the controversy, and, further, that plaintiff, by his testimony in that case in which he stated the contract had been assigned to the Macan, Jr., Company, was estopped from taking a position in this proceeding inconsistent with his contention there.

It will be observed, in the first place, the parties to this action are not the same as in the former proceeding. Macan is here suing in his individual capacity, while the previous action was against the Macan, Jr., Company, a corporation. Although Macan was a large stock-

holder in the company, this fact did not make him a party to the action within the rule requiring, *inter alia*, identity of parties to make a judgment in one proceeding *res judicata* in another. A corporation has a separate entity or existence, irrespective of the persons who own its stock, and this rule is not altered by the fact that the greater portion or even the entire issue of stock happens to be held by one person. *Monongahela Bridge Co. v. Pittsburgh & B. Traction Co.* 196 Pa. 25, 79 Am. St. Rep. 685, 46 Atl. 99; *Rhawn v. Edge Hill Furnace Co.* 201 Pa. 637, 51 Atl. 360; *Kendall v. Klapperthal Co.* 202 Pa. 596, 52 Atl. 92; *Goetz's Estate*, 236 Pa. 630, 85 Atl. 65. Further it does not appear

—question not considered.

that the merits of the case, that is, whether or not there was in fact a wrongful breach of the contract by defendant, were adjudicated in the first proceeding. The finding of the jury in that case, in view of the statement attached to the verdict and stricken out by the court below, indicates the merits of the case were not considered by them in that proceeding, but, on the contrary, their conclusion was based on the ground that in their opinion the Macan, Jr., Company was not the assignee or owner of the contract. To establish this result con-

Evidence—  
record of  
judgment.

sideration of the record in that case was proper. *Follansbee v. Walker*, 74 Pa. 306; *Weigley v. Coffman*, 144 Pa. 489, 27 Am. St. Rep. 667, 22 Atl. 919; *Pittsburgh Constr. Co. v. West Side Belt R. Co.* 227 Pa. 90, 75 Atl. 1029.

The fact that plaintiff testified in the previous proceeding to having transferred the contract to the Macan, Jr., Company does not estop him from taking a contrary position in the present action. Apparently he intended to make such assignment, and fully believed he had made a valid transfer, and

vested in the Macan, Jr., Company full power to exercise all rights and privileges under the agreement. The verdict of the jury in the action against the corporation, however, established he was mistaken in this, and that, in fact, no valid transfer had been made. His acceptance of the verdict and judgment as binding upon him, and subsequent treatment of the contract as his own should not subject him to criticism. His present attitude is consistent with the law as laid down in that case, where his testimony was in harmony with his action in making what he believed to be a valid assignment of the contract to the corporation. Defendant in the present case, rather than plaintiff, might justly be accused of taking inconsistent positions, inasmuch as in the other case the defense to the set-off was that no transfer of the contract had been made, and any rights therein must be enforced by the present plaintiff. The court and jury

having agreed with this view, defendant is not now in a position to escape liability under the contract by taking a position contrary, not only to its previous contention, but also in opposition to the view of the court in sustaining such contention. Furthermore, the mere fact that plaintiff testified as a witness in the former action does not estop him, if he sees fit, from now taking a position contrary to his statement made in that case. The record of the other proceeding is not received in evidence

—inconsistent  
positions—  
different  
actions.

on the theory that it conclusively establishes the facts testified to by the witness, so as to constitute an estoppel, but only as evidence of a declaration or admission by the witness that the facts were as stated, and affects merely his credibility. *Becker v. Philadelphia*, 217 Pa. 344, 66 Atl. 564; *Hess v. Vinton Colliery Co.* 255 Pa. 78, — A.L.R. —, 99 Atl. 218.

Evidence—  
record of  
testimony in  
former suit—  
conclusiveness.

Defendant finally argued that the



damages suffered by plaintiff are speculative and uncertain to such extent they cannot form the basis of a finding in favor of plaintiff. The measure of damages in a case of

this class is the value of the contract at the time of its breach, and if it

reasonably appears that profits would be realized if the contract were carried out, and that the loss of such benefits necessarily followed the breach, their amount may constitute the true measure of damages (Wilson v. Wernwag, 217 Pa. 82, 66 Atl. 242, 10 Ann. Cas. 649; Press Pub. Co. v. Reading News Agency, 44 Pa. Super. Ct. 428), and it has been held that, where an agent agreed to sell his principal's goods within a certain district for a fixed period, and before the expiration of the time the principal declared the contract at an end without sufficient cause, the agent may show the extent and volume of the business done in the territory under both his agency and that of his successor, as bearing upon the question of damages. Pittsburg Gauge Co. v. Ashton Valve Co. 184 Pa. 36, 39 Atl. 223.

The contract in this case provides it should remain in force so long as the agent's sales amount to the sum of \$40,000 annually. Whether sales were made to this extent is one of the issues the jury found in favor of plaintiff, and the only question, so

far as the measure of damages is concerned, is whether there was evidence upon which a finding of damages could reasonably be based. Defendant admits the gross profits made from sales in the territory included in the agreement, covered by the years 1914 to 1917, inclusive, were approximately \$5,000 a year on a total average sale of \$43,267 annually. Out of this amount the evidence shows salesmen were paid \$3,000, and for traveling expenses \$2,000, which latter amount, plaintiff claimed, would have gone to him. Plaintiff testified that in 1912 he made a profit of \$7,000 on gross sales of \$34,679.67, and in the following year a profit of \$6,663.03, and that the cost to him of doing business was comparatively small, as the belting was handled in connection with the sale of other mill supplies to the same customers. The verdict was conservative under the evidence, and while, in the nature of the case, the amount of profits was necessarily uncertain, the law does not require absolute certainty of data upon which they are to be estimated. All that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture. Wilson v. Wernwag, supra; Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 229 Pa. 61, 68, 140 Am. St. Rep. 700, 78 Atl. 28.

Evidence—  
proof of lost  
profits.

The judgment is affirmed.

### ANNOTATION.

**Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party.**

The decisions, generally, are to the effect that one is not estopped to contradict what he testified to as a witness adversely to his present opponent, in a prior action to which he was not a party, where such testimony represented a mistake of law on the part of the witness, was a mere matter of opinion, or, although in the exercise of good faith, was made inconsiderately, by mistake, or without full

5 A.L.R.—95.

knowledge of the facts; but that the witness is estopped as to absolute statements of facts which are prejudicial to the opponent, against whom the witness wishes to reverse his position by offering contradictory testimony.

Illustrative of the first class of cases above referred to is North Ave. Bldg. & L. Asso. v. Huber (1918) 286 Ill. 375, 121 N. E. 721. In this case it was held

that a person was not estopped from foreclosing a trust deed by reason of the fact that in a prior suit by another to foreclose the same deed he had testified that he had sold the property and securities involved, and did not then claim to own any interest in the securities, which testimony, while true as to facts, was a mistake of law as to who was the owner, but a mistake not prejudicial to the grantor. The court said: "The showing is that he simply stated the facts as they actually existed, and made his conclusion that the building and loan association was the legal owner of the securities, and not himself. He made no misstatement of facts, and stated no facts that were untrue. He simply made a mistake of law as to who, in fact, was the legal owner of the securities. Defendant in error was not prejudiced or injured in any way by such wrongful conclusion of Kemper. She was informed by Kemper's evidence of the exact facts, and was not deceived thereby to her injury. . . . So far as the record now shows, defendant in error has no defense against the plaintiffs in error by way of estoppel, by reason of the fact that Kemper made a mistake of law by honestly concluding that the sale of the securities to the building and loan association was legal and valid, and conferred upon the association the right to foreclose the trust deed and to collect the amount remaining due on the note."

And in the reported case (*MACAN v. SCANDINAVIA BELTING Co.* ante, 1502) a similar situation and holding are found. Here the plaintiff in an action for breach of an exclusive sale contract had in good faith, and in accordance with what he supposed to be the facts, testified in defendant's prior suit against a corporation of which plaintiff was an officer and principal stockholder that he had assigned his claim to the corporation, but the judgment established that he was mistaken, and that in fact no valid transfer had been made. Under these facts it was held that the plaintiff was not estopped from taking a position contrary to that taken in the first suit, and, therefore, that he had a right to tes-

tify to the facts as found rather than to the facts as he had supposed them to be when he testified in the action by the corporation.

And in *Lee v. Calvert* (1900) — Tenn. —, 57 S. W. 627, the court applied the rule that where a witness who is not a party to the action in good faith makes a statement inconsiderately, by mistake, or without full knowledge of the facts, he is not absolutely and unconditionally bound by it in a subsequent action to which he is a party, so as to estop him from showing the true facts.

But where the former testimony relates merely to matters of fact, and to allow a contradiction would prejudice the witness's present opponent, it seems that an estoppel is raised. Thus in *Luling v. Sheppard* (1896) 112 Ala. 588, 21 So. 352, it was expressly held that where a married woman defended an action of forcible entry and detainer on the ground that what was done was the independent act of her husband, which defense was sustained by his testimony, he was estopped to defend a subsequent similar action brought against him, on the ground that he had merely acted as agent for his wife, and not in his own right. However, no reason was assigned by the court for the holding. In *Stillman v. Stillman* (1874) 7 Baxt. (Tenn.) 174, it was held that witnesses who deposed in a divorce proceeding as to who were members of a certain partnership, and as to the title to certain alleged partnership property, were estopped from subsequently setting up a claim to such property in opposition to their sworn statements in the deposition. In *Folger v. Palmer* (1883) 35 La. Ann. 743, where the president of a bank testified that a note in suit was the property of the bank, it was held, in a subsequent suit by him against a party to the first action, that he was estopped from claiming that he, and not the bank, was the owner of the note. In *Hoyt v. Hoyt* (1868) 68 Iowa, 703, 28 N. W. 27, where the plaintiff's husband was indebted to defendant and gave him an order on a third person, but plaintiff contended that the money was hers and was simply

loaned to defendant, while he claimed that it was a payment to be applied on the husband's indebtedness, the plaintiff's contention being sustained by the husband's testimony, it was held that the court did not err in instructing the jury that it was immaterial whether or not plaintiff's title to the money was good as against her husband, since the latter would be estopped from disputing her title as against the defendant. In *Richards v. McCormick* (1898) 119 Mich. 7, 77 N. W. 1116, a suit in equity by a judgment creditor to reach property claimed to have been fraudulently conveyed to a father by his sons, it was held that where the father, who was a codefendant, had testified in a previous action that an amount advanced by him to such sons was a gift and not a loan, he could not maintain in the present suit that the advance was a loan and not a gift, the court saying that the nature of the advance was a question entirely of fact. However, it does not appear whether the court regarded the question as one of estoppel, or of the weight of evidence, it not affirmatively appearing that the present plaintiff was a party to the prior action.

In *McEwen v. Jenks* (1880) 6 Lea (Tenn.) 289, where one not a party to an action made a deposition therein to the effect that he had no interest in his deceased father's estate, as he had conveyed the same absolutely without any agreement or understanding as to a reconveyance, it was held that he was estopped subsequently to claim a right in such property, and to set the same up against a party to the original suit whose rights were affected by his deposition. The court said: "The statement of his want of interest was not an error, it was not a mistake; it is nowhere in the record adequately explained so as to make it consistent with his present claim. It was not made to avoid claims of creditors, if this indeed would have been an adequate moral excuse for his making it. It was not made from a fear that he himself should, in some drunken moment, afterwards be cheated out of so shadowy a right as a verbal promise on the part of M. and wife to reconvey. It is, then, a solemn admission in conflict with his present claim, made in a judicial proceeding, inexplicable or at least unexplained, unless upon the supposition of its truth." G. J. C.

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R. S. NEWMAN  
v.  
MARTIN C. GARFIELD.

*Vermont Supreme Court — November 19, 1918.*

(— Vt. —, 104 Atl. 881.)

**Bulk Sales Law — validity of sale between parties.**

1. A sale without compliance with the requirements of the Bulk Sales Law is final and binding as between the parties until attacked and set aside by creditors, notwithstanding the statute says it shall be null and void.

[See note on this question beginning on page 1517.]

**Statute — construction in *pari materia*.**

2. Statutes in *pari materia* are to be construed with reference to each other as parts of one system.

[See 25 R. C. L. 1060.]

**— use of words already construed.**

3. The use in a later statute of words which have been construed by the courts raises the presumption, in the absence of anything to the contrary, that they were used in the same sense

attributed to them by such construction.

[See 25 R. C. L. 992.]

**Bulk Sales Law — violation — remedy of creditor.**

4. Notwithstanding the statute provides that a sale of goods in bulk without complying with the requirements of the statute shall be null and void, creditors of the seller cannot attach the property as that of the vendor, but must resort to equity to set aside the

sale, or charge the purchaser as trustee for them.

[See 12 R. C. L. 529.]

**Trover — attachment for violation of Bulk Sales Law.**

5. An officer levying an attachment at the suit of a creditor of the vendor, upon property sold in bulk without complying with the provisions of the Bulk Sales Law, is liable in damages as for a conversion.

**EXCEPTIONS** by plaintiff and defendant to rulings of the Caledonia County Court (Fish, J.) made during the trial of an action brought for the conversion of certain goods; plaintiff excepting to the overruling of his motion for judgment for full value of the goods, and defendant excepting to the overruling of his motion for a verdict in his favor. *Reversed and judgment rendered for plaintiff.*

The facts are stated in the opinion of the court.

Messrs. Elisha May and W. W. Reir-  
den, for plaintiff:

The word "void" as used in the statute means "voidable" only.

Merrill v. Englesby, 28 Vt. 150; Tudor v. Tudor, 80 Vt. 220, 130 Am. St. Rep. 977, 67 Atl. 539; Allen v. Huntington, 2 Aik. (Vt.) 249, 16 Am. Dec. 702; McGreenery v. Murphy, 76 N. H. 338, 39 L.R.A. (N.S.) 374, 82 Atl. 720; Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970; La Belle Iron Works v. Hill, 22 Fed. 195; Strauss v. Abrahams, 32 Fed. 310; Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941; Keely-Buckley Co. v. Cohen, 195 Mass. 585, 81 N. E. 297; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Young v. Lemieux, 79 Conn. 434, 20 L.R.A. (N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452.

The statutes of Vermont and the practice gave ample power to Haskell-Armstrong Company to test the validity of the sale to Newman in the safe and orderly way.

Kohn v. Fishbach, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199; Rothchild Bros. v. Trewella, 36 Wash. 679, 68 L.R.A. 281, 104 Am. St. Rep. 973, 79 Pac. 480; Jaques & T. Co. v. Carstarphen Warehouse Co. 131 Ga. 1, 62 S. E. 82; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; Rood, Garnishment, § 76; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Thorpe v. Pennock Mercantile Co. 99 Minn. 22,

108 N. W. 940, 9 Ann. Cas. 229; Young v. Lemieux, supra.

The judgment relied upon by the attaching creditor must be a valid one, whether personal or in rem.

Quimby v. Hazen, 54 Vt. 132; W. B. Parham & Co. v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Taylor v. Folds, 2 Ga. App. 453, 58 S. E. 683.

Plaintiff paid the chattel mortgage to Barton Bank, given by Lewis to secure a \$4,300 note, and so became subrogated to the rights of the bank.

Bullard v. Leach, 27 Vt. 495; Cobbe, Chat. Mortg. § 885; McGreenery v. Murphy, 76 N. H. 338, 39 L.R.A. (N.S.) 374, 82 Atl. 720.

The evidence showed that defendant's entry into the store and the subsequent sale were illegal, and that the damages were not limited to the value of the articles sold which were not in the stock purchased of Lewis, or as was limited by the trial court.

Cooley, Torts, p. 316; Davis v. Stone, 120 Mass. 228; 25 Am. & Eng. Enc. Law, 2d ed. 104; Malcolm v. Spoor, 12 Met. 279, 46 Am. Dec. 675; Williams v. Powell, 101 Mass. 467, 3 Am. Rep. 396.

Messrs. Frank D. Thompson, and Porter, Witters, & Harvey, for defendant:

The evidence was inadmissible for the purpose of subrogating the plaintiff to the rights of the Barton Savings Bank & Trust Company under its mortgage, as subrogation is purely an equitable doctrine, enforceable in courts of equity and not in courts of law.

Gerrish v. Bragg, 55 Vt. 329; Davis

v. Hulett, 58 Vt. 90; 4 Atl. 139; Wilder v. Wilder, 75 Vt. 178, 53 Atl. 1072; Downer v. Wilson, 83 Vt. 1; Davis v. Davis, 81 Vt. 259, 130 Am. St. Rep. 1035, 69 Atl. 876; McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406; Deavitt v. Ring, 76 Vt. 216, 56 Atl. 978; Ripton v. McQuivey, 61 Vt. 76, 17 Atl. 44; Freeman v. Holt, 51 Vt. 538; Durkee v. Durkee, 59 Vt. 70, 8 Atl. 490; King v. White, 63 Vt. 158, 25 Am. St. Rep. 752, 21 Atl. 535; Francis v. Parks, 55 Vt. 80; Scheve v. Vanderkolk, 97 Neb. 204, 149 N. W. 401; Marquette County Sav. Bank v. Koivisto, 162 Mich. 554, 127 N. W. 680; Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; Re Allen, 65 Vt. 392, 26 Atl. 591; Rugg v. Brainerd, 57 Vt. 364; Brooks v. Wentz, 61 N. J. Eq. 474, 49 Atl. 147.

In cases of sales fraudulent in fact, the fraudulent vendee cannot place the property beyond the reach of the vendor's creditors by changing its form or character, or by substituting other property, but the substituted property will stand in the place of the property fraudulently conveyed, and be liable in the same manner to the creditors of the vendor.

Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655; Mandeville v. Avery, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951; Clements v. Moore (Clements v. Nicholson) 6 Wall. 299, 18 L. ed. 786; Heath v. Page, 63 Pa. 108, 3 Am. Rep. 533.

Noncompliance with the provisions of the Bulk Sales Law affects a sale within its terms, the same as fraud in fact affects a sale, that is, as against the creditors of the vendor, no title passes to the vendee, and if the vendee sells any of the property, the proceeds of said sale, or property bought with said proceeds, as against the creditors of the vendor, are the property of the vendor.

Young v. Lemieux, 79 Conn. 434, 20 L.R.A. (N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452; Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941; Jaques & T. Co. v. Carstarphen Warehouse Co. 131 Ga. 1, 62 S. E. 82; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77; Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166; Owosso Carriage & Sleigh Co. v. McIntosh, 107 Tex. 307, L.R.A. 1916B, 970, 179 S. W. 257.

Defendant was not liable as a trespasser ab initio for selling more paint than enough to pay the exact amount of the execution and costs.

Humphry v. Beeson, 1 G. Greene, 200, 48 Am. Dec. 370; Moore v. Jenks, 173 Ill. 157, 50 N. E. 698; Wilson v. Seavey, 38 Vt. 221; Bentley v. White, 54 Vt. 564; Fullam v. Stearns, 30 Vt. 443; Adams v. Burton, 43 Vt. 36; Wooley v. Edson, 35 Vt. 214; Lakin v. Ames, 10 Cush. 198.

The plaintiff's store is a public place, within the meaning of the statute requiring execution sales to be held at a public place.

Austin v. Soule, 36 Vt. 645; Alger v. Curry, 40 Vt. 437.

The plaintiff is entitled to recover only for such actual damage as he sustained.

Blodgett v. Brattleboro, 30 Vt. 579.

If a person lawfully enters upon the land of another by his consent or license, he is not liable in trespass quare clausum for any unlawful act which he may commit after the lawful entry. In that case the action would be an action on the case and not of trespass quare clausum.

Grout v. Knapp, 40 Vt. 163; Howard v. Black, 42 Vt. 258; Wendell v. Johnson, 8 N. H. 220, 29 Am. Dec. 648; Bennett v. McIntire, 121 Ind. 231, 6 L.R.A. 736, 23 N. E. 78; Perry v. Bailey, 94 Me. 50, 46 Atl. 789.

A plaintiff in an action of trespass, to recover more than nominal damages, must prove the actual damage suffered.

Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Pratt v. Battels, 28 Vt. 685; Murphy v. Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757.

A sale not in compliance with the provisions of the statute is void as to the vendor's creditors, and not voidable.

12 R. C. L. 474; Lynch v. Murray, 86 Vt. 1, 83 Atl. 746; Wilson v. Spear, 68 Vt. 145, 34 Atl. 429; Fair Haven Marble & Marbleized Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749; Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626, affirmed in 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C, 1213; Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166; Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302; Galbraith v. Oklahoma State Bank, 36 Okla. 807, 130 Pac. 541; Goodwin v. Tuttle, 70 Or. 424, 141 Pac. 1120; Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 62 S. E. 598.

Powers, J., delivered the opinion of the court:

M. H. Lewis was a merchant at West Burke. On July 7, 1916, in good faith and for an adequate

price, he sold his stock of goods to this plaintiff, who paid for and took possession of the same, and continued the business in the same store, which he rented of Lewis for that purpose. At the time of this transaction Lewis owed the Haskell-Armstrong Company, of Portland, Maine, an unpaid bill for merchandise, and that concern brought suit against him and attached the goods in the plaintiff's possession, and, having obtained judgment therein, took out an execution and sold a part of these goods to satisfy the same. The defendant is the deputy sheriff who did the business for the Haskell-Armstrong Company, and the action is tort for the conversion of the goods. The defense is predicated upon a noncompliance by Lewis and the plaintiff with the terms of the Bulk Sales Law (Pub. Stat. § 5010 [Gen. Laws. § 6013]).

By that statute it is provided that the sales in bulk of a part or the whole of a stock of merchandise "shall be fraudulent and void as against the creditors of the seller," unless certain things are done by the parties to the sale.

The first important question in the case is as to the true meaning of the term, "fraudulent and void," as here used. Notwithstanding these positive terms, as was said by Judge Poland in *Woodcock v. Bolster*, 35 Vt. 632, in many cases where statutes use the word "void," it is construed to mean "voidable." Thus in *Merrill v. Englesby*, 28 Vt. 150, this court had under consideration a statute providing that general assignments should be "null and void as against creditors of said debtors;" and it was held that such assignments were voidable at the instance of creditors. And in the recent case of *Tudor v. Tudor*, 80 Vt. 220, 130 Am. St. Rep. 977, 67 Atl. 539, this court had under consideration Pub. Stat. § 5782, which provides that fraudulent conveyances of houses and lands, or of goods and chattels, shall be, as to the party defrauded, "null and void." Upon full consideration and discussion, it was

held that by proper construction the statute made such conveyances voidable merely.

Here, then, is the construction of a statute sufficiently cognate to be in *pari materia*; and it is the established rule that such statutes are to be construed with reference to each other, as parts of one system. *Isham v. Bennington Iron Co.* 19 Vt. 230; *State v. Central Vermont R. Co.* 81 Vt. 463, 130 Am. St. Rep. 1065, 71 Atl. 194. This rule necessarily involves recourse to the construction of such statutes by the courts. Endlich, *Interpretation of Statutes*, ¶ 367.

So it is that when, in a later act on the same general subject, the legislature makes use of a particular word or form of words which the courts have construed, it is to be presumed, in the absence of anything to the contrary, that it used such words in the sense attributed to them by such construction. *Whitcomb v. Rood*, 20 Vt. 49.

We have no hesitation, therefore, in holding that this statute really means that bulk sales are constructively fraudulent and voidable at the instance of creditors, and that as between the parties the transaction is final and binding, with title passing to the purchaser, where it remains until divested by proceedings instituted by a creditor for that purpose.

This view of the statute is approved in *McGreenery v. Murphy*, 76 N. H. 338, 39 L.R.A. (N.S.) 374, 82 Atl. 720; *Kelley-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297, and *Rothchild Bros. v. Trewella*, 36 Wash. 679, 68 L.R.A. 281, 104 Am. St. Rep. 973, 79 Pac. 480.

The next question of importance relates to the remedy available to the creditor. On this subject the statute in question is silent. It must be taken, therefore, that it was the intent of the legislature that the creditor should resort to such rem-

Statute—  
construction in  
pari materia.

—use of words  
already  
construed.

Bulk Sales Law—  
validity of sale  
between parties.

edy or remedies as the law then provided in similar cases. Here, again, reference may be had to the statutes on the same or analogous subjects and the remedies therein provided. Thus consistency and harmony throughout a particular topic of the law will be secured. While this statute establishes a new and drastic restraint upon the free disposition of a certain class of property, in essence it is nothing more than a further extension of the general scheme of preventing fraudulent conveyances. So in our search for the proper remedy we look to the law of that subject.

Public Statutes, § 1723, provides that a person who holds goods under a title void as to creditors may be held as a trustee thereof, though the defendant could not maintain a suit against him. Here, then, is a plain and convenient remedy; one that provides for an action to which all interested are parties, and in which all questions may be litigated. In ordinary circumstances, at least, it would be complete and adequate. Pub. Stat. § 5782, as we have seen, refers to fraudulent conveyances of goods and chattels, and Pub. Stat. § 5783, provides that the parties to such fraudulent transfer shall forfeit the value of such goods and chattels; recovery to be had in an action on the statute, and one half the recovery to go to the party aggrieved and one half to the county. Then, too, there is the long-recognized jurisdiction in equity, available at least in cases wherein the above remedies might be inadequate. This is the remedy expressly provided by Pub. Stat. § 2204, for cases where real estate has been conveyed in fraud of creditors. In such cases the creditor obtains and levies his execution upon the land in question, and then proceeds in chancery for the satisfaction of the same. No good reason is suggested why a remedy in chancery should not be available in cases like this, and free use seems to be

—violation—  
remedy of  
creditor.

made of it under Bulk Sales Statutes in other jurisdictions. *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Wheeler & M. Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665; *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401; *Daly v. Sumpter Drug Co.* 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

We are aware that the procedure followed by this defendant has been approved in several of the states having statutes on the subject of bulk sales much like ours. But, in view of the remedies available here, we cannot hold that such procedure was lawful. It gave the plaintiff no opportunity to test any of the questions affecting his title. He could not even show that the terms of the statute had been complied with. His only remedy for an unlawful seizure and sale was by a new and independent proceeding. It is not a sufficient answer to say that the title had not passed to him as against the creditor. It had passed subject to the right to vacate it. And to say that it had not passed on account of a noncompliance with the statute is to assume a fundamental fact that had never been judicially established. It is wholly unnecessary to support the defendant's action in order to protect the creditor. As we have seen, his rights are otherwise protected. And it is to be assumed that the legislature intended to interfere with the right of contract only so far as was necessary for the creditor's protection.

Nor are we unmindful of the fact that in cases of actual fraud (*Hall v. Eaton*, 25 Vt. 458), and even in cases of so-called fraud in law (*Mills v. Warner*, 19 Vt. 609, 47 Am. Dec. 711; *Weeks v. Prescott*, 53 Vt. 57), we have allowed the creditor to proceed by attachment and sale. But we do not think the rule should be extended, even if its soundness is admitted.

These views are conclusive of the rights of the parties so far as these proceedings are concerned, and the

other questions discussed by counsel need not be considered.

**NOTE.**

Judgment reversed, and judgment for the plaintiff for the sum of \$817.75, with interest thereon from February 17, 1917, and his costs.

The question as to the rights between parties to a sale in violation of the Bulk Sales Law is treated in the annotation following *Escalle v. Mark*, post, 1517.

**Trover—  
attachment for  
violation of  
Bulk Sales Law.**

PETER ESCALLE, Respt.,

v.

FRANK MARK, Also Known as Frank Marks, Appt.

*Nevada Supreme Court — September 4, 1919.*

(— Nev. —, 183 Pac. 387.)

**Fraudulent conveyance — Bulk Sales Law — failure to comply — recovery of price.**

1. The provision in the Bulk Sales Law that failure to comply with the provisions of the law as to notice renders the sale fraudulent and void does not prevent a recovery by the seller of the purchase price.

[See note on this question beginning on page 1517.]

**Statute — construction — intent.**

2. The intent of the legislature controls in the construction of a statute, in seeking which the evils to be remedied must be ascertained.

[See 25 R. C. L. 960, 1015.]

**Bulk Sales Law — purpose.**

3. The main purpose of the Bulk Sales Law is to protect the wholesaler.

[See 12 R. C. L. 525.]

**APPEAL** by defendant from a judgment of the District Court for Washoe County (Bartlett, J.) in favor of plaintiff, and from an order denying a new trial, in an action brought to recover the balance of the purchase price of a one-half interest in a hotel and saloon business conducted by plaintiff, and a like interest in the stock, fixtures, and appurtenances thereto. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Platt & Sanford for appellant.

Mr. Robert Richards for respondent.

Coleman, Ch. J., delivered the opinion of the court:

This action was instituted by plaintiff, who is respondent here, to recover from the defendant (appellant) the balance of the purchase price of a one-half interest in and to a hotel and saloon business conducted by plaintiff in Reno, and a like interest in the stock, fixtures, furnishings, furniture, and appurtenances thereof. Judgment was rendered in favor of the plaintiff, and

from an order denying defendant's motion for a new trial, and from the judgment an appeal has been taken.

The only point urged upon our consideration as a reason why the judgment and order appealed from should be reversed is that prior to the making of the sale § 2 of the "Bulk Sales Act" (Stat. 1907, p. 209; Rev. Laws, 1912, § 3909) was not complied with. That section reads: "Whenever any person shall bargain for or purchase any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prose-



cution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof or to his order, or to any person for his use, any promissory note or other evidence of indebtedness, to give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase price or any part thereof, without at least five days previously thereto having demanded and received from the said vendor or his agent the statement provided for in § 1 of this act, and verified as there provided, and without notifying also at least five days previously thereto, personally or by registered mail, every creditor as shown upon said verified statement when said proposed sale or transfer is to be made, and the time and conditions of payment, and without paying or seeing to it that the purchase money of said property is applied to the payment of bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, such sale or transfer shall be fraudulent and void."

Section 1 of the act provides: "It shall be the duty of every person who shall bargain for or purchase any portion of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, before paying to the vendor or his agent or representative, or delivering to the vendor or his agent or representative, any part of the purchase price thereof or any promissory note or evidence therefor, to demand of and receive from such vendor or agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor to whom said vendor

may be indebted, together with the amount of the indebtedness due or owing or to become due or owing by said vendor, to each of the said creditors, and it shall be the duty of the said vendor or agent to furnish such statement, which shall be verified."

To be more specific, it is contended that because of the failure of the defendant to demand and receive from the plaintiff, five days previous to the consummation of the sale, the sworn statement provided for in § 1 of the act in question, and give five days' notice of such proposed sale to the creditors of the vendor, the sale was and is absolutely null and void, and that for this reason the plaintiff cannot recover the unpaid amount of the purchase price.

It is true that the statute says that when there is a failure to comply with § 1 of the act the sale shall be "fraudulent and void;" but did the legislature mean that a sale should be absolutely "void" as between the parties, regardless of the fact that no creditor was prejudiced thereby? We think not. It is a cardinal rule of statutory construction that the legislative intent

Statute—  
construction—  
intent.

controls (Worthington v. District Ct. 37 Nev. 212, L.R.A. 1916A, 696, 142 Pac. 230, Ann. Cas. 1916E, 1097), and in seeking the intention of the legislature in enacting a certain law we must ascertain the evils sought to be remedied. This court, speaking through Hawley, J., in *Ex parte Siebenhauer*, 14 Nev. 365, said: "The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject-matter and the policy of the law may also be invoked to aid in its interpretation, and it should always be so construed as to avoid absurd results"—citing *Roney v. Buckland*, 4 Nev. 45; *State ex rel. Keith v. Dayton & V. Tollroad Co.* 10 Nev. 155; *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138; *State ex rel. Harper v.*

Judge of Ninth Judicial Dist. 12 La. Ann. 777; State ex rel. Kelly v. Mayor, 35 N. J. L. 196.

It was said in *Columbia & P. S. Co. v. Braillard*, 12 Wash. 22, 40 Pac. 382: "It is doubtless true that the word 'void,' when used in a statute, does not always mean absolutely void for every purpose, and in determining its meaning in a given case regard must be had to the subject-matter of the statute, its scope, purpose and effect."

See also *Colburn v. Wilson*, 24 Idaho, 94, 132 Pac. 579; *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 566.

It is said: "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object." 36 Cyc. 1110.

It was also said by this court in *Ex parte Siebenhauer*, 14 Nev. at page 369, supra: "In order to reach the intention of the legislature, courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict, or extend the meaning of the words, so as to meet the plain evident policy and purview of the act, and bring it within the intention which the legislature had in view at the time it was enacted. *Gibson v. Mason*, 5 Nev. 285; *Reiche v. Smythe*, 13 Wall. 164, 20 L. ed. 566; *Burgett v. Burgett*, 1 Ohio, 480, 13 Am. Dec. 634; *McIntyre v. Ingraham*, 35 Miss. 52; *Camp v. Rogers*, 44 Conn. 291; *Castner v. Walrod*, 83 Ill. 178, 25 Am. Rep. 369; *Fisher v. Patterson*, 13 Pa. 338; *Bishop*, *Statutory Crimes*, § 212."

See also 36 Cyc. 1111.

In *Goldfield Consol. Mines Co. v. State*, 35 Nev. 178, 127 Pac. 77, it was said: "All laws should receive

a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278. And see *State ex rel. Truman v. McKenney*, 18 Nev. 189, 2 Pac. 171; *State v. Kruttschnitt*, 4 Nev. 178."

In the light of these rules of construction let us ascertain what evil the legislature sought to remedy by enacting the Bulk Sales Law. 12 R. C. L. § 54, at page 525, states that the Bulk Sales Law has but one aim, namely, "to prevent a sale of goods in bulk until the creditors of the seller have been paid in full." It is the common knowledge that the main purpose of the law is to protect the **Bulk Sales Law—purpose.** wholesaler. Prior

to the passage of the law, it was a common practice for retailers to sell their stock of goods in bulk, pay no one, and leave the man who sold them the goods without recourse. Such practices became so disastrous to the wholesalers that they were driven to the necessity of procuring legislation which would afford them protection against unscrupulous retail merchants. The Bulk Sales Law is the result.

"The object of this act was, no doubt, to protect wholesale merchants, particularly against fraudulent sales by retailers; but the act by its terms protects all creditors of merchants alike." *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; *Eklund v. Hopkins*, 36 Wash. 179, 78 Pac. 787.

This being the purpose of the law, how can it be successfully urged, as contended by appellant, that we should hold that such a sale as here in question was absolutely void? It is true that the statute says a sale shall be void when the terms of the act are not complied with; but to our minds, when construed in the

light of the purpose of the statute, it was clearly the intention of the legislature that the

**Fraudulent conveyance—Bulk Sales Law—failure to comply—recovery of price.**

sale should be voidable only. It is not pointed out what protection would or

could be afforded anyone by placing any other construction upon the law.

But all rules of construction aside, it seems to us that no other conclusion can be reached, from a reading of the entire act itself, especially § 4 thereof (Rev. Laws, § 3911). This section provides that, if the vendor produces and delivers a written waiver of the requirements of the act as to notice to creditors, from at least a majority in number and amount of his creditors, the provisions of the act shall not apply. If it was the purpose of the legislature in enacting the law to protect any but creditors, the section just referred to is a most remarkable one. In fact, we cannot escape the conclusion, from a consideration of this very section, that the sole purpose of the law is to protect creditors. If such was not the intention, the legislature would never have embodied § 4 in the law, because it would manifestly have made the act inconsistent in its operation. Such seems to have been the conclusion reached by the supreme court of New Jersey, in considering the effect of a similar provision in the Bulk Sales Law of that state, in the case of *Dickinson v. Harbison*, 78 N. J. L. 97, 72 Atl. 941. The court in that case said: "The body of the act, as will be observed, declared that a sale should be void as to creditors unless certain things were done by the purchaser. The proviso, however, speaks of the sale as 'such voidable sale.' The word 'void' was used in the sense of voidable. The proviso itself shows that the sale was a nullity only when attacked by creditors within a certain period."

So in our statute, the "body of the act" provides that a sale which is made without first complying with certain terms thereof shall be

"fraudulent and void," while § 4 says such requirements may be waived by creditors.

Many cases may be found growing out of the Bulk Sales Statutes of various states, wherein the word "void" is construed to mean "voidable;" such construction invariably being reached upon the theory that such was the evident intention of the lawmaking bodies. To quote from all of them would unnecessarily lengthen this opinion, and we content ourselves with the following extracts:

"The phrase, 'fraudulent and void as to creditors,' relates to attaching creditors who seek to set aside the vendee's title, which, until set aside, is a valid title. As between the parties to the sale, the title passed to the vendee, and it remains in him until it is vacated by a creditor of the vendor upon proceedings instituted for that purpose, or until the vendee disposes of the property. Though the word 'void' is used in the statute, in legal effect it means voidable at the instance of an attaching creditor." *McGreenery v. Murphy*, 76 N. H. 338, 39 L.R.A. (N.S.) 374, 82 Atl. 720.

"The question whether in a statute the term 'void' is used with entire technical accuracy, or only in its less strict meaning as voidable, is frequently one of difficulty. In many statutes the word is used in its strict technical sense, and in many it is used in the sense of voidable. In view of the subject-matter of this statute, the conditions of the law prior to its passage, the abuse which it aims to correct, and the manifest difficulty of any other view, we are of the opinion that the legislature intended to place the kind of sale named in the statute into the class of sales theretofore existing as fraudulent and for that reason voidable by creditors, unless the conditions therein prescribed were complied with; or, in other words, it is intended to create another instance of a sale which the creditors might avoid as being fraudulent, and for that reason against their rights.

But it was not the intention of the statute that this kind of sale should stand upon any different footing from that of the general class to which it was added. The sale is voidable like the other kinds of sales which are commonly called void as against creditors, and the right of the creditor as to this sale is similar in its nature to the right of the creditor in such other sales. Such an interpretation of the statute seems to us reasonable, and in accordance with the general principle of law applicable to the subject-matter. See, in this connection, the language used by Knowlton, Ch. J., in giving the opinion of the court in *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297.

"Knowlton, Ch. J.: . . . A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statutes, if he pays his debts." *John P. Squire & Co. v. Tellier*, supra.

"But since the decision in *State v. Richmond*, 26 N. H. 232, this term 'void' is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case." *Brown v. Brown*, 50 N. H. 552.

"It is doubtless true that the word 'void,' when used in a statute, does not always mean absolutely void for every purpose; and in determining its meaning in a given case regard must be had to the subject-matter of the statute, its scope, purpose, and effect." *Columbia & P. S. R. Co. v. Braillard*, 12 Wash. 22, 40 Pac. 382.

"The question involves the construction of a clause of our revenue

law: . . . 'Provided further, that in all cases where the owner of land sold for taxes shall resist the validity of such tax title, such owner may show and prove fraud committed by the officer selling the same, or in the purchaser to defeat the same; and if fraud is so established such sale and title shall be void.' This controversy involves the construction of the . . . clause just quoted.

. . . The word 'void' has, with lexicographers, a well-defined meaning: 'Of no legal force or effect whatsoever; null and incapable of confirmation or ratification.' Webster's Dict. But it is sometimes, and not infrequently, used in enactments by the legislature, in opinions by courts, in contracts by parties, and in arguments by counsel, in the sense of voidable; that is, capable of being avoided or confirmed. *Ibid.* The word 'void,' when used in any of these instruments, will therefore be construed in the one sense or the other, as shall best effectuate the intent in its use, which will be determined from the whole of the language of the instrument and the manifest purpose it was framed to accomplish. Or, as the same rule has been more extendedly stated: 'It is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the courts are satisfied that the literal meaning of its words would extend to cases which the legislature never designed to include in it.' *Brewer v. Blougher*, 14 Pet. 178, 10 L. ed. 408. This rule is broader than the one first stated, for it would justify restraining the meaning of a word to narrower limits than its import; whereas, to restrain the word void to the meaning of voidable, is to give it one of its not unfrequent accepted significations." *Van Shaack v. Robins*, 36 Iowa, 201.

See also *Southern Nat. Ins. Co. v. Barr*, — Tex. Civ. App. —, 148 S. W. 845; 12 R. C. L. 525; *Newman v.*

Garfield, — Vt. —, ante, 1507, 104 Atl. 882; Portland & O. C. R. Co. v. Hyde, 87 Or. 163, 169 Pac. 791; Benson v. Johnson, 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014.

For the reasons given, it follows that the order and judgment appealed from must be affirmed.  
It is so ordered.

Sanders and Ducker, JJ., concur.

## ANNOTATION.

### Rights between parties to sale in violation of Bulk Sales Law.

It seems to be the general rule that the fact that a transfer of property is in fraud of the creditors of the transferor does not affect the rights of the parties, but merely makes the transfer invalid at the instance of a creditor. See 12 R. C. L. p. 597. It is held in *ESCALLE v. MARK* (reported herewith) ante, 1512, that the provision in a Bulk Sales Law that a sale made without complying with its requirements shall be "void" as to creditors does not put such a sale on a footing different from other fraudulent conveyances. It is accordingly held that the seller may recover the price, though the sale was in violation of the act.

The only other case passing directly on the rights of the parties to a sale in violation of a Bulk Sales Law reached a conclusion at variance with that in *ESCALLE v. MARK*. In *Farrar v. Lonsby Lumber & Coal Co.* (1907) 149 Mich. 118, 112 N. W. 726, it appeared that a corporation sold its stock in trade in bulk, giving a bill of sale and receiving notes for the price. No delivery was made. Thereafter a receiver was appointed for the corporation at the instance of a stockholder. The purchaser brought a bill to establish his title to the property covered by the bill of sale. The court said: "Act No. 223, known as the 'Sales in Bulk Act,' was held valid by this court in *Spurr v. Travis* (1906) 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250. Counsel for the petitioning appellants appears to concede that under that act the sale was void, but claims that the receiver should either return the petitioners' notes or pay them with the money derived from the sale of the goods. He also contends that the bill of sale should be treated as a mort-

gage. Neither of these contentions can be sustained. Otherwise a quick and easy way to completely avoid the statute would be furnished. A sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid."

However, in several cases, the court, in passing on the rights of creditors as against a sale wherein the requirements of a Bulk Sales Law, were not complied with, has said by way of dictum that such a sale is valid as between the parties. *John P. Squire & Co. v. Tellier* (1904) 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Kelly-Buckley Co. v. Cohen* (1907) 195 Mass. 585, 81 N. E. 297; *McGreeney v. Murphy* (1912) 76 N. H. 388, 39 L.R.A. (N.S.) 374, 82 Atl. 720; *Dickinson v. Harbison* (1909) 78 N. J. L. 97, 72 Atl. 941; *Benson v. Johnson* (1917) 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014; *Oregon Mill & Grain Co. v. Hyde* (1918) 87 Or. 163, 169 Pac. 791; *NEWMAN v. GARFIELD* (reported herewith) ante, 1507; *Rothchild Bros. v. Trewella* (1905) 36 Wash. 679, 68 L.R.A. 281, 104 Am. St. Rep. 973, 79 Pac. 480; *Kasper v. Spokane Merchants' Asso.* (1915) 87 Wash. 447, 151 Pac. 800.

Thus in *Benson v. Johnson* (1917) 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014, it was said obiter as to a sale in violation of the Bulk Sales Law: "It was manifestly good as between themselves." See to the same effect *Oregon Mill & Grain Co. v. Hyde* (1918) 87 Or. 163, 169 Pac. 791.

So, in *John P. Squire & Co. v. Tellier* (1904) 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, the court, in sustaining the validity of a Bulk Sales Law, said: "A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts

are paid, the sale cannot be interfered with."

Similarly, in *Kelly-Buckley Co. v. Cohen* (1907) 195 Mass. 585, 81 N. E. 297, the court said: "It was not the intention of the statute that this kind of sale should stand upon any different footing from that of the general class to which it was added. The sale is voidable like the other kinds of sales which commonly are called void as against creditors; and the right of the creditor as to this sale is similar in its nature to the right of the creditor in such other sales. Such an interpretation of the statute seems to us reasonable, and in accordance with the general principle of law applicable to the subject-matter." See to the same effect *Rothchild Bros. v. Trewella* (1905) 36 Wash. 679, 68 L.R.A. 281, 104 Am. St. Rep. 973, 79 Pac. 480.

In *NEWMAN v. GARFIELD* (reported herewith) ante, 1507, with respect to a statute declaring that sales in bulk "shall be fraudulent and void as against creditors of the seller," it was said in passing on the rights of creditors against the purchaser: "We have no hesitation, therefore, in holding that this statute really means that bulk sales are constructively fraudulent and voidable at the instance of creditors, and that as between the parties the transaction is final and binding, with title passing to the purchaser, where it remains until devest-

ed by proceedings instituted by a creditor for that purpose."

In *McGreeney v. Murphy* (1912) 76 N. H. 338, 39 L.R.A. (N.S.) 374, 82 Atl. 720, it was said: "The phrase 'fraudulent and void as to creditors' relates to attaching creditors who seek to set aside the vendee's title, which, until set aside, is a valid title. As between the parties to the sale, the title passed to the vendee and it remains in him until it is vacated by a creditor of the vendor upon proceedings instituted for that purpose, or until the vendee disposes of the property. Though the word 'void' is used in the statute, in legal effect it means voidable at the instance of an attaching creditor."

In *Kasper v. Spokane Merchants' Asso.* (1915) 87 Wash. 447, 151 Pac. 800, it was said: "The first of the sections above quoted, it will be observed, declares sales made without a compliance with the provisions of the act fraudulent and void. It is manifest, however, that the meaning is fraudulent and void as to the creditors of the vendor. The purpose of the statute being to protect the creditors of the vendor, not the vendor himself, its language must be construed to effectuate the purpose intended. Hence it follows that, as between the vendor and the vendee, title will pass to the property by a sale in bulk, notwithstanding a want of compliance with the statutory requirements.

W. A. S.

## WHITING-MEAD COMMERCIAL COMPANY

v.

## INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA.

*California Supreme Court (In Banc) — July 3, 1918.*

(— Cal. —, 173 Pac. 1105.)

### Workmen's compensation — injury arising out of employment — lighting cigarette.

An accident incident to the attempt by one employed in the business of wrecking houses to light a cigarette in working hours arises out of his employment within the operation of the Workmen's Compensation Act, so that he is entitled to compensation for injury to his hand through igni-

tion of a bandage saturated with turpentine to alleviate the pain of a nail wound in the hand.

[See note on this question beginning on page 1521.]

TRANSFER by the District Court of Appeals for the Second Appellate District, upon application of petitioner, for the opinion of the Supreme Court, of a judgment affirming an award of compensation made by respondent in a proceeding to test the validity of the award. *Award affirmed.*

The facts are stated in the opinion of the court.

Mr. R. L. Horton for petitioner.

Mr. Christopher M. Bradley, for respondent:

The injury arose out of the employment.

M'Lauchlan v. Anderson [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376; Martin v. J. Lovibond & Sons [1914] 2 K. B. 227, 6 B. R. C. 466, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, 7 B. W. C. C. 243, 5 N. C. C. A. 985; Manson v. Forth & C. S. S. Co. [1913] S. W. 921, 50 Scot. L. R. 687, [1913] W. C. & Ins. Rep. 399, 6 B. W. C. C. 830; Chludzinski v. Standard Oil Co. 176 App. Div. 87, 162 N. Y. Supp. 225; Carinduff v. Gilmore, 7 B. W. C. C. 981, 48 Ir. L. T. 137; Northwestern Iron Co. v. Industrial Commission, 160 Wis. 633, 152 N. W. 416; Brooklyn Min. Co. v. Industrial Acci. Commission, 172 Cal. 774, 159 Pac. 162; Zabriskie v. Erie R. Co. 86 N. J. L. 266, L.R.A. 1916A, 315, 92 Atl. 385; Cook v. Manners Main Collieries, 7 B. W. C. C. 696; Archibald v. Workmen's Compensation Comr. (Archibald v. Ott) 77 W. Va. 448, L.R.A. 1916D, 1013, 87 S. E. 791; Keenan v. Flemington Coal Co. 5 Sc. Sess. Cas. 5th series, 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409; Elliott v. Rex, 6 W. C. C. 27.

Sloss, J., delivered the opinion of the court:

The district court of appeal for the second appellate district issued a writ of review to test the validity of an award of compensation made by the Industrial Accident Commission. The proceeding resulted in a judgment affirming the award. Upon application of the employer the matter was transferred to this court. Our further examination has led us to a concurrence with the conclusions of the district court of appeal. We, therefore, adopt the opinion of that court, prepared by Works, Judge pro tem., as a correct statement of the facts and an ade-

quate treatment of the questions of law arising on those facts. The opinion reads as follows:

"The Whiting-Mead Commercial Company was engaged in the business of wrecking houses, and Miguel Duarte was one of its workmen. While at work on one of the company's jobs Duarte ran a nail into the palm of his right hand, but the wound was not so severe as to cause him to cease his work, although the hand had to be bandaged. Twice during the day, once at noon and once at about 3 o'clock, the bandage was soaked with turpentine by an agent of the company in an endeavor to alleviate the pain caused by the nail wound. Soon after the second application of the turpentine, Duarte temporarily ceased his labor and struck a match for the purpose of lighting a cigarette. The saturated bandage was ignited by the match, and the hand was seriously burned. Duarte applied to the Industrial Accident Commission for compensation on account of the disability resulting from the burn, and an award was made in his favor. The petitioner now asks that the award be annulled.

"At the time he was burned Duarte was in the course of his employment as a workman of the company, but it is contended that the injury did not arise out of the employment. There are many decided cases which bear more or less directly upon the question here presented. In one of them (Martin v. J. Lovibond & Sons [1914] 2 K. B. 227, 6 B. R. C. 466, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, 7 B. W. C. C. 243, 5 N. C. C. A. 985, a drayman employed by a firm of

brewers was run down by an automobile and killed. His hours of employment were from 8 in the morning until 9 in the evening, or later. During his working hours he took no meals at home. On the day of his death he left his team at the side of the street, and crossed the way for the purpose of refreshing himself at a public house with a glass of beer. He was in the public house about two minutes. While crossing the street to return to his dray he was killed. Compensation was allowed. In two cases, *Archibald v. Workmen's Compensation Comr.* (*Archibald v. Ott*) 77 W. Va. 448, L.R.A.1916D, 1013, 87 S. E. 791; *Keenan v. Flemington Coal Co.* 5 Sc. Sess. Cas. 5th series, 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409, compensation was awarded for the result of accidents suffered while employees had left the actual performance of their work to procure drinking water. In another case (*Carinduff v. Gilmore*, 48 Ir. L. T. 137, 7 B. W. C. C. 981), a girl who was employed on the top of a threshing machine stopped her work to partake of refreshment provided by her employer, and suffered an injury while so engaged. Compensation was awarded. In one case (*Northwestern Iron Co. v. Industrial Commission*, 160 Wis. 633, 152 N. W. 416), it was held that an employee, injured while warming himself during a labor which subjected him to the cold, is entitled to compensation. In at least three cases (*Cook v. Manvers Main Collieries*, 7 B. W. C. C. 696; *Elliott v. Rex*, 6 W. C. C. 27; *Zabriskie v. Erie R. Co.* 86 N. J. L. 266, L.R.A.1916A, 315, 92 Atl. 385) compensation was allowed for injuries suffered by employees during absence from actual work in response to calls of nature. In a California case (*Brooklyn Min. Co. v. Industrial Acci. Commission*, 172 Cal. 774, 159 Pac. 162), a miner was proceeding from one working place in a mine to another, passing over the surface of the ground from shaft to shaft in order to reach the second point. The day was very hot,

and he paused in the shade of an ore bin to rest. The bin collapsed and killed him. Compensation was awarded.

"From these cases there is deducible a rule which is thus stated in one of them (*Archibald v. Workmen's Compensation Comr.*): 'Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. . . . That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment. Are we to place the use of tobacco in this list of ministrations to the comfort of the employed? Is its use necessarily contemplated in the course of such an employment as that in which Duarte was engaged? The petitioner, in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a self-created appetite and not a natural appetite.

**Workmen's compensation—injury arising out of employment—lighting cigarette.**

The argument does not appeal to us. In an endeavor to determine what indulgences of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to the depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us, and must deal with it as it is. It will not do to say that mankind would be better for a lack of the weed, even if that statement be



true. Tobacco is universally recognized to be a solace to him who uses it, and it may be that such a one, unless he finally shakes off the habit, cannot perform the labors of his life as well without it as with it. In the present war one of the constantly recurring calls upon the public of the world is for tobacco for the comfort of the participants in the conflict. Nor are the books without their cases to the substantial effect that the employer must expect the employed to resort to the use of tobacco as a necessary adjunct to the discharge of his employment. *M'Lauchlan v. Anderson* [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376; *Manson v. Forth & C. S. S. Co.* [1913] S. C. 921, 50 Scot. L. R. 687, 6 B. W. C. C. 830, [1913] W. C. & Ins. Rep. 399; *Chludzinski v. Standard Oil Co.* 176 App. Div. 87, 162 N. Y. Supp. 225.

"The award is affirmed."

The case of *Haller v. Lansing*, 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335, may be cited as an additional authority supporting the views expressed above.

The award is affirmed.

We concur: *Melvin, J.; Angellotti, Ch. J.; Richards*, Judge pro tem.

*Wilbur, J.*, concurring:

I concur. In concurring I think it proper to say that although petitioner claims in its answer and argument that the applicant should have been denied compensation on the ground that his injury was the result of his own wilful misconduct in violating a rule of the employer prohibiting workmen from smoking, the record contains no evidence tending to show the existence of any such rule, and we cannot, therefore, question the validity of the Commission's finding that the injury was not caused by the wilful misconduct of the employee.

## ANNOTATION.

### Workmen's compensation: compensation to workmen injured through smoking.

The statement of Works, Judge pro tem., as quoted in the reported case (*WHITING-MEAD COMMERCIAL CO. v. INDUSTRIAL ACCI. COMMISSION*, ante, 1518), to the effect that the employer must expect an employee to resort to the use of tobacco as a necessary adjunct to the discharge of his employment, is recognized in every case in which the court has been called upon to pass upon the question of awarding compensation to an employee who was injured through smoking.

Thus an employee injured by the explosion of a dynamite cap, caused by his striking a match to light a cigarette while in the employer's building and on his way to his workbench, is entitled to compensation, although the employer's rules forbade the bringing of dynamite caps into the room in which the explosion took place. *Rish v. Iowa Portland Cement Co.* (1919) — Iowa, —, 170 N. W. 532. The court said: "Smoking, while not a necessity, is a recognized and quite universal habit

among workmen, and an indulgence reasonably to be anticipated by employers. The lighting of a cigarette with a match is not in itself attended by the slightest hazard. It was rendered dangerous to plaintiff only by the presence of a powerful explosive in common use upon certain parts of defendant's premises. It may be that the officers of defendant were not negligent or to blame for the presence of the explosive in the building, but the right of the employee to compensation does not arise out of tort, but exists by reason of the provisions of the Workmen's Compensation Act, which defendant had not rejected."

So, where a workman, who, in the course of his employment, was sitting on a wagon which was being drawn by a traction engine, fell from the wagon in an attempt to recover his pipe which he had dropped, an award of compensation for the injury received was sustained. *M'Lauchlan v. Anderson* (1911) 48 Scot. L. R. 349, 4 B. W. C.

C. 376. The Lord President said: "He had a right to be at the place, riding on or walking beside the wagons he was with in the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man while working may reasonably do. A workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again."

It is not unreasonable for workmen to smoke out of doors during intervals of work, where it does not interfere with their duties, says the Pennsylvania supreme court in *Dzikowska v. Superior Steel Co.* (1918) 259 Pa. 578, L.R.A.1918F, 888, 103 Atl. 351, in affirming an order awarding compensation in the case of an injury to a workman by fire, when, during a lull in the work, he struck a match to light a cigarette, which ignited the oil-soaked apron which the work required him to wear.

An award of compensation was sustained in *Haller v. Lansing* (1917) 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335, for an injury to a city employee engaged in outdoor work in inclement weather, caused by the explosion of vapor from a gasoline can in a tool house used in connection with the work, to which he had gone for shelter while eating his dinner, when he struck a match to light his pipe. The court said: "As before stated, in seeking shelter there during the noon intermission, he did a reasonable and natural thing under existing conditions, might reasonably light his pipe at such a time, was doing no forbidden thing, incurring no apparent risk, and violating no known rule of his employment."

Injuries to a ship carpenter by being burned from a fire caused by a shore laborer, who, after lighting his cigarette, threw the match while yet burning into some shavings, are caused by accident arising out of the employment, since the carpenter was, in his employment, required to work among shavings, and had gotten oil upon his trousers in the course of his work. *Manson v. Forth & C. S. S. Co.* [1913]

S. C. 921, 50 Scot. L. R. 687, [1913] W. C. & Ins. Rep. 399, 6 B. W. C. C. 830.

An employee in an oil refinery who went into his locker room for some unknown reason and after a short time rushed out with his shirt, which was highly inflammable because of oil, in flames, may be found to have suffered injuries from the fire by accident arising out of his employment, where going into the locker room was not forbidden, and there was in the locker room an exposed gas jet from which the fire might have been communicated to his shirt; and even if it could be found that the fire was caused by his lighting a match for the purpose of smoking, it would not prevent a recovery, since smoking was not forbidden. *Chludzinski v. Standard Oil Co.* (1916) 176 App. Div. 87, 162 N. Y. Supp. 225. The court said: "Smoking was not prohibited, and if an employee had a leisure moment there was no reason why he might not smoke. Smoking in the factory during business hours by an employee, when not prohibited, cannot deprive him of the benefit of the law."

Of course, if the act of the employee in indulging in smoking or in preparing to smoke takes him entirely outside of the employment, no recovery for compensation is allowable, not because of the smoking, but because injuries in such cases cannot be said to arise out of and in the course of the employment.

Thus an employee of a tinner, who, while riding on a conveyance of the employer from the place of business to the place where work was being carried on, leaves the wagon to go to a drug store to purchase tobacco for his own use, and is struck and instantly killed by a passing automobile, does not suffer injury arising out of and in the course of the employment. *Re Betts* (1918) — Ind. App. —, 118 N. E. 551. The court said: "Of course, it cannot be said that Betts, while on an errand for himself, was doing any service required by his employment, and we are unable to see wherein his employment exposed him to the hazard or danger which resulted in his death. To illustrate our meaning, if

the employment of the injured party had been of the kind to take him on a roof, and in going for his tobacco he had slipped, or for any other cause had fallen from the roof and been injured, we can see a connection between the employment and the injury, in that his employment placed him where the hazard of indulging in his tobacco was increased. In the instant case the employment did not keep deceased on the street as a pedestrian. If it could be said to expose him to any dangers of the street, other than

that to which the public generally are exposed, it was the danger of traveling in a vehicle to and from his work. In other words, as a pedestrian on the street going for his tobacco, his employment exposed him to no danger that would not have been incurred by any other pedestrian on a like errand, nor was he exposed to any hazard different from or in excess of the hazard to which he would have been exposed when on such errand, though he had not been engaged in the employment indicated." W. M. G.

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W. A. LESSENGER, Appt.,

v.

CITY OF HARLAN, Iowa, et al.

*Iowa Supreme Court—September 17, 1918.*

(— Iowa, —, 168 N. W. 803.)

**Water — gathering in sewers — hastening flow — liability.**

1. A municipal corporation is not liable to the owner of private property for gathering surface water within its limits and carrying it along the natural course of drainage and casting it upon such property, if the water would have reached the point where it was discharged without artificial interference, although it would not have done so as quickly as it does through the sewer.

*[See note on this question beginning on page 1530.]*

**Municipal corporation — liability for injury through authorized act.**

2. Where a city has statutory authority to do a particular thing through its properly constituted officers, it cannot be held liable to a citizen for consequences that follow the doing, in the absence of some showing of negligence in the manner of doing.

*[See 19 R. C. L. 1083.]*

**Water — right to accelerate flow.**

3. A landowner may tile his land into a natural channel even though it may facilitate the flow of surface water into the natural channel and increase the volume of water flowing therein.

**— casting water on a neighbor's property.**

4. A landowner cannot dig a ditch

to divert water from its natural course, and then tile into that ditch and discharge the water upon his neighbor's property.

**— discharge on servient estate.**

5. The owner of a dominant estate cannot concentrate at one point the water diffused over the surface of his own land and discharge it in a body on the servient land.

**Injunction — against casting water on property.**

6. Injunction will not lie to prevent a city from casting water upon private property if injury therefrom is not shown or reasonably to be apprehended.

*[See 14 R. C. L. 345.]*

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**APPEAL** by plaintiff from a decree of the District Court for Shelby County (Arthur, J.) dismissing a petition filed to enjoin defendants from dis-

charging surface water upon plaintiff's land, and also for damages. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Byers, Byers, & Miller, for appellant:

A city will not be permitted to divert a large quantity of surface water from its natural course in another direction so as to flow on private property in destructive quantities through a drain or channel.

*Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Dill. Mun. Corp.* 4th ed. §§ 1045-1051; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Gould, Waters*, § 272.

The acts of the defendant city in constructing and maintaining the improvements in question, and particularly a sewer or drainage system, in such a manner as to discharge upon plaintiff's property, made the plaintiff's property a part of such system and was a taking of his property for public use without due process of law or just compensation.

*Dill. Mun. Corp.* 4th ed. § 992; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Talcott Bros. v. Des Moines*, 134 Iowa, 113, 12 L.R.A. (N.S.) 696, 120 Am. St. Rep. 419, 109 N. W. 311; *Hoffman v. Muscatine*, *supra*.

By providing a drainage system for the city the defendant city was bound to provide means for taking care of large volumes of water, flowing with great velocity, collected by this system.

*Indianapolis v. Lawyer*, 38 Ind. 348.

The defendant city was negligent in failing to provide sufficient means for caring for said water without damage to plaintiff or others, and was negligent in continuing to maintain said storm sewer and outlet in the manner herein shown after it was known to it, or, in the exercise of reasonable diligence by its officers, should have been known to it, that there were no adequate means for caring for such water.

*Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Dill. Mun. Corp.* 4th ed. §§ 1045-1051.

Messrs. Edward S. White, Cullison & Cullison, and Thomas H. Smith, for appellee:

As a general rule the city is not liable for damage occasioned by the

mere grading of its streets, if this is done in a prudent manner.

*Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. Burlington*, 30 Iowa, 267; *Damour v. Lyons City*, 44 Iowa, 282.

The owner of the dominant estate has the right to conduct the water falling upon his land, by means of underground tile drains, into the channel provided by nature for the drainage of his land, and through such channel to cast it upon the servient estate.

*Vannest v. Fleming*, 79 Iowa, 638, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44 N. W. 906; *Resser v. Davis*, 100 Iowa, 745, 69 N. W. 524; *Hull v. Harker*, 130 Iowa, 190, 106 N. W. 629.

Where a culvert for the drainage of water did not increase the quantity of water on plaintiff's land, or throw it thereon in a different manner from that in which it would naturally have flowed thereon, a petition to enjoin the maintenance and use of said culvert will be dismissed.

*Schrope v. Pioneer Twp.* 111 Iowa, 113, 82 N. W. 466; *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 200.

If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to the width, the line of its flow is, within the meaning of the law applicable to the discharge of surface water, a watercourse.

*Hull v. Harker*, 130 Iowa, 193, 106 N. W. 629; *Lambert v. Alcorn*, 144 Ill. 313, 21 L.R.A. 611, 33 N. E. 53.

Mere acceleration of flow of water by reason of the construction of tile drainage is not ground for damages.

*Hull v. Harker*, *supra*.

In injunction cases, the evidence must clearly and satisfactorily show that defendant is about to materially and unduly increase the flow of water to plaintiff's imminent damage. An increase of flow of water simply is not sufficient; there must be a material and prejudicial increase.

*Wirds v. Vier Kandt*, 131 Iowa, 125, 108 N. W. 108.

A landowner may collect the surface water upon his land in a channel and discharge it into a natural swale or depression, and unless he substantially increases the volume, or discharges it in a negligent manner so as to injure his neighbor, he is not

guilty of creating a nuisance or liable in damages.

Jontz v. Northup, 157 Iowa, 6, 137 N. W. 1056, Ann. Cas. 1915C, 967; Obe v. Pattat, 151 Iowa, 723, 130 N. W. 903; Manteufel v. Wetzel, 133 Wis. 619, 19 L.R.A.(N.S.) 167, 114 N. W. 91; Shaw v. Ward, 131 Wis. 646, 111 N. W. 671, 11 A.n. Cas. 1139.

A city has the undoubted right to grade its streets in such way, time, and manner as it sees fit, and has the right to protect itself from surface water, having the same right as the owners of abutting lots so to protect itself.

Freburg v. Davenport, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705; Cedar Falls v. Hansen, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585.

The city has no greater duty to care for surface water in the protection of property abutting on its streets than the private owner would have in protecting an adjoining owner from such injury.

Cech v. Cedar Rapids, 147 Iowa, 251, 126 N. W. 166.

An owner of lower land cannot re-

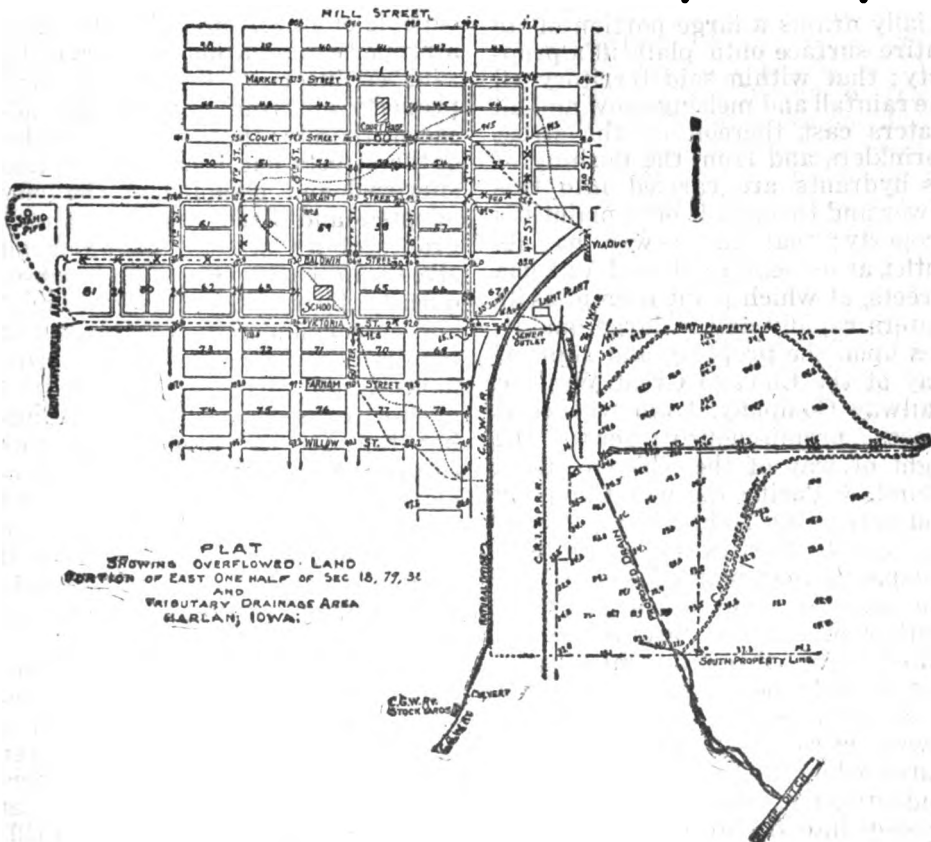
strain the owner above him from tiling his open ditches, on the theory simply that the location of the tile below the surface would drain a greater area more rapidly and carry additional water upon the lower land, which water otherwise would evaporate or be absorbed.

Plagge v. Mensing, 126 Iowa, 737, 103 N. W. 152; Pascal v. Donahue, 170 Iowa, 315, 152 N. W. 605.

Gaynor, J., delivered the opinion of the court:

This action was brought in equity to secure an injunction restraining the defendants, particularly the city of Harlan, from discharging surface water from its storm sewer upon the lands of the plaintiff. Damages are also asked.

It appears that all the territory involved in this suit is within the corporate limits of the city. A map of the platted portion of the city showing the streets and alleys is herewith submitted, and it shows that immediately east and adjacent



to the platted portion, somewhat in the platted portion, are the tracks of the Chicago Great Western Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Chicago & Northwestern Railway Company. Immediately east of these tracks lies plaintiff's land, consisting of 115 acres of unplatted agricultural land. The platted portion of the city is much higher than the land to the east, and much higher than the land owned by the plaintiff. The natural course of drainage from the platted portion of the city is towards the east and towards the plaintiff's land.

Plaintiff complains and says: That the defendant city paved its streets, and under a portion of the pavement has constructed and now maintains a storm sewer, which receives, carries, and discharges the surface water, which falls or flows upon the pavement, onto plaintiff's land; that by this means the city artificially drains a large portion of its entire surface onto plaintiff's property; that within said territory all the rainfall and melting snow and all waters cast thereon by the street sprinklers and from the flushing of its hydrants are carried into this sewer and through it onto plaintiff's property; that this sewer has its outlet at or near Fifth and Victoria streets, at which point it empties its waters rapidly and in large quantities upon the property and right of way of the Chicago Great Western Railway Company, from whence it passes promiscuously across the right of way of the Chicago, Rock Island, & Pacific Railway Company and across the right of way of the Chicago & Northwestern Railway Company, upon plaintiff's land; that the outlet of said storm sewer is neither at, in, nor near a natural watercourse through which such water might be carried away; that if said pavement and said storm sewer were not maintained the water which falls or comes upon said city's territory would evaporate or seep into the ground and disap-

pear, and only a small portion of the same would find its way to the land of plaintiff; that some would drain into natural watercourses in the north and south parts of the city, and would not find its way to plaintiff's land; that a large portion of the city's territory is not naturally drained by the swale through which said storm sewer has its outlet; that under the conditions complained of all the water that falls and all that comes upon the streets finds its way over the pavement into said sewer, and through it onto plaintiff's land.

It was stipulated upon the trial that under and by virtue of proper enactments, ordinances, and by resolutions properly passed, defendant city duly and legally fixed and established the permanent grade of its several streets, including the streets involved in this controversy, and that the grades so established were in accordance with the plan and recommendations of a competent capable engineer, and all done after a proper examination and survey by said engineer of the streets and property abutting thereon and adjacent thereto; that after the grades of the streets had been planned and surveyed and established, the city adopted and fixed the permanent grades of its streets, including all streets in controversy, and subsequently, by and through its council and mayor, under the necessary and required acts, resolutions, ordinances, and proceedings, required by law, caused said streets, including the streets involved in this controversy, to be brought to permanent grades, and proceeded properly and lawfully by ordinance and resolution to pave, curb, and gutter the same, and to provide proper drainage therefor; that the bringing of said streets to grade, and the paving thereof, and the providing of curbs and gutters therefor, as well as the construction and establishment of the storm sewer and sewers herein involved, wherever constructed, and especially at the place complained of by plaintiff,

as well as the provisions for the drainage of said streets, was all done and provided under the direction and in accordance with the plans, specifications, and survey of an efficient and competent civil engineer employed by the city for that purpose, in the doing of which things the city was in no way careless or negligent; that in the establishment of the grades, and in doing the work in bringing said streets to grade, and in the making of said improvements thereon and therein, all the proceedings, resolutions, and ordinances were duly passed, adopted, and enacted and complied with as by law provided, and all notices required by law in the making of said improvements and in the establishment of said grades were duly and legally given.

A city is authorized under our statute to bring its streets to grade. This involves the idea of lowering or raising them above the natural level of the ground at points where the necessities of travel demand a lowering or raising. It has the power to open, grade, and improve its streets, and this involves grading, paving, and guttering. In determining the necessity for these, it acts in a legislative capacity, and is not answerable for error of judgment in this respect. In the very nature of things, the changing of agricultural or rural lands into city territory necessitates some disturbance of the surface of the ground, and out of this inevitably grows a disturbance of the surface drainage of the ground. Where, in the exercise of the rights given it by statute, it follows the requirements of the statute, it is not liable for consequences that follow the doing of the act, without some showing, at least, of negligence in the manner of the doing. It is not liable for results that follow the discharge of its public duties without negligence.

Where a city has authority, under the statute, to do a particular thing through its properly consti-

tuted officers, it cannot be held liable to a citizen for consequences that follow the doing, in the absence of some showing of negligence in the manner of the doing. A natural person has the right to a proper and profitable use of his own land, and if, in the exercise of such right, without fault or negligence, loss unavoidably occurs to his neighbor, the neighbor is without remedy. Cities and towns as such certainly are invested with as much immunity in the exercise of rights over their property as individuals. If in the doing of these things, which it has the right to do under the law for the public good, and for the proper and profitable use of its own territory, it causes, without negligence, injury to a citizen, the citizen is without remedy. If we should hold the city liable to individuals for consequential damages resulting solely from the improvement of the city in the grading, guttering, and paving of its streets, done properly and in strict accordance with the requirements of the statute, upon a simple showing that injury occurred from the doing, without any showing of negligence in the manner of the doing, we would be going a long way in preventing any improvement. If we should hold that the city is liable to a citizen for consequential damages, upon the simple showing that the city, in the lawful exercise of its right, without negligence in the manner of the doing, graded its streets, paved and guttered them, and, as an incident thereto and a consequence thereof, the surface water was diverted from the course it pursued in the state of nature, we would throw in the way of public improvement insurmountable stumbling blocks.

This would be especially true where it is not shown that the city, by the exercise of reasonable care and thoughtfulness for the safety of the citizen, could have done the work complained of in any other

Municipal corporation—  
liability for  
injury through  
authorized act.

manner. The act of the city in determining the necessity for the work is legislative. The doing of the work and the manner of the doing may be ministerial. Where there is no fault in the doing, or in the manner of the doing, it cannot be held liable for consequential damages flowing from the exercise of the right to do.

So much for the general proposition. Concretely, however, we are met by the proposition that a citizen has no right to divert water from the course of its natural drainage, and cast it upon the land of his neighbor in greater quantities or in any other manner than it would go in the course of nature. The citizen may tile his

**Water—right to accelerate flow.**

land into a natural channel on his land, even though by doing so it may facilitate the flow of surface water into the natural channel. He may lay tile in a natural channel or watercourse on his own land, even though the effect of it is to facilitate the flow of water along the channel. He may tile his land into a natural channel or watercourse, even though it increases the volume of water that flows into the natural channel or watercourse. In doing so he does no wrong for which he is answerable, providing the waters brought into and discharged are ultimately released at the same place at which they would have been discharged in the course of nature. We are speaking now of surface water, and the fact that evaporation and seepage are interfered with does not change the situation. Of course, a citizen cannot dig a ditch and di-

**—casting water on a neighbor's property.**

vert the water from its natural course, and then tile into that ditch and discharge the waters upon his neighbor; but if there is a natural watercourse, or a course through which the water naturally flows from the surrounding country in a state of nature, he may tile his land into it, and of this his lower neighbor cannot complain.

It is claimed, however, that in

Victoria street the plaintiff placed a storm sewer, into which was gathered the waters coming from the other streets, and through this sewer the water from the city was carried in a body to and discharged at a point near the northwest corner of plaintiff's land. Now, if this water gathered into this sewer did not naturally gather there, or its course was changed and it was forced there by the change, and the sewer was placed to receive it and carry it in a body onto plaintiff's land, there would be force in plaintiff's contention. The record, however, discloses that the street in which this storm sewer was laid, and streets leading into it, were natural outlets for the surface water before the storm sewer was laid; that practically the whole surface water of the city tends towards this point; that the surface water of the city in the course of nature, unaffected by any act of the city, had a natural outlet at this point; that deep gullies had been washed in these streets, and that these gullies received and carried water from the city to the west, and discharged it practically at the point where this sewer discharges. This sewer was laid in the gullies, and received the same water practically that was received by these gullies, and discharged it practically at the same place, with practically the same consequential injury to plaintiff's land. The city has not changed the natural course of drainage, but has availed itself of natural conditions that existed there, which, before the putting in of the sewer, served the same purpose that the sewer serves. It cannot be said that the city gathered the waters from this territory into this channel and discharged it upon the plaintiff. The waters naturally came there, came there in the course of nature, facilitated perhaps somewhat by the paving in reaching there; but practically the same waters came to this street and passed through the gullies to the same point at which this sewer pipe was laid.



It is shown in the instant case that in grading, paving, and guttering the streets of the defendant city very little, if any, disturbance was made in the general surface of the ground as it existed before the work was begun. Any change in the course that the surface water may have pursued before the improvement is at best but slight, and only follows as an incident to the exercise of the right to grade, pave, and gutter its streets. No obstructions have been placed in the way of the natural flow of water; no barriers have been erected; no cuts have been made or ditches dug to divert the water from its natural channels. Any disturbance in the course of the surface water as it existed before the work was done by the city cannot be traced to any specific act done by the city to that end. Whatever change in the natural course of water upon the surface of the ground within the city's territory may have taken place is the natural and inevitable result of the exercise of that right and dominion over the property within its limits given to it by statute. No wrong can be

—gathering in  
sewers—hasten-  
ing flow—  
liability.

predicated upon a showing that the city has exercised its statutory right

in improving the territory within its own limits in the manner here shown. In the absence of any showing of any positive act of malfeasance or misfeasance, or of negligence in the doing of the act, the consequential damages resulting from the act must be borne by the sufferer without complaint.

It is a general principle that the

—discharge on  
servient estate.

owner of the dominant estate cannot concentrate at one

point the surface water diffused over the surface of his own land and discharge it in a body upon the servient estate. This rule, however, prohibiting the concentration of surface water at a particular point, does not apply to natural depressions or drains through which the surface water on the higher land is,

in the course of nature, carried to the lower land. The authorities hold that the flow of surface water along such natural depressions or drains may be hastened and incidentally increased, by artificial means, so long as it is not diverted from its natural course. The rule is well stated in *Dayton v. Rutherford*, 128 Ill. 271, 21 N. E. 198: "The defendant has no right at common law, as the owner of the dominant estate, to divert the waters of the slough into a channel wholly different from that in which they would naturally run. The rule undoubtedly is that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands next adjoining; and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased. But the owner of the higher lands has no right to open or remove natural barriers, and let onto such lower lands water which would not otherwise naturally flow in that direction. That would be to subject the servient heritage to an unreasonable burden, which the law will not permit, and against which the owner ought reasonably to have protection."

As to surface water the same rule is applied to cities. *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77. The owner of the upper estate may construct ditches and underground drains to hasten the flow of surface water into and along the natural depressions or drainways on his own land, so long as he does not divert the water from its natural course. *Bickel v. Martin*, 115 Ill. App. 367; *Vannest v. Fleming*, 79 Iowa, 638, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44 N. W. 906; *Dorr v. Simmerson*, 127 Iowa, 551, 103 N. W. 806; *Hull v. Harker*, 130 Iowa, 190, 106 N. W.

629; *Meixell v. Morgan*, 149 Pa. 415, 34 Am. St. Rep. 614, 24 Atl. 216. In *Manteufel v. Wetzel*, 133 Wis. 619, 19 L.R.A.(N.S.) 167, 114 N. W. 91, we find the following language: "Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course, but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation, as formerly, where no new watershed is tapped by said ditch, and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act."

See also *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Aldritt v. Fleischauer*, 74 Neb. 66, 70 L.R.A. 301, 103 N. W. 1084; *Todd v. York County*, 72 Neb. 207, 66 L.R.A. 561, 100 N. W. 299.

We have treated this case so far as involving only surface water. We have done this because there is no proof in this record that any sewage from the city was discharged through this sewer upon plaintiff's land, and no nuisance is shown to be created from that source.

As to the first count of plaintiff's petition, based on the thought that the surface water was diverted from the city territory and reached plaintiff's land in a way that it would not have reached the land, except for such diversion, we think the court was right in holding that no cause of action was shown.

As to the second count involving the discharge of water from the electric light plant adjacent to plaintiff's property, we think the plaintiff has shown no cause of action, for the reason that he has made no basis for the assumption that he has suffered any damage by reason of this action of the city. Unless damage to the plaintiff is shown to have resulted from the specific act charged, or damage is reasonably apprehended, he has no ground on which to base an injunction.

*Injunction—  
against casting  
water on prop-  
erty.*

Upon the whole record, we think the court was right in dismissing plaintiff's petition, and its action is affirmed.

*Preston, Ch. J., and Weaver and Stevens, JJ., concur.*

## ANNOTATION.

### Right to hasten by improvement of street or highway the flow of surface water along natural drainways.

The well-settled rule that the flow of surface water along natural depressions or drainways may be hastened and incidentally increased by artificial means, so long as the water is not diverted from its natural flow, has been applied in the improvement of streets and highways by municipal authorities. *Young v. Highway Comrs.*

(1890) 134 Ill. 569, 25 N. E. 689 (obiter); *Graham v. Keene* (1892) 143 Ill. 425, 32 N. E. 180 (obiter); *Robb v. La Grange* (1895) 158 Ill. 21, 42 N. E. 77 (obiter); *Palmer v. O'Donnell* (1884) 15 Ill. App. 324 (obiter); *Highway Comrs. v. Whitsitt* (1884) 15 Ill. App. 318; *Crohen v. Ewers* (1890) 39 Ill. App. 34; *Baldwin v. Ohio Twp.*

(1904) 70 Kan. 102, 67 L.R.A. 642, 109 Am. St. Rep. 414, 78 Pac. 424; *Gardiner v. Camden* (1894) 86 Me. 377, 30 Atl. 13; *Carroll v. Rye Twp.* (1904) 13 N. D. 458, 101 N. W. 894; *Hamilton v. Ashbrook* (1900) 62 Ohio St. 511, 57 N. E. 239, 8 Am. Neg. Rep. 118; *Miller v. Newport News* (1903) 101 Va. 432, 44 S. E. 712.

In *Rutherford v. Holley* (1887) 105 N. Y. 632, 11 N. E. 818, an action brought to compel a municipality to close a sluiceway which plaintiff claimed discharged the surface water onto a lot adjoining his, and then onto his lot, the court, in denying recovery, states: "It is not improbable that the turnpiking of the street and the construction of the gutters diminished to some extent the waste by soakage and evaporation, and thereby increased somewhat the quantity of water which collects at the sluice and which is discharged onto the Cary lot and ultimately on the plaintiff's lot. But it would be quite unreasonable to hold that every change in the natural surface or condition of land made in the improvement of a street or highway, which to any extent increases the flow of surface water on adjacent premises, constitutes an actionable injury." The court concludes, however, that the municipality, "in improving the highway, did not increase the flow of surface water on the plaintiff's lot beyond what it was prior to the excavation," and therefore committed no wrong to the plaintiff. In *Hamilton v. Ashbrook* (1900) 62 Ohio St. 511, 57 N. E. 239, 8 Am. Neg. Rep. 118, a municipal corporation was held not liable for damages caused by the increased flow in a natural watercourse as a result of the improvement of lots and streets within the territory whose waters naturally drained into the watercourse.

The right to increase the flow of water in natural drains has been limited in some cases. It is limited in *Noonan v. Albany* (1880) 79 N. Y. 470, 35 Am. Rep. 540, as follows: "The right of a riparian owner to drain the surface water on his lands into a stream which flows through them, and which is its natural outlet, is an incident to his right as riparian owner to

the reasonable use of the stream. But this right is not, we conceive, an absolute right under all circumstances, irrespective of the size of the stream or the natural purpose which it subserves, to throw into it surface water by means of ditches or drains, when by so doing it will be filled beyond its natural capacity and overflow and flood the lands of the lower proprietor." In this case, a city had, by means of sewers and the manner of grading one of its streets, concentrated the surface water and sewage of a large territory and discharged it in one body into a small stream on the land of the plaintiff, and the court states, with reference to the limitation of the right in this particular case, that "the stream into which the sewage and water collected by the defendant found its way was a mere rivulet of water, the outlet of springs at the head of the ravine. . . . In view of the character and capacity of this watercourse, it cannot, we think, be held as matter of law that there was the right in the city to discharge into the stream the water from Colonie street and from the Lark street sewer although by so doing it would flood the premises of the plaintiff." A city is not liable for increased flow of water in a natural drainway, owing to the macadamized surface of the street and the construction of catch basins and conduits, unless by this means the drainage is increased to an extent beyond that which could be accommodated by the watercourse in its natural condition. *Smith v. Auburn* (1903) 88 App. Div. 396, 84 N. Y. Supp. 725. A municipal corporation which constructed a sewer having its outlet in a natural watercourse was held liable to the owner of the land through which the watercourse flowed, where there was emptied into the watercourse a greater body of water than the natural flow of water through the watercourse. *O'Brien v. St. Paul* (1872) 18 Minn. 176, Gil. 163. It further appeared in this case that because of the increased flow of water in the watercourse that course had been greatly enlarged, and the channel thereof worn away to a much greater extent than would have

been caused by any stream naturally flowing through the watercourse.

In *Graham v. Keene* (1892) 143 Ill. 425, 32 N. E. 180, it was held that the public, represented by the highway commissioners, had a right to have the surface water falling or coming naturally upon the highway pass off the same through the natural and usual channel or outlet, and to construct ditches or drains for the purpose of conducting the surface water, and the water in a pond on the highway, into such natural and usual channel or out-

let, even if the water carried upon the lower lands was thereby increased; but that they had no right to cut through a natural ridge so as to drain the water of a pond into a channel which was not its natural outlet.

A municipality was held liable for an increased flow of water along a natural watercourse, due to the grading of streets and highways in pursuance of legislative authority. *Anchor Brewing Co. v. Dobbs Ferry* (1895) 84 Hun, 274, 32 N. Y. Supp. 371. W. A. E.

## IOWA LOAN & TRUST COMPANY

v.

BOARD OF SUPERVISORS OF POLK COUNTY et al., Appts.

*Iowa Supreme Court — October 2, 1919.*

(— Iowa, —, 174 N. W. 97.)

### Tax — exemption — highway.

1. The conveyance to the public of an easement for a highway is sufficient alienation to invoke exemption from taxation.

[See note on this question beginning on page 1537.]

### — upon land dedicated for highway.

2. Dedication of land for a public highway renders it nontaxable to the former owner, although it has not been formally accepted by the public.

### Highway — dedication — how effected.

3. Dedication of land for a highway may be effected by an intention to dedicate, followed by general public use without objection.

[See 8 R. C. L. 890, 900.]

### — dedication — unincorporated town.

4. There may be a common-law dedication by platting of a highway in an unincorporated town, although the statutes provide for platting only in cities and incorporated towns.

[See 8 R. C. L. 897.]

### — acceptance — user.

5. Acceptance of a dedication of a public highway may be effected by user alone.

[See 8 R. C. L. 900; 13 R. C. L. 34.]

**APPEAL** by defendants from a judgment of the District Court for Polk County (McHenry, J.) in favor of plaintiff in an action brought to set aside an assessment for the construction of a drainage ditch, and to restrain defendants from making any assessments against the plaintiff. *Affirmed.*

Statement by Salinger, J.:

The trial court canceled an assessment in aid of the defendant drainage district, and which had been assessed against the appellee, and it enjoined defendants from thereafter making any assessment against plaintiff. Defendants appeal. *Affirmed.*

Messrs. Brockett, Strauss, & Shaw, for appellants:

The establishment and care of highways is an act of sovereignty, governmental in its nature, and while it may be delegated, no authority exists for such establishment and care except as conferred by statute.

*Dickinson County v. Fouse*, 112 Iowa, 21, 83 N. W. 804; *Quinn v. Baage*, 138

(— Iowa, —, 174 N. W. 97.)

Iowa, 426, 114 N. W. 205; Weikamp v. Jungers, 150 Iowa, 292, 129 N. W. 953; Elliott, Roads & Streets, 2d ed. § 408.

Authorizations by statute to a city or town are not applicable to a county or other quasi public corporations.

Hanson v. Cresco, 132 Iowa, 533, 109 N. W. 1109; Soper v. Henry County, 26 Iowa, 264; Jefferson County v. Ford, 4 G. Greene, 367.

There can be no dedication without acceptance, and such acceptance must be made by the proper authorities. User alone is not sufficient, even for the period of the Statute of Limitations.

Elliott, Roads & Streets, 2d ed. § 112; Uptagraff v. Smith, 106 Iowa, 385, 76 N. W. 733; Haan v. Meester, 132 Iowa, 709, 109 N. W. 211; Joseph v. Sharp, 172 Iowa, 254, 154 N. W. 469; McAllister v. Pickup, 84 Iowa, 70, 50 N. W. 556.

The board of supervisors is the only representative of the state of Iowa authorized to establish highways, and acts of the county auditor without authorization or ratification by the board of supervisors are null and void.

Kennedy v. Dubuque, C. & M. R. Co. 34 Iowa, 421; Ressler v. Hirshire, 52 Iowa, 568, 3 N. W. 613; Patton v. Cass County, 13 N. D. 351, 102 N. W. 174.

Jurisdiction to establish highways cannot be conferred either on the board of supervisors or the county auditor by estoppel.

Curtis v. Pocahontas County, 72 Iowa, 151, 33 N. W. 616; McCarl v. Clarke County, 167 Iowa, 14, 148 N. W. 1015.

Mr. Nathan E. Coffin, for appellees:

The acts of the Iowa Loan & Trust Company constituted an irrevocable offer to dedicate the streets in the plat.

Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; 14 Cyc. 1176; 13 Cyc. 455.

There was a legal acceptance of the dedication on behalf of the public.

Snethen v. Harrison County, 172 Iowa, 81, 152 N. W. 12; Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188; 11 Cyc. 341; Hanson v. Cresco, 132 Iowa, 533, 109 N. W. 1109; Hamilton County v. Mighels, 7 Ohio St. 109; Schweiss v. First Judicial Dist. Ct. 23 Nev. 226, 34 L.R.A. 602, 45 Pac. 289; 1 Dill. Mun. Corp. 4th ed. 23; Tiedeman, Mun. Corp. § 3; Ressler v. Hirshire, 52 Iowa, 568, 3 N. W. 613; Ferguson-McKinney Dry Goods Co. v. First Nat. Bank, 34 Tex. Civ. App. 272, 78 S. W. 265; Dallas v. Gibbs, 27 Tex.

Civ. App. 275, 65 S. W. 81; Schade v. Albany, 16 N. Y. Supp. 262; Re Public Parks, 53 Hun, 556, 6 N. Y. Supp. 779; Delaware, L. & W. R. Co. v. Syracuse, 157 Fed. 700; Knox v. Roehl, 153 Wis. 239, 140 N. W. 1121; Steele v. Sullivan, 70 Ala. 589; 1 Elliott, Roads & Streets, 3d ed. § 169; 13 Cyc. 471; Cambridge v. Cook, 97 Iowa, 599, 66 N. W. 884.

The public officials have irrevocably accepted the roads in Johnson Acres, Plat 2, by other acts in addition to the filing of an official plat.

Keokuk v. Cosgrove, 116 Iowa, 189, 89 N. W. 983; Warden v. Blakley, 32 Wis. 690; Guthrie v. New Haven, 31 Conn. 308; 13 Cyc. 475; New Orleans v. Carrollton Land Co. 131 La. 1092, 60 So. 695; Smith v. Navasota, 72 Tex. 422, 10 S. W. 414; State v. Trask, 27 Am. Dec. 569, note.

The assessment is not an "equitable" apportionment of the sewer "according to the benefits received."

Hanson v. Proffer, 23 Idaho, 705, 132 Pac. 573; 13 Cyc. 494.

Salinger, J., delivered the opinion of the court:

I. The essence of the claim of appellee is that the tax is void because by platting and selling lots the land sought to be taxed is a public highway.

If we apprehend it correctly, appellant contends that a highway may not be established by dedication, and that, without some formal act on the part of the taxing power or tax-collecting authorities (not performed here), sequestering lands for use as a public highway, there can be no exemption from taxation on the ground of the existence of a public highway. We deem it well settled that Tax-upon land dedicated for highway.

this position is untenable. We said in Valley Junction v. McCurnin, 180 Iowa, 510, 163 N. W. 345, "The law with reference to the common-law dedication of a highway or street is fully settled," and see Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261. There can be a highway either by prescription, dedication, or by estoppel. Baldwin v. Herbst, 54 Iowa, 168-170, 6 N. W. 257; Joseph v. Sharp, 172 Iowa, 254, 154 N. W. 469; Casey v. Tama County, 75

Iowa, 661, 37 N. W. 138; 13 Cyc. 437. To the same effect is the recent case of *Long v. Wilson*, — Iowa, —, 173 N. W. 76, and *Steele v. Sullivan*, 70 Ala. 589. That there are statutes providing for formal establishment does not affect the power to create a highway by dedication and acceptance or order of court. *Mosier v. Vincent*, 34 Iowa, 478, 479; *Casey v. Tama County*, 75 Iowa, 661, 37 N. W. 138; 13 Cyc. 441. The dedication need not be in writing nor formal. *New Orleans v. Carrollton Land Co.* 131 La. 1092, 60 So. 695; *Knox v. Roehl*, 153 Wis. 239, 140 N. W. 1121. It may be worked by an intention to dedicate,

**Highway—  
dedication—  
how effected.**

followed by general public use without objection. *Id.* We said in *Joseph v. Sharp*, 172 Iowa, 254, 154 N. W. 469, that while use alone will not cause a traveled way to ripen into a highway, use, plus a claim of right with notice, acquiesced in for ten years, will have that effect. To the same effect is *McAllister v. Pickup*, 84 Iowa, 70, 50 N. W. 556. All that we can find in *Haan v. Meester*, 132 Iowa, 709, 109 N. W. 211, cited by appellant, is that, while use alone is not sufficient to establish a highway, evidence that the same has been used by the public for a period of years, during which time the plaintiff and his grantors have made no objections to its improvement for travel, will support a finding of its existence by prescription and dedication. The point is as well disposed of in *Steele v. Sullivan*, *supra*, as it is anywhere, and it is there held that a dedication of land to public use as a highway is not required to be in writing, but may be made by any act or declaration of the owner, manifesting an intention to devote the property to such public use.

II. This settles that there can be a public street without formal establishment. The next question is whether the court erred in holding that such streets were the subject of the attempted taxation.

Less than these appellees did may

amount to a dedication. The mere duty to file a plat for record constitutes between the original owner and the buyer of any part or parcel of the platted subdivision, a covenant of warranty as to some matters. Code 1897, § 914. It may be effected as a common-law dedication by a plat which is neither signed, acknowledged, nor recorded. 13 Cyc. 441. In many instances a dedication has been held established on much less of a showing than we find in this record. 13 Cyc. 473; *Knox v. Roehl*, *supra*; *Warden v. Blakeley*, 32 Wis. 690; 14 Cyc. 1176 to 1178. Mere acquiescence in long-continued use of land as a highway has been held to operate as a dedication of the land to the public use. 13 Cyc. 455, 482. In *Hull v. Cedar Rapids*, 111 Iowa, 466, 83 N. W. 28, a dedication was held established on evidence certainly no stronger than we find here. In *Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573, it is held that the dedication was complete and irrevocable when the plat was filed in the proper office and lots sold with reference to it. We have held that where the legislature lays off land upon which a city is situated into lots, with streets indicated, the sale of such lots irrevocably dedicates the use of such streets. *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358. Where the owner lays out a town and sells lots with reference to the plat thereof, the buyers obtain every privilege represented by such plat as belonging to the lot sold. *Dubuque v. Maloney*, 9 Iowa, 450, 451, 74 Am. Dec. 358. Where there is a plat on which the owner lays off lots, blocks, and streets, and adopts such plat by reference in selling, this amounts to an irrevocable dedication of the streets. *Corsicana v. Anderson*, 33 Tex. Civ. App. 596, 78 S. W. 261; *New Orleans v. Carrollton Land Co.* 131 La. 1092, 60 So. 695; 13 Cyc. 455 to 458.

True, the dedication by plat does not convey the fee title to the streets to the buyers of lots. But it does convey to them and the general public an easement—the right to use

(— Iowa, —, 174 N. W. 87.)

the platted streets as streets. That is a sufficient alienation to invoke exemption from taxation. There is such exemption as to confessed highways, and yet such highways do not convey fee title to adjacent lot owners, and not more than the right to use as highways. See *Dickinson County v. Fouse*, 112 Iowa, 23, 83 N. W. 804.

2a. It is suggested by appellant that statutes providing for platting and the effect thereof have application to a city or incorporated town only, and therefore have no application to the plat in consideration. There is a statement in *Kenwood Park v. Leonard*, 177 Iowa, at pages 341, 342, 158 N. W. 655, that statute provisions, to the effect that the recording of plats is equivalent to a deed in fee simple of such portion of the premises as is set apart for streets, relates to streets in cities and towns, and not to those in unincorporated villages. While there is an abstract discussion of the difference between incorporated and unincorporated towns in *Hanson v. Cresco*, 132 Iowa, 533, 109 N. W. 1109, it is scarcely relevant to anything involved here. And the case holds that while the word "municipality" is ordinarily used in its technical sense, it should not be so dealt with in that case, and has not been so dealt with in others. It affords no support to appellant. All we can find in *Soper v. Henry County*, 26 Iowa, 264, is that the duty of repairing roads is not, by the statute, imposed on the county as a corporation, but on the respective road districts, and that the county is not liable for the default of the road district or its officers, and that incorporated towns and cities are held to a much more extended liability than counties or school road districts, even where the latter are declared to be invested with corporate capacity. Now, while the *Leonard Case* does make a distinction between incorporated and unincorporated towns, that distinction is that, while as to incorporated towns the

platting gives the fee-simple title in the streets to the municipality, the filing of the plat where the lands are in an unincorporated town has merely the effect of giving "the public at large the privilege of passing over and using the land so set apart as a public highway for public travel. The public acquired a right to an easement in the land so set apart for the purposes for which it was set apart." The case quotes from *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876, as follows: "The recording of the plat is a tender of the conveyance of portions set apart as streets and alleys for such use to a municipality, and continues until shown to have been withdrawn."

The *Leonard Case* continues: "To an incorporated city or town the tender is in fee. . . . To an unincorporated village it is the tender of an easement in the land set apart," and, "A plat amounts simply to a dedication—a solemn written act of dedication. It is the solemn written evidence of an intent to dedicate."

We conclude that, notwithstanding that this plat did not deal with an incorporated town, it worked a common-law dedication.

Highway—  
dedication—  
unincorporated  
town.

III. To work an exemption from taxation acceptance of the dedication is essential, and we now turn to the question whether the evidence sustains the finding below that there was sufficient acceptance.

The appellant contends that acceptance must be made by the proper authorities, and that user alone, even if continued for the period of the Statute of Limitations, is not sufficient. The acceptance need not necessarily be by the municipality or by public authority. It may be by the general public. The dedication grants an easement—one for every individual in a community to pass and repass over the same. Another way of saying that acceptance can be worked by the general public. *State v. Maloney*, 9 Iowa, 451,

74 Am. Dec. 358. As said in *Dickinson v. Fouse*, 112 Iowa, at page 23, 83 N. W. 804, the only effect of establishment is that the public at large obtains the privilege of passing and repassing. Very slight evidence is required to establish acceptance by the public of lands dedicated for an alley. *Cambridge v. Cook*, 97 Iowa, 599, 66 N. W. 884.

—acceptance—  
user. Acceptance may be inferred from public use, and that use need be only such as the public wants and necessities demand. *Keokuk v. Cosgrove*, 116 Iowa, at page 194, 89 N. W. 983.

The acceptance may be so worked by the public entering upon the land and enjoying the privileges offered—briefly, by user. And when the user is relied on to raise a presumption of dedication, the duration of the use is wholly immaterial. 13 Cyc. 465, 466. And such acceptance may be manifested, among other methods, by long and uninterrupted use on part of the public without objection. *Steele v. Sullivan*, 70 Ala. 589. It may be shown by acquiescence in the use of the land as a public street for fourteen years, with acts indicating acquiescence on part of the owner. *Hull v. Cedar Rapids*, 111 Iowa, 466, 83 N. W. 28.

A formal acceptance on part of the public of property dedicated to the public use is neither necessary nor practicable. *New Orleans v. Carrollton Land Co.* 131 La. 1092, 60 So. 695. And acceptance by the public is presumed where it is shown that the claimed highway is of common convenience and necessity, and therefore beneficial to the public. It is stipulated that the claimed street is the sole means of access to many of the lots. And the principal evidence of its beneficial character will be the actual use as a highway, without objection, by those who have occasion to use it. *Guthrie v. New Haven*, 31 Conn. 308.

We find that the use of the dedication with and co-operation of the dedicator sustains the finding that there was acceptance.

3a. There is a vigorous controversy over whether action on part of the county auditor works an acceptance. There is no occasion to decide it. One line of evidence establishing that there was an acceptance is as good as a hundred. And as we hold that evidence, aside from the acts of the auditor, sustains the holding that there was sufficient acceptance, it is immaterial whether other evidence sustains or fails to sustain the claim of acceptance.

3b. The cases of *Corsicana v. Anderson*, 33 Tex. Civ. App. 596, 78 S. W. 261; *Delaware, L. & W. R. Co. v. Syracuse (C. C.)* 157 Fed. 700; *Cambridge v. Cook*, 97 Iowa, 599, 66 N. W. 884; *Keokuk v. Cosgrove*, 116 Iowa, 189, 89 N. W. 983; *Uptagraff v. Smith*, 106 Iowa, 388, 76 N. W. 738; *Smith v. Navasota*, 72 Tex. 422, 10 S. W. 414, 416, and *New Orleans v. Carrollton Land Co.* 131 La. 1092, 60 So. 695, are of no benefit to the appellee or, for that matter, to either party. They are either cases wherein it is held, because overwhelmingly shown, that there was no acceptance, or cases wherein acceptance is shown by acts of the municipality which are not found in this record. And so of 13 Cyc. 469. We see nothing relevant in *Weikamp v. Jungers*, 150 Iowa, 292, 129 N. W. 953.

IV. The question of whether the defendants are under duty to maintain these alleged streets is foreign to the issues, and we will not decide it. See 13 Cyc. 467.

V. It is suggested by the appellees that if we should not reverse, and so hold that no streets have been created by dedication, because so to hold in a cause wherein the buyers of the lots are not parties might determine the rights of those who are not within the jurisdiction of the court. In view of the conclusions reached, that point needs no consideration.

VI. In view of the conclusions reached we will not pass upon the question whether the tax in question



(— *Iowa*, —, 174 N. W. 97.)

is equitably apportioned according in question, and therefore the decree below is affirmed.

We are of opinion that there was Ladd, Ch. J., and Evans and Preston, JJ., concur.

### ANNOTATION.

#### Necessity of acceptance of dedicated street to relieve it from taxation.

The decision in the reported case (*IOWA LOAN & T. CO. v. POLK COUNTY*, ante, 1532) to the effect that, to work an exemption from taxation of property dedicated as a street, acceptance of such dedication is essential, is supported by the only other case which seems to have passed upon the question, it having been held in *Traylor v. State* (1898) 19 Tex. Civ. App. 86, 46 S. W. 81, that a tax lien on property

cannot be defeated by proof of a prior dedication thereof to the public as a "square," unless it appears that the public owned or claimed the land by virtue of such dedication at the time the tax was levied; in other words, the dedication of the property for use as a public square did not exempt it from taxation, in the absence of an acceptance thereof by the public. G. J. C.

### OMAHA CROCKERY COMPANY, Appt.,

v.

C. H. CLEAVER et al.

*Kansas Supreme Court — April 12, 1919.*

(104 Kan. 642, 180 Pac. 273.)

#### Set-off — action against partners — claim of one partner.

1. In an action upon a verified account against two partners for an indebtedness of the partnership, a cross demand by one of the partners individually for damages to her, caused by an unrelated tort of the plaintiff, cannot be used as a set-off or counterclaim against the plaintiff's action.

[See note on this question beginning on page 1541.]

#### — injury to partner.

2. Two defendants were partners in conducting a variety store. They bought a small bill of goods from plaintiff, and failed to pay for them. Plaintiff sued the partners upon its verified account. One of the defendants set up a cross demand for damages to her individually, caused by her

being poisoned by the wrappings of a former shipment of goods received from the plaintiff. Held, that such cross demand, not being a mutual defense to her and her partner, cannot serve as a set-off or counterclaim to plaintiff's verified account against the two partners.

[See 24 R. C. L. 870.]

Headnotes by DAWSON, J.

APPEAL by plaintiff from a judgment of the District Court for Jewell County (Pickler, J.) in favor of defendant cross claimant, in an action brought to recover the purchase price of certain goods sold and delivered by plaintiff to defendants. *Reversed.*

The facts are stated in the opinion of the court.

5 A.L.R.—97.

Messrs. R. W. Turner and D. F. Stanley, for appellant:

The motion to strike out the portion of the answering bill of particulars which attempts to set up a counterclaim or set-off in favor of the defendants should have been sustained.

*Sims v. Kennedy*, 67 Kan. 383, 73 Pac. 51; 1 Cyc. 473; 25 Am. & Eng. Enc. Law, 2d ed. 525; *Alexander v. Clarkson*, 100 Kan. 294, L.R.A.1917F, 1006, 164 Pac. 294; *Priest v. Dods-worth*, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; *Richardson v. Penny*, 10 Okla. 32, 61 Pac. 584; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Hunter v. Booth*, 84 App. Div. 585, 82 N. Y. Supp. 1000; *Pope Mfg. Co. v. Charleston Cycle Co.* 55 S. C. 528, 33 S. E. 787; *Ritchie v. Moore*, 5 Munf. 388, 7 Am. Dec. 688; *Rogers v. McMillen*, 6 Colo. App. 14, 39 Pac. 891.

The demurrer to defendant's evidence should have been sustained.

*Duncan v. Chicago, R. I. & P. R. Co.* 82 Kan. 230, 108 Pac. 101; *Carruthers v. Chicago, R. I. & P. R. Co.* 55 Kan. 604, 40 Pac. 915; *Chicago, R. I. & P. R. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58, 11 Am. Neg. Rep. 383; *Brown v. Union P. R. Co.* 81 Kan. 701, 29 L.R.A. (N.S.) 808, 106 Pac. 1001; *Byland v. E. I. du Pont de Nemours Powder Co.* 93 Kan. 288, L.R.A.1915F, 1000, 144 Pac. 251, 10 N. C. C. A. 278; *Duncan v. Atchison, T. & S. F. R. Co.* 86 Kan. 112, 51 L.R.A. (N.S.) 565, 119 Pac. 356; *Home Oil & Gas Co. v. Dabney*, 79 Kan. 820; *Hart v. St. Louis & S. F. R. Co.* 80 Kan. 699, 102 Pac. 1101; *Root v. Cudahy Packing Co.* 88 Kan. 413, 129 Pac. 147; 29 Cyc. 419; *Atchison, T. & S. F. R. Co. v. Baumgartner*, 74 Kan. 148, 85 Pac. 822, 10 Ann. Cas. 1094; *Kahn v. Burette*, 42 Misc. 541, 85 N. Y. Supp. 1047; *Lewinn v. Murphy*, 63 Wash. 356, L.R.A.1917E, 198, 115 Pac. 740, Ann. Cas. 1912D, 433; *Potter v. Rorabaugh-Wiley Dry Goods Co.* 83 Kan. 712, 32 L.R.A. (N.S.) 45, 112 Pac. 613; 20 R. C. L. 187; *Denver & R. G. R. Co. v. Ashton-Whyte-Skillcorn Co.* 49 Utah, 82, L.R.A.1917C, 768, 162 Pac. 83, 15 N. C. C. A. 101; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; *Obertoni v. Boston & M. R. Co.* 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980, 17 Am. Neg. Rep. 71.

The evidence was insufficient to justify the judgment against plaintiff.

*Missouri P. R. Co. v. Holley*, 30 Kan. 474, 1 Pac. 130, 554; *Dail v. Taylor*,

151 N. C. 284, 28 L.R.A. (N.S.) 949, 66 S. E. 135; *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, L.R.A.1916E, 1074, 71 So. 743; *Long v. Chicago, K. & W. R. Co.* 48 Kan. 28, 15 L.R.A. 319, 30 Am. St. Rep. 271, 28 Pac. 977; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 666, 7 Pac. 204, 15 Am. Neg. Cas. 19; *Atchison, T. & S. F. R. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12, 2 Am. Neg. Rep. 141; *Carruthers v. Chicago, R. I. & P. R. Co.* 55 Kan. 600, 40 Pac. 915; 29 Cyc. 481.

Brushing aside all other considerations of the merits of defendants' case, their restricted claim for damages could only be supported by a showing of partnership loss of business or of profits, occasioned by the loss of defendant Hodgson's services.

*Sindelare v. Walker*, 137 Ill. 43, 31 Am. St. Rep. 353, 27 N. E. 59; 22 Am. & Eng. Enc. Law, 2d ed. 121; *O'Brien v. Smith*, 42 Kan. 49, 21 Pac. 784; *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713; *Hart v. Gerretson Co.* 91 Kan. 569, 138 Pac. 595.

Mr. W. R. Mitchell for appellees.

Dawson, J., delivered the opinion of the court:

The plaintiff, a Nebraska corporation, brought this action before a justice of the peace for the price of a small consignment of crockery which it had sold and delivered to the defendants, who were partners in a variety store in Mankato.

One of the defendants answered with a cross claim for \$2,633.45 as damages, alleging that, in a similar shipment received from plaintiff a few weeks earlier, she had been poisoned by the wrappings in which the crockery had been shipped, and had sustained damages in loss of health, and for doctor's bills, medicines, nurse hire, dressings, and attendance.

The pleadings in the district court were those used in the justice court where the action had originated.

The cause was tried without a jury; and the evidence tended to show that the straw, hay, excelsior, and paper in which the crockery was packed was infected with some virulent yellow dust or substance which poisoned defendant's hands, face, eyes, and her skin down to the top of her waist. The nature of the

poison was not discovered, but it caused intense inflammation, her skin was red and swollen, her eyes nearly swollen shut, and a watery substance exuded from her skin. Other persons who assisted her were likewise somewhat affected, and customers in the store noticed the peculiar odor which appeared to have come from the packing material. The stuff was carried out of the store and burned. The defendant was partly incapacitated for several months, and she required some volunteer and some paid help to conduct her business during her indisposition.

The evidence for the plaintiff tended to show that the packing was all of clean and wholesome materials, and the work of packing was done in a clean and wholesome place of business. There was no evidence as to the condition of the shipment when it was received from the railway company.

At the trial, defendant waived all her claims for damages except for "wages" to herself at \$60 per month for the time she had lost through her incapacity.

The court gave judgment for defendant for \$114.30, and plaintiff appeals.

Appellant urges many objections to this judgment, the chief of which are: (1) That tort is not an allowable cross claim before a justice of the peace in an action on a verified account, and that the district court on appeal had no greater jurisdiction than the justice of the peace; (2) that a cross claim for a tort by one defendant against a plaintiff's claim against two defendants on an account is bad for want of mutuality; (3) that defendant's bill of particulars was not verified; (4) that defendant and cross claimant failed to prove plaintiff's negligence, and failed to prove that plaintiff knew or might have known that the wrappings were poisonous; (5) that since plaintiff proved by unimpeached witnesses the wholesome and sanitary packing of the goods by plaintiff, the fact that the

packing was poisonous when the goods were received did not establish a case of negligence against plaintiff as alleged in "carelessly and negligently" packing the shipment of goods "in wrappings which contained poison," and "that the wrappings of said goods were full of dust and poison;" (6) that the evidence failed to prove the damages which were voluntarily narrowed by defendant at the trial to "wages," and that a partner is not entitled to wages in the absence of a partnership agreement to that effect.

As the court has not been favored with a brief by appellee in answer to these contentions, we will only consider one of them,—one which obviously disposes of the whole controversy. Plaintiff's action was against two defendants, who, as partners, were liable on its verified account. In an action of that sort, one of the defendants could not set up a cross claim founded on a tort personal to herself against the partnership liability; and the reason is that

Set-off—action against partners—claim of one partner.

there is want of mutuality. The defendants have no community of interest in such cross demand. It was wholly unrelated to the transaction which is the basis of the verified account.

In 25 Am. & Eng. Enc. Law, 2d ed. 524, 525, it is said: "It is also a generally prevailing rule that, where there are two or more defendants jointly sued by the plaintiff, one or more of such defendants less than all cannot set off a debt due from the plaintiff to him or them only. This rule will prevent the setting off of their several claims against the plaintiff by each defendant. And in an action against a partnership the indebtedness of the plaintiff to one of them cannot be set off."

See *id.*, note 3, p. 524.

In 34 Cyc. 727, 728, it is said: "As a broad general rule a joint debt cannot be set off against a separate debt, nor counterclaimed, nor can a separate debt be set off against a joint debt, nor counterclaimed, nor

pleaded in reconvention. . . . A debt due by plaintiff to only part of joint defendants cannot be set off against the joint debt due to plaintiff."

In *Roberts v. Donovan*, 70 Cal. 108, syl. 2, 9 Pac. 180, 11 Pac. 599, it was said: "In an action against two or more joint debtors to enforce their joint liability, the summons being served on all of them, one of the defendants cannot set up by way of counterclaim a cause of action existing in his favor alone against the plaintiff."

See also *Rogers v. McMillen*, 6 Colo. App. 14, 39 Pac. 891; *Hunter v. Booth*, 84 App. Div. 585, 82 N. Y. Supp. 1000; *Pope Mfg. Co. v. Charleston Cycle Co.* 55 S. C. 528, 33 S. E. 787; *Ritchie v. Moore*, 5 Munf. 388, 7 Am. Dec. 688.

Causes of action which the Code permits to be united, other than to enforce liens, are those which affect all parties to such causes of action, and cross petitioners are plaintiffs in effect. Civ. Code, §§ 88, 97-102 (Gen. Stat. 1901, §§ 4522, 4531-4536); *Hudson v. Atchison County*, 12 Kan. 140; *Swenson v. Moline Plow Co.* 14 Kan. 387; *Palmer v. Waddell*, 22 Kan. 352; *Dobbs v. Stauffer*, 24 Kan. 127; *Jeffers v. Forbes*, 28 Kan. 174; *McGrath v. Newton*, 29 Kan. 364; *State ex rel. Cherokee-Lanyon Spelter Co. v. Shufford*, 77 Kan. 263, 94 Pac. 137.

In *State ex rel. Taggart v. Addison*, 76 Kan. 699, 704, 92 Pac. 583, it was said: "The third ground of the demurrer seems to be well taken. The petition contains as many separate and distinct causes of action as there are defendants, and each of these several causes of action depends upon its own peculiar facts. Neither defendant is necessarily in-

terested in the defense or success of his codefendants. A separate and different judgment must be entered upon each cause of action. Under the Code every cause of action in the petition must affect all the parties to the action; otherwise, they cannot be joined. Code, § 83; Gen. Stat. 1901, § 4517; *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961; *Rizer v. Davis County*, 48 Kan. 389, 392, 29 Pac. 565; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 677, 26 Pac. 16."

See also *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961.

To be of any validity, a cross demand, set-off, or counterclaim must be sufficient in itself to form the basis of a cause of action (Civ. Code, §§ 97-102), and the test of the mutuality of interest in such set-off or counterclaim must be the same as that required to permit the joinder of causes of action under § 88 of the Civil Code.

It will thus be seen that while the grievance of one of these defendants, Mrs. Hodgson, may be the subject-matter of a meritorious separate lawsuit against the plaintiff, the want of mutuality between her and her codefendant prevents considera- <sup>-injury to partner.</sup> tion of her individual grievance in this action against her partner and herself on plaintiff's verified account for goods sold and delivered to them.

This necessitates a reversal of the judgment, and the cause is remanded, with instructions to enter judgment for plaintiff on its verified account.

All the Justices concur.

Petition for rehearing denied, May 14, 1919.

# ANNOTATION.

## Right to set off claim of individual partner against claim against partnership.

- I. In absence of statute or agreement:
  - a. Rule at law:
    - 1. In general, 1541.
    - 2. Defendant sued as individual and as partner, 1544.
    - 3. Defendant sued as surviving partner, 1545.
  - b. Rule in equity, 1545.
- II. Under statute, 1549.
- III. Under agreement between parties, 1551.

### I. In absence of statute or agreement.

#### a. Rule at law.

##### 1. In general.

The rule at law in the absence of a statute or a specific agreement between the parties is that a separate claim of an individual partner cannot be used as a set-off against a claim on a debt of the partnership except in cases where the individual partner is sued for the firm debt, or where a surviving partner is sued for the firm debt.

**California.**—Taylor v. Hill (1896) 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

**Colorado.**—Rogers v. McMillen (1895) 6 Colo. App. 14, 39 Pac. 891.

**Georgia.**—McAllister v. Millhiser (1895) 96 Ga. 474, 23 S. E. 502; Youmans v. Moore (1912) 11 Ga. App. 66, 74 S. E. 710.

**Illinois.**—Harris v. Pearce (1880) 5 Ill. App. 622; Bailey v. Valley Nat. Bank (1886) 21 Ill. App. 642, affirmed on another ground in (1889) 127 Ill. 332, 19 N. E. 695.

**Indiana.**—Wasson v. Gould (1832) 3 Blackf. 18; Skillen v. Jones (1873) 44 Ind. 136.

**Kentucky.**—Lebanon Steam Laundry v. Dyckman (1900) 22 Ky. L. Rep. 348, 57 S. W. 227.

**Massachusetts.**—Reed v. Whitney (1856) 7 Gray, 533; Hewitt v. Hayes (1910) 204 Mass. 536, 27 L.R.A. (N.S.) 154, 90 N. E. 985; McGuinness v. Kyle (1911) 208 Mass. 443, 94 N. E. 700.

**Michigan.**—Sager v. Tupper (1878) 38 Mich. 258.

**Mississippi.**—Wilson v. Horne (1859) 37 Miss. 477; Green v. Bounds (1916) 112 Miss. 252, 72 So. 1001.

**New Hampshire.**—Weaver v. Rogers (1862) 44 N. H. 112.

**New Jersey.**—Bowne v. Thompson (1790) 1 N. J. L. 2; Williams v. Hamilton (1818) 4 N. J. L. 220; Brewet v. Norcross (1865) 17 N. J. Eq. 219.

**New York.**—Hunter v. Booth (1903) 84 App. Div. 535, 82 N. Y. Supp. 1000; Popham v. Rubin (1912) 134 N. Y. Supp. 1067; Bowling Green Sav. Bank v. Todd (1872) 64 Barb. 146, affirmed in (1873) 52 N. Y. 489; Pinckney v. Keyler (1855) 4 E. D. Smith, 469; Peabody v. Beach (1856) 6 Duer, 53; Peabody v. Bloomer (1856) 5 Duer, 678, 3 Abb. Pr. 353.

**North Carolina.**—Cotton v. Evans (1835) 21 N. C. (1 Dev. & B. Eq.) 284.

**Ohio.**—Williams v. Pultze (1877) 5 Ohio Dec. Reprint, 503.

**Oregon.**—Sanford v. Pike (1918) 87 Or. 614, 170 Pac. 729, rehearing denied in (1918) 87 Or. 621, 171 Pac. 394.

**South Carolina.**—Pope Mfg. Co. v. Charleston Cycle Co. (1899) 55 S. C. 528, 33 S. E. 787.

**Texas.**—Olive v. Morgan (1894) 8 Tex. Civ. App. 654, 28 S. W. 572.

**Virginia.**—Ritchie v. Moore (1817) 5 Munf. 388, 7 Am. Dec. 688; Porter v. Nekervis (1826) 4 Rand. 359; Edmondson v. Thomasson (1911) 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301.

**Wisconsin.**—Wilson v. Runkel (1875) 38 Wis. 526.

**England.**—Watts v. Christie (1849) 11 Beav. 546, 50 Eng. Reprint, 928, 18 L. J. Ch. N. S. 173, 13 Jur. 244, 845; Ex parte Christie (1804) 10 Ves. Jr. 104, 32 Eng. Reprint, 783.

In Edmondson v. Thomasson (1911) 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301, the stockholders of an insolvent bank brought a bill in equity, to have receivers appointed for the bank to wind up its affairs. The bank held the notes of a partnership, composed of A and B. B had money on deposit in the bank and a set-off was claimed of the amount of the deposit against his liability on the notes. B had also indorsed the notes individ-

ually. The court said that if the firm was insolvent and B was resorted to individually for the payment of the notes, he might claim the deposit as a set-off; but held that since the firm was solvent and could pay the notes, the set-off would not be granted.

In *Cotton v. Evans* (1835) 21 N. C. (1 Dev. & B. Eq.) 284, suit was brought against a firm by the assignee of an insolvent creditor. The defendant partnership claimed a set-off of the individual claim of one of the partners against the assignor. The court held that such a set-off was not good against the claim of the assignee in a case where there had been an assignment to bona fide creditors.

In *Olive v. Morgan* (Tex.) *supra*, a suit against a partnership, one partner pleaded in defense that he had assumed by agreement all the debts of the firm, and pleaded a set-off based on the fact that through an agent the plaintiffs had induced him to become surety on a bond of a contractor, which bond he had been compelled to pay. The court found that there was no consideration for the release of the other partner from partnership liability, and said that since an individual claim against a firm creditor cannot be set off against the firm debt, in the absence of proof of a valid release of B, the other partner, the question of set-off should not have been submitted to the jury.

In *Bowne v. Thompson* (1790) 1 N. J. L. 2, an action against a partnership for labor done, the defendants sought to set off a claim of one of the partners individually. The court held that the set-off was not valid.

In *Sager v. Tupper* (1878) 38 Mich. 258, an action to recover for services against a partnership, a claim was made in set-off of a broken contract to do the work sued on. An instruction to the effect that such breach could not be pleaded unless it was a joint promise to both of the partners was approved.

In *Popham v. Rubin* (1912) 134 N. Y. Supp. 1067, the plaintiff, as an assignee in bankruptcy, brought an action against a partnership for the value of certain goods sold to them.

The defendants pleaded as a set-off a claim of one of them individually against the assignor. The claim was held invalid as a set-off.

In *Bowling Green Sav. Bank v. Todd* (1872) 64 Barb. (N. Y.) 146, affirmed in (1873) 52 N. Y. 489, it appeared that attorneys composing a partnership were employed by a bank to foreclose a mortgage. The bank failed and the plaintiff was appointed receiver. The attorneys foreclosed the mortgage and received the money therefor. In an action by the plaintiff against the attorneys, one of the defendants claimed as a set-off to the claim, a deposit to his individual credit in the bank, a sum due him on a note, and the value of his services individually to the bank in other matters. The court held that the claim was invalid as a set-off against the partnership liability for the sums received at the sale under the mortgage.

In *Reed v. Whitney* (1856) 7 Gray (Mass.) 533, an action by one partnership against another, it appeared that one member, since deceased, of the plaintiff partnership, owed one member of the defendant partnership. This claim was set up as a set-off in the action, and was held invalid, on the ground that the claims were not due in the same right.

In *Weaver v. Rogers* (1862) 44 N. H. 112, it appeared that one member of a defendant partnership owed the plaintiff an individual debt. The partnership was also in debt to the plaintiff. The debtor member paid to the plaintiff a certain amount out of the partnership funds. It was not clear whether the amount so paid was in payment of the firm indebtedness or that of the individual partner. In an action by the plaintiff to recover a balance due to him from the partnership, the amount so paid was pleaded as a set-off. It was held by the court that if the payment was made on the personal debt of the partner, it could not be pleaded as a set-off in the action by the plaintiff against the partnership, since the claim was not one on which the defendants could have maintained an independent action.

In *Green v. Bounds* (1916) 112 Miss. 252, 72 So. 1001, an action against one of two partners, it appeared that there was an agreement between the plaintiff and the defendant that his share of the proceeds from a sale of logs by the partnership to the plaintiff should be applied by the plaintiff in the payment of a claim by the plaintiff against the defendant individually. The plaintiff did not so apply the credits for the logs sold him, but applied them all to the credit of the defendant's partner. This action was brought for the recovery of the amount of the debt left due by the defendant to the plaintiff. The court held that the agreement was not one of set-off, but one of payment, and also that the plaintiff could not recover, since he failed to apply the payments as directed.

In *Hunter v. Booth* (1903) 84 App. Div. 585, 82 N. Y. Supp. 1000, the action was brought by the plaintiff against a partnership on an account stated. It appeared that one of the members of the partnership had agreed to secure for the plaintiff two customers, for which he was to receive a certain amount. This amount was never paid, and the defendant pleaded it as a set-off in the action against both of them. It was held that this claim did not constitute a valid set-off.

In *Taylor v. Hill* (1896) 115 Cal. 143, 44 Pac. 336, 46 Pac. 922, an action against a partnership for goods sold and delivered, a plea of set-off was set up, based on the fact that two of the plaintiffs owed money for board to one of the partners. The plea was not allowed.

In *Sanford v. Pike* (1918) 87 Or. 614, 170 Pac. 729, rehearing denied (1918) 87 Or. 621, 171 Pac. 394, it appeared that a deed of trust was given to the plaintiffs to secure a partnership obligation. One of the partners had a credit to his favor as a trustee in the bank. In a suit by the plaintiffs to enforce the deed of trust, the defendants claimed the deposit of the individual partner as a set-off. The court held that if the trust fund was the sole property of the individual

partner, it could not be pleaded as a set-off.

In *Wasson v. Gould* (1832) 3 Blackf. (Ind.) 18, an action by the executrix of a deceased payee of a note executed by a partnership, it appeared that one of the partners had a claim against the executrix individually for certain property he had sold plaintiff and for personal property left in her possession. This claim against the executrix individually was pleaded in set-off to the claim made by her in her administrative capacity. The set-off was not allowed. The court said: "The subject belongs to the individual transactions between [the executrix] and [the partner.] This separate liability, if there was any, could not be a subject of set-off either at law or in equity, were [the executrix] suing the partnership for a demand in her own right. . . . : a fortiori, it cannot be a matter of set-off when she is claiming a debt from the partnership, due to her only in the character of an executrix."

In *Ritchie v. Moore* (1817) 5 Munf. (Va.) 388, 7 Am. Dec. 688, an action against a partnership by the assignees of a creditor for two promissory notes executed by them, notes which, at the time of the assignment, were the property of one of the partners, were claimed as a set-off. It appeared that after the partners had received notice of the assignment, the notes became the property of the partners. Therefore, as to the assignee, the notes were the property of one of the partners only. The set-off was disallowed.

In *Ex parte Christie* (1804) 10 Ves. Jr. 104, 32 Eng. Reprint, 783, an action by a master of a ship, who was bankrupt, against the owners of the ship, for a debt due him, the owners claimed as a set-off debts which the bankrupt owed to them individually. It was held that if the owners of the ship were partners, which appeared to be the case, then their individual claims could not be set off against the joint claim against the partnership.

In *Peabody v. Beach* (1856) 6 Duer (N. Y.) 53, an action against a partnership by another partnership for money advanced, one member of the defendant partnership set up as a set-

off to the action, a claim against the plaintiff for damages based on a violation of an agreement for the sale of certain property by him or his agents. The court held that this did not constitute a valid set-off, if a claim on contract, since there was a lack of mutuality, and also since there could not have been an independent action on the claim by the partnership. If the claim was a tort, then it was not so connected with the claim against the partnership as to constitute a valid set-off for the same reasons. See to the same effect *Peabody v. Bloomer* (1856) 5 Duer (N. Y.) 678, 2 Abb. Pr. 353.

In *Wilson v. Runkel* (1875) 38 Wis. 526, A sued a partnership composed of B and C on a note executed by them in a settlement of accounts between them. C claimed as a set-off to the partnership liability a claim of a third person against A, which he owned. The court held that the claim of the individual partner could not be set off against the partnership liability.

In *Rogers v. McMillen* (1895) 6 Colo. App. 14, 39 Pac. 891, an action by an executor for money due to the testator from a mining partnership, it appeared that the testator had executed a note to one of the partners. The defendant partnership introduced the note as a set-off, and attempted to show that it was made to the partnership. The court held that the note was made to one individual, not to the partnership, and that it could not be pleaded in set-off.

In *Lebanon Steam Laundry v. Dyckman* (1900) 22 Ky. L. Rep. 348, 57 S. W. 227, an action for breach of contract of employment against a partnership, each of the partners set up an individual claim against the plaintiff. One claim was based on the ground of fraud and misrepresentation by the plaintiff in inducing the defendant partner to purchase property, and the other on the same ground in inducing the other, at a later time, to purchase a one-half interest. Both claims were disallowed as set-offs, on the ground that they lacked mutuality.

In *Williams v. Hamilton* (1818) 4 N. J. L. 220, the plaintiff sued a firm

on an open account, crediting the partners with a claim of one of the partners against the plaintiff in order to get the amount within the jurisdiction of the justice court. A motion for nonsuit on the ground of an improper credit giving the justice court jurisdiction was upheld. The court held that the claim against the plaintiff was in the nature of a set-off, and had it been pleaded in that manner by the defendants it could not have been maintained.

In *Pinckney v. Keyler* (1855) 4 E. D. Smith (N. Y.) 469, it appeared that a proprietor of a provision store sold certain things to defendant partnership and furnished them certain supplies. In an action by the assignor of the store owner, the partnership pleaded as a set-off money borrowed by plaintiff from one of the defendant partners. The court held the set-off improper for lack of mutuality.

In *Briggs v. Briggs* (1835) 20 Barb. (N. Y.) 477, it was held on peculiar facts that an individual claim of one partner could be set off against a joint claim against the partnership. The defendant partners were factors, and were accordingly jointly and severally liable for goods received. One of the partners had retired from the firm. An action was commenced against the firm for goods delivered to them. A claim of the partner who had retired against the plaintiff on a note was claimed as a set-off to the partnership liability. The court held that the defendants were liable to several judgments, and therefore the set-off was proper under a Code provision that a debt existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the specified causes of action, could be set off, and a provision that in an action on contract any other cause of action, arising also on contract, and existing at the commencement of the action, shall be a counterclaim.

*2. Defendant sued as individual and as partner.*

In a suit on a note against a partnership, each individual member being also sued, it has been held, in a memo-



random decision, that the individual claims of the defendant partners could be used as set-offs in favor of the individuals, on the theory that the debt of the firm was the debt of the individuals contained in it. *Youmans v. Moore* (1912) 11 Ga. App. 66, 74 S. E. 710.

In *McAllister v. Millhiser* (1895) 96 Ga. 474, 23 S. E. 502, the plaintiffs brought suit on an open account against a partnership as a whole and against each one of them individually. The defendant was the only survivor of the partnership, having bought out the other member. The defendant was allowed to set off against the claim of the plaintiffs, on the partnership debt, an individual claim which he had against plaintiffs. The court said: "In testing the merits of this plea, it is all-important to notice the precise character of the plaintiffs' action. An has been seen, it was brought, not only against the partnership, but in terms against each of its members as an individual. The plaintiffs might have contented themselves by bringing an action against the partnership alone, and a judgment rendered therein would have bound, not only the property of the partnership, but also the individual property of each of the members who was served with the process. The plaintiffs did not, however, choose to sue the partnership alone. It may be that they were unwilling to risk their case upon their ability to prove that the partnership was its debtor, and preferred also to take the chances of showing that the members of the firm were indebted to them as individuals. Be this as it may, the plaintiffs certainly sued *Simmons* as an individual; and this being so, we see no reason why he could not lawfully set off against them a demand alleged to be due him individually by them, which was in existence at the time their action was commenced. Whatever may have been the proper disposition of the plea under review if the plaintiffs' action had been brought against the partnership only, we are satisfied that, in view of the declaration as actually brought, this plea was appropriate."

### 3. Defendant sued as surviving partner.

A surviving partner has the right to offset his individual claims in a suit against him as survivor. *Harris v. Pearce* (1880) 5 Ill. App. 622; *Skillen v. Jones* (1873) 44 Ind. 136; *Hewitt v. Hayes* (1910) 204 Mass. 586, 27 L.R.A. (N.S.) 154, 90 N. E. 985.

See also *Williams v. Pultze* (1877) 5 Ohio Dec. Reprint, 503, where the decision was against the set-off on other grounds, but it was said that a surviving partner can set off individual debts against a demand against the partnership.

In *Harris v. Pearce* (Ill.) supra, an action was instituted against a defendant for a claim against a partnership of which he was the survivor. The defendant set up a claim of his own against the plaintiff, which was upheld. The court said: "And a debt due to a defendant as a surviving partner may be set off against a demand on him in his own right, and vice versa. By the death of the copartner the debt is considered to be owing to him in his own right, and so is not subject to the objection that it is a demand held in *autre droit*. The fact that rights are derived from different titles is of no moment."

In *Skillen v. Jones* (1873) 44 Ind. 136, an action by the executor of a deceased partner against the surviving partner for a claim against the partnership, it appeared that the deceased partner owed the survivor for money advanced by him individually to the former for the purchase of a house. This claim was pleaded as a set-off to the action of the executor, and was sustained by the court.

### b. Rule in equity.

Though in general a court of equity follows the law, and will not grant a set-off where in the same case it would not be granted at law, yet in special cases that call for equitable relief a court of equity will allow a set-off not allowed at law. Thus, a set-off of the individual claim of a partner is allowed in equity in cases where a claimant against a partnership is insolvent, or where the claim against the partnership stands only as security for

the individual debt of one of the partners.

**Indiana.**—*Spinney v. Hall* (1912) 49 Ind. App. 502, 97 N. E. 571.

**Kentucky.**—*Fidelity Trust, etc., Co. v. Shannahan* (1892) 14 Ky. L. Rep. 111; *Jeffries v. Evans* (1845) 6 B. Mon. 119, 43 Am. Dec. 158.

**Maine.**—*Robinson v. Furbush* (1852) 34 Me. 509. See also *Donnell v. Portland & O. R. Co.* (1884) 76 Me. 33.

**Mississippi.**—*Eyrich v. Capital State Bank* (1889) 67 Miss. 60, 6 So. 615.

**New Jersey.**—*Brewer v. Norcross* (1865) 17 N. J. Eq. 219.

**New York.**—*Gay v. Gay* (1843) 10 Paige, 369.

**Ohio.**—*Williams v. Pultze* (1877) 5 Ohio Dec. Reprint, 503.

**Vermont.**—*Blake v. Langdon* (1847) 19 Vt. 485, 47 Am. Dec. 701.

**Virginia.**—*Edmondson v. Thomasson* (1911) 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301.

**England.**—*Ex parte Hanson* (1811) 1 Rose, 156, 18 Ves. Jr. 232, 34 Eng. Reprint, 305, 8 Revised Rep. 335, affirming (1806) 12 Ves. Jr. 346, 33 Eng. Reprint, 131.

In *Brewer v. Norcross* (N. J.) *supra*, a bill was brought in equity for an accounting of one partner against his copartner. The defendant set up a counterclaim of an individual debt owing by the plaintiff to the defendant. The set-off was not allowed. The court held that equity followed the law unless there was some ground for equitable interference. The court, in describing the jurisdiction of a court of equity in cases of set-off, said: "The general rule in equity, as well as at law, is, that joint and separate debts, or debts accruing in different rights, cannot be set off against each other. At law, under the statutes of set-off, the rule is inflexible; but in equity, special circumstances give rise to exceptions. Courts of equity exercise a jurisdiction in matters of set-off, independent of the statutes upon the subject. They look beyond the form of the contract, to its real character; and beyond the nominal parties, to the parties to be affected by the decree. Wherever it is necessary to effect a clear equity, or to prevent ir-

remediable injustice, the set-off will be allowed, though the debts are not mutual."

In *Spinney v. Hall* (Ind.) *supra*, it appeared that a county treasurer and partner in a firm deposited in a bank funds of the county, and as a security for the deposit received collateral from the bank. The partnership borrowed money from the same bank, and as security the member who was county treasurer surrendered notes he had received as security for the county funds deposited by him. The bank went into the hands of a receiver, but was not insolvent. The receiver brought suit against the partnership for the amount of the notes. It appeared that the member who was county treasurer had made good to the county the amount of money he had deposited belonging to it, and claimed the deposit as his own. On the action on the notes the treasurer partner set up the sum on deposit as an equitable set-off to the claim against the partnership. The court held that the money on deposit was not a valid set-off, since the claims lacked mutuality. The court said: "The answer is drawn on the theory of an equitable set-off, and we are asked to hold it good on that theory alone. 'Mutuality is essential to the validity of a set-off.' . . . But to this general rule there are exceptional cases where the want of mutuality will not defeat a set-off. To bring a case within the exception, it must clearly appear that it is necessary to allow the set-off in order 'to do complete equity or to prevent irremediable injustice, as in cases of insolvency, or of joint credit given on account of an individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal. . . . In the case before us the answer does not aver insolvency of the firm known as the Goodland Bank, or that there is any question of nonresidence, or that either appellant is principal and the other surety for the payment of said notes.'"

In *Jeffries v. Evans* (1845) 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158, A secured a judgment against the firm of B and C. B and C asked for an in-

In *Jeffries v. Evans* (1845) 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158, A secured a judgment against the firm of B and C. B and C asked for an in-

junction against said judgment on the ground that B had two individual judgments against A which aggregated a greater amount than the judgment of A against the partnership, and on the ground that A was insolvent. The injunction was granted. The court said: "The relief sought by the complainant does not depend upon our statute authorizing set-offs. That statute is applicable only to suits at law. The right to an offset in chancery exists independent of the statute, and is controlled only by the general principles of equity. In this case the complainant was responsible for the judgment in favor of Evans, and to be relieved against such responsibility he had a right, as Evans was insolvent, to set up his claims upon him in a court of equity. It is true the judgment was against him and others; but that fact did not affect his liability, and from anything that appears in this record, he was equally entitled to relief as if the judgment had been against him alone. *Musgrove*, by the assignment of Evans's judgment, obtained merely an equity which was junior and subordinate to the elder equity of the complainant, which existed at the rendition of Evans's judgment, and, of course, prior to the assignment."

In *Fidelity Trust, etc., Co. v. Shanahan* (1892) 14 Ky. L. Rep. 111, a suit on the account of a bank by the bank's assignees, in an assignment for the benefit of creditors, against a partnership, a set-off was allowed of the individual claims of the partners against the bank, as represented by their deposits in the bank.

In *Ex parte Hanson* (1811) 1 Rose, 156, 18 Ves. Jr. 232, 34 Eng. Reprint, 305, 8 Revised Rep. 335, affirming (1806) 12 Ves. Jr. 346, 33 Eng. Reprint, 181, a petition by one member of a firm was filed, asking that a separate debt of the creditor to him for money paid on a bond be set off against the claim of the creditor against the joint bond of the firm. It appeared that the joint debt was merely a security for the separate debt. The court held that it was a valid set-off, saying that a creditor who has

a joint security for a separate debt should not be allowed to resort to such security without giving credit for what he has already received on the separate debt.

In *Robinson v. Furbush* (1852) 34 Me. 509, copartners were brought into a trustee process on a claim against the partnership by the defendant in the proceedings. One of them claimed a set-off in favor of the partnership by virtue of an individual claim he had against the defendant. The set-off was allowed.

In *Gay v. Gay* (1843) 10 Paige (N. Y.) 369, a suit in equity for a settlement of partnership accounts by the assignee of one of the partners, it appeared that the defendant partner was the indorser of two notes of the assignor, and that a judgment had been found against him on both, which he had paid, and the judgment had been assigned to him at a time before that of the assignment of the insolvent partner of his partnership claims. The judgments assigned to defendant were not completely liquidated. These judgments were set up as a set-off in the suit by the assignee on the partnership account. The court held that they constituted a valid set-off, and that, in a summary application by motion for set-off, the claims must be liquidated, but that, in case of insolvency of the party against whom the set-off was claimed, such liquidation need not have been made. The court said: "Upon a bill filed in this court for a set-off, the right of set-off does not always depend upon the statute, nor upon the question whether both demands are liquidated by judgment or decree. But if an equitable right of set-off exists, while the parties have mutual demands against each other, because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law or in equity, to recover the same, this court, upon a bill filed, will compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed is a sufficient ground for the exercise of the

jurisdiction of the court of chancery, in allowing a set-off in cases not provided for by the statute, although the demands on both sides are not liquidated by judgment or decree, so as to authorize a set-off upon a summary application, by motion. . . . And where there are cross demands between two parties, of such a nature that if both were recoverable at law they would be the subjects of legal offset, then if either of the demands is matter of equitable jurisdiction only, the set-off may be enforced in equity."

In *Eyrich v. Capital State Bank* (1889) 67 Miss. 60, 6 So. 615, it appeared that a bank had a legal claim against an administrator and the partner of the intestate, on a note on which the intestate was an indorser and his partner principal. The estate was being administered in equity and the complainant bank sought to enforce the claim for the note against the estate. In that suit the surviving partner was joined with the administrator. The administrator set up as an offset a deposit of the intestate in the bank. The court held that it was not a case where equity ordinarily would have jurisdiction, since it was purely a legal claim, but that since the estate of the intestate was being administered in equity, the question of liability would be settled as an incidental matter. The set-off was held valid, the court saying: "The complainant cannot, by joining in the proceedings another defendant, jointly liable with the intestate at law, preclude the administrator from setting up in discharge of the liability of the estate a debt due by the creditor to the intestate. Without regard to the character of the demand asserted against the estate, as one due by the intestate alone, or by him jointly with another, the rights of the parties will be settled just as though the obligation was that of the estate alone, even though it was made jointly with another, and that other is, without objection on his part, or by the administrator, improperly joined as defendant in the proceeding."

In *Williams v. Pultze* (1877) 5 Ohio Dec. Reprint, 503, a suit for the debts

of a firm composed of W & P, W alone was served. The complainant in the suit was the assignee of an insolvent creditor. W set up as a set-off a claim of the firm of W & M, of which W was the sole survivor. It appeared that his rights as a surviving partner did not vest until after the assignment to plaintiff. The existence of the set-off was denied by the plaintiff and not proved by W. The defendant W was already deeply in debt to his deceased partner, M. The set-off was not allowed. The court held that under such circumstances an exception existed to the general rule that equity will allow a set-off of an individual claim against a partnership claim in cases where the claimant is insolvent.

In *Blake v. Langdon* (1847) 19 Vt. 485, 47 Am. Dec. 701, it appeared that B and H were members of a partnership in which H furnished a certain share of the capital and received a specified sum each year from the firm. Later B and M formed a partnership as the successors of B and H. The former firm was continued for the purpose of closing its accounts. The firm of B and M paid the debts of B and H and charged them to that firm. H gave a note to B and M, signed by the firm name of B and H. B and M executed a note to H individually in the settlement of certain liabilities of third persons to the firm of B and H. In a suit on that note by H, it appeared that H was insolvent. On a bill in chancery by B and M, a set-off against the note was allowed of the account of the firm of B and H on the books of B and M, and of the note executed in the name of the firm of B and H, and given to B and M, although the set-off was in fact a claim of B alone.

In *Watts v. Christie* (1849) 11 Beav. 546, 50 Eng. Reprint, 928, 18 L. J. Ch. N. S. 173, 13 Jur. 244, 845, it appeared that the firm of A & B had an account with a bank on which they owed the bank money. At the same time A had money on deposit in the bank, in an amount exceeding the debt of A & B. The bank became bankrupt. A assigned his claim for the deposit to the firm of A & B. Assignees of the bank

brought an action against the firm of A & B for the amount of their indebtedness. A bill was filed asking an injunction against the proceeding at law and that the claim of A be set off against the firm claim against A & B. The injunction was refused on the ground of lack of mutuality, and that no equitable cause of interference with the proceedings at law was shown.

## II. Under statute.

Under statutes making liability on joint debts, joint and several, it is held that an individual claim may be set off against a partnership liability. *Trann v. Gorman* (1839) 9 Port. (Ala.) 456; *Carson v. Barnes* (1840) 1 Ala. 98; *Jones v. Jones* (1847) 12 Ala. 244; *Leach v. Lambeth* (1854) 14 Ark. 668; *Dick v. Byrne* (1844) 7 Rob. (La.) 465; *Cowden v. Elliott* (1828) 2 Mo. 60; *National Handle Co. v. Huffman* (1909) 140 Mo. App. 684, 120 S. W. 690; *Warren Wood-Working Co. v. Cooke Mercantile Trust* (1896) 5 Pa. Dist. R. 359; *Hurst v. Johnston* (1868) 6 Phila. (Pa.) 593; *Cochran v. Cutter* (1901) 18 Pa. Super. Ct. 282.

In *Trann v. Gorman* (1839) (Ala.) *supra*, under a statute, giving the right to a plaintiff to consider the liability of a partnership either joint or several, the plaintiff brought suit against an individual partner for a firm liability. It was held that the defendant could set off against the firm liability the individual debt of the plaintiff to him.

In *Leach v. Lambeth* (1854) 14 Ark. 668, a suit against a partnership, a demand of one defendant was allowed as a set-off under a statute providing as follows: "When two or more persons are mutually indebted to each other, etc., and one of them commences an action against the other, one debt may be set off against the other, although they may be of a different nature." It appeared in that case that the partnership was composed of two members, A and B. A was an infant and pleaded it as a defense, so that in fact B was solely liable on contract. *Trammell v. Harrell* (1842) 4 Ark. 602, was overruled so far as it conflicted with the decision made.

In *Cochran v. Cutter* (1901) 18 Pa. Super. Ct. 282, it appeared that the plaintiff was indebted to an old firm of which there was one survivor. The survivor formed a new partnership with others and engaged the plaintiff to work for them. The plaintiff sued the new partnership for wages due him. The defendants claimed as a set-off the claim of the survivor of the old partnership. The set-off was held valid.

In *Hurst v. Johnston* (1868) 6 Phila. (Pa.) 593, the plaintiff sued a partnership for goods sold. It appeared that the plaintiff had induced the members of the partnership to buy stock in a certain oil company, and had made promises to each of them that he would secure them from loss. The stock proved to be worthless and the value was claimed as an offset to the claim of the plaintiff. The court held that an individual partner may set off his claim in a suit against the partnership.

In *Warren Wood-Working Co. v. Cooke Mercantile Trust* (1896) 5 Pa. Dist. R. 859, the plaintiff brought an action against A and B as partners for goods sold to them. B filed an affidavit denying the partnership. A set up a claim for commissions for selling goods of the plaintiff corporation. The set-off was allowed. It is not entirely clear whether A and B were regarded as a partnership or not. The court said that B could not be held liable after filing the affidavit mentioned, but the decision in favor of the set-off was rested on cases wherein an individual debt is set off against a joint or partnership debt. The court said: "The English rule is, that joint and separate debts or demands cannot, owing to the absence of mutuality, be set off against each other. . . . A demand against a partnership and one in favor of a partner against a partnership creditor [cannot] be set off against each other, whether in an action by the partner, or by the creditor against the partnership. . . . But the Pennsylvania rule seems to be more liberal. As is admirably stated by Mr. Justice, now Chief Justice, *Sterrett*, in *Montz v.*

Morris (1879) 89 Pa. 394: 'Great liberality has always been exercised in this state in the admission of either legal or equitable set-off; and it is always allowed when, by doing so, it is practicable to avoid circuity of action and unnecessary costs, with safety and convenience to the parties concerned.' The early case of *Tustin v. Cameron* (1840) 5-Whart. (Pa.) 379; *Childerston v. Hammon* (1822) 9 Serg. & R. (Pa.) 67 (opinion by Tilghman, Ch. J.); *Stewart v. Coulter* (1825) 12 Serg. & R. (Pa.) 252 (opinion by Gibson, J.), are admirable examples of the breadth and wisdom of these great judges, who, adopting the system of the administration of equity through common-law forms, made a splendid advance on the more technical and narrow English rule, which has been followed in many states."

In *Carson v. Barnes* (1840) 1 Ala. 93, where suit was brought against the makers of a note by an indorsee, but tried by agreement as if the payee were plaintiff, two notes executed by the payee to one of the makers of the note in suit were held to be a good set-off under a statute making the liability joint and several, since the payee could have been sued on them alone. See, to the same effect, *Jones v. Jones* (1847) 12 Ala. 244.

In *Cowden v. Elliott* (1828) 2 Mo. 60, it was held that in view of the provisions of a Missouri statute which declares that all contracts which, by the common law, were deemed joint, shall be deemed joint and several to all intents and purposes, and that all joint assumptions of copartners and others may be sued on separately, a demand against the plaintiff and another as copartners might be set off in an action brought on a bond given by the defendant to plaintiff and a third person, who was dead before the action was brought, under a statute providing that if two or more persons be mutually indebted to each other, and one of them commence an action, one debt may be set off against another, notwithstanding such debt may be deemed in law of a different nature.

In *National Handle Co. v. Huffman* (1909) 140 Mo. App. 634, 120 S. W.

690, an action against a surviving partner on a note given by the partnership to the plaintiff in payment for a mill, and also in consideration of the plaintiff purchasing the product of the mill from the partnership, the surviving partner set off the claim that the plaintiff had not lived up to its contract of purchase and had damaged him individually to the amount claimed as a set-off. The court held that the claim was not a "set-off," but a counterclaim, since the damages were unliquidated and since a set-off must be in the nature of a debt. It was also held that the act (Rev. Stat. (1899) § 149) providing that in an action against joint obligors any debt due to the defendant from plaintiff in the action, or to all the obligors in a contract sued on, may be set off against the demand of the plaintiff, did not apply to a counterclaim, but to a set-off alone.

In *Beauregard v. Case* (1875) 91 U. S. 134, 23 L. ed. 263, an action brought against an ordinary partnership in Louisiana on a note to a bank, one of the defendant partners claimed as a set-off an indebtedness of the bank to another partner. The set-off was not allowed, though in a case where it is the partner's own claim that is set off against a claim of a creditor, it is allowed by the laws of Louisiana. The court said: "The members of an ordinary partnership, by the law of Louisiana, are only liable to their common creditor for their proportional part of the indebtedness of the partnership; and, in a suit by the creditor against the firm, a partner having an individual demand against the creditor may, by way of defense, or by exception, as it is termed in the practice of the state, offset or oppose the compensation of his demand to that of the creditor. But this is a very different thing from one partner attempting to offset or oppose the compensation of the personal demand of his associate to the claim of their common creditor. For this position we can find no authority in the Code of Louisiana or the decisions of its courts. In the present case, for example, the defendant May might have

set up against the claim of the plaintiff his personal demand against the bank, had he not previously disposed of that demand to the United States; but the defendant Beauregard could not set up that demand of May's in compensation of the bank's claim against him for his share of the partnership indebtedness, any more than he could set up a similar demand of a stranger."

In *Lewis v. Culbertson* (1824) 11 Serg. & R. (Pa.) 48, 14 Am. Dec. 607, the administrator of a creditor brought an action against the executrix of the estate of one who had been the surviving member of a partnership, for goods sold to the partnership. The creditor's estate was insolvent. The defendant put in a claim of set-off based on an indebtedness of the creditor to the defendant's decedent individually. The set-off was held valid. The court said: "The set-off of a defendant is in the nature of an action by him. It is certain that S. Lewis could have brought an action against Vanlear, for the sum he intended to set off; it is equally true that in this action Samuel Lewis is alone answerable; the writ, declaration, judgment, and execution must all be against him. By the death of his partner, the onus of paying this debt was thrown on him; why then is he not to be permitted to set it off? He is sued by the plaintiff for a debt due him; why should he not set off a debt due to himself? . . . A set-off is an equitable defense; why should the assignees or trustees of Vanlear recover against Samuel Lewis, when he is the debtor of Samuel Lewis, and then leave to Lewis a mock action against Vanlear, an insolvent debtor, against whom he might recover a verdict, but from whom he could not obtain one cent? The defendant who is sued is the same individual who sets up the counter demand against the plaintiff; he sets it up in his own right, because he is sued in his own right; the debts are, in the strictest sense of the word, mutual. There is no occasion to call for the exercise of any equity power."

*III. Under agreement between parties.*

Where there is an agreement between the parties that an individual debt is to be set off against a joint claim against the partnership, the set-off is allowed. *McGuinness v. Kyle* (1911) 208 Mass. 443, 94 N. E. 700; *McDonald v. Mackenzie* (1887) 24 Or. 573, 14 Pac. 866; *Barnes v. Esch* (1917) 87 Or. 1, 169 Pac. 512; *Sanford v. Pike* (1918) 87 Or. 614, 170 Pac. 729, 171 Pac. 394.

In *McDonald v. Mackenzie* (1887) 24 Or. 573, 14 Pac. 866, it appeared that the plaintiff sold wheat to a partnership of which A was a member. A held the note of plaintiff, and it was agreed between the parties that such note of A should be applied as a set-off to the claim against the partnership. A did not surrender the note as agreed, but assigned it to a third person after maturity. The third person obtained a judgment on the note. The plaintiff obtained a judgment against the partnership for the wheat sold. He then brought a bill in equity to have the agreement of set-off enforced. The set-off was held valid and was enforced by the court.

In *Barnes v. Esch* (1917) 87 Or. 1, 169 Pac. 512, the court found that a partnership did not in fact exist between a husband and wife. A judgment had been obtained against the husband, against which the wife sought to set off a claim for damages. The court, however, said that in a case where there was an agreement between the parties to that effect, an individual claim might be set off against a partnership claim.

In *Sanford v. Pike* (1918) 87 Or. 614, 170 Pac. 729, 171 Pac. 394, a set-off was held to be invalid on the ground that it lacked mutuality, the attempt being made to set off against a partnership debt an individual claim; but the court said if there had been an agreement to that effect by all the parties, the court would have sustained the set-off.

In *McGuinness v. Kyle* (1911) 208 Mass. 443, 94 N. E. 700, an action by a plaintiff against a partnership, it appeared that one of the defendants and his wife had done work for the plain-

tiff, and this was pleaded as a set-off. It was held that it did not constitute a valid set-off, but the court further found an agreement between all the parties to deduct the value of the services from the note in the hands of the plaintiff, and this amount was deducted.

In *Wilson v. Horne* (1859) 87 Miss. 477, the question was whether an agreement to the effect that a claim of one partner, for the price of certain slaves sold to the plaintiff, "is good as offset to my claims against him, the said J. B. Horn," applied to an in-

dividual debt which J. B. Horn, the defendant partner, owed to the plaintiff, or to the claim of the plaintiff against the firm of which he was a member. It appeared in making a settlement of the amount due to the plaintiff from the firm, at a time later than that of the sale and execution of the agreement to the individual partner, that this amount was not treated as a credit to the firm. The court held that under the circumstances an agreement between the parties was not shown, and that the set-off claimed was invalid. R. R. R.

## FRED WIESE

v.

JOHN THIEN et al.

*Missouri Supreme Court (Division No. 1) — September 27, 1910.*

(— Mo. —, 214 S. W. 853.)

**Easement — private way — effect of separation of land by impassable stream.**

1. A statutory right to a private way of necessity for access to a public highway from petitioner's tillable land and buildings is not defeated by the fact that he owned other land, separated from such land by an impassable stream and high bluffs which abut upon a public road.

[See note on this question beginning on page 1557.]

—way of necessity.

2. Ways of necessity existed at common law.

[See 9 R. C. L. 768.]

**Pleading — petition for private way — accessible to public road.**

3. A petition for the laying out of a private way of necessity is sufficient which alleges that no accessible public road passes through or touches the land.

[See 9 R. C. L. 770.]

—private way of necessity — disclosure of access to road.

4. That a petitioner for a private way of necessity discloses in his petition that he owns land separated from that for which he seeks the way by a high bluff and impassable stream, which touches a public road, does not defeat his right to the way.

[See 9 R. C. L. 771.]

**TRANSFER** by the Kansas City Court of Appeals for the determination by the Supreme Court of an appeal by defendants from a judgment of the Circuit Court of Gasconade County (Breuer, J.) affirming a judgment of the County Court in favor of petitioner, in a proceeding to open and establish a private road. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. W. S. Pope and Robert Walker, for defendants:

Under the admitted facts, petitioner is not entitled to the private road petitioned for.

*Chandler v. Reading*, 129 Mo. App. 63, 107 S. W. 1039.

The private road petitioned for is not a way of strict necessity.

*Colville v. Judy*, 73 Mo. 651; *Cox v.*



Tipton, 18 Mo. App. 450; Barr v. Flynn, 20 Mo. App. 383; Coberly v. Butler, 63 Mo. App. 556.

Messrs. J. W. Hensley and Clarence G. Baxter for plaintiff.

Brown, C., filed the following opinion:

This is a proceeding to open and establish a private road over the lands of appellants connecting the lands owned and occupied by the respondent with a public road running some distance to the west of it. It was begun in the county court of Gasconade county in which the petitioner resides and all the lands involved are situated. The road was laid out and established in due course by the county court, and damages regularly assessed. An appeal was taken from that court to the Gasconade county circuit court, where the matter was retried and the court made its findings as required, which are fully sustained by the evidence. The findings and judgment of the circuit court were made and entered at the January term, 1916, and are as follows:

"Now on this day, the above cause coming on to be heard, and the plaintiff Fred Wiese appearing in person and being represented by counsel, and the defendants John Thien and Vincent Skornia both appearing to this suit in person and being represented by counsel, and the matters in issue being taken up and considered by the court, and the court, after seeing and hearing the evidence adduced by the plaintiff and the defendants and each of them, finds for plaintiff Fred Wiese; finds that the said Fred Wiese is an inhabitant of Gasconade county, in the state of Missouri; that he is the owner of the south half of the northeast quarter of section 21, township 41 north, range 4 west, in Gasconade county, Missouri, upon which he resides with his family; that the Bourbois river crosses the east end of his said lands in a general north to south direction, about 200 yards west of and nearly parallel to the west boundary line of plaintiff's said lands, and that plaintiff's residence,

5 A.L.R.—98.

barn, and all his buildings and all his tillable lands lie on the west side of said river, and that all that part of his said lands lying on the east side of said river consists of and is a very high, rough, and rugged bluff, rising steep and rocky from the water's edge, the lower part of which consists of ledges of wall rock, the other and top part of which is rough and uneven, and mostly covered with hugh boulder rocks; that the east end of plaintiff's land abuts on the Franklin county line, and that no public road passes through or touches plaintiff's said lands except on top of said bluff at the southeast corner of his said lands, for a distance of 69 feet; that it would be impracticable to build and construct a roadway from plaintiff's tillable lands and residence on the west side of said river, to the east and across said river over any part of said bluff to said public highway, at the southeast corner of plaintiff's said lands; and, if such could be done, it would require an excessive expenditure of approximately \$4,000 of money, and would be confiscatory of plaintiff's said lands, and further, should this be done, the ford of the river would be impracticable, because during a large portion of the seasons it would not be fordable on this part of the river, and such roadway from any point along this part of said river over any part of said bluff to the public road at the southeast corner of plaintiff's lands would necessarily be steep, and that, after reaching the public road at this point, plaintiff could only travel in one direction, and then going nearly in an opposite direction from school, post-office, and trading point, as this public road starts at this point and runs in a southwest direction a distance of 1½ miles to and across the river, thence west to and connecting with a south-to-north public road, which runs about 1 mile west of plaintiff's said lands, over the Bourbois bridge through the town of Tea to Owensville and Rosebud, plaintiff's trading points on the Chicago, Rock Island, & Pacific Railroad, and that this

road crosses the said river at Tea postoffice about 2 miles northwest of plaintiff's farm, over the bridge over said river; and that, should plaintiff be forced to the last described route, he would, in addition to incurring the excessive expenses aforesaid, be required to cross said river twice, at impracticable fords not bridged, and be made to go a distance of  $3\frac{1}{2}$  miles to public school,  $4\frac{1}{4}$  miles to store and postoffice, and about 15 miles to trading stations on railroad, making the distance to said points at least 3 miles further than by the route asked for in plaintiff's petition; that plaintiff's lands lie within 20 miles of the Chicago, Rock Island, & Pacific Railroad, a railroad running from east to west across said country, through Owensville and Rosebud, trading points about 11 miles north of plaintiff's farm; that there is no public road passing through or touching plaintiff's said lands except as aforesaid, which said way would be entirely impracticable, and that plaintiff has no other road or outlet from his said premises except over the lands of others; that the way herein petitioned for would be practicable, providing for plaintiff a way to school of less than 1 mile distance, and to railroad 10 or 11 miles distance, and to store and postoffice 2 miles distance, and by giving the way petitioned for he would not have to cross said river in going to school, and in going to postoffice and railroad he could cross same by way of bridge built by the taxpayers of said county for the convenience of all the people of the community where the parties to this suit live.

"The court further finds that the way and road herein prayed for is practicable, and a way of necessity within the meaning of the Constitution and laws of this state; that, at a former trial of this matter in the county court in which all the parties to this suit appeared in person and by counsel, damages were awarded to John Thien as follows, no damages; and that damages were awarded to Vincent Skornia in the sum of

\$75 by jury trials; and that in the trial of this case in this court it was agreed by all the parties to this suit that the damages awarded to the defendants in the county court were fair and reasonable, and that the same should be taken and adopted as the damages to be found and awarded in this trial in the event the issue should be found for the plaintiff.

"It is therefore ordered and adjudged by this court that the said private road be established according to the prayer of the petition and plat of same, to wit."

Here follows the description of the center line of the road 20 feet in width as located by the commissioners. The remainder of the judgment relates to the payment of damages and costs.

The petition is in two counts. The first asserts that the petitioner is an inhabitant of Gasconade county, Missouri; that he owns the south half of the northeast quarter of section 21 and all that part of the northeast quarter of the southeast quarter of section 21 lying west of the Bourbois river, in township 41 north, of range 4 west, in said county; "that he has no road from said lands and premises except through gateways and over the lands of others." The second count states "that no accessible public road passes through or touches said land." Each count sets out in detail the necessity and use for a private road leading west from the premises described.

1. It will be seen from the foregoing statement that the only issue between these parties is a naked right of the petitioner, under the Constitution and laws of this state, to have access to the farm on which he resides through and over the lands of the defendants. There is no question of damages. These were admitted to be just and reasonable, and include all those elements which the law recognizes as subjects of pecuniary compensation. Whether the rigorous defense proceeds from a desire for a holiday in court or

from a patriotic impulse to vindicate the law can make no difference. The question involved is important as well as interesting, and is here for our consideration.

The framers of our Constitution were not inventors of the doctrine of private ways of necessity. They

**Easement—  
way of  
necessity.** existed by the common law, and were usually said to be founded upon a presumption of grant or reservation; as, where one sold a close surrounded by his own estate, he was presumed to grant the easement of access, or, if he sold his surrounding estate and reserved the close, a reservation would be presumed of the same easement. In *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94, the same doctrine was said to apply to the United States as an original proprietor in the disposition of the public lands. Judge Napton, speaking for the court, said: "The United States, being the proprietor of a section of land entirely surrounded by eight other sections, sells the section so surrounded; the purchaser acquires, by the common law, a right of way to the land he has bought, as a necessary incident of the grant. The case is not altered by the United States' selling the surrounding land to different individuals. The purchasers take it subject to the burden imposed on it whilst it belonged to the government, the original proprietor."

The state did not exceed its jurisdiction over private property within its limits by recognizing and perhaps enlarging the application of this principle in § 20 of article 2 of the state Constitution by excepting private ways of necessity from its guaranty of inviolability, and expressly vesting in the legislature the power to prescribe the manner in which such easements might be acquired. It was in pursuance of the authority so conferred that § 10,447 of the Revised Statutes of 1909, by which this proceeding must be

judged, was enacted. It prescribes no formula of words in which the petition must set forth that the petitioner is the owner of the tract of land for which the easement is desired, and that no public road passes through it or touches it. Any words that express these facts in plain and unmistakable terms are sufficient. This petition, for instance, states "that no accessible public road passes through or touches said land." The word "accessible" is relied on by appellants as rendering this petition insufficient and the judgment rendered upon it null and void. The argument implies that there could be such a state of facts that a public road might touch the land and still be absolutely inaccessible to it. This involves a distinction altogether too shadowy for application by a court. To relieve the law from the charge of absurdity, we must assume that the legislature intended such a contact with the premises involved as would give access to the premises and thus avoid the necessity upon which the legislative right is founded. The petition is good and needs only to be sustained by the facts.

**Pleading—  
petition for  
private way—  
accessible to  
public road.**

2. As we have already seen, the right conferred by this statute is not a personal one, but pertains to the land to which it becomes appurtenant. It is the situation of the land that calls for its application, and the owner for the time being is the instrument by which the proceeding is instituted. The statute requires that he be the owner of a tract or lot of land, and that no public road passes through or touches it, and it is to this tract alone that the right appertains. That the same proprietor has other lands in the same or adjoining counties does not impair his statutory remedy. The lines of government subdivision have no application, even though they may be used in his title deeds to describe the extent of his hold-

ings. For instance, it is a matter of common knowledge that the government, in surveying the public lands, frequently meanders a stream, so that no subdivision line is permitted to cross it; while in other cases, as appears to have been done in this, the subdivision lines cross the stream so that its bed is included in the description of sectional subdivisions. The method adopted makes no difference in the rights of riparian proprietors in the bed of the stream, although these rights may perhaps be affected by the nature of the stream itself. But so far as the statute now under consideration is concerned, the fact that the proprietor who invokes its remedy with respect to lands bordering

upon an impassable stream may also have lands on the other side cannot affect his right of access to either tract. The effect would be the same, in all respects, as if his holdings were separated by the lands of other proprietors.

In this case the farm of the petitioner is situated on the west bank of the Bourbois river at a point where the stream is unfordable throughout a considerable portion of each year. One of its government subdivisions extends across the river a distance of about 200 yards. The east bank of the river is formed by a palisade of perpendicular rock, surmounted by boulders which cover practically the entire strip. On this bluff runs a road which touches the east line of the strip for a distance of 69 feet, and then passes southwesterly away from it. The court has found that to construct a road from its farm to the road on the top of the bluff, so that it could be used only during that portion of the year when the stream was fordable, would cost approximately \$4,000, which would be confiscatory of his land, which means, as far as it means anything, that the cost would amount to as much or more than

the value of his farm. It is perhaps unnecessary to take into consideration the fact that by passing this ford and climbing the bluff his children attain a schoolhouse less than a mile from his residence, by going  $3\frac{1}{4}$  miles and recrossing the river at another ford during that portion of the year when the stream is fordable. The same disparity of conditions exists in reaching available trading and shipping points. These facts force the conclusion that, for the purpose to which the provisions of § 10,447 apply, the tract owned by petitioner on the east side of the river is, within the meaning of this section, as much a separate tract of land as if it were situated on the other side of a meandered navigable river or miles away across the level prairie. The prohibitive expense of connecting these tracts for purposes of access to the farm on the west side of the river might of itself produce that result. Tiedeman, Real Prop. 2d ed. § 609, and cases cited. Yet in this case we have the added reason that the access so obtained would be entirely inadequate to the purpose which the law is designed to serve. That purpose is such communication with the vicinage as makes the estate inhabitable under conditions indispensable to its appropriate occupation and use.

3. The only remaining question is whether the mere fact that the respondent in his petition has described his holdings as including the bluff on the east side of the river precludes him from presenting the case in the aspect we have considered. We do not think so. The disclosure of the real situation in his petition has no other or greater effect than does the disclosure of the same facts in evidence. He simply presented his entire case to the county court and called for the determination of his right, and the law will not punish him for that commendable course.

We think that upon the whole

Easement—  
private way—  
effect of  
separation of  
land by im-  
passable stream.

Pleading—  
private way  
of necessity—  
disclosure of  
access to road.

case as presented in the petition and upon the trial he is entitled to the relief granted him in the Circuit Court, and its judgment is therefore affirmed.

Ragland and Small, CC., concur.

**Per Curiam:**

The foregoing opinion of Brown, C., is adopted as the opinion of the court.

All the Judges concur; Bond, J., in result.

**ANNOTATION.**

**Easement of way of necessity as affected by common ownership of parcels which are not accessible one from the other.**

It will be seen that it is held in the reported case (*WIESE v. THIEN*, ante, 1552), under a Constitution and statutes providing for private ways of necessity, that one dwelling on the banks of a stream not fordable part of the year is not to be debarred from a private road because he owns a tract of land across the stream on a high bluff, the back part of which is touched by a public road the use of which, at best, would be extremely inconvenient to him, where the cost of building a road across the stream and up the bluff would be confiscatory of his land, and such road could not be used during the part of the year when the stream was unfordable.

It would seem clear that, if a way of necessity must be absolute, there can be no way of necessity where one part of a contiguous tract of land has access to the highway, no matter how difficult the construction of a road reaching all of the tract might be, unless it is an impossibility.

In *McDonald v. Lindall* (1827) 3 Rawle (Pa.) 492, the court said: "The right of way from necessity, over the land of another, is always a strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbor's would be a better road, more convenient, or less expensive is not to the purpose; that the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way over the land of another can exist."

In *Kripp v. Curtis* (1886) 71 Cal.

62, 11 Pac. 879, the court said: "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." Quoted in *Bully Hill Copper Min. & Smelting Co. v. Breuson* (1906) 4 Cal. App. 180, 87 Pac. 237.

Where a slough crossed the defendant's land, making it highly inconvenient for him to get out of the greater part of his land, this would not give him a way of necessity where a bridge could be built or other crossing made. *Huddleston v. Love* (1901) 13 Manitoba L. R. 432.

In *Nichols v. Luce* (1834) 24 Pick. (Mass.) 104, 35 Am. Dec. 302, where the defendants, to justify their use of the plaintiff's land for a road to the north, proved that about 4 acres of their tract was separated from the balance by an elevation over which it was exceedingly difficult to pass to a road to the east, the court said: "Where a man should grant a tract of land surrounded by his own, so divided into parts by an impassable mountain, river, or other barrier as that there could be no passing from one part to the other, he would, by necessary implication, convey a right of way to each separate part, because without this some portion of the thing granted would be entirely useless to the gran-

tee. But these implications of grants are looked upon with jealousy and construed with strictness. It is only the necessity of the case which will carry one way, and certainly the necessity must be not less strong to carry two. It is not pretended that the bluff across the defendants' land is impassable; but only that it is 'exceedingly difficult to pass it, and that it would be much more convenient to the defendants to pass' over the plaintiff's land. Here is no such necessity as will raise an implication of a grant of different ways from different parts of the defendants' lot. Convenience, even great convenience, is not sufficient."

Where the statute provided that, "in cases of necessity, private ways may be granted upon just compensation being first paid by the applicant," the court said: "The way of necessity contemplated by the Constitution is not a way of convenience, nor is it, indeed, intended to give the applicant the shortest route to market. . . . Nor does the fact that there was a cut or obstruction in plaintiff's farm, between his residence and the settlement road, change the legal complexion of this case. The burden of crossing these natural barriers falls upon him, and not upon another. 'A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way to his own land may be.'" *Gaines v. Lunsford* (1904) 120 Ga. 370, 102 Am. St. Rep. 109, 47 S. E. 967.

But on the other hand, where the courts hold that the necessity need not be absolute, a reasonable solution is offered.

In *Crotty v. New River & P. Consol. Coal Co.* (1913) 72 W. Va. 68, 46 L.R.A. (N.S.) 156, 78 S. E. 233, where it was held that in a remote conveyance of severance there was an implied grant of a way of necessity, and where it is not clear whether the cliff in question was or was not on the plaintiff's land, the court said: "As to whether physical obstruction to access to land, such as the insurmountable cliff standing between the plaintiff's lot and the public road on the tableland within

the boundary of lot No. 15, will sustain an implication of a grant of a way of necessity, the authorities are in conflict, some saying the grantee cannot have a right of way out over the adjacent land of the grantor, if by any means, no matter at what cost, he can get out over his own land, while others say necessity within the meaning of the term as it is used in the law of contracts suffices. The latter class of cases seems to accord with reason and the considerations upon which the rule rests."

In *Pettingill v. Porter* (1868) 8 Allen (Mass.) 1, 85 Am. Dec. 671, the court said: "The word 'necessary' cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but \$1,000, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of \$100,000."

It will be seen that the reported case (*WIESE v. THIEN*, ante, 1552), while arising under statute, takes a similar view.

The court did not decide the question of absolute necessity in *Dee v. King* (1901) 73 Vt. 375, 50 Atl. 1109, where, in denying a claim of a way of necessity where part of the orator's lot could not be reached over his land without extreme inconvenience, on account of a hill, the court said: "The hill is such that it cannot be crossed without making several turns, and then only with very light loads. The master finds that the conditions now existing could be materially improved by the building of certain described pieces of road, the expense of which would be disproportioned to the income from the hill lot, but which would benefit the farm as a whole more than enough to offset the cost. The proposed road is pronounced inconvenient, and expensive in the first laying out, but not impracticable. The

orator's claim cannot be sustained upon these findings. . . . It is not necessary to inquire whether a way through one's own land must be absolutely impossible. It is clear that mere inconvenience, however great, will not be sufficient. It is necessity, and not convenience, that gives the right."

Under some of the statutes the difficulty need not be great. Thus, under a statute providing that "if any person be settled upon or cultivating any land to which there is leading no public road, and it shall appear necessary, reasonable, and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the board of supervisors of the township, praying for a cartway to be kept open across such other persons' lands, leading to some public road, ferry, bridge, or public landing," etc., it was held that the plaintiff was entitled to a cartway, where, as the court reports, "it was in evidence that plaintiff owned two tracts of land,—one lying on the public road, the other distant from the public road 1,000 yards; that between the plaintiff's two tracts of land was a tract of defendant's land, entirely woodland, 200 yards wide and 900 yards long, which cut off plaintiff's last-mentioned tract (which is in cultivation and on which is a tenant house) entirely from any access to the public road, except that it is connected by a narrow strip of land belonging to plaintiff with plaintiff's other tract on the public road. This strip, however, was 'wholly unfit for a cartway, by reason of the great number and size of ditches to be crossed and its being continually subject to inundation and overflow.'" It was held that the trial court properly charged the jury that if the plaintiff could have a "practicable" cartaway over the strip of his own land above referred to, then it was not necessary to have it laid off over defendant's land. *Mayo v. Thigpen* (1890) 107 N. C. 63, 11 S. E. 1052.

In dismissing proceedings for laying out a public road, the court said: "Admittedly, a citizen who is sur-

rounded by the lands of others has a right to obtain access to a public highway. Even where, as the evidence here proves Frankheiser to have, he may have such access over his own land, if the route would be specially difficult and burdensome, he could enforce his right to reach the highway over intervening lands. But in such a case his right would be to a private road, to be built and maintained at his own expense, and not to a public road to be built and maintained at the expense of the township. The acts of assembly relating to private roads have made provision for precisely such cases as this." *Re Road* (1874) 2 Woodw. Dec. (Pa.) 437.

**Way of necessity from one part to another of claimant's land.**

In *Cooper v. Maupin* (1840) 6 Mo. 624, 35 Am. Dec. 456, where there was a bluff, it was held in an action of trespass that the trial court properly charged the jury that "the defendant can have no right of way by necessity over the land of plaintiff to any other portion of the same entire tract of defendant's land." The court said: "No case has yet sustained a right of way from necessity from one part of the claimant's land to another part of the same contiguous tract, over the land of another. How can such a way be called a way of necessity? It may be convenient, but I understand the necessity must be absolute, and created by the intervention of another's land."

Under a statute providing that "the selectmen of the respective towns, or a major part of them, may lay out such public highways or private ways as they shall judge needful within their respective towns," and that "if the selectmen, on application to them, shall refuse or neglect to lay out such private ways as may be necessary for any inhabitant of said town, the county court is empowered, upon application, to cause such ways to be laid out as may appear necessary," it was held that a private way might be laid out to connect two separated tracts of the petitioner (the constitutional objection that the legislature could not authorize the laying out of a way for the sole use

of a particular individual not having been raised at the proper time). *Reynolds v. Reynolds* (1842) 15 Conn. 83.

In *Robinson v. Swope* (1876) 12 Bush (Ky.) 21, it was held that while "the general assembly may, in the exercise of the right of eminent domain, authorize the establishment of private passways over the lands of others when it is necessary to enable any inhabitant of the state to attend courts, elections, churches, or mills, or to reach an established public highway," it may not provide "for the establishment of private passways when necessary to enable a citizen 'to pass from one tract of land to another owned by him,'" as this is a private use.

But in *Re Stewart's Private Road* (1909) 38 Pa. Super. Ct. 339, it was held that under the Pennsylvania statute a petitioner buying a field or plantation separated from his dwelling by the land of another may have a private road through such intervening land. We are perhaps to suppose that the lot purchased was not on a public highway. (It may be noted that in *Pennsylvania Coal Co. v. Waddell* (1876) 5 Luzerne Leg. Reg. (Pa.) 15, the court stated that a statute authorizing such a private road would be unconstitutional).

Railroad private crossings or farm crossings may properly be provided for by statute as limiting the grant of power of eminent domain. While it is not intended to take up generally the subject of such crossings, a few of the cases are here referred to as of interest upon the subject of ways of necessity.

A reservation in a deed granting a right of way for railroad tracks, of the privilege of crossing and recrossing and maintaining water pipes over it, will remain a permanent easement in the grantor, where the strip granted is so situated as to shut off all access to the grantor's valuable wharves in such manner that without the reservation a way of necessity would exist, and the reservation is in effect an exception of an already existing right. *Chappell v. New York, N. H. & H. R. Co.* (1892) 62 Conn. 195, 17 L.R.A. 420, 24 Atl. 997.

Similarly where, after a condemnation for a railway right of way separating a farm into two tracts, there were no practical means of access to one of the tracts except over the railway right of way, it was held that "a right of way of necessity, was, by legal implication, reserved in the owner when the original condemnation proceedings were had." *Cleveland, C. C. & St. L. R. Co. v. Smith* (1912) 177 Ind. 524, 97 N. E. 164.

In *Pittsburgh, C. C. & St. L. R. Co. v. Kearns* (1915) 58 Ind. App. 694, 108 N. E. 873, the court said, besides referring to the statute: "From the evidence it appears that, when the original line of railway across the farm in question was built by appellant's predecessor, there was no practical way of travel from one of the parts of the farm to the other, except over the railroad right of way, therefore a way of necessity across such railroad right of way was by legal implication reserved in the owner, irrespective of any covenant in the deed granting the railroad its rights. *Cleveland, C. C. & St. L. R. Co. v. Smith* (Ind.) *supra*."

In *New York & N. E. R. Co. v. Railroad Comrs.* (1894) 162 Mass. 81, 38 N. E. 27, it was held that a conveyance by a landowner by warranty deed to a railroad company, of a strip cutting his land in two, implies a right of way across the railroad so that a subsequent statute is not unconstitutional as applying to such cases, where it provides that "when any person or corporation is cut off from access to lands owned by such person or corporation by the laying out of a railroad or the widening of the road-bed of such railroad, and when no compensation has been paid by the company owning or operating said railroad for cutting off access to said lands, or agreement made relative thereto, the railroad commissioners, after due notice to the parties in interest and a hearing, under such rules as they shall adopt for proceedings under this act, shall, if they deem expedient, order a crossing to be made and maintained at the expense of the railroad company." The court said: "It is familiar law that if one conveys



a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject-matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed."

But where a grantor in a deed excepted from the land conveyed a 100-

foot strip through the same, theretofore taken by a railroad company under condemnation proceedings, by virtue of which the railroad corporation obtained title in fee, it was held that the grantee was not entitled to a way of necessity from one part of her land to another, divided by the strip so condemned, as she was in no different position than if she had taken title by two separate deeds of the lands separated by the railroad. *Atchison, T. & S. F. R. Co. v. Conlon* (1901) 62 Kan. 416, 53 L.R.A. 781, 63 Pac. 432.

It may be noted that in *Dubbs v. Philadelphia & R. R. Co.* (1892) 148 Pa. 66, 23 Atl. 883, a statute requiring railroads dividing lands to provide crossings whenever necessary was held to include cases where an owner of divided lands might pass from one part to the other by a circuitous route.

B. B. B.

J. S. WOODWARD, Appt.,

v.

SAVINGS & TRUST COMPANY.

*North Carolina Supreme Court — October 1, 1910.*

(— N. C. —, 100 S. E. 304.)

**Bank — right to charge back forged paper.**

1. A bank cannot charge back to the account of its depositor a forged check upon itself which it has credited to such account.

[See note on this question beginning on page 1566.]

—right to charge back check proving to be overdraft.

2. The drawee of a check, accepting it unconditionally and passing it to the credit of the depositor, cannot, in the absence of a special custom known to the depositor, charge it back against the account of the depositor on the ground that it was an overdraft.

[See 3 R. C. L. 526.]

—effect of knowledge of payee.

3. One depositing in the drawee bank a check to which the name of the purported drawer was signed by another in his presence cannot deny the right of the bank to charge it back upon its proving to have been signed without authority.

[See 3 R. C. L. 527.]

**Bills and notes — holder in due course — drawee bank.**

4. The bank on which a check is drawn does not, in crediting it to the account of the payee, become a holder in due course within the meaning of the Negotiable Instruments Act.

—absence of damage.

5. One who takes a forged check in payment of an automobile is not damaged by the charging back of the check against his account after the bank has given him credit for it, if he recovers possession of the car under mortgage foreclosure, and the cash payment is, so far as appears, sufficient to compensate him for the use of the car and any injury done to it.

**APPEAL** by plaintiff from a judgment of the Superior Court for Beaufort County (Devin, J.) in favor of defendant in an action brought to recover damages for charging back a check against the account of plaintiff. *No error.*

Statement by Allen, J.:

This is an action to recover damages against the defendant bank for charging back against the account of the plaintiff a check of \$380. The jury returned the following verdict:

"(1) Did the defendant represent to the plaintiff that the check for \$380, signed in the name of Winnie E. Jackson, was good and would be paid? Answer. No.

"(2) Was the plaintiff induced by said representation to sell and deliver the car to Simon Jackson? Answer. No.

"(3) Did the defendant accept the check for \$380, and credit plaintiff's account therewith? Answer. Yes.

"(4) Was the name of Winnie E. Jackson signed to said check without the authority, knowledge, or consent of said Winnie E. Jackson? Answer. Yes.

"(5) What damage, if any, is plaintiff entitled to recover therefor? Answer. None."

The verdict, considered in connection with the evidence and the charge, discloses the following facts: In January, 1919, the plaintiff was engaged in the business of selling automobiles in Washington under the name of the Overland Washington Company. On the morning of January 24th one Simon Jackson went to the place of business of the plaintiff about 8 o'clock in the morning, and entered into a contract for the purchase of a Ford car from one Hollowell, agent of the plaintiff, by the terms of which Jackson was to pay \$20 in cash, give a paper for \$100 with solvent indorsers, a check for \$280, and a note for \$25, secured by mortgage on the automobile. Simon Jackson had no account with the defendant bank, but he gave a check for the \$280, signing the name of his mother, Winnie Jackson, as drawer, who did have an account in the bank. Hollowell took

the check to the defendant bank, and asked if the check of Winnie Jackson for \$280 was good, which was answered in the affirmative, Winnie Jackson having at that time \$340 to her credit in the bank. Hollowell returned to the place of business of the plaintiff when the plaintiff was present, and it was then found that Simon Jackson could not secure the papers for \$100, properly indorsed, and the check for \$280 was then torn up, and he gave to the plaintiff as payee another check upon the defendant bank for \$380, signing the name of Winnie Jackson as drawer in the presence of the plaintiff, who took this check to the bank, indorsed it, passed it across the counter, and was given credit for the same on his account as a depositor. Later in the day the defendant bank charged back the check to the account of the plaintiff, finding that Winnie Jackson did not have \$380 to her credit, and that she had not authorized Simon Jackson to sign her name to the check, which the jury finds to be a fact.

The automobile was delivered to Simon Jackson on Friday, and was used by him, and, being injured, was returned to the plaintiff on Saturday for repairs.

The plaintiff, then claiming the right to hold the automobile under his mortgage to secure the \$25, after advertisement sold it, and had it bought in for himself.

The plaintiff now has the automobile, \$20 in cash paid by Simon Jackson, and his note for \$25.

The plaintiff moved for judgment on the third issue, which was refused, and he excepted.

Judgment was rendered for the defendant, and the plaintiff appealed.

Mr. E. A. Daniel, Jr., for appellant.  
Messrs. Stewart & Bryan and Ward & Grimes for appellee.

Allen, J., delivered the opinion of the court:

The weight of authority is in favor of the proposition for which the plaintiff contends, that a bank, the drawee of a check, accepting it unconditionally and passing it to the credit of the depositor, in the absence of special custom known to the depositor, cannot charge it back against the account of the depositor on the ground that it is an overdraft.

Bank—right to charge back check proving to be overdraft.

The court says in *First Nat. Bank v. Burkhardt*, 100 U. S. 689, 25 L. ed. 768:

"In Morse's well-considered work on Banking, p. 321, it is said: 'But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.'

"We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text.

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the re-

quisite concurrence and assent of the minds of those concerned. It was well said by an eminent chief justice: 'If there has ever been a doubt on this point, there should be none hereafter.' *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160."

"When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officers labored under the mistake that there were funds sufficient. In such a case the bank could have received the check conditionally, and have come under obligations to account to the holder for it only in the event that on an examination of the accounts of the drawer it was found he had funds to meet it, or in the event that he provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay or dishonor the check. It would have been within the option of the holder to have accepted or rejected either of these propositions. But when the holder presented the check with his pass book, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and there can be no distinction between a request for payment in money, and a request for payment by a transfer to the credit of the holder." 3 R. C. L. 526.

To the same effect see 7 C. J. 681; *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814; *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 142; *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, 32 Am. St. Rep. 173, 28 N. E. 839; *Wasson v. Lamb*, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729.

And the authorities also sustain the position that the same rule applies when the check is a forgery:

"A bank is bound to know the signatures of its customers; and if it pays a forged check it must be considered as making the payment out of its own funds, and cannot ordinarily charge the amount so paid to the account of the depositor whose name was forged." 7 C. J. 683.

"In pursuance of the rule that a bank, as between itself and the bona fide holder of a check, is bound to know the signature of its depositors,

—right to charge  
back forged  
paper. and cannot recover from such a holder money paid to him

upon the subsequent discovery that the drawer's name was forged, if a depositor presents a check, which he holds in good faith, drawn on the bank by another depositor, and the check is credited to him in his account and charged to the drawer, this is in effect a payment of the check, and the bank . . . cannot strike off the credit." 3 R. C. L. 527.

This principle was first declared by Lord Mansfield in 1762 in *Price v. Neal*, 3 Burr. 1355, 97 Eng. Reprint, 871, 1 W. Bl. 390, 96 Eng. Reprint, 221, and has been adopted in *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Neal v. Coburn*, 92 Me. 145, 69 Am. St. Rep. 495, 42 Atl. 348; *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 15, 7 L.R.A. 849, 13 S. W. 339; *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 21, 96 Am. Dec. 554; *Bernheimer v. Marshall*, 2 Minn. 82, Gil. 61, 72 Am. Dec. 79; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327; *Bank of St. Albans v. Farmers & M. Bank*, 10 Vt. 145, 33 Am. Dec. 188; *Yarborough v. Banking Loan & T. Co.* 142 N. C. 377, 55 S. E. 296; and, indeed, in all the states except Pennsylvania, where

it has been changed by statute. *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 438.

These principles rest upon the presumption that the drawer knows the signature of its customer, and upon the necessity of fixing some time when there shall be no further inquiry by the one upon whom it is drawn into the integrity of commercial paper with which so much of the business of the world is done to-day; but the courts recognize that they are establishing a rule at variance with the principle that money paid under a mistake of fact may be recovered, and the one depositing the check, if both the payee and indorser of the check, is held to knowledge of all other facts except the signature of the drawer, and he can take no benefit from the transaction if he actively participated in the forgery, although without fraudulent intent.

This is true because the payee in the check is necessarily brought in close touch with the drawer, and has every opportunity to inquire into the regularity and genuineness of the paper.

"It would be an exceedingly harsh rule to permit one who negotiates with the forger, and obtains his check payable to the use of the party advancing the money, who then indorses it to a bank, to hold onto the money when the payee has himself contracted with the forger, and given credit to the paper by his indorsement that led the bank to believe the paper was genuine." *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339.

"The drawee bank is held to a knowledge of the signature of the drawer, but the payee indorser is held to a knowledge of all other facts.

"The discounting bank and the drawee bank, in such a case, have the right to rely upon the indorsement of the payee, and as to him are not required to exercise any diligence to discover the fact that the check had been raised. These facts are conclusively presumed to be

within the knowledge of the payee. Under such circumstances the money paid can be recovered back in assumpsit, unless, possibly, from some subsequent arrangement or cause, the right is lost. Certainly, the fact that the payee, who received the money as payee and ostensible owner, has disposed of it according to his own will, cannot in any way affect this right. The authorities cited by appellee to the proposition that if a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back, are not applicable to the case at bar. Bradley was the payee, and, by his indorsement, obtained the money. He parted with nothing to get possession of the check. Its genuineness is conclusive as to him, and as indorser he guaranteed it to be genuine for the amount expressed in the check. *Carpenter v. Northborough Nat. Bank*, 123 Mass. 66; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, 39 Am. Rep. 652." *Birmingham Nat. Bank v. Bradley*, 103 Ala. at page 119, 49 Am. St. Rep. 17, 15 So. 443.

"In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or the mistake of fact under

which the payment has been made. . . . To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken. *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 34 Am. Dec. 610; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104." *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44.

In this case the plaintiff was present and saw Simon Jackson sign the name of Winnie Jackson to the check, and he made no inquiry, —effect of knowledge of payee. except of Simon, of his authority to do so. He carried the check to the bank during business hours, and according to the evidence of the defendant, which the jury has accepted, indorsed it, and had it passed to his credit, without giving any information to the bank of the circumstances attending the drawing of the check.

The plaintiff offered evidence to the contrary, but his theory of the case has been repudiated.

Under these conditions the plaintiff cannot be permitted to recover.

We have made no reference to the liability of an indorser under the Negotiable Instruments Law (Laws 1899, chap. 733) because his guaranties under that law are only in favor of a holder in due course, and the drawee bank does not occupy that position. *Farmers & M. Bank v. Bank of Rutherford*, 115 Tenn. 71, 112 Am. St. Rep. 817, 88 S. W. 939.

Bills and notes—holder in due course—drawee bank.

It pays nothing, and simply honors an order on funds in its hands.

It also appears, and the jury has so found, that the plaintiff has suffered no damage, and that if he re-

covered \$380 of the defendant it would be a recovery for which he has paid nothing.

He sold a Ford car to Simon Jackson on Friday for \$425, of which \$20 was paid in cash, and the balance by the check of Winnie Jackson on the defendant for \$380, and the note of Simon Jackson for

\$25 secured by mortgage on the car.

Simon Jackson kept the car one day, and returned it to the plaintiff for repairs, there being evidence that the car was damaged, but the extent not shown.

The plaintiff then advertised the car for sale under the chattel mortgage of Simon Jackson, and at the sale had it bought for himself, and he now has the car, and \$20 to indemnify him for the repairs, the amount of which he did not state, and the use of the car one day.

No error.

### ANNOTATION.

#### Right of drawee bank to charge back a credit given on a forged check.

Where a bank pays a check purporting to be drawn by one of its depositors, there are different theories as to the right of the bank to recover the amount thus paid upon discovery that the drawer's signature is forged.

It has been announced as an absolute rule that it is incumbent upon the drawee of a check to be satisfied that the signature is genuine, and if he pays a check to which the drawer's name has been forged, he cannot recover the money paid; but this rule is qualified in many cases, some of which were decided by courts which have announced the unqualified rule, by applying it only to payments to bona fide holders. Other cases hold that the foregoing rule, which may for convenience be designated the rule of estoppel, applies only where the parties are equally innocent, that if the loss can be traced to the fault or negligence of either party it should be fixed upon him. In still other cases the right to recover is made to depend upon whether or not a change of situation to the prejudice of the holder has resulted from the payment, and not upon the existence of negligence.

Whether the right of a bank which has merely credited the account of the holder of the forged check instead of paying cash is governed by the same rule as if cash had been paid is the subject of investigation in this note. The few cases which have passed upon

the question make no distinction between a credit and the payment of cash.

In the reported case the negligence rule is applied, and, there being an active participation in the forgery by the one thus credited, the bank was held entitled to withdraw the credit. Other cases which have passed upon this question have applied the rule of estoppel, and held that the bank cannot, after it has credited one of its customers with the amount of a check purporting to be drawn upon the bank by another customer, withdraw the credit upon discovering that the signature to the check is a forgery. *National Bank v. Grocers' Nat. Bank* (1867) 2 Daly (N. Y.) 289; *Levy v. Bank of United States* (1802) 1 Binn. (Pa.) 27, 4 Dall. 234, 1 L. ed. 814. Accordingly, the customer whose credit has been canceled has been allowed to recover the amount thereof upon refusal of the bank to make payment. *National Bank v. Grocers' Nat. Bank* (N. Y.) and *Levy v. Bank of United States* (Pa.) supra. In *Levy v. Bank of United States* (Pa.) supra, Shippen, Ch. J., in charging the jury, states: "It is our opinion that when the check was credited the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken." In *National Bank v. Grocers' Nat. Bank* (N. Y.) supra, a check which had

come regularly to one bank (not the drawee) from one of its depositors was sent to the clearing house and credit given to the first bank, and the check retained by the drawee bank about three months, when it was returned on the ground that it was a forgery, and the first bank debited with the amount of the check. The return was alleged to be in violation of the rules of the clearing house association. In permitting the first bank to recover against the drawee bank the amount of the check, the court treats the right of the drawee bank the same as if it had paid cash, and states: "It is quite clear that if the defendant had sued the plaintiff for the money as soon as the forgery was discovered, it would have failed in the action. The fact that the Bank of the Commonwealth is plaintiff rather than defendant cannot change the absolute rights of the parties."

That a drawee bank which has at first, at least, merely credited the amount of the forged check to another bank from which it was received, cannot recover of the latter bank, has been held in several cases. *Bank of St. Albans v. Farmers & M. Bank* (1838) 10 Vt. 141, 33 Am. Dec. 188; *Commercial & F. Nat. Bank v. First Nat. Bank* (1868) 30 Md. 11, 96 Am. Dec. 554; *People's Bank v. Franklin Bank* (1889) 88 Tenn. 299, 6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 716. And the same doctrine has been announced in a case in which there was a series of credits by the banks through which the check was sent. *First Nat. Bank v. First Nat. Bank* (1890) 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44. It seems to be assumed, however, in these cases that the money was paid; at any rate the action was by the drawee bank to recover money, and not by the depositor whose credit had been canceled.

If the person presenting the check has been negligent, the drawee bank may recover. *National Bank v. Bangs* (1871) 106 Mass. 441, 8 Am. Rep. 349; *First Nat. Bank v. First Nat. Bank* (1890) 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; *People's Bank v. Franklin Bank* (1889) 88 Tenn. 299,

6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 716; and see the reported case (*WOODWARD v. SAVINGS & T. Co.* ante, 1561).

The negligence that will entitle the drawee bank to recover cannot be stated generally. A bank which had paid through the clearing house, in the usual manner of settling daily balances, a check forged in the name of one of its depositors, and deposited by the payee with another bank to his account therein, was allowed to recover of the payee upon discovery that the check was a forgery, where the check had been negotiated for value by a stranger or third party to the payee, who had made no investigation thereof. *National Bank v. Bangs* (Mass.) supra.

In *National Bank v. Bangs* (Mass.) supra, the rules of the clearing house authorized a return of checks after examination in case of forgery, until a certain time; the forgery not having been discovered in this case in the required time, the court states that the case must stand as if the payment had been made directly at the plaintiff's counter in the ordinary mode. Speaking of the circumstances which were held to require an investigation by the payees of a check, the court states that "to the defendants the presentation by a stranger or third party of a check purporting to be drawn to their own order which such third party proposed to negotiate to them for value was a transaction which should have aroused their suspicions. It ought to have put them upon inquiry for explanations; and if inquiry had been properly made it would have disclosed the fraud and prevented its success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party who acted in like good faith and also without fault or want of due care."

The action of a bank (other than the drawee) in cashing a check for a stranger without any inquiry as to his identification was held to be such negligence as warranted a finding of

negligence entitling the drawee bank to recover, in *First Nat. Bank v. First Nat. Bank* (1890) 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44. The court states that "it is altogether probable that if the defendant before it cashed the check had made proper inquiry, the utterer of it would not have remained to encounter any such investigation, and if he had it would readily have been ascertained that he was not the reputable person of the name of [the payee of the check] . . . There was also evidence of the general custom of banks in paying such checks to have the person presenting them identified."

In *People's Bank v. Franklin Bank* (1889) 88 Tenn. 299, 6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 716, a recovery by the drawee bank was allowed against the bank from which the check had been received, where the latter bank accepted and cashed the check to which the name of the drawer and the payee had both been forged, without requiring any identification of the parties to whom such payment was made, at least without reserving any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery.

The court in *Bank of St. Albans v. Farmers & M. Bank* (1838) 10 Vt. 141, 38 Am. Dec. 188, agrees with the foregoing general principles, but holds that the drawee bank, which has received from and credited to another bank a forged check, cannot recover the amount thereof from the latter bank, although the latter bank purchased the check for value from the payee, who was a stranger to the bank. The court, after referring to the general rule, states that something "like fraud or mala fides must appear, or at least some culpable negligence on the part of the person putting off the security," in order to entitle the drawee bank to recover. The drawee bank contended, and requested the court to charge the jury "that, if they found that the said Hockley [cashier of the defendants] received the check without due circumspection or the exercise of due

diligence in ascertaining its genuineness or the title of the person presenting it, the plaintiffs were entitled to recover; that if he received it under suspicious circumstances, and at any time before transmitting it to the plaintiffs doubted its genuineness or the title of the person presenting it, he was bound to communicate his suspicions to the plaintiffs with an account of the circumstances under which it was received." But the court instructed the jury that their verdict should depend upon the question whether, at the time of receiving and paying for the check, Hockley either knew or suspected that it was not genuine; and if they found that he had such knowledge or suspicion at that time, the plaintiffs were entitled to recover; but that a mere suspicion, afterwards entertained, and not suggested by any new facts, would not affect the rights of the defendants, arising out of the subsequent acceptance and payment of the check by the plaintiffs, nor was Hockley bound, provided he purchased the check in good faith, to communicate to the plaintiffs either the circumstances under which he received it or his after-conceived suspicions of it. The jury returned a verdict for the defendants, and in sustaining a judgment rendered thereon, the supreme court states that "it is certainly true that in order to protect the defendants in this view of the case it should appear that they received the bill in the ordinary course of business and in good faith. The former of these requisites is inferred as a matter of law from the statement of the case, and the latter is found by the jury." The court, after further stating that an exception had been taken to the charge of the court below and that it was insisted that Hockley should have communicated to the plaintiffs his aftersuspicions of the spurious character of the instrument, continues: "Whether such was his duty and whether the jury should have been so instructed depends much upon the inquiry whether there were anything to communicate. It does not appear that any facts affording rational grounds of suspicion came to his



knowledge after the purchase of the check. What is termed his suspicion turns out on inspection of the case to be no more than his sense of the risk incurred in making the purchase of a stranger, which he very properly communicated to his clerk. But of what service would a knowledge of this have been to the plaintiffs. Had facts come to his knowledge which would have benefited the plaintiffs, there would be ground for the argument that he was bound in good faith to communicate them. Whether in such case the omission would have subjected the defendants to this action is a question which we are not called upon to decide. But the case discloses nothing which could furnish to his mind any substantial ground of suspicion and nothing which it would have been important to the plaintiffs to know. There was nothing, therefore, which called for a charge on this point, and the question how far the defendants or their agent were bound to communicate such facts as came to their knowledge after the purchase is one not involved in the suit, and which will be seasonably decided when a case arises which requires it."

The sending of a check through the clearing house and the failure to communicate to the drawee bank the fact that it was received from a stranger do not amount to such negligence as will throw the loss upon the bank thus sending the check. *Commercial & F. Nat. Bank v. First Nat. Bank* (1868) 30 Md. 11, 96 Am. Dec. 554.

That a bank which has accepted and paid through the clearing house a check drawn upon it in which the

name of the drawer is forged cannot recover the amount thereof of the bank to which payment was made, on discovery of the forgery, is recognized also in *First Nat. Bank v. Northwestern Nat. Bank* (1894) 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739, but it is held in that case, in which it appeared that the signatures of the indorsers were also forged, that the drawee bank might recover, the court stating that where a drawee or a bank pays a bill of exchange or a bank check to an indorser who derives title to a prior forged indorsement, he may recover back the money so paid on discovery of the forgery, provided he makes demand for repayment within a reasonable time after the discovery of the forgery.

None of the cases involving the right of a bank to charge back a credit given on a forged check have applied the change-of-situation rule, but it seems that a court that applies this rule to the recovery of money paid on a forged check must, if it is consistent, apply it in determining the right to charge back a credit. The change-of-situation rule, however, was applied in *Goddard v. Merchants' Bank* (1848) 2 Sandf. (N. Y.) 247, and a recovery allowed in case of a draft where there had been no change of situation, while in *National Bank v. Grocers' Nat. Bank* (1867) 2 Daly (N. Y.) 289, the rule of estoppel was applied and a recovery denied. In affirming the *Goddard Case* the court of appeals (1850) 4 N. Y. 147, omits all reference to the question of change of situation and places the affirmation upon another ground.

W. A. E.

## INDEPENDENT ORDER OF FORESTERS, Plff. in Certiorari, v.

MRS. ELLA C. CUNNINGHAM.

*Tennessee Supreme Court — April 24, 1913.*

(127 Tenn. 521, 156 S. W. 192.)

**Insurance — mutual benefit — waiver of by-law — illness of applicant.**

1. The acceptance and initiation of an applicant for membership in a mutual benefit society by a deputy officer of the order having all the au-  
5 A.L.R.—99.

thority of the chief executive officer within the territory over which he has jurisdiction, including power to accept and initiate applicants, and the delivery of the certificate and collection of dues with knowledge of both himself and the applicant that since the medical examination the applicant has been attacked by acute disease, waive a provision of the constitution and by-laws that an applicant for membership who may be ill when he presents himself for initiation shall not be initiated until he has fully recovered his health.

[See note on this question beginning on page 1575.]

—forfeiture — refusal to enforce.

2. Forfeiture of life insurance policies is not favored and will not be enforced against equity and good conscience.

[See 10 R. C. L. 381; 14 R. C. L. 926.]

—act of agent — excess of authority — binding effect.

3. An agent of an insurance company having ostensible general authority to solicit applications, make contracts for insurance, and receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority.

[See 14 R. C. L. 871.]

—forfeiture for nonpayment of premium.

4. A provision in a policy of insurance for a forfeiture of the contract for nonpayment of premium is a material element of the contract, a violation of which will forfeit the contract unless the forfeiture has been waived.

[See 14 R. C. L. 975.]

—mutual benefit societies — waiver.

5. That an enforcement of a waiver of the forfeiture clause of a mutual benefit certificate may impair the principle of mutuality between the members of the society is no reason why it should not be enforced against the society.

**CERTIORARI** to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Davidson County (Meeks, Circuit Judge) in plaintiff's favor in an action brought to recover the amount alleged to be due upon a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pendleton & De Witt for plaintiff in certiorari.

Mr. F. M. Bass, for defendant in certiorari:

The doctrine of waiver and estoppel applies to fire and life policies.

*Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937.

Imposing or collecting an assessment by a mutual insurance company after the company has knowledge of facts entitling it to consider the policy no longer binding upon it is a waiver.

*Murray v. Home Ben. Life Asso.* 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *High Ct. I. O. F. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Masonic Mut. Ben. Asso. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 83; *Ball v. Granite State Mut. Aid Asso.* 64 N. H. 291, 9 Atl. 103; *Whigham v. Independent Foresters*, 44 Or. 543, 75 Pac. 1067; *Grimaldi v. Associazione Fraterna Italiana*, 31 Misc. 745, 64 N. Y. Supp. 25; *Modern Woodmen*

*v. Lane*, 62 Neb. 89, 86 S. W. 943; *Thornburg v. Farmers Life Asso.* 122 Iowa, 260, 98 N. W. 105; *Order of Columbus v. Fuqua*, — Tex. Civ. App. —, 60 S. W. 1020; *Callies v. Modern Woodmen*, 98 Mo. App. 521, 72 S. W. 713; *Modern Woodmen v. Coleman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.

By issuing a certificate of insurance the society waives or estops itself from asserting any defense based on facts of which it had knowledge at the time of issuance.

29 Cyc. 190.

The doctrine of waiver and estoppel is applicable in cases of fraternal insurance.

*Kentucky Grocers' Ins. Co. v. Logan*, 149 Ky. 453, 149 S. W. 922; *Hendrickson v. Grand Lodge, A. O. U. W.* 120 Minn. 36, 138 N. W. 946.

Lansden, J., delivered the opinion of the court:

Mrs. Cunningham brought this

suit in the circuit court of Davidson county to recover of the defendant the face value of a benefit certificate issued by it to her husband. There were a verdict and judgment for plaintiff in the court below, and upon appeal to the court of civil appeals the action of the circuit court was in all things affirmed. A petition for writ of certiorari to the judgment of the court of civil appeals was filed in this court, which has been allowed, and the case has been argued at the bar.

Plaintiff in error is a fraternal benefit society incorporated under the laws of the Dominion of Canada. Its chief executive officer is known as the supreme chief ranger, and one Boger was the deputy supreme chief ranger, with headquarters in Nashville, and he was invested with all the authority and power which pertain to the chief executive office of the order within the territory over which he had jurisdiction. He had authority to initiate members into the order and accept them as proper risks, subject to the ratification of the home office, and power to collect for and remit to the order initial and subsequent premiums due from the members to the order. He also had power to deliver to the member the policy or contract of insurance when received by him from the home office.

Cunningham made application for membership into the order at the repeated solicitation of Boger, on February 19, 1908. On that day he was physically examined by a physician selected by the order for that purpose in conformity with the requirements of the order, and was the next day accepted as a proper risk. On the night of the 19th Cunningham discovered that his feet and legs were swollen, and consulted a physician, who informed him that he had acute nephritis, or Bright's disease, and advised him to take his bed; but the assured was not suffering, and did not regard his condition as serious, and on the next day returned to work as usual. On that day the physician who had

examined Cunningham for the order gave to Boger a report of his examination which failed to show any evidence of the disease. Boger, having authority to do so, initiated Cunningham into the order and accepted him as a risk for insurance. Cunningham took his bed on the night of the 20th, and was confined there until some time in November, when he died of nephritis.

The benefit certificate did not actually issue until March 6, 1908, and was not delivered to Cunningham until several days thereafter. Boger became aware and knew that he was suffering from Bright's disease before the benefit certificate was delivered. Other members of the subordinate lodge to which Cunningham belonged were also aware of his condition and visited him during his sickness. Boger visited him at least twice, and discussed with him the question as to whether he was entitled to sick benefits from the order. With full knowledge of the real facts, Boger delivered the benefit certificate and collected the dues or assessments under the rules and regulations of the order until Cunningham's death. One of the provisions of the constitution and by-laws of the plaintiff in error is as follows: "An applicant for membership, who may be ill or suffering from an injury of any kind at the time he presents himself for initiation, shall not be initiated, even though he has been duly examined and recommended by the court physician, or other duly authorized examining physician, or his medical examination has been accepted by the medical board, until after he has fully recovered from such illness or injury, and until he has again been examined by the court physician, and such medical examination has been accepted by the medical board."

The plaintiff in error defended below upon the ground, among others, that the assured was initiated into the order in violation of the foregoing provision of the by-laws, and claimed a forfeiture of the con-

tract upon that ground. The reply to this defense made by the defendant in error is that the order is estopped to insist upon the forfeiture, and has waived the forfeiture provision by delivering the benefit certificate and accepting the dues and assessments after it had come into full knowledge of the assured's condition.

It is said for the plaintiff in error that, because it is a mutual benefit society, the rules of waiver and estoppel as applied to stock insurance companies do not apply to it, for the reason that its officers and agents cannot waive conditions which go to the substance of the contract between the society and the members. This distinction is sought to be supported upon the idea that each member of the organization must be conclusively presumed to have knowledge of the limits set upon the authority of the agents and officers of the society to which he belongs, and that, the burdens and benefits of such an organization being mutual as between the membership, it would be unjust and inequitable to permit an officer or agent of the order to waive a condition of forfeiture. The contention of counsel upon this point is best stated in the language of Mr. Niblack in his work on Benefit Societies, from which the following is taken: "Mutual benefit societies and stock companies are essentially different in their plans of carrying on the business of life insurance. Societies have many by-laws, which are a part of the contract of insurance, and which are binding on all members, whether officers or not. They are conducted on principle of mutuality, and should give insurance to each member on the same terms, conditions, and restrictions. It would be destructive of this equality in the contract of insurance to give to an officer the power to waive the provisions of a by-law which relates to the substance of the contract. As a general rule, an officer of a mutual benefit society has no authority to

waive a strict compliance with the by-laws on the part of a member. The society has power to establish by-laws, and it is the imperative duty of the member to comply with them.

. . . This rule, however, does not extend to those by-laws which relate to the clerical transactions of its business, or to the mode of establishing its liability. By-laws in regard to proof of death of a member, for instance, may be waived. But it is well settled that the officers of such a society have no authority to waive those of its by-laws which relate to the substance of the contract between it and a member, determine the relations of the members to each other, or in any manner fix the rights and liabilities of the parties." [2d ed. § 97.]

The authorities cited in support of the text are *Burbank v. Boston Police Relief Asso.* 144 Mass. 434, 11 N. E. 691; *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541, 7 Atl. 394; *Mulrey v. Shawmut Mut. F. Ins. Co.* 4 Allen, 116, 81 Am. Dec. 689; *Lyon v. Supreme Assembly, R. S. G. F.* 153 Mass. 83, 26 N. E. 236, and two cases from the intermediate courts of Illinois and Missouri. Mr. Bacon takes the same distinction. In his work on Benefit Societies, at § 434, he cites in support of the text the case from Maine, *supra*, one of the cases from Massachusetts, *supra*, and an additional case from that state, together with a case from the Illinois court of appeals, and *Levell v. Royal Arcanum*, 9 Misc. 257, 80 N. Y. Supp. 205.

Forfeitures are not favored, and will not be enforced against equity and good conscience. This doctrine is firmly embedded in our jurisprudence as applied to stock companies, beyond dispute. *Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937, and cases there cited.

It is equally settled that an agent of an insurance company, having ostensible general authority to so-

Insurance—  
forfeiture—  
refusal to  
enforce.

licit applications, make contracts for insurance, and receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding the actual excess of authority. *Ætna L. Ins. Co. v. Fallow*, supra; *Murphy v. Southern L. Ins. Co.* 3 Baxt. 440, 27 Am. Rep. 761, and cases cited.

It is also well-settled law in this state that a provision in a policy of insurance for a forfeiture of the contract for non-payment of the premiums is a material element of the contract, a violation of which will forfeit the contract unless the forfeiture has been waived. *Ætna Ins. Co. v. Fallow*, supra; *Dale v. Continental Ins. Co.* 95 Tenn. 38, 31 S. W. 266; *New York Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

This being true, it would seem to follow logically that the acceptance of premiums by the insurer with full knowledge of the condition of the assured would be a waiver of the claim of forfeiture growing out of his condition.

The foregoing general principles governing the contracts of regular insurance companies with the assured are supported by abundant authority, and are not questioned in this case. But it is said that these principles do not apply to a benefit society, in so far as they justify the waiver of the substance of the contract between it and a member, or determine the relation of members to each other, or in any manner fix the rights and liabilities of the parties. In our opinion, this contention overlooks the fundamental basis of the doctrine of waiver and estoppel as applied to contracts. This doctrine does not grow out of the original agreement of the parties, but is based upon the conduct and dealings of the parties with each other in respect of the particular matter in controversy. It affects

the conscience of the party whose conduct has led the other to a course of dealing to his injury, so that he is not allowed to predicate a right upon a former agreement inconsistent with his course of conduct. In practical effect, the conduct of the parties makes a new contract, the substance of which is that the society agrees not to insist upon the forfeiture clause. It is not meant that the parties formally agree to a waiver of the forfeiture clause, but that the courts will not allow the party claiming the forfeiture in violation of good faith and good conscience to set it up. This is the rationale of those cases announcing the doctrine of waiver and estoppel as applied to regular insurance companies, and we can see no magic in the name of a benefit society which will allow it to avail itself of an advantage against equity and good conscience. The fact that a waiver of the forfeiture clause of the policy may impair the principle of mutuality between the members of the society is no reason why the law should permit the society itself to act unjustly. It is the nature of such organizations, like regular insurance companies, that they can only act through their agents and officers. If it were possible that the membership could act en masse, and thus be guilty of a course of conduct which would waive a forfeiture clause in one of its policies, it could not be truly said that the waiver should not be enforced because it would impair the quality of mutuality. In such a case, the individual conscience of each member would be directly affected, so that no one could claim advantage which had been obtained by representations made by them and relied upon by the assured. What different attitude can the membership assume, when, instead of acting en masse, they act through their agents and officers selected for the purpose?

—act of agent—  
excess of  
authority—  
binding effect.

—forfeiture for  
nonpayment of  
premium.

—mutual benefit  
societies—  
waiver.

It may be conceded that the contract of insurance between the society and its members is laid out upon such lines as to preserve the quality of mutuality underlying the scheme of organization and operation. If the rules and regulations of the society should be strictly observed, the principle of mutuality would be preserved. But if the officers and agents, acting within the real or apparent scope of their authority, pass by a rule or regulation intended to preserve mutuality, and induce a member to act upon the assumption that the regulation is waived, and, so acting, change his condition for the worse, the principle of mutuality is waived, together with the regulation itself. This is obviously so, because mutuality is preserved alone by the rules and regulations of the company.

What appears to be a great weight of modern authority is in accord with this holding. *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 10 L.R.A. (N.S.) 136, 89 Pac. 661, 12 Ann. Cas. 636; *Whigham v. Independent Foresters*, 44 Or. 543, 75 Pac. 1067; *Ball v. Granite State Mut. Aid Asso.* 64 N. H. 291, 9 Atl. 103; *Modern Woodmen v. Lane*, 62 Neb. 89, 86 N. W. 945; *Thornburg v. Farmers Life Asso.* 122 Iowa, 260, 98 N. W. 105; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Kentucky Growers' Ins. Co. v. Logan*, 149 Ky. 453, 149 S. W. 922.

The principle was stated in *McCarthy v. Catholic Knights*, 102 Tenn. 345, 52 S. W. 142; *Masonic Life Asso. v. Robinson*, 149 Ky. 80, 41 L.R.A. (N.S.) 505, 142 S. W. 882; *Walker v. American Order of Foresters*, 162 Ill. App. 30; *Foresters of America v. Hollis*, 70 Kan. 71, 78 Pac. 160, 3 Ann. Cas. 535; *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533.

Having determined that the officers and agents of the association

may waive the provision for forfeiture, it is perfectly clear upon our authorities that Boger was such an agent of the society and that he acted for it. *Murphy v. Southern L. Ins. Co.* supra. In the case of *Trotter v. Grand Lodge, I. L. H.* supra, the supreme court of Iowa said: "The authorities are substantially unanimous that in schemes of co-operative life insurance, in which the authority to issue benefit certificates, prescribe terms of membership, and levy assessments is vested in a grand or supreme lodge or council, or other central governing body, which central body exercises jurisdiction over local lodges or societies, through which the membership is recruited, and by the officers of which assessments are collected and remitted, the local organization and its officers, to whom the duty of making such collections is committed, are to be considered the agents of the governing body. *Bragaw v. Supreme Lodge, K. L. H.* 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905; *Fraternal Aid Asso. v. Powers*, 67 Kan. 420, 73 Pac. 65; *Whiteside v. Supreme Conclave, I. O. H. (C. C.)* 82 Fed. 275; *Schunck v. Gegen-seitiger Wittwen und Waisen Fond*, 44 Wis. 369; *Bacon, Ben. Soc.* 3d ed. 148; *Brown v. Supreme Ct. I. O. F.* 176 N. Y. 132, 68 N. E. 145."

The remaining question is whether the conduct of Boger as disclosed by the record amounts to a waiver of the forfeiture or an estoppel of the society to set it up. We think clearly that it does. It is beyond doubt that he knew the condition of Cunningham before the policy was delivered. This being true, it is immaterial whether he knew of his condition at the time of the application or not. The evidence indicates that Cunningham himself did not realize his condition at the time of the application, and it is certain that the examination made by the society's physician did not disclose any evidence of nephritis. There is no criticism upon the ability of this

—mutual benefit  
—waiver of by-law—illness  
of applicant.

physician, or of the kind of examination that he made. It is established by the verdict of the jury, and there is evidence to the effect, that Cunningham had no purpose to deceive or mislead the society. It was plainly the duty of Boger, acting for the society, to refuse to deliver the benefit certificate, if it was intended at any time to insist upon a forfeiture. Instead, however, he delivered it to Cunningham while he was in bed, and the society regularly assessed and collected the assessments due under the policy. The society cannot be permitted to hold

fast and loose with the contract. It cannot insist upon the contract for the purpose of collecting dues and appropriating them to its benefit, and then deny it for the purpose of avoiding payment of the benefit certificate, or to lead the assured to believe that his contract with it was valid, and that his certificate would be paid if he should die. It cannot now repudiate its conduct by which the assured was led into a line of action which materially changed his situation.

The judgment of the Court of Civil Appeals is affirmed, with costs.

### ANNOTATION.

#### Waiver of provision in contract of mutual benefit association against reception or initiation of applicant while ill.

##### Generally.

It has been generally held that provisions in an insurance contract of a mutual benefit association stipulating that liability for benefits on the part of the insurer shall not attach unless the certificate or policy is delivered to the applicant while in good health, or unless he is in good health at the date of the policy or date of issuance, or unless he is in good health at the time of payment of the first premium, are conditions precedent which may be waived by the insurer.

**Arkansas.** — *Peebles v. Eminent Household*, C. W. (1914) 111 Ark. 435, 164 S. W. 296.

**Georgia.** — *Few v. Supreme Lodge*, K. P. (1911) 136 Ga. 181, 71 S. E. 130, later appeal in (1912) 138 Ga. 778, 76 S. E. 91.

**Idaho.** — *Rasicot v. Royal Neighbors* (1910) 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048.

**Iowa.** — *Wilson v. Interstate Business Men's Acci. Asso.* (1913) 160 Iowa, 184, 140 N. W. 860.

**Kentucky.** — *Modern Brotherhood v. Phelps* (1911) 142 Ky. 544, 134 S. W. 892.

**Michigan.** — *Court of Honor v. Her- ing* (1914) 178 Mich. 377, 144 N. W. 843.

**South Dakota.** — *Cunningham v. Roy-*

*al Neighbors* (1910) 24 S. D. 489, 140 Am. St. Rep. 793, 124 N. W. 434.

**Tennessee.** — *McLendon v. Woodmen of the World* (1901) 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

**Texas.** — *Home Forum Ben. Order v. Varnado* (1900) — Tex. Civ. App. —, 55 S. W. 364; *Home Circle Soc. v. Shelton* (1904) — Tex. Civ. App. —, 81 S. W. 84; *Supreme Lodge, U. B. A. v. Lawson* (1910) — Tex. Civ. App. —, 133 S. W. 907; *Sovereign Camp, W. W. v. Carrington* (1905) 41 Tex. Civ. App. 29, 90 S. W. 921; *Home Forum Ben. Order v. Jones* (1898) 20 Tex. Civ. App. 68, 48 S. W. 219.

Conditions in a life insurance policy of a mutual benefit association, which provide that the delivery of the policy shall not be effective to create a binding contract unless the insured is alive and in good health when the policy is delivered, may be waived by the company, as they are made for the company's benefit. *Wilson v. Interstate Business Men's Asso.* (Iowa) *supra*.

It has been generally held that an officer or agent either of the sovereign lodge or of a local lodge of a mutual benefit association, when acting within the real or apparent scope of his authority, may waive provisions in the contract of insurance which stipulate that liability for benefits on the

part of the insurer shall not attach unless the certificate or policy is delivered to the applicant while in good health, or unless he is in good health at the date of the policy or date of issuance, or unless he is in good health at the time of payment of the first premium; and knowledge by an officer or agent of the association, or of a local or subordinate lodge, of the health of the applicant, is imputable to the association. *Peebles v. Eminent Household*, C. W. (Ark.); *Rasicot v. Royal Neighbors* (Idaho); *Modern Brotherhood v. Phelps* (Ky.); *Supreme Lodge, U. B. A. v. Lawson*; and *Sovereign Camp, W. W. v. Carrington* (Tex.) *supra*.

In *Peebles v. Eminent Household*, C. W. (1914) 111 Ark. 435, 164 S. W. 296, it appeared that the clerk of a local lodge of a fraternal and beneficial association was the agent of the association for the purpose of delivering the policy of insurance, and was also charged with the duty of ascertaining whether the policy ought to be delivered and ought to take effect. It was held that knowledge of the local lodge as to the health of an applicant was imputable to the association, and that its act in delivering a policy to an applicant while ill, with knowledge of that fact, constituted a waiver by the association of a provision in the by-laws requiring delivery of the policy to the applicant while in good health.

A local camp of a fraternal and beneficial association, which collects and receives dues from its members and is charged with the duty of looking after their health and conduct, is the agent of the society, and the society is chargeable with notice of the condition of health of the insured at the time of and after issuing the certificate, and the delivery of the benefit certificate by the local camp to the insured while ill is a waiver of a provision in the contract requiring delivery while insured is in sound health, and the action of the local camp is imputable to the society. *Rasicot v. Royal Neighbors* (1910) 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048.

A local agent who has complete charge of a local lodge, keeps the books, receives dues, forwards the money, and delivers the policy has authority to waive a provision in an application for benefits in a beneficial and fraternal association which provides that the policy shall not become operative and binding until it is delivered to the applicant in good health. *Modern Brotherhood v. Phelps* (1911) 142 Ky. 544, 134 S. E. 892, wherein it was said: "An applicant for insurance had no possible means of knowing the extent to which he [the agent] was authorized to bind the company, but could only judge from appearances, and when the company permitted him to exercise such powers as might be exercised by a general agent or the company itself, and transactions were had with him on the faith and belief that he was clothed with power and authority to represent the company to the extent and in the way and manner in which he undertook to represent it, it will not be heard to deny that he had such power."

A stipulation in a contract of life insurance issued by a beneficial association, requiring payment of the first premium while insured is in good health as a condition precedent to the commencement of the risk, may be waived by the secretary of a local lodge, where neither the application, certificate, charter, nor by-laws contained any provision denying authority to the secretary to do so. *Supreme Lodge, U. B. A. v. Lawson* (1910) — Tex. Civ. App. —, 133 S. W. 907.

In *Sovereign Camp, W. W. v. Carrington* (1905) 41 Tex. Civ. App. 29, 90 S. W. 921, it was held that a clerk of a local camp of a mutual benefit association, part of whose duties it was to deliver benefit certificates to applicants, having the power within his discretion to withhold a certificate if the applicant was not in good health, had authority to waive a provision contained in the certificate and in the by-laws and constitution of the association, which stipulated that the association was not to become liable unless the benefit certificate was delivered to the insured while in good



health. The court said: "Traylor, having been charged with the duty of delivering the policy and vested with discretionary powers with respect thereto, had authority to waive the written regulations of the contract relating to the manner of delivery."

But in *McLendon v. Woodmen of the World* (1901) 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36, wherein it appeared that the constitution of a benefit society provided that the beneficiary certificate was not in force until delivered to the applicant, the applicant was initiated by a local lodge, but died before delivery of the certificate. It was held that the initiation did not operate as a waiver of the provision as to delivery of the policy, where such initiation was unauthorized by the constitution of the society.

#### What constitutes waiver.

A waiver on the part of a mutual benefit society of a provision that the certificate shall not be effective unless it is delivered while the insured is in good health may be proved by evidence that the society customarily and knowingly accepted in the order persons not in good health. *Home Circle Soc. v. Shelton* (1904) — Tex. Civ. App. —, 81 S. W. 84.

In *Sovereign Camp, W. W. v. Carington* (Tex.) supra, it appeared that the application was delivered by the insurer to the mother of the applicant, and premiums due were paid by her and accepted by the insurer, who had knowledge that the applicant was at the time ill. It was held that these facts constituted a waiver of the stipulations that the insurer was not to be liable on the certificate unless it was delivered in person and while in good health.

In *Supreme Lodge, U. B. A. v. Lawson* (Tex.) supra, it appeared that the agent of the association accepted in payment of the first premium a check from a third person, which was dishonored when presented at the bank. Thereafter the agent accepted the second premium from the third person and secured from him a promise to pay the dishonored check. It appeared that the applicant had no

knowledge of the unpaid check. It was held that these facts constituted a waiver of a provision in the by-laws which stipulated that the policy should not be binding until payment of the first premium while insured was in good health.

Initiation of the applicant and delivery to him of the benefit certificate and acceptance from him by the association of dues and assessments, the association having knowledge of the condition of the applicant's health, have been held to be acts sufficient to constitute a waiver of a provision in the policy and by-laws that the certificate should not be binding on the insurer until actually delivered to the insured while in good health. *Peebles v. Eminent Household, C. W.* (1914) 111 Ark. 435, 164 S. W. 296.

Where the applicant was initiated and paid his initiation fee and current dues, but the certificate of insurance did not reach the officers of the local lodge until after the applicant had gone to a sanatorium, where he subsequently died, it was held that there was no completed contract of insurance, the delay in forwarding the certificate not being unreasonable, and the insurer was held not to have waived the stipulation in the application for insurance which required that the applicant should be in sound health at the time of delivery of the application. *Court of Honor v. Hering* (1914) 178 Mich. 377, 144 N. W. 843. See to the same effect *McLendon v. Woodmen of the World* (1901) 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

Acceptance by the insurer of dues and assessments from the husband of insured, after the death of insured, with knowledge of such death on the part of the insurer, operates as a waiver of a condition in the by-laws of the association which stipulates that the certificate of membership shall not be delivered to any person unless such person is in good health at the time of delivery; and actual delivery to the member in person is not a condition precedent to the liability of the insurer. *Home Forum Ins. Co.*

v. Jones (1898) 20 Tex. Civ. App. 68, 48 S. W. 219.

In South Dakota, under a statute, an insurance company is prohibited from setting up as a defense to an action on the policy the fact that the insured was not in good health at the time the policy was received, where the medical examiner, or physician acting as such, has issued a certificate of health. *Cunningham v. Royal Neighbors* (1910) 24 S. D. 489, 140 Am. St. Rep. 793, 124 N. W. 434.

Delivery of the policy to the applicant by insurer, and acceptance from him of premium then due, have been held to constitute a waiver by the insurer of a provision in the certificate that the society shall not be liable unless the member has actually paid the membership fee and made the first monthly payment while in good health, where the delivery of the certificate and acceptance of the premium are contemporaneous. *Supreme Lodge, K. P. v. Few* (1912) 138 Ga. 778, 76 S. E. 91. See to the same effect (1911) 136 Ga. 181, 71 S. E. 130.

In *Rasicot v. Royal Neighbors*

(1910) 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048, it appeared that the certificate was delivered to the insured, and the association accepted dues and assessments from her with full knowledge of the condition of her health. It was held that these facts constituted a waiver of a stipulation in the application which required that the certificate, in order to be effective, must be delivered to the applicant while in good health. See to the same effect *Modern Brotherhood v. Phelps* (1911) 142 Ky. 544, 134 S. W. 892.

In *Home Forum Ben. Order v. Varnado* (1900) — Tex. Civ. App. —, 55 S. W. 364, it was held that, where a policy of insurance in a fraternal and beneficial association was delivered to the insured by the agent of the insurer while the insured was ill, the company could not defend an action on the policy on the ground that the policy did not come into effect as it was delivered to the applicant while not in good health, where the company had full knowledge of the condition of the applicant's health.

W. F. F.

## INGLE SYSTEM COMPANY

v.

J. E. NORRIS et al., Plffs. in Certiorari.

*Tennessee Supreme Court — September 25, 1915.*

(132 Tenn. 472, 178 S. W. 1113.)

**Corporation — contracting with — estoppel to deny existence.**

1. One executing a note to a payee bearing a name which is not descriptive of a firm of individuals, but which imports that it is a corporation, is, in an action on the note, estopped to deny the corporate existence of the payee.

[See note on this question beginning on page 1580.]

**Estoppel — to deny existence of corporation.**

2. When a private person enters into a contract with a body purporting to be a corporation, in which that body is described by a corporate name

which it has assumed, such private person thereby admits the existence of the corporation for the purpose of the suit brought to enforce the obligation.

[See 7 R. C. L. 105; 10 R. C. L. 725.]

**CERTIORARI** to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for McMinn County (Brown, J.) in de-

defendants' favor in an action brought to recover the amount alleged to be due on an instalment note executed by defendants to plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Oscar W. Wells, for plaintiffs in certiorari:

A plea denying the existence of a corporation is a plea in bar.

Bank of Jamaica v. Jefferson, 92 Tenn. 541, 36 Am. St. Rep. 100, 22 S. W. 211; Hoereth v. Franklin Mill Co. 30 Ill. 151; Lewiston v. Proctor, 27 Ill. 416; Christian Soc. v. Macomber, 3 Met. 238; Law Trust Soc. v. Hogue, 37 Or. 553, 62 Pac. 380, 63 Pac. 690; Northumberland County Bank v. Eyer, 60 Pa. 439; 10 Cyc. 1357.

The doctrine of estoppel has no application to the case at bar; nor is there any action or conduct on the part of the defendants to bring them within the rule of estoppel.

Caruthers v. Crockett, 3 Shannon, Cas. 628; Watterson v. Lyons, 9 Lea, 571; Gibson, Suits in Ch. § 67; Taylor v. Nashville & C. R. Co. 86 Tenn. 244, 6 S. W. 393; McLemore v. Memphis & C. R. Co. 111 Tenn. 663, 69 S. W. 338.

Mr. D. Sullins Stuart, for defendant in certiorari:

The suit having been brought on a written instrument in which plaintiff was referred to as the Ingle System Company, a name clearly implying a corporation, defendants, having contracted with it in this capacity, cannot be heard to deny its corporate existence.

Harris v. Muskingum Mfg. Co. 4 Blackf. 267, 29 Am. Dec. 372; Bennington Iron Co. v. Rutherford, 18 N. J. L. 107, 35 Am. Dec. 528; Weller v. Davis & S. Co. 15 Ga. App. 79, 82 S. E. 593; Andes v. Ely, 158 U. S. 812, 39 L. ed. 996, 15 Sup. Ct. Rep. 954; Morawetz, Priv. Corp. § 774; Jones v. Cincinnati Type Foundry Co. 14 Ind. 90; Williams v. Cheney, 3 Gray, 215; Field, Priv. Corp. 2d ed. § 349.

Fancher, J., delivered the opinion of the court:

This suit was instituted before a justice of the peace of McMinn county by the Ingle System Company, averred in the warrant to be a corporation organized under the laws of the state of Ohio, against defendants Norris & Hall, to recover on an instalment note executed by Norris & Hall to the Ingle System Company. Judgment was rendered by

the justice in favor of the plaintiff for the amount due on the note.

Defendants appealed to the circuit court of McMinn county, where a written plea was filed by them, averring that "the plaintiff is not now and never has been a corporation under the laws of Ohio, as in plaintiff's warrant alleged."

Plaintiff's attorney moved to strike this plea from the files for several reasons, which were overruled by the court, and issue was taken on the plea.

At the conclusion of the proof introduced by the plaintiff, the defendants moved the court to direct the jury to return a verdict in their favor, which motion was sustained by the court. After motion for a new trial the plaintiff appealed in error to the court of civil appeals, where the judgment of the circuit court was reversed, and judgment entered for the amount due on the note and all costs in the case.

The case is before this court by a writ of certiorari. The sole question necessary to be here decided is whether the plea of nul tiel corporation is to be sustained. The note or contract on which suit was brought does not show on its face, unless it be by inference, that the Ingle System Company is a corporation, and no proof was introduced before the court to show that fact, other than the introduction of the note or contract. The concern is simply referred to in the contract by the name of the Ingle System Company.

While, as against the state, a corporation cannot be created by the mere agreement or other act or admission of private persons, yet as between private litigants they may, by their agreements, admissions, or conduct, place themselves where they would not be permitted to deny the fact of the existence of the corporation. When a private person enters into a contract with a body purporting to be a corporation, in

which that body is described by the corporate name which it has assumed, such private person thereby admits the existence of the corporation for the purposes of the suit brought to enforce the obligations, and will not be permitted to deny the corporate existence of the plaintiff. 10 Cyc. 244, 245; Morawetz, Priv. Corp. § 774. Many cases are cited on this proposition by the above authorities.

While the above proposition does not seem to be disputed by any authority, there is a division of opinion as to whether the existence of a private corporation is imported by its name. A few courts have held that in order to raise this presumption, or make out a prima facie case by contracting with the assumed corporation, the fact of its incorporation must be stated in the contract. *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Williams v. Bank of Michigan*, 7 Wend. 539; *Holloway v. Memphis, E. P. & P. R. Co.* 23 Tex. 465, 76 Am. Dec. 68.

But the more general statement of the rule, and that which is sustained by the weight of authority, is that one who executes a written obligation to an obligee by a name which is not descriptive of a firm of individuals, but one which imports that it is a corporation, is by that fact estopped in an action thereon to deny the corporate existence of the payee,

**Estoppel—to deny existence of corporation.**

**Corporation—contracting with—estoppel to deny existence.**

or perhaps, more properly speaking, the form of name which would be assumed to be a corporation is said to imply that it is a corporation, and the mere introduction of the obligation as evidence will make out a prima facie case that the contract is with a corporation. *United States Exp. Co. v. Bedbury*, 34 Ill. 459; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *Barbaro v. Occidental Grove*, 4 Mo. App. 429; *Harris v. Muskingum Mfg. Co.* 4 Blackf. 267, 29 Am. Dec. 372; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 107, 35 Am. Dec. 528; *Weller v. Davis & S. Co.* 15 Ga. App. 79, 82 S. E. 593. In these cases such names as the following were held to imply a corporation: "Missouri City Savings Bank;" "Muskegon Manufacturing Company;" "Davis & Sanford Company;" "Bennington Iron Company."

The name "Ingle System Company" does not indicate that it is a firm of individuals. While it is not a conclusive fact, yet it may be fairly assumed as a presumption from the name of the company that it is a corporation, especially at this time, when corporations form so large a part of the concerns engaged in business, and especially among those doing an interstate business, as it appears this concern is doing.

The result reached by the Court of Civil Appeals was therefore correct, and the judgment is affirmed.

## ANNOTATION.

**What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence.**

- I. General rule, 1580.
- II. Rule in New York, 1583.
- III. Rule in Texas, 1584.

### *I. General rule.*

It seems well settled in the majority of jurisdictions that if the name by which a party contracts is such as usually imports a corporation, that is, naming an ideality, but disclosing that

of no individual, it imports a corporation within the doctrine that one contracting with a corporation is estopped to deny its corporate existence.

*Colorado.* — *Grande Ronde Lumber Co. v. Cotton* (1898) 12 Colo. App. 375, 55 Pac. 610; *Thompson v. Commercial Union Assur. Co.* (1904) 20 Colo. App. 331, 75 Pac. 1073; *Kelle-*

her v. Denver Music Co. (1910) 48 Colo. 212, 109 Pac. 860.

Georgia.—Georgia Co-op. Fire Asso. v. Borchardt (1905) 123 Ga. 181, 51 S. E. 429, 3 Ann. Cas. 472. See also Holcomb v. Cable Co. (1904) 119 Ga. 466, 46 S. E. 671.

Idaho.—Toledo Computing Scale Co. v. Young (1909) 16 Idaho, 187, 101 Pac. 257.

Indiana.—Jones v. Cincinnati Type Foundry Co. (1860) 14 Ind. 89; McBroom v. Lebanon (1869) 31 Ind. 268; Vater v. Lewis (1871) 36 Ind. 288, 10 Am. Rep. 29.

Kansas. — Lowell-Woodward Hardware Co. v. Woods (1919) 104 Kan. 729, 180 Pac. 734.

Michigan.—Estey Mfg. Co. v. Runnels (1884) 55 Mich. 130, 20 N. W. 823.

Minnesota.—Johnston Harvester Co. v. Clark (1883) 30 Minn. 308, 15 N. W. 252.

Missouri.—Farmers & M. Ins. Co. v. Needles (1873) 52 Mo. 17; National Ins. Co. v. Bowman (1875) 60 Mo. 252; Stoutimore v. Clark (1879) 70 Mo. 471; Studebaker Bros. Co. v. Montgomery (1881) 74 Mo. 101.

Tennessee.—See the reported case (INGLE SYSTEM CO. v. NORRIS, ante, 1578).

In Georgia Co-op. Fire Asso. v. Borchardt (Ga.) supra, the court, in holding that the name "Georgia Co-operative Fire Association" imported a corporation, said: "It is clear, from previous decisions of this court, that if the defendant had been engaged in carrying on a regular business under the name the 'Georgia Co-operative Fire Company,' the name thus used would have imported a corporation.

. . . We can see no reason for making a distinction between the words 'company' and 'association,' when they are respectively used to designate an entity engaged in carrying on business and making contracts. Each of the words is used in defining the other. One of the meanings of the word 'company' is 'an association of persons for the purpose of carrying on some enterprise or business;' and one of the meanings of the word 'association' is 'a union of persons in a com-

pany or society for some particular purpose.' Webster's Dict. So the word 'association,' when used with descriptive adjectives as the name of a business entity, is as much indicative of a corporation as the word 'company' when so used. Other courts, in determining whether a particular name imported a corporation, have made no distinction between these two words."

In Grande Ronde Lumber Co. v. Cotton (1898) 12 Colo. App. 375, 55 Pac. 610, wherein it appeared that the defendant contracted with the plaintiff in the name of the Grande Ronde Lumber Company, the court held that he was estopped from denying the plaintiff's corporate existence, saying: "The sole contention of the defendant in support of the judgment is that the plaintiff did not show by proper evidence that it was a corporation, but the defendant, by virtue of his dealings with the plaintiff, estopped himself to question its capacity to sue. He contracted with the Grande Ronde Lumber Company; at the settlement, and on the trial, he acknowledged that he was indebted to the Grande Ronde Lumber Company, and he was therefore in no position to require proof that the plaintiff was a corporation.

. . . By contracting with the plaintiff he admitted that it was a legal entity in whose favor a liability might be incurred, and at whose suit the liability might be enforced, and in this proceeding the admission is conclusive upon him. He is precluded from alleging the incompetency of the plaintiff, and his objection that its corporate existence was not proved cannot be listened to."

And in McBroom v. Lebanon (1869) 31 Ind. 268, it was held that a note made payable to the "Corporation of Lebanon" estopped the maker from denying the existence of the corporation at the date of the contract, the court saying: "We do not judicially know that there is not, or cannot be, a corporation by the name of the 'Corporation of Lebanon,' under the laws of this state. We have various statutes under which a corporation might be legally organized in such a name."

So, in *Stoutimore v. Clark* (Mo.) *supra*, the court held that the maker of a promissory note, in which the payee was denominated as the "Missouri City Savings Bank," was estopped from denying that the bank was a corporation, for the name used to designate the payee imported a corporation, and the maker, by using the same, admitted the fact that it was a corporation.

In the reported case (*INGLE SYSTEM Co. v. NORRIS*, ante, 1578) the court holds that the name "Ingle System Company" did not indicate that the body so designated was a firm of individuals, but imported a corporation within the rule that a party contracting with a body described by a corporate name is estopped to deny its corporate existence.

In *Vater v. Lewis* (1871) 36 Ind. 288, 10 Am. Rep. 29, the court held that the defendant was estopped from denying the corporate existence of the payee of a note designated therein as the "Indianapolis Machine Brick Company," for the name implied the existence of a corporation thus designated, and the defendant was bound by the rule that "a party contracting with a corporation as such is, when sued upon such contract, estopped to deny the existence of the corporation at the time of making the contract."

In *Lowell-Woodward Co. v. Woods* (1919) 104 Kan. 729, 180 Pac. 734, wherein it appeared that the defendant executed a promissory note made payable to the plaintiff, styled in the note as the "Lowell-Woodward Hardware Company," the court held that this title *prima facie* imported a corporation, and that the defendant could not avoid payment of the note by denying the corporate existence of the payee. It was said: "The defendant, having given his promise to pay the sum indicated to the payee named, should not be permitted to escape or delay performance by raising an issue as to the character of the organization to which he is indebted, unless his substantial rights might be thereby affected, which would only be under exceptional conditions. It is thoroughly settled that in such a situation

the defendant cannot attack the regularity of the plaintiff's organization, or take any advantage of the fact that it has no legal standing as a corporation. No good reason is apparent why, having explicitly promised to make payment to the concern by which he is sued, he should be permitted to question its *de facto* any more than its *de jure* character—to inject into the case an issue having no bearing on his obligation to make payment."

In *Estey Mfg. Co. v. Runnels* (1884) 55 Mich. 130, 20 N. W. 823, it appeared that the defendant had contracted with the plaintiff in the name assumed by the latter, the "Estey Manufacturing Company." The court held that the name under which the plaintiff contracted imported a corporation, and the defendant, having dealt with it under that name, was estopped from questioning its corporate existence.

In *Jones v. Cincinnati Type Foundry Co.* (1860) 14 Ind. 89, an action to recover on a promissory note, the defendant contended that the plaintiff had no capacity to sue, since there was no proof that it was a corporation. The court held that the name in which the plaintiff contracted with the defendant, "Cincinnati Type Foundry Company," imported a corporation, and the defendant could not, in an action against him on the contract, deny its corporate existence.

In *Studebaker Bros. Mfg. Co. v. Montgomery* (1881) 74 Mo. 101, wherein it appeared that the defendant executed a promissory note payable to the plaintiff, which was designated therein as "Studebaker Bros. Manufacturing Company," the court held that the defendant, having given the note to the plaintiff in a name importing corporate capacity, could not be heard to deny the fact that it was a corporation.

So, in *Johnston Harvester Co. v. Clark* (1883) 30 Minn. 308, 15 N. W. 252, wherein the suit was on a promissory note designating the plaintiff as payee by the name the "Johnston Harvester Company," the court held that, regardless of the fact as to the plaintiff's incorporation, the defend-

ant, by contracting with it by a name importing a corporation, recognized the existence of some legal entity known by that name and having capacity to contract, and could not defeat recovery on the note by alleging want of proof of the incorporation of the plaintiff.

In *Thompson v. Commercial Union Assur. Co.* (1904) 20 Colo. App. 331, 78 Pac. 1073, it appeared that the defendants contracted with the plaintiff by the name in which it sued, the "Commercial Union Assurance Company." The court held that formal proof of the plaintiff's incorporation was unnecessary, and the defendants could not, after so contracting with it, deny its capacity to sue.

In *National Ins. Co. v. Bowman* (1875) 60 Mo. 252, it was held that the defendants, having contracted with the plaintiff in its corporate name, the "National Insurance Company," thereby admitted it to be a duly instituted corporation, and they were estopped from averring anything against its existence, for the name implied a corporation within the rule that one contracting with a body described by a corporate name cannot deny its corporate existence.

Likewise in *Kelleher v. Denver Music Co.* (1910) 48 Colo. 212, 109 Pac. 860, it was held that the name, the "Denver Music Company," indicated that the plaintiff was a corporation within the rule that one who has contracted with a body described by a corporate name is estopped from questioning its corporate existence.

In *Toledo Computing Scale Co. v. Young* (1909) 16 Idaho, 187, 101 Pac. 257, the court held that where the defendant had contracted with the plaintiff under its name, the "Toledo Computing Scale Company," and the plaintiff performed its part of the contract, the defendant was estopped from denying the plaintiff's corporate existence. The court said: "The respondent contracted with the Toledo Computing Scale Company. He may not have known at the time he made the contract whether it was a corporation or a partnership, but that makes no difference. He contracted with it

under that name, and, it having complied with its part of the contract, the respondent is in no position to deny its corporate existence. And even if it were a partnership doing a partnership business under that name, he would not be in a position to deny the partnership."

In *Farmers & M. Ins. Co. v. Needles* (1873) 52 Mo. 17, an action on a promissory note executed by the defendant to the plaintiff, in which the "Farmers & Merchants Insurance Company" was named as payee, the court held that the defendant, having entered into the contract with the plaintiff in a name which imported the corporate existence of the latter, could not deny its corporate existence.

See also *Holcomb v. Cable Co.* (1904) 119 Ga. 466, 46 S. E. 671, wherein the court held that the name, the "Cable Company," imported a corporation. However, it did not appear that the question of estoppel to deny the plaintiff's corporate existence was raised in that case.

## II. Rule in New York.

In New York it was held in several early cases that the fact that a contract designates a party by a name such as is customarily borne by a corporation does not import the corporate existence of that party so as to estop the other from denying its incorporation.

Thus in *Welland Canal Co. v. Hathaway* (1832) 8 Wend. 480, 24 Am. Dec. 51, wherein it appeared that the defendant had contracted with an association denominating itself the "Welland Canal Company," and nothing more, the court held that the defendant, by so naming the plaintiff in the contract, did not admit its character as a corporation, for the name "Welland Canal Company" standing alone, without further evidence of incorporation, did not import a corporation within the rule that one who contracted with a body designated by its corporate name was estopped to deny its corporate existence, saying: "The receipt and contract show the fact of an association, acting under a particular name. So much appears on the face of the contract, and may be said to

be admitted, but that is not enough for the plaintiffs; it must also appear that they had legal authority and capacity thus to act, and to prosecute suits by such name, before their suit can be entertained."

And in *Williams v. Bank of Michigan* (1831) 7 Wend. 539, the court held that the mere nomination in a contract of a party as "the President, Directors, and Company of the Bank of Michigan" did not, standing alone, import a corporation, without a distinct statement in the contract that the company was an incorporated company.

So, too, in *First Baptist Soc. v. Rapalee* (1837) 16 Wend. 605, following and citing *Welland Canal Co. v. Hathaway*, supra, it was held that the designation in a contract of the "Trustees of the First Baptist Church" did not import a corporate entity, within the rule of estoppel to deny the corporate existence of a body described in a contract by the corporate name.

But in *Whitford v. Laidler* (1883) 94 N. Y. 145, 46 Am. Rep. 131, there was dictum to the effect that if the contract in suit had been properly executed neither party thereto could have questioned the corporate character of a body designated therein as the "Garrattsville Agricultural & Farmers' Club," for the name imported a corporate existence.

See also the dictum in *Commercial Bank v. Pfeiffer* (1888) 108 N. Y. 242, 15 N. E. 311.

### III. Rule in Texas.

In Texas, the rule seems to be that the mere designation in a contract of a body by a name appropriate to a corporation does not imply a corporation without some statement in the contract that the body so described is a corporation, within the rule that one contracting with a body described by a corporate name is estopped to deny its corporate existence. *State Bank v. Simonton* (1847) 2 Tex. 531; *Holloway v. Memphis, E. P. & P. R. Co.* (1859) 23 Tex. 465, 76 Am. Dec. 68; *Luck v. Alamo Printing Co.* (1916) — Tex. Civ. App. —, 190 S. W. 204.

In *Holloway v. Memphis, E. P. & P. R. Co.* (1859) 23 Tex. 465, 76 Am. Dec. 68, it was held that the mere fact

that, in a contract with the plaintiff company, the defendant had designated it by the name "Memphis, El Paso, & Pacific Railroad Company," which name was appropriate to a corporate body, did not admit the plaintiff's corporate legal existence, without a statement in the contract that the company was a corporation. The court said: "The English rule seems most in consonance with principle. The merely naming themselves a company shows the fact of an association acting under a particular name, but not that they have the legal capacity to act and prosecute suits by that name; nor can the court know that they have such capacity, unless they are constituted a body corporate by public law, or are recognized as such by a law of which the court can judicially take notice. It would seem, therefore, on principle, that a private domestic corporation, equally with a foreign corporation, must aver and prove the fact of incorporation."

So, also, in *State Bank v. Simonton*, supra, the court held that the mere contracting with the plaintiff under its name "Bank of the State of Alabama" was not an admission by the plaintiff of its corporate capacity within the rule of estoppel, for the name, standing alone, did not import a corporation, saying: "It is well known that there are many joint stock and even banking companies which are mere partnerships as to every person except their own stockholders, they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership and not a corporate designation; and every suit upon a contract with the company must be brought in the names of the several persons composing the firm. A contract made with the company by that name is neither an admission nor any evidence whatever that it is entitled to sue by that name, as a corporation aggregate." The court cited and followed *Williams v. Bank of Michigan* (1831) 7 Wend. (N. Y.) 541, supra, II.

And in *Luck v. Alamo Printing Co.* (1916) — Tex. Civ. App. —, 190 S. W.



204, the court held that the use of the name "Mexico American Colony Association" in a contract did not necessarily import a corporation, so as to

estop the plaintiff from denying the corporate existence of the body so designated and recovering against the defendant individually. W. J. K.

WASHINGTON FIRE INSURANCE COMPANY, Appt.,

v.

DANIEL HOGAN et al.

*Arkansas Supreme Court—June 9, 1919.*

(— Ark. —, 213 S. W. 7.)

**Judge — waiver of disqualification.**

1. A constitutional disqualification of a judge to sit in a case of which he has been of counsel may be waived by failure to call his attention to the fact of disqualification and permitting the case to proceed to judgment.

[See note on this question beginning on page 1588.]

**Appeal — jurisdiction of appellate court.**

2. Upon appeal from the county court to the circuit court, the circuit court acquires only such jurisdiction as the county court had, and may render such judgment only as the county court should have rendered.

**Judge — disqualification — how waived.**

3. The disqualification of a judge because he has been of counsel in the case is waived by the adverse party announcing ready for trial, and allowing the case to proceed to judgment without objection, when present in court with knowledge that the judge had been of counsel in the case.

[See 15 R. C. L. 536.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Sebastian County, Greenwood District (Grant, Special J.) quashing an execution issued on a void judgment in an action on an open account. *Reversed.*

Statement by Hart, J.:

This is an appeal from a judgment of the circuit court quashing an execution on the ground that the judgment upon which it was issued was void. The material facts are as follows:

On the 5th day of November, 1912, the Washington Fire Insurance Company brought suit in the Sebastian circuit court for the Greenwood district against Daniel Hogan and John W. Jasper upon an open account. On the 6th day of January, 1915, this suit was dismissed by the court for want of prosecution. On the 23d day of December, 1915, the same insurance company through another firm of attorneys instituted a suit in the

same circuit court against Daniel Hogan and John W. Jasper on the same account.

The case was tried before a jury, which returned a verdict in favor of the plaintiff, and judgment was rendered on the verdict. The presiding judge of the circuit court at which the trial was had and the judgment rendered was a member of the firm of attorneys which had brought the first suit, which had been dismissed for want of prosecution. The attention of the presiding judge was not called to the fact that he had been of counsel in the first case, which had been dismissed for want of prosecution on the 6th day of January, 1915.

There is nothing in the record to

show the disqualification of the presiding judge, or that the case was tried before him by consent. The record does show, however, that the plaintiff appeared by its attorneys, and that the defendants were present in person and by attorneys, and that both parties announced ready for trial. The case was tried before a jury of the regular panel.

Messrs. Rowell & Alexander and Warner, Hardin, & Warner, for appellant:

At the common law substantial or direct interest in the event of litigation was the only cause of disqualification of a judge. Relationship to a party to the suit was not a disqualification.

Morrow v. Watts, 80 Ark. 57, 95 S. W. 988.

Having been of counsel did not necessarily disqualify the judge.

Theilussun v. Rendlesham, 7 H. L. Cas. 429, 11 Eng. Reprint, 172, 28 L. J. Ch. N. S. 948, 5 Jur. N. S. 1031, 7 Week. Rep. 563; Taylor v. Williams, 26 Tex. 586.

In the absence of express constitutional or statutory inhibition, the disqualification now sought to be enforced would not exist, and, since this qualification created by the Constitution and statute is in derogation of the common law, it will be strictly construed.

Thompson v. Treller, 82 Ark. 247, 101 S. W. 174.

Every presumption will be indulged in favor of the validity of the judgment now attacked.

Crittenden Lumber Co. v. McDougal, 101 Ark. 395, 142 S. W. 836; McMillan v. Nichols, 62 Ga. 36; Cleghorn v. Cleghorn, 66 Cal. 309, 5 Pac. 516; Stevens v. Hall, 8 Idaho, 549, 69 Pac. 282; Ryan v. Geigel, 25 Colo. App. 122, 186 Pac. 804; Blackburn v. Craufurd, 22 Md. 447; The Richmond, 9 Fed. 863.

Failure to object at the time the cause was tried before Judge Little constituted a waiver of any disqualification that may have existed.

Shropshire v. State, 12 Ark. 210; Pettigrew v. Washington County, 43 Ark. 33; Morrow v. Watts, 80 Ark. 60, 95 S. W. 988; 15 R. C. L. § 28, p. 540; Ex parte Hilton, 64 S. C. 201, 92 Am. St. Rep. 800, 41 S. E. 978; Jeffers v. Jeffers, 89 S. C. 244, 71 S. E. 810; DuQuoin Waterworks Co. v. Parks, 207 Ill. 46, 69 N. E. 587; Buena Vista Loan

& Sav. Bank v. Grier, 114 Ga. 398, 40 S. E. 284; Farr v. Fuller, 12 Iowa, 83; Blagg v. Fry, 105 Ark. 356, 151 S. W. 699; Sweeptzer v. Gaines, 19 Ark. 96; Re Hancock, 91 N. Y. 292; 24 Am. & Eng. Enc. Law, 995.

The judgment of a judge disqualified under article 7, § 20, of the Constitution is not void, and objection for disqualification must be promptly made.

Trawick v. Trawick, 67 Ala. 271; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112; Rogers v. Felker, 77 Ga. 46; Shope v. State, 106 Ga. 226, 32 S. E. 140; Floyd Co. v. Cheney, 57 Iowa, 160, 10 N. W. 324; Homes v. Eason, 8 Lea, 754; Posey v. Eaton, 9 Lea, 500; Fowler v. Brooks, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417; Stevens v. Hall, 8 Idaho, 549, 69 Pac. 282.

Mr. R. W. McFarlane, for appellees:

Where a judge, by statutory inhibition, is deprived of authority to act, any proceedings before him are absolutely void, although the parties agree to waive objections to the jurisdiction, and consent that he try the case.

23 Cyc. 600; Grimmett v. Askew, 48 Ark. 156, 2 S. W. 707; Oakley v. Aspinwall, 3 N. Y. 547; People v. Conner, 142 N. Y. 180, 36 N. E. 807; Newcome v. Light, 58 Tex. 141, 44 Am. Rep. 604; Freeman, Judgm. § 146; Black, Judgm. § 174; Chambers v. Hodges, 23 Tex. 104; Bates v. Thompson, 2 D. Chip. (Vt.) 99; Hill v. Wait, 5 Vt. 124; Low v. Rice, 8 Johns. 409; Carr v. Duhme, 10 Ann. Cas. 970, note; State v. Castleberry, 28 Ala. 85.

Hart, J., delivered the opinion of the court:

It is the contention of counsel for appellant that the court erred in holding that the judgment was void on account of the presiding judge being disqualified because he had acted as counsel for the appellant in the first suit against appellees, which was dismissed for want of prosecution.

On the other hand, it is the contention of counsel for appellees that the judgment was absolutely void, and that no valid execution could issue upon it. The decision of the question involves the construction of article 7, § 20, of the Constitution of 1874, and our decisions relative to it. The section is as follows: "No

judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court."

It is claimed by counsel for appellees that according to the current of authority, where the Constitution or statute expressly provides that a judge shall not preside or shall not sit in a case by reason of personal disqualification because of relationship, interest, or having been of counsel in the cause, his disqualification is absolute, and that any judgment rendered by him is void, and therefore his disqualification cannot be waived by the parties. We will not consider or review these authorities, for the reason that as early as 1884 this court held that the objection that the judge was disqualified because of relationship was waived by the failure to call the judge's at-

**Judge-waiver  
of disqualifica-  
tion.**

tention to the fact of disqualification and permitting the case to proceed to judgment. *Pettigrew v. Washington County*, 43 Ark. 33. This decision has never been overruled; but, on the contrary, has been an established rule of practice in this state since its rendition. It was so understood by this court in the later case of *Morrow v. Watts*, 80 Ark. 57, 95 S. W. 988. Doubtless many judgments have been rendered in reliance upon it, and many rights have been settled under it. No useful purpose could be served by overruling it; and it might cause much litigation and controversy, or, at least, might create needless alarm in the minds of lawyers and litigants who, during all these years, have conformed to the decision in the conduct of their affairs.

Again, it is insisted by counsel for appellees that this case is not in point; but we do not agree with counsel in this contention. It is true, as claimed by him, that the cir-

cuit court quashed the judgment of the county court against the son of the county judge, and affirmed it as to the other defendants. This court said this was not an error of which the appellants could take advantage because they were severally as well as jointly liable. If the judgment of the county court, however, had been void because one of the defendants was the son of the county judge, as is the claim of counsel, in such cases, the circuit court could have acquired no jurisdiction of the case on appeal. Upon appeal from the county court the circuit court acquires only such jurisdiction as the county court had, and may render such judgment only

**Appeal-juris-  
diction of ap-  
pellate court.**

as the county court should have rendered. *Pride v. State*, 52 Ark. 502, 13 S. W. 135; *Price v. Madison County Bank*, 90 Ark. 195, 118 S. W. 706.

This brings us to a consideration of the question of whether or not, under the facts as disclosed by the record, the personal disqualification of the judge was waived in the case at bar. We answer the question in the affirmative. The record shows that appellees were present in court in person as well as by attorney at the time the judgment in question was rendered. They knew that the presiding judge had

**Judge-dis-  
qualification—  
how waived.**

been one of the attorneys for appellant when the first suit had been brought and dismissed. The record also shows that they announced ready for trial, and allowed the case to proceed to judgment without objection. Having taken their chances of a favorable judgment at the hands of a judge, who, they knew, was personally disqualified, they cannot, after an adverse decision, avail themselves of facts which they knew before the judgment was rendered to get rid of it. In other words, litigants cannot take their chances of a favorable decision with a judge, who, they know, is disqualified to sit in the case, reserving the right to set the judgment aside, if it appears to their advantage to do so.

It follows from the views we have expressed that the court erred in holding the judgment void and in quashing the execution issued upon it.

For that error, the judgment must

be reversed and the cause remanded, with directions to the Circuit Court to overrule appellees' motion to quash the execution and for further proceedings according to law.

Petition for rehearing denied.

## ANNOTATION.

### Waiver of disqualification of judge.

- I. At common law, 1588.
- II. Under statute declaratory of common law:
  - a. Rule stated, 1589.
  - b. Application of rule, 1591.
- III. Under statute permitting waiver by consent:
  - a. Express consent, 1598.
  - b. Implied consent held insufficient, 1601.

#### *I. At common law.*

At common law, while it was recognized that a judge who was interested in the action or of kin to either party was disqualified from sitting in the cause, his judgment was generally considered to be erroneous only, and not void, so that the objection might be waived by the parties either expressly or impliedly. *Sampson v. People* (1901) 188 Ill. 592, 59 N. E. 427; *Duquoin Waterworks Co. v. Parks* (1903) 207 Ill. 46, 69 N. E. 587; *Clark v. Schofield* (1889) 28 N. B. 231; *Dimes v. Grand Junction Canal Co.* (1852) 3 H. L. Cas. 749, 10 Eng. Reprint, 301.

On the contrary, it has been said: "Though the principle that a party can never act as judge is not declared by our Constitution or statute, yet, as it is a maxim of universal justice, and is undoubted law in England, it exists here as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and when his own rights are in question, he has no authority to determine the cause." Nor can the objection be waived by the parties. "If not taken before the decision is rendered, it will avail in the appellate court, and the suit may be dismissed on that ground. The judge

#### III.—continued.

- c. Implied consent held sufficient, 1604.

#### IV. Under statute forbidding disqualified judge to sit:

- a. Rule stated, 1607.
- b. Application of rule:
  - 1. Express waiver, 1608.
  - 2. Implied waiver, 1612.

acting in such case is not simply acting irregularly, but he is acting without jurisdiction." *First Nat. Bank v. McGuire* (1899) 12 S. D. 226, 47 L.R.A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074, holding that where the wife of a judge is a stockholder in a plaintiff corporation, he is an interested party, and the fact that the defendant was compelled to apply to the same judge, in another action, for a temporary injunction, would not waive or remove the disqualification.

And in *State v. Ham* (1910) 24 S. D. 639, 124 N. W. 955, Ann. Cas. 1912A, 1070, it was said: "By the common law the judge must not be a party nor otherwise interested, and he must not be within the too near relationship of the party, which commonly, by the unwritten rule, includes the fourth degree of consanguinity or affinity."

This rule seems to have been established out of reasons of public policy, and where a judge is interested as a party, or otherwise, or is within the prohibited degree of relationship to a party, the disqualification cannot be waived by consent of either or both parties, because, when the disqualification exists by reason of the interest or relationship of the judge, the consent to waive does not remove the disqualification, but the disqualification still exists notwithstanding the consent and waiver. It is

against the policy of the law to permit a judge who is interested or within the forbidden degree of relationship to sit in the trial of the cause, although the parties may consent thereto."

Where a party seeks or obtains a change of venue and afterwards goes to trial before the same judge without objecting to the disqualification, he waives the point and cannot urge it as a ground of reversal on appeal or writ of error. *Du Quoin Waterworks Co. v. Parks* (1903) 207 Ill. 46, 69 N. E. 587.

In *Sampson v. People* (Ill.) supra, the defendant was in court attended by counsel when the jury returned their verdict, and made no objection to its reception by the judge, but, on the contrary, apparently acquiesced, and requested the judge to enter a motion for a new trial. It was said by the appellate court: "In such state of case it is the duty of the judge, if he knows he is disqualified, to refuse to allow any step to be taken in the particular case; but as it is possible, and very probable, a judge may not be able to bear in mind at all times that he has been disqualified to act in a particular case, it is the duty of the party at whose instance the disqualification was effected to object, and request that such judge should not sit."

It was held in *Clark v. Schofield* (1889) 28 N. B. 231, wherein it appeared that the interest of the judge's son in the suit was not known to him at the time of trial, and was not called to his attention, that the right to object to his disqualification was waived by allowing the action to proceed to a decree. The court said: "Notwithstanding that the judge in equity had no pecuniary interest, it may be said that if the fact of his son's purchase had been brought to his knowledge, it would have been such a fact as would have induced him entirely to withdraw from the case. While the mere possibility of bias does not, ipso facto, avoid the decision of a judge, yet a real bias would do so. Here, as the learned judge had no knowledge of his son's interest, . . . there could be no real knowledge or the mere possi-

bility of bias. We therefore think there is not sufficient in the facts shown in this case to create such disqualification in the judge as would render the decree voidable upon appeal."

Where, however, a judge has a direct interest in the matter in controversy, no waiver will be presumed, and a decree by him is voidable and will be reversed. *Dimes v. Grand Junction Canal Co.* (1852) 3 H. L. Cas. 759, 10 Eng. Reprint, 301.

Similarly, in *Forest Coal Co. v. Doolittle* (1903) 54 W. Va. 210, 46 S. E. 238, it was held that, under the common law, the disqualification of a judge cannot be waived by implication, and when final judgment is entered, it will be reversed on appeal if the objection be raised, the court saying: "There is no reason for any distinction between the cases in which a statute declares that an interested judge shall not sit and those in which he is inhibited by the common law from sitting. A statute is of no higher dignity, nor any more efficacious, than the common law, and no statute has more emphatically and unequivocally negatived the power of a judge to sit in his own cause than does the maxim of the common law, 'Nemo debet esse iudex in propria causa.'"

## II. Under statute declaratory of common law.

### a. Rule stated.

Under statutes which specify the causes of disqualification, but do not forbid a disqualified judge to act, the disqualification of a judge is not generally regarded as jurisdictional, and it may be waived either expressly or impliedly by the parties.

**United States.**—*Coltrane v. Templeton* (1901) 45 C. C. A. 328, 106 Fed. 370; *Re Eatonton Electric Co.* (1903) 120 Fed. 1010; *Utz & D. Co. v. Regulator Co.* (1914) 130 C. C. A. 17, 213 Fed. 315; *Re Equitable Trust Co.* (1916) 147 C. C. A. 30, 232 Fed. 836. Compare *McClaghry v. Deming* (1901) 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786 (court-martial composed entirely of ineligible officers).

**Arkansas.**—*Shropshire v. State*

(1851) 12 Ark. 190; *Sweeptzer v. Gaines* (1857) 19 Ark. 96; *Pettigrew v. Washington County* (1884) 43 Ark. 33; *Morrow v. Watts* (1906) 80 Ark. 57, 95 S. W. 988; *WASHINGTON F. INS. Co. v. HOGAN* (reported herewith) ante, 1585.

**Colorado.** — *Eberville v. Leadville Tunneling Min. & Drainage Co.* (1901) 28 Colo. 241, 64 Pac. 200; *Nicholls v. Barrick* (1900) 27 Colo. 432, 62 Pac. 202; *Kerr v. Burns* (1908) 42 Colo. 285, 93 Pac. 1120.

**Idaho.** — *Stevens v. Hall* (1902) 8 Idaho, 549, 69 Pac. 282.

**Indiana.** — *Smythe v. Scott* (1886) 106 Ind. 245, 6 N. E. 145; *Baldwin v. Runyan* (1893) 8 Ind. App. 344, 35 N. E. 569; *Goodrich v. Stangland* (1900) 155 Ind. 279, 58 N. E. 148; *Smith v. Amiss* (1902) 30 Ind. App. 530, 66 N. E. 501; *Carr v. Duhme* (1906) 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967.

**Kentucky.** — *Hargis v. Com.* (1909) 135 Ky. 578, 128 S. W. 239; *Pace v. Reed* (1910) 138 Ky. 605, 128 S. W. 891; *White v. Jouett* (1912) 147 Ky. 197, 144 S. W. 55.

**Louisiana.** — *Ricks v. Gantt* (1883) 35 La. Ann. 920; *State v. Morgan* (1917) 142 La. 755, 77 So. 588.

**Mississippi.** — *Nimocks v. McGehee* (1910) 97 Miss. 321, 52 So. 626.

**Montana.** — *State ex rel. Nissler v. Donlan* (1905) 32 Mont. 256, 80 Pac. 244; *State ex rel. Jacobs v. District Ct.* (1914) 48 Mont. 410, 138 Pac. 1091; *State ex rel. Carroll v. District Ct.* (1915) 50 Mont. 506, 148 Pac. 312.

**New Hampshire.** — *Warren v. Glynn* (1858) 37 N. H. 340; *Moses v. Julian* (1863) 45 N. H. 52, 84 Am. Dec. 114; *Stearns v. Wright* (1872) 51 N. H. 600; *Hutchinson v. Manchester Street R. Co.* (1905) 73 N. H. 271, 60 Atl. 1011.

**South Carolina.** — *Ex parte Hilton* (1902) 64 S. C. 201, 92 Am. St. Rep. 800, 41 S. E. 978; *Jeffers v. Jeffers* (1911) 89 S. C. 244, 71 S. E. 810.

**Washington.** — *State ex rel. Gourley v. Smith* (1914) 78 Wash. 292, 139 Pac. 60.

**Wyoming.** — *Dolan v. Church* (1875) 1 Wyo. 187.

"In the absence of peremptory pro-

visions in a statute, the question of the interest or bias of a judge is regarded as a private matter, of concern only to the parties to the action, who may give a disqualified judge jurisdiction by consent or by waiver, express or implied, as by failing to raise the objection at the trial when the party objecting had full knowledge of the existence of the disqualification. The authorities, however, under statutes of the latter class, are not in entire harmony, and in certain jurisdictions the right of waiver is denied as being contrary to public policy. If the participation of the interested judge so affects the jurisdiction of the court as to make its judgment void, then the invalidity cannot be cured even by consent of the parties, but if such improper action is a mere irregularity or error rendering such proceeding voidable only, then the disqualification and consequent error may be waived by failure to make reasonable objection." *Carr v. Duhme* (Ind.) supra.

"Except in cases where a statute forbids it, . . . the parties, by a joint application to the judge, suggesting the ground of recusation, expressly waiving all objection on that account, and requesting him to proceed with the trial or hearing, signed by them, or their attorneys, may give full power to the judge to proceed as if no objection existed. . . . This is denominated in civil and Scotch law prorogated jurisdiction." *Moses v. Julian* (1863) 45 N. H. 52, 84 Am. Dec. 114.

A judge whose disqualification has been waived by consent of the parties may still refuse to sit. *Re Eatonton Electric Co.* (1903) 120 Fed. 1010, where it appeared that the judge was a relative by consanguinity with one directly interested in the outcome of the case, and, notwithstanding the consent of the parties that he proceed with the trial, he withdrew under his interpretation of the statute, which provides: "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opin-

ion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district," etc. It was noted by the court that the statute "seems to intrust to the discretion of the judge of the United States court to determine if his relationship renders it improper for him to sit on the trial," and in conclusion it was said: "It is my opinion that, for reasons of public policy, and also since Congress has afforded a convenient and accessible tribunal for the trial of the cause, it is my duty to withdraw. In several of the states waiver of disqualification is distinctly forbidden. In the absence of a definite rule for the national courts, it seems appropriate that they should adopt that which will the more effectively shelter the judges from criticism."

*b. Application of rule.*

**Under statutes which do not contain a peremptory provision, the objection to the competency of a judge is waived by proceeding in the cause without objection.** *Hutchinson v. Manchester Street R. Co.* (N. H.) *supra*, wherein the defendants, with full knowledge of the facts on which they based their claim of disqualifying prejudice, submitted to the judge the question of continuance on other grounds. It was held that "they could not present to him this question and take the chances of a favorable decision, holding in reserve the jurisdictional question, to be brought forward if the result should be unfavorable. If they intended to rely upon this objection, they were bound to present it as soon as they were aware of it."

"A tacit prorogation is inferred against a plaintiff who brings his cause before a judge who is known to him to be disqualified to try it, and against a defendant, who, knowing the existence of just grounds of recusal, appears and without objecting offers defenses in the cause, either dilatory or peremptory. . . . If the

facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced; otherwise, he will be deemed to have waived the objection in cases where a statute does not make the proceedings void. . . . After a trial has been commenced, no attempt to recuse a judge will be listened to, unless it is shown affirmatively that the party was not aware of the objection, and was in no fault in not knowing it." *Moses v. Julian* (1863) 45 N. H. 52, 84 Am. Dec. 114.

An objection should be interposed at the earliest opportunity, and if there is undue delay the objection will not be considered, but will be construed as waived. *Eberville v. Leadville Tunneling Min. & Drainage Co.* (1901) 28 Colo. 241, 64 Pac. 200, wherein, after the action had been pending for nearly five years, and a demurrer and several motions had been passed on by the presiding judge of the court in which the action was instituted, and the issues were made up, and the case by agreement of parties had been set for trial, the defendant made a motion for a change of judge on the ground that the presiding judge was disqualified to try the cause, and it was held that the application came too late.

It has been held that a petition addressed to the trial judge in an election contest, requesting him to call in another judge to try the cause, presented on the date set for trial, based on the alleged prejudice of the trial judge in that he had made statements to the effect that the ballots in question should be counted in favor of the contestant, was too late where the statement was made thirty days before. *Nicholls v. Barrick* (1900) 27 Colo. 432, 62 Pac. 202, wherein the court said: "Whether or not what the judge is said to have stated regarding the merits of this controversy was sufficient to disqualify him from trying the cause, it is not necessary to determine, as the petition should have been presented within a reasonable time after contestee was advised that it had been made. In view of the fact that thirty days had elapsed between

the date when the trial judge is said to have made the statement attributed to him, and the time when the petition for a change was presented, in connection with the fact that no excuse is offered why this petition was not filed at an earlier date than it was, we are of opinion that it came too late, and was, therefore, properly overruled."

"An objection to the trial judge raises, in effect, a question of jurisdiction, and the objection, to be available, must be made before an appearance to the merits of the action or the submission of preliminary motions by either party preparatory to a trial." *Hargis v. Com.* (1909) 135 Ky. 578, 123 S. W. 239, a prosecution for murder, wherein it was held that by filing a demurrer to the indictment and, when that was overruled, moving for bail, the defendant had waived his objection to the disqualification of the trial judge for bias. It was said: "The whole of the affidavit above quoted, except the last paragraph, refers to matters which the defendant knew at the preceding term when he entered his general demurrer to the indictment, when he filed his application for a change of venue, and when he made a motion for bail. If, in a criminal case, the defendant were allowed thus to experiment with the circuit judge, and at a succeeding term to swear him from the bench because his experiments had not turned out as he would like them, the door would be open for a practice well calculated to bring the administration of criminal law into disrepute. The rule is a sound one which requires the defendant to make his objection promptly to the circuit judge, and which precludes him from making an objection where he elects to proceed with the case before him without objection."

In *Pace v. Reed* (1910) 138 Ky. 605, 128 S. W. 891, following the rule in *Hargis v. Com.* (Ky.) *supra*, it was held that although the facts were such as to disqualify the judge, who should have declined to preside, yet having permitted the court to pass on a demurrer to his petition and waited until the defendant filed a written motion to strike out certain parts, the plaintiff

was estopped to deny the competency of the judge.

Where the disqualification of a judge is known to the party, reasonable objection must be made or it will be deemed waived. *Warren v. Glynn* (1858) 37 N. H. 340. In that case, a prosecution for bastardy, on a second trial counsel moved for a dismissal of the complaint on the ground that the examining magistrate was a citizen and taxpayer, and therefore so interested in the result of the prosecution as to have no jurisdiction over it. It appeared to the court that this objection was known to and understood by counsel for the respondent at the time of the complaint and examination, and that it had designedly not then been taken for the reason that the respondent intended first to avail himself of the objection that the town was not entitled to maintain the action, and if that failed, then to avail himself of the objection to the qualification of the magistrate. It was held that a motion to dismiss the complaint, under the circumstances, was properly denied, the court saying: "Conceding that the magistrate before whom the preliminary examination in this case took place was legally disqualified to act in that examination by reason of his interest in the event of the suit, as a resident citizen and taxpayer of the complainant town, we think it entirely clear, upon the authorities, that it is now too late for the defendant to avail himself of this objection to his competency. Being a magistrate in commission, the justice before whom the complaint was made had jurisdiction of its subject-matter by the express provisions of the statute authorizing the complaint in such cases to be made and the examination to be had before any justice of the peace. The disqualification or incompetency arose from the extrinsic facts of residence, citizenship, and liability to taxation in the complainant town, and the case [court] finds that these facts were not only known, but understood and considered, both by the respondent and his counsel at the time the complaint was made and the examination had, . . . and that they designedly omit-



ted to take the objection, now insisted upon, at that time, and during the subsequent proceedings for a year and a half in the common pleas and this court. It is a general rule, to which, if it be not universal, the present case does not seem to us to form any exception, that where general jurisdiction or the power to act exists, and the only objection to its exercise is one intended for the benefit and designed for the protection of the party complaining, such objection must be taken at the earliest practicable opportunity, after the party or his counsel become aware of the facts on which its validity depends, or it will be held to have been waived by the omission or neglect to urge it seasonably. The reason of the rule would seem to be, that it is justly to be regarded as the folly or misfortune of a party, if, knowing of a valid objection to a proceeding, he neglects to avail himself of it, but stands by and participates therein, unless he intends, as is the natural presumption, from his silence, to waive altogether any objection on that account."

In *Stearns v. Wright* (1872) 51 N. H. 600, a case involving the probate of a will, it did not distinctly appear when the defendant first knew of the fact that the judge of probate was acting as counsel for the plaintiff, but it was shown that he appeared before the commissioner of the estate and presented the claim. A hearing was then had, and an appeal from that decision taken and entered in the appellate court, where it was continued from term to term until a trial was finally had by a jury, with a verdict against the defendant, and at this trial the first intimation or notice of any objection to the judge was made. It was held that as a motion might have been made when the action was first entered in the appellate court, the defendant was bound to make his objection then; and as he had full knowledge of the fact before, and had failed to object promptly, he must be held to have waived the disqualification.

In *Kerr v. Burns* (1908) 42 Colo. 285, 93 Pac. 1120, the defendant objected to the trial judge as disqualified under

the Code because he had at one time been attorney for the plaintiff. It appeared that nine years prior to the present action the defendant had acquiesced in the sitting of the judge in two actions and accepted the benefits of the adjudications. It was said: "This objection does not go to jurisdiction over the subject-matter. The statute upon which plaintiff in error relies—Civ. Code, § 429—does not disqualify the judge under such circumstances when all parties consent to his acting. All the other parties to that proceeding, as well as plaintiff in error, voluntarily appeared therein, taking active part without objection or protest in this respect. From first to last the action of Judge Russel in presiding over those proceedings was acquiesced in by everyone in any manner connected therewith. And such acquiescence must be held equivalent to an affirmative consent. The present objection therefore, even had it been presented to this court on the appeal from the priority adjudication itself, would have been overruled. Much less is it available in the present controversy."

In *Nimocks v. McGehee* (1910) 97 Miss. 321, 52 So. 626, it was said: "Appellant, not having made objection to the justice of the peace, on account of his disqualification during the pendency of the suit on which the judgment was rendered, is deemed to have waived such disqualification, even though unknown to him at the time. At his peril he was required to exercise the necessary diligence to ascertain such disqualification, and, not having done so, he is precluded from attacking the judgment collaterally on that ground. Under the Constitution the disqualification may be waived, and such waiver may be express or implied, and under the facts of this case it is implied. If judgments were open to collateral attack on this ground, the evil results would at once be apparent."

It has been held that a statute which declares that the imputed bias and prejudice shall be made to appear by affidavit filed at any time before the day fixed for the trial or hearing does

not admit of a construction that will permit a litigant to file an affidavit of disqualification after the day for a hearing has arrived, and thus rob the court or judge of the power to proceed. *State ex rel. Nissler v. Donlan* (1905) 32 Mont. 256, 80 Pac. 244, holding that the disqualification was waived where objection was not made until the day of hearing.

In *State ex rel. Jacobs v. District Ct.* (1914) 48 Mont. 410, 138 Pac. 1091, the court said: "Actual disqualification on the part of a judge may be manifested at any time after as well as before the date fixed for a hearing, and it is therefore available in probate proceedings whenever it is made to appear; but the privilege to impute bias to a judge where none may exist belongs to a different order of things, and its existence may fairly be limited to a given time. The disqualification of a judge for imputed bias is like the peremptory challenge of a juror, which may not be exercised after he has once been passed."

When disqualification of a judge because of interest is regulated by statute, it has been held that a guardian does not waive his objection by failing to appear and ask for a continuance; but it was said that if he had made such a motion his objection could not afterward be heard. *State ex rel. Carroll v. District Ct.* (1915) 50 Mont. 506, 148 Pac. 312.

"In those jurisdictions in which bias or prejudice on the part of the trial judge is, by statute, a cause for recusation in a criminal case, it is generally, if not consistently, held that an objection to a judge's presiding in a case, on that ground, must be made before any other issue is tendered for decision by him, or it will be considered waived." *State v. Morgan* (1917) 142 La. 755, 77 So. 588. In that case it appeared that the defendant had submitted a preliminary plea to the judge for decision on the same morning when he filed his motion for recusation, and the judge had ruled on the plea when the motion for recusation was filed. It was therefore held that there was no error in the judge's refusal to recuse himself or to submit

the motion to another judge for a ruling on it.

When the disqualification of a judge is defined by statute, the power of the parties "to waive this absolute right conferred upon him cannot be questioned." *Ricks v. Gantt* (1883) 35 La. Ann. 920, wherein the court further said: "His right to act arises whenever he discovers the cause of recusation; but when, as in this case, he submits his case to the judge, with full knowledge of the cause of recusation, and asks the judge to pass upon the very question in which he afterwards claims he is interested, the authority of the judge cannot, after judgment, be questioned."

Where a statute dealing with the disqualification of a judge requires the removal of a cause when the circumstances "render it improper in his opinion for him to sit on the trial," it is for the judge to decide if the circumstances warrant such removal, and if, upon motion of the complainant, a receiver has been appointed by a judge, after argument and the determination of preliminary matters, the complainant will be presumed to have waived the disqualification which was known to him at the time of filing his motion. *Coltrane v. Templeton* (1901) 45 C. C. A. 328, 106 Fed. 870.

In *Utz & D. Co. v. Regulator Co.* (1914) 130 C. C. A. 17, 213 Fed. 315, under the Federal statute relating to the disqualification of judges (Judicial Code, § 20, 4 Fed. Stat. Anno. 2d ed. p. 881), it was held that where the interest of the judge was remote, and both parties agreed that the corporation of which he was a stockholder should be withdrawn "from the controversy," the question could not be raised on appeal. The court said: "The judge below was confronted by his natural desire on the one hand, and his official duty and the desire of the parties on the other. He would have failed in duty had he renounced a jurisdiction imposed by law, however disagreeable. The parties had come with their witnesses and were in the course of trial. His concern in the litigation which developed was remote, almost trivial. He was not a

party to the proceeding, nor was the creditor in which he had a stockholding interest a party by name. The legal title and control of its account had been transferred to the assignee for the benefit of creditors. Its account was not in dispute; the real question at the end was where or by whom the estate of the debtor should be administered,—the court of bankruptcy or the assignee for the benefit of creditors. With full knowledge of the facts, the parties desired him to proceed; neither filed the application prescribed by the statute. Though the form of withdrawal of the creditor did not change the situation, we think it was the duty of the judge to go on with the trial."

An application made to the circuit court of appeals for a writ of mandate compelling a judge of the district court, because of disqualification, to proceed no further, will not be entertained during the pendency of a motion made by the same party in the district court before the same judge. *Re Equitable Trust Co.* (1916) 147 C. C. A. 30, 232 Fed. 836.

Where a statute does not provide that a judge who had formerly been an attorney for any party to a suit can be qualified by agreement of the parties or counsel to try the case, nor that jurisdiction cannot be conferred in this way, an objection made eight years after the disqualification was known and waived cannot avail. *Stevens v. Hall* (1902) 8 Idaho, 549, 69 Pac. 282. In that case an attorney who appeared for the defendant against whom judgment was entered afterward became judge of the court where a motion was made to revive the judgment, counsel at that time knowing of the disqualification and agreeing that the judge should try the case and waiving all objection. In holding that the judge was not disqualified to sit, the appellate court said: "Should a party be permitted to insist upon the court doing a certain thing, and thereafter be heard to complain of his own acts in case the ruling of the court is not in harmony with his contentions? . . . A party, cognizant in the earlier stages thereof of an ob-

jection that might be fatal to the validity of proceedings before a tribunal otherwise competent, cannot be permitted to lie by and take the chances of a favorable result, and, after an adverse one has been reached, be allowed to avail himself of that objection to avoid its consequences. . . . When we consider that at the first opportunity presented the judge called attention to the fact that he had been an attorney for one of the parties to the suit in former litigation and between the same parties, it was certainly the duty of counsel for either party to the suit to ask for a change of venue, if they desired it, and not wait to see what the result would be, and then, if adverse to their interests, ask that the venue be changed. Whilst we are in accord with the decisions that all proceedings of the courts should be free from any taint, suspicion, partiality, or favoritism, yet we cannot give our approval of the proceedings by which it is sought to take the advantage of their own laches."

Where the appellant did not raise the objection that the probate judge was related to the parties within the prohibited degrees until the case was heard and the judge had announced his judgment orally, it was held that the objection, which was known when the proceedings commenced, was waived. *Ex parte Hilton* (1902) 64 S. C. 201, 92 Am. St. Rep. 800, 41 S. E. 978, wherein the decision was based on the distinction between jurisdiction of the person and of the subject-matter.

The doctrine was carried to an extreme in *Jeffers v. Jeffers* (1911) 89 S. C. 244, 71 S. E. 810, wherein it was held that in order to set aside a judgment refusing a motion for a new trial, based on the disqualification of the trial judge, and raised for the first time on such motion, an affidavit showing the incompetency of a judge because of relationship, which became known after the trial, is not sufficient, and that it must also be shown that the judge knew, before the decree was signed, of his relationship to one of the parties, as he would then have

been guilty of a wilful violation of the law, which is never presumed.

In *Dolan v. Church* (1875) 1 Wyo. 187, it appeared that by consent of parties the cause was set down for trial, and after the time of trial had been fixed the plaintiff interposed his motion for a change of judge. In holding that the objection to disqualification had been waived, the court said: "We are of the opinion that while, in ordinary cases, a party, on a proper showing, has a right to such change of judge, yet that a motion of this nature should be made promptly, in due season, and certainly not for the sole purpose of causing delay, and that in this case the plaintiff, by omitting to file his affidavit until after he had consented to have the trial of the cause fixed for a day certain, and the cause had been called on that day, thereby waived his rights under the statute which provides for a change of judge, unless the party so applying has just learned that facts exist from which he believes that a judge may be prejudiced against him, which facts should be alleged in the affidavit."

In Indiana there is no statute which in express terms disqualifies a judge from acting in any case, but the legislature has enacted that where the judge is interested in the cause, this is good ground for a change of venue. Under that act it is held that where a presiding judge discloses his relationship and the parties waive any objection to his qualification, he should not thereafter be embarrassed by the question, and there is no merit in the point when raised on appeal. *Smythe v. Scott* (1886) 106 Ind. 245, 6 N. E. 145.

The general rule is that the denial of an application for a change of judge must be presented in a motion for a new trial, and that it cannot be specified as an independent writ of error. It has been held, however, that where judgment is taken by default, its rendition not being a trial in the sense that a party may afterwards apply for a new trial, the specification of the refusal of the court to grant a change of judge may properly be assigned as an independent error. *Goodrich v.*

*Stangland* (1900) 155 Ind. 279, 58 N. E. 148.

In *Baldwin v. Runyan* (1893) 8 Ind. App. 344, 35 N. E. 569, it appeared that during the progress of the trial and after all the witnesses had been examined a motion was made to strike the case from the record on the ground that the justice of the peace by whom the case was originally heard was an agent or attorney for the plaintiff. It was held that the objection had been waived, the court saying: "Just at what point of time this supposed disqualification was discovered by the appellant is not made to appear. We are of the opinion that the disqualification of the justice was not such as necessarily deprived him of jurisdiction, either of the person or of the subject-matter. The utmost that can be made of the fact that he had previously attempted to collect the claim is that it might, if a proper showing were made, disqualify him as an impartial trier of the case. It is, however, such a disqualification as might be waived, and we think it would be waived unless made known at the earliest opportunity. That this was the first opportunity the appellant had for making the objection should also be made to appear by the appellant. That an objection to a trial judge on account of such a disqualification as is here relied upon may be waived if not seasonably made, we think, is in conformity to the spirit of our decisions. As stated by Judge Elliott in his excellent work on Appellate Procedure: 'The authority of the person who assumes to discharge the function of a judge is presumed to be lawful. This presumption applies to a special judge, unless the record shows a well-founded objection to his capacity to act as judge. The later cases declare the doctrine we have stated, and they rest on sound principles, since it would be unreasonable to assume that parties quietly sat by and permitted their cause to be tried by an intruder or usurper. . . . The appellate tribunal will presume that the courts were held at the proper time and place, and that all was done to make the holding of the court regular and legal.' Elli-

ott, App. Proc. § 714, and cases cited. This doctrine fully meets our approbation. It would, in our judgment, be a dangerous rule that would permit a party to a judgment to assail it upon any and all occasions, as void, when the record thereof utterly fails to disclose anything to impeach it. Such a practice would render many judgments, regular upon the face thereof, subject to collateral attacks for reasons that might, for aught that appears, have been known and disclosed prior to the rendition. If the appellant in the present case was aware of the alleged disqualification of the justice at the time he tried the cause, it was his imperative duty to make it known, and object to his acting as judge in such trial. He could not be permitted to sit quietly by, and await the result of the trial, and then, in the event of an adverse decision, raise an objection to the judge after the rendition of the judgment. We are bound in the present case to presume that the appellant had knowledge of the alleged disqualification, for everything must be presumed in favor of the rulings of the court below until the error relied upon is made to appear affirmatively, and this includes every step necessary to establish such error."

In *Carr v. Duhme* (1906) 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967, it was held that where the disqualification was disclosed by the record and known to the parties, and in the absence of statute, it could not for the first time be raised on appeal. The court said: "In cases where the disqualification of the judge renders the proceeding voidable merely, and not void, it may be waived by consent of parties. . . . It was appellees' duty, if they desired to object to his acting because of interest, to make such objection at the earliest opportunity, and thereby prevent the accumulation of needless costs and the attainment of a fruitless result. If a party, knowing of a valid objection to a proceeding, neglects to avail himself of it, and stands by or participates therein until a result is reached adverse to his interests, it is but justice that he

should bear the consequences which his only folly has suffered to occur."

Where it appeared in an action on a promissory note that a son of the judge was a member of a company of which the plaintiff was trustee, it was held that proceeding with the trial was a waiver of the disqualification of the judge. *Smith v. Amiss* (1902) 30 Ind. App. 530, 66 N. E. 501, wherein the court said: "Where a rule of court, reasonable within itself, and not contrary to any statute, requires an application for a change of venue to be made within a certain time, an application made after the time should be granted where it appears that knowledge of the cause for which the change is asked did not come to the applicant until after the time limited by the rule; and in such case the applicant need not show diligence, before the time limited by the rule, to ascertain the cause for which the change is asked. . . . Had the application for the change in this case been made at the time the cause for the change was discovered, or as soon thereafter as it reasonably could have been made, it should have been granted. But it appears that the evidence upon the trial disclosed the relationship. The evidence was heard on the 28th day of January, 1901, and the cause taken under advisement until February 2, 1901, at which time the special finding of facts and conclusions of law were read in open court. On February 5, 1901, appellant filed his affidavit for a change. There was ample time after the discovery of the fact to have asked for the change before the court read its finding in the case. No excuse whatever is given for the delay. If appellant, having ample opportunity to ask for the change, chose not to do so until the court had decided the case, he must be held to have waived his right to ask for the change. By his conduct he gave his implied consent that the judge might try the case."

"When a party, knowing of the disqualification, permits judgment to go by default, and does not raise the question of jurisdiction until in the circuit court, he may well be held to have consented to the proceeding in

the justice court." *Morrow v. Watts* (1906) 80 Ark. 57, 95 S. W. 988.

In *Pettigrew v. Washington County* (1884) 43 Ark. 38, an action against a public official and his sureties for the amount of a defalcation, it was held that an objection to the judgment on the ground that the judge was the father of one of the defendants and so disqualified to try the cause was waived by failure to call the attention of the court to the fact of disqualification.

Where no question was raised as to the power or authority of a special judge to try a case and there was nothing in the record on which such an objection could be grounded, the appellate court will assume such objection to have been waived. *Sweptzer v. Gaines* (1857) 19 Ark. 96.

A similar ruling was made in *Shropshire v. State* (1851) 12 Ark. 190, wherein the judge who heard the case had been district attorney at the time the indictment was found, and the defendant proceeded to trial without making objection to the competency of the judge and raised the question for the first time on appeal. And see the reported case (*WASHINGTON F. INS. CO. v. HOGAN*, ante, 1585).

The objection to the disqualification of a judge will be deemed to have been waived where a party filed a demurrer and made several motions in the cause, and did not raise the question of disqualification until a subsequent term of court, when the facts were previously known to him. *White v. Jouett* (1912) 147 Ky. 197, 144 S. W. 55, wherein the court said: "The law does not permit one to proceed with his case until he subsequently becomes dissatisfied, and then rely upon facts which he had known all the time, for the purpose of getting rid of an unsatisfactory judge."

In a proceeding for civil contempt for refusing to deposit a stock certificate with the clerk of the court in compliance with an order contained in a final judgment, it has been held that objection to the disqualification of the trial judge is waived, the proceedings being regarded as ancillary to the original action or in the nature of an

execution issued. *State ex rel. Gourley v. Smith* (1914) 78 Wash. 292, 139 Pac. 60, wherein the court said: "Her appearance in the contempt proceeding was not her first appearance before the trial judge. Having therefore appeared, and having submitted herself to the jurisdiction of the court upon the trial of the principal action, she was not entitled to a change of judges on the ground of prejudice."

But the filing of a second motion for a change of venue is not a waiver of the disqualification of a judge. "If the first motion was well taken, it should have been granted, but if not well taken, . . . it was an abortive attempt, and had no legal force or effect." *State ex rel. Dunham v. Superior Ct.* (1919) — Wash. —, 180 Pac. 481.

### III. Under statute permitting waiver by consent.

#### a. Express consent.

In some jurisdictions the statute relating to the disqualification of judges provides that a disqualified judge may act with the consent of the parties. Under such an act, the express consent of the parties that a judge may act is of course effective to obviate his disqualification. *Hine v. Hussey* (1871) 45 Ala. 496; *McGovern v. Mitchell* (1906) 78 Conn. 536, 63 Atl. 438; *Jewett v. Miller* (1861) 12 Iowa, 85; *Stone v. Marion County* (1889) 78 Iowa, 14, 42 N. W. 570; *Burns v. Burns* (1905) 27 Ohio C. C. 149.

Thus in *McGovern v. Mitchell* (1906) 78 Conn. 536, 63 Atl. 433, supra, a suit to restrain the defendants, as state officers, from paying increased salaries to judges, it appeared that when the cause was reached for argument, counsel for all parties stated that they had filed a written waiver of any and every disqualification which might exist on the part of any justice of this court, and of any judge of the superior court. Thereupon the court retired for consultation, and upon its return to the court room the chief justice read the following memorandum: "The court is reluctant to hear this cause. No final determination of the

subject-matter in controversy, however, can be made except by the supreme court of error. Of its five justices, all are directly interested in the result of this action. Of the judges of the superior court who might be called in to sit here, all but two are similarly interested. If, therefore, the cause were to be heard before a full court, a majority of the judges would be interested in the result. If, on the other hand, a special court of three judges of the superior court were to be constituted under General Statutes, § 484, to constitute the supreme court of errors *pro hac vice*, it would be necessary, in order to fill it up, to designate at least one judge who was so interested, and thus to place upon him the burden now resting upon each of us. The question presented to us by this condition of things we regard as one of judicial duty. The statutes of the state have provided for the situation in which the parties find themselves. They authorize judges who are interested in the event of a cause to hear it, on the request and by the consent of both parties, expressed in this cause. We think that we have no right, under these circumstances, to decline to exercise the jurisdiction which the law has committed to us."

In *Burns v. Burns* (Ohio) *supra*, it was held that the disqualification of a judge, as provided by statute, may be waived by consent of the parties, and where counsel in open court makes a statement of such waiver, his client will be bound thereby.

In *Stone v. Marion County* (1889) 78 Iowa, 14, 42 N. W. 570, the plaintiff was related to the trial judge within the fourth degree of consanguinity, which, under the statute, disqualified him from sitting except by consent of the parties. It appeared that the defendant had entered into an agreement with the plaintiff that he would not take a change of venue and would try the case at the next term of court, which was to be held by the disqualified judge. It was held that this constituted a mutual consent or waiver, the court saying: "The attorney for defendant shows that although the agreement to enter an appearance for

defendant and try the case was made, as alleged, yet he did not expect the case to be tried before Judge Ayres until a ruling on a certain motion was made. That was two days before the case was called for trial. We are of the opinion that, under the facts stated, the trial before the judge named was had by mutual consent of parties. It was known to the parties that he was presiding at the term at which they agreed the case should be tried, and no objection was made to a trial before him. If the agreement was made by defendant under a misapprehension as to what judge would preside at the trial, it was its duty to make known the fact that the consent given was not intended to include a trial at which the judge named should preside. It is clear to us from the record that both the court and the plaintiff understood that the disability of the judge had been waived by mutual consent; that defendant had given ample cause for such an understanding, and was chargeable with knowledge of it. Evidently it would be not only unjust, but contrary to the spirit of the statute, to allow defendant to remain silent under such circumstances, until it ascertained that the trial had not resulted as it desired, and then to permit it to interpose the objection now argued."

In *Jewett v. Miller* (1861) 12 Iowa, 85, it appeared that twenty months after the signing of a decree in mortgage foreclosure proceedings, the defendant moved to set it aside for several causes, one of which was that the judge had been an attorney of record in the case. The record showed that the cause was submitted by the consent of the parties and it was held that the objection was without foundation.

And in *Hine v. Hussey* (Ala.) *supra*, construing a statute providing that a judge must not act if he is interested or related to the parties within the fourth degree of consanguinity or affinity unless by their consent entered of record, the court said: "We think that justice will be best subserved by ruling that the disabilities mentioned in § 635 render the proceedings of the court voidable only, and

not absolutely void. These disqualifications may be unknown, or so obscure as to require a judicial decision to determine their existence. It is a serious thing to annul the judgments of courts, and it ought not to be done where the consent of the parties alone is requisite to their validity, and its entry on the record is the only admissible evidence that it was given."

See also *Hall v. Wilson* (1848) 14 Ala. 295, where it was held that the proceedings before a judge of the orphans' court prior to the transmission of the cause to the chancery court, in compliance with a statute making such transfer the duty of the judge when he is interested as a party or as counsel, are not void where the parties appeared before him and made no objection to his sitting upon the case, since they must be regarded as consenting to his competency to act. The court said: "The scarcity of judicial decisions upon the question of incompetency from relationship is evidence of the delicacy which judges feel in sitting in any case where there can be the possibility of doubt as to the existence of any bias. *Becquet v. Lempriere* (1830) 1 Knapp, P. C. C. 376, 12 Eng. Reprint, 362. Such was the prudent jealousy of our ancestors, in ancient times, that by positive enactment (4 Edw. III. chap. 2; 8 Rich. II. chap. 2) judges could not then hold court in the county in which they were born, or which they inhabited. These statutes were, however, repealed when the liberal confidence of a more enlightened age obtained. 12 Geo. II. chap. 2; 49 Geo. III. chap. 91; see also 3 Chitty, Gen. Pr. 9. But it is manifest the spirit of our statutes merely require the mind of the court to be free from all imputation of bias from such consideration, and too great caution cannot be observed by the judges upon a question so delicate. 3 Chitty, Gen. Pr. 9, note L."

The relationship of the judge to one of the creditors in an insolvent estate cannot affect the filing and verification of his claims. The acts to be done by the judge are purely ministerial, involving no discretion whatever. But, "in addition to this," the court said,

"section 635 of the Revised Code should not be construed to render void the judgment of a court because the presiding judge was related to either party, or interested in the cause, or had been of counsel. It was not so by the common law, and this we regard as high authority. A system of law, the accretion of ages in practical application to human affairs, and so comprehensive as to furnish a remedy for the protection of every right, and the redress of every wrong, may well indicate the construction of a statute the terms of which do not forbid the interpretation. The statute referred to does not declare void the acts of the judge, but expressly authorizes them, with the consent of the parties entered of record. If the omission of this entry is to annul the judgment, then it may be set aside indefinitely afterwards, notwithstanding the actual consent of the parties, by strangers whom its operation may impede." *Hayes v. Collier* (1872) 47 Ala. 726.

A statute authorizing a waiver of the disqualification of a judge to sit in a case in which he is interested, by consent of the parties, does not apply where he is himself a party. Consent cannot confer jurisdiction. *Kansas City v. Knotts* (1883) 78 Mo. 356, wherein it was said: "I am unable to perceive how a judge who is a party to a cause can properly discharge the functions of a judge in trying his own case. The statute, in my opinion, does not contemplate or authorize such a proceeding, even though sanctioned by the request of the parties. It provides that 'no judge of any court of record, who is interested in any suit or related to either party, or who shall have been of counsel in any suit or proceeding pending before him, shall, without the express consent of the parties thereto, sit on the trial or determination thereof.' Rev. Stat. 1879, § 1041. Certainly this implies that the judge interested in the manner mentioned, may sit and determine the cause by the consent of the parties. But I know of no principle upon which this provision can be invoked in a case where the judge is not simply interested, but is an actual party to the cause.



I am satisfied that it was never intended to be applied to such a case. Neither am I able to perceive how the supposed consent of the parties could, in any manner, relieve the judge from the embarrassment and absurdity of trying his own cause. How can he, with 'a decent respect to the opinion of mankind,' call himself into his own court for trial, appear before himself in person or by attorney, render judgment in his own favor when he is satisfied that his attorney has made a good case, or turn himself out of his own court when his case is devoid of merit, or commit himself for contempt of court, when he has indulged in the unfortunate misconduct of a litigant.' Again, if he is a party to the case, then he must be a necessary party to the agreement or consent which is to enable him to try it. Clearly the legislature never intended he should have the privilege or be compelled to make such an exhibition of himself. He might, with equal approbation of the law, assume to take his own acknowledgment of a deed or perform the ceremony of his own marriage."

*Waterhouse v. Martin* (1824) *Peck* (Tenn.) 374, was decided under a provision of the state Constitution that "no judge shall sit on the trial of any cause where the parties shall be connected with him by affinity or consanguinity, except by consent of parties," etc. While the case turned on the degree of relationship, it was held that "consent of parties" meant the consent of both parties to the suit, and that the consent of one was not sufficient.

It has been held that a consent to hear a preliminary motion by a judge disqualified by statute to act in the case will not be extended to embrace further action by the court. *Bryan v. Welch* (1878) 62 Ga. 172. In that case certain exceptions to an auditor's or master's report were demurred to, and it was agreed that the presiding judge should hear and determine the demurrer, "but that he should not do more than pass upon the same," he having been of counsel in the case. The judge thereupon held the demurrer good and dismissed the exceptions and ordered the auditor's report to be

received and entered on the minutes of the court, and thereupon at the same term entered a final decree in the cause without further consent. It was held that the final decree so entered was not embraced in the agreement of counsel, and hence that the judge, having been of counsel, had not legal power to make it, and it must be annulled.

*b. Implied consent held insufficient.*

In some jurisdictions a statute dealing with the disqualification of judges and declaring that an incompetent judge may act if the parties consent has been interpreted as requiring an express consent. *Hine v. Hussey* (1871) 45 Ala. 496; *Hayes v. Collier* (1872) 47 Ala. 726; *Keeler v. Stead* (1888) 56 Conn. 501, 7 Am. St. Rep. 320, 16 Atl. 552; *State v. Hartley* (1902) 75 Conn. 104, 52 Atl. 615; *McGovern v. Mitchell* (1906) 78 Conn. 536, 63 Atl. 433; *State ex rel. Gallivan v. Bradley* (1906) 194 Mo. 166, 92 S. W. 464; *Walters v. Wiley* (1901) 1 Neb. (Unof.) 235, 95 N. W. 486; *Gregory v. Cleveland, C. & C. R. Co.* (1855) 4 Ohio St. 675; *Burns v. Burns* (1905) 27 Ohio C. C. 149.

Where there is no evidence that the objection has been waived, it will not be presumed, and a judgment will be set aside. *Gregory v. Cleveland, C. & C. R. Co.* (1855) 4 Ohio St. 675.

On an appeal from the decision of a justice of the peace, where it appeared that the disqualification of the justice was not known to the defendant, it has been held that he might on the appeal raise the point, since, under the statute, a waiver must be part of the record. *Walters v. Wiley* (1901) 1 Neb. (Unof.) 235, 95 N. W. 486. The statute involved in that case provided as follows: "A judge or justice of the peace is disqualified from acting as such except by mutual consent of parties in any cause wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and such mutual consent must be in writing and be made a part of the record." The court said: "This statute is declara-

tory of the principles of the common law, and everyone must subscribe to the equity of the rule which declares that no one shall be a judge in his own case or where he is interested or near relation of one of the parties. . . . It contains an absolute prohibition against a judge or justice acting in a case under the conditions described. Courts of all grades ought to regard with the most scrupulous care this provision of our statute, and on its own motion refuse to act where it is disqualified. If his disability is unknown, he ought to disclose it, and to act no further than to make such order as will place the case in charge of a court that has jurisdiction to entertain and try it. It cannot be urged that the plaintiff in error waived the statutory disqualification of the justice, because, first, his answer alleges that such disqualification was not known to him until after the judgment had been rendered and his appeal to the district court perfected; and, second, the only manner in which such waiver can be made is by writing made a part of the record. It is not only the fact of consent that is required to authorize the justice to hear the case, but the fact must appear in the manner specified. Jurisdiction in the case is made to depend upon the consent of the parties, evidenced by a writing to that effect filed in the case and made a part of the record. In no other way can jurisdiction be acquired."

But in *Ingraham v. State* (1908) 82 Neb. 553, 118 N. W. 320, where, in a prosecution for larceny, it was contended that the judge was disqualified by reason of the relationship with the prosecuting witness, the court disposed of the objection upon two grounds, saying: "It is true that § 4747, Anno. Stat. 1903, provides: 'A judge or justice is disqualified from acting as such except by mutual consent of parties in any case where in he is a party or interested or where he is related to either party by consanguinity or affinity within the fourth degree.' We are of opinion, however, that this provision has no application to the case at bar. Henry Heard was not one of the parties,

neither did he possess any pecuniary interest in the result of the examination. In a criminal prosecution the state of Nebraska is the plaintiff, and the complaining witness is considered, and is treated, in all respects the same as any other witness in the case. Again, it is not shown that the defendant was ignorant of this relationship at the time his preliminary examination was held, and it will be presumed that he had such knowledge and consented to the holding of such examination."

In *State v. Hartley* (1902) 75 Conn. 104, 52 Atl. 615, a prosecution for resisting an officer, the disqualification of the judge was not raised at the trial, and it was not shown that the parties knew of the disqualification. On appeal, however, the action of the trial judge was assigned as error, and it was held that by proceeding to trial the parties did not waive the disqualification of the judge under the Act of 1899 (Rev. Stat. 1902, § 500), providing that "no judge of any court who shall have presided over any jury trial, either in a civil or criminal case in which a new trial shall be granted, shall again preside at the trial of such case," and § 841 of the General Statutes (Rev. Stat. 1902, § 498), providing that "when any judge shall be disqualified to act in any proceeding before him, he may act by consent of the parties in writing," etc.

In *Keeler v. Stead* (1888) 56 Conn. 501, 7 Am. St. Rep. 320, 16 Atl. 552, it was contended that the defendant waived his right to object by proceeding to trial, presumptively with the knowledge of the justice. The court, however, said: "As the justice was disqualified to act in the case, his action could have no legal validity or effect. Although it is a case of want of power to act, and not strictly one of want of jurisdiction, yet the result in both cases must be the same; the judgment must be void. And as in the case of want of jurisdiction there can be no waiver of the defect, and jurisdiction cannot be conferred even by the agreement of the parties, so here a waiver can have no effect, and an agreement of the parties could have

none if it were not for a statute expressly providing for that mode of removing the disqualification. That statute provides that 'when any justice of the peace shall be disqualified to act in any proceeding before him, he may act by consent of the parties in writing given thereto in court.' Gen. Stat. § 676. This mode having been thus provided must be followed if the parties desire to remove the disqualification; while a mere waiver of all objection to the disqualification, by the conduct of one of the parties, or in any other mode, can have no effect whatever."

Compare *Platt v. New York & B. R. Co.* (1857) 26 Conn. 544, wherein it was held that the claim that the judge of probate was disqualified to ask in a petition for the appointment of a trustee of the defendant as to an insolvent estate, because he had been retained or consulted as attorney or counsel in matters pertaining to the settlement of the estate, was plainly unfounded. It was said that under the Act of 1855, on which appellant relied, it was optional with the judge to act, and as no objection was made below by any person interested in the estate, it was to be considered waived.

Likewise, in *Church v. Norwich* (1786) Kirby (Conn.) 140, decided before the enactment of a statute upon the subject, in an action against a town, objection was made in the appellate court that the judge was a taxpayer and so interested in the outcome of the case. It was said by the court: "If the defendants would object, on account of his kindred to one of them, they should have done it when the cause came on. Having waived it then, it is unreasonable they should take advantage of it after hearing his opinion to accept the verdict against them."

In *State ex rel. Gallivan v. Bradley* (1906) 194 Mo. 166, 92 S. W. 464, wherein it was held that the relator, a judge, having been of counsel in the prior proceedings of the case, was incompetent to sit for the purpose of settling the bill of exceptions, without the express consent of the parties as provided by statute, and could do nothing

except to order the election of a special judge.

In Tennessee it is provided by statute that a disqualified judge shall not sit unless the parties consent thereto in writing, the writing to be entered on the record if the court is one of record. Under that act it is held that a waiver otherwise than in the manner prescribed by the statute is ineffectual to remove the disqualification. *Reams v. Kearns* (1867) 5 Coldw. (Tenn.) 217; *Smith v. Pearce* (1873) 6 Baxt. (Tenn.) 72; *Pierce v. Bowers* (1875) 8 Baxt. (Tenn.) 353.

In the earlier case of *Wroe v. Greer* (1852) 2 Swan (Tenn.) 172, it was held that a disqualification by relationship was waived by going to trial without objection, but, as was said in *Smith v. Pearce*, supra, the statute then in force contained no provision as to the manner of waiver.

In *Crozier v. Goodwin* (1878) 1 Lea (Tenn.) 125, the court followed *Wroe v. Greer* (Tenn.) supra, without referring to the intermediate decisions. But in *Holmes v. Eason* (1882) 8 Lea (Tenn.) 754, the doctrine of *Reams v. Kearns* (Tenn.) supra, and the cases following it, was reaffirmed.

In *Hilton v. Miller* (1880) 5 Lea (Tenn.) 395, it was held that the confession of judgment in writing before a disqualified justice was the equivalent of the written consent required by the statute.

In several cases it was held that a judgment rendered by a judge whose disqualification was not waived in the manner required by the statute is a nullity and open to collateral attack. *Bolling v. Anderson* (1874) 4 Baxt. (Tenn.) 550; *Smith v. Pearce* (1873) 6 Baxt. (Tenn.) 72; *Pierce v. Bowers* (1875) 8 Baxt. (Tenn.) 353.

But in *Holmes v. Eason* (1882) 8 Lea (Tenn.) 754, those cases were overruled, the court saying: "At common law it was well settled that, although no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors, yet his action in such case was regarded as an error or irregularity not affecting his jurisdiction, and to be corrected by a vacation or

reversal of his judgment, except in the case of those inferior tribunals from which no appeal or writ of error lies. *Dimes v. Grand Junction Canal Co.* (1852) 16 Eng. L. & Eq. Rep. 68; *Washington Ins. Co. v. Price* (1823) 1 Hopk. Ch. (N. Y.) 1. And, generally, if the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced, otherwise he will be deemed to have waived the objection in cases where the statute does not make the proceedings void.

. . . If the objection be raised of record, and the court undertake to proceed notwithstanding, the judgment might be held void under these principles. . . . But if no objection be made, and the court is permitted to go to a trial of the case on the merits, the judgment is clearly not void on its face, and something more than the mere existence of the fact on which the incompetency rests should be required to authorize a resort to another tribunal. The terms of the statute are sufficiently met by holding the proceedings invalid if the objections be made, unless the incompetency be waived in the mode prescribed by the statute."

That case was followed in *Posey v. Eaton* (1882) 9 Lea (Tenn.) 500, wherein it was said: "If the parties submit to the action of the judge at the time, the incompetency is considered waived, and not available on a collateral attack."

*c. Implied consent held sufficient.*

In other jurisdictions, however, it has been held that a statute allowing a disqualified judge to sit by consent permits the implication of a waiver from the acts of a party. *Stephens v. Stephens* (1915) 17 Ariz. 306, 152 Pac. 164; *McMillan v. Nichols* (1878) 62 Ga. 36; *Bryan v. Welch* (1878) 62 Ga. 172; *Beall v. Sinquefield* (1884) 73 Ga. 48; *Rogers v. Felker* (1886) 77 Ga. 46; *Meeks v. Guckenheimer* (1897) 102 Ga. 710, 29 S. E. 486; *Shope v. State* (1898) 106 Ga. 226, 32 S. E. 140; *Brown v. Holland* (1900) 111 Ga. 817, 35 S. E. 643; *Tindall v. Nisbet* (1901) 113 Ga. 1114, 55 L.R.A. 225, 39 S. E. 450; *Buena Vista Loan & Sav. Bank v.*

*Grier* (1901) 114 Ga. 398, 40 S. E. 284; *Berry v. State* (1903) 117 Ga. 15, 43 S. E. 438; *Baldwin v. Ragan* (1909) 6 Ga. App. 529, 65 S. E. 335; *Shuford v. Shuford* (1914) 141 Ga. App. 407, 81 S. E. 115; *Kirby v. Johnson County Sav. Bank* (1914) 141 Ga. 499, 81 S. E. 214. Compare *Jewett v. Miller* (1861) 12 Iowa, 85; *Chase v. Weston* (1888) 75 Iowa, 159, 39 N. W. 246; *Stone v. Marion County* (1889) 78 Iowa, 14, 42 N. W. 570; *Dows v. De Long* (1910) 149 Iowa, 251, 128 N. W. 341.

Under the Iowa statute requiring consent of the parties to remove the disqualification of a judge, it has been held that the consent may be implied. *Dows v. De Long* (Iowa) supra, a criminal prosecution for violation of a town ordinance, wherein it appeared that a motion in arrest of judgment raised the question of the jurisdiction of the mayor, as justice of the peace, based on his relationship with the defendant. The court said: "Had proper and timely objection been made to the trial of the case before the mayor, there is no question but what the mayor would have been disqualified under the statute in question. But the record nowhere discloses, nor is it now claimed, that objection was made to the jurisdiction of the mayor, or to the jurisdiction of the district court, until the motion in arrest of judgment was filed. Such being the case, it must be assumed that the defendant consented to the jurisdiction of the mayor; and it is well settled that jurisdiction of the person may be conferred by consent. There is no question but what the mayor had jurisdiction of the subject-matter, and if he had jurisdiction of the person of the defendant by his consent, there is nothing in this appeal. . . . The defendant appeared in the mayor's court both personally and with counsel, and, although he must have been fully cognizant of the relationship existing between them, he went to trial without protest or objection; and, inasmuch as it is the almost universal rule that jurisdiction of the person may be conferred by consent, it would be little less than startling to hold in this case, with these facts before

us, that the mayor was without jurisdiction to hear and determine the charge made against the defendant."

The making of a motion to dissolve an attachment will be construed as the waiver of objections to the disqualification of a judge. *Ellsworth v. Moore* (1857) 5 Iowa, 486, wherein it appeared that the judge had formerly been of counsel for the plaintiff at the time of the commencement and trial of the cause. It was said: "It does not appear that any objection was made by the defendant to his acting in the premises. If no objection was made, it was certainly not irregular for him to adjudicate whatever questions were involved in the motion of the plaintiff."

Compare *Chase v. Weston* (1888) 75 Iowa, 159, 39 N. W. 246, a suit in equity to restrain the sale of real estate in satisfaction of a judgment alleged to be void. The petition was filed in 1885, and two years later, when the case was set down for trial, the plaintiff filed a motion for a change of venue on the ground that the judge was an uncle of the defendant. The motion was overruled and the plaintiff was ordered to proceed to trial. In reversing a judgment for the defendant, the court said: "The district judge was disqualified from sitting on the trial of the case in the first instance, and the disqualification could be removed only by the mutual consent of parties. Stress is laid upon the conduct of plaintiff in regard to the trial. It is said that he permitted a large number of terms of court to pass without bringing the case on for a hearing; that he had due notice that the defendant would insist on a trial at that term of court, and that, notwithstanding these facts, he failed to take any steps for a continuance or change of forum until the sixteenth day of the term, when the case was reached for trial in its order. Whether the delay in bringing the case on for trial was the fault of plaintiff, we are not advised; but if we concede that it was, and that he was guilty of gross negligence at the term at which it was tried, these facts would not amount to a waiver of his rights. Nothing but

the mutual consent of both parties, or that which would in law amount to such consent, would remove the disability imposed by statute, nor do we think it necessary for plaintiff to do more than to make the fact of the relationship a matter of record to preserve his rights, if the consent required by statute is not given. He made that fact known, and protested against and excepted to the ruling of the court directing him to proceed at once to trial. In our opinion it was the duty of the judge, having knowledge of the prohibited relationship, to refuse to act as judge on the trial of the cause until the required consent was given. It is the policy of the law to give to each suitor a fair hearing before an impartial and disinterested tribunal."

In *Stephens v. Stephens* (1915) 17 Ariz. 306, 152 Pac. 164, it was contended that the appellant, by his conduct in consenting to and asking for continuances, waived his right for a change of judge on the ground of bias, but the court held that a motion made five days before the trial was within the provisions of the statute.

Under the Georgia statute disqualifying any judge interested in the cause or related to the parties within the fourth degree of consanguinity, etc., where the defendant protested by affidavit that the judge was disqualified, but did not, as he might have done, take his protest to a higher tribunal when it was disregarded, it was held that he acquiesced in the competency of the judge and impliedly waived the disqualification. *McMillan v. Nichols* (1878) 62 Ga. 36.

So it has been held that a judgment is not void because the judge rendering it was related in equal degree to both the parties litigant, when it appears that no objection was made at the hearing, and it had been acquiesced in for more than five years. *Beall v. Siquiefield* (1884) 73 Ga. 48.

In *Shope v. State* (1898) 106 Ga. 226, 32 S. E. 140, it appeared that the presiding judge was a nephew of two stockholders, parties to the suit, and this fact was known to counsel for the accused before the trial began. After

it had proceeded for at least a day, and after most of the evidence had been introduced, counsel for the first time raised the question of the competency of the judge. It was held that the disqualification had been waived, the court saying: "Granting that the judge was disqualified, we are of the opinion that, in view of the circumstances above stated, this point was waived. It ought to have been made when the case was called for trial. Section 4045 of the Civil Code in effect declares that a judge disqualified by reason of relationship may nevertheless preside with the consent of all the parties at interest. This section further provides that where a judge has been employed as counsel in a case before going upon the bench, he cannot preside in that case unless 'the opposite party or counsel agree in writing that he may preside;' but consent that a judge disqualified by relationship may preside need not be in writing."

In *Rogers v. Felker* (1886) 77 Ga. 46, it was held that a judgment will not be set aside as void on the ground of the disqualification of the judge, where the objection is first raised in the appellate court, since the court below, as a court, had jurisdiction of the parties and the subject-matter, and the statute does not absolutely inhibit the judge from presiding in the case, but permits this with consent of the parties, which, under the circumstances, may be presumed.

If a judge who is disqualified by reason of relationship to try a case should preside and render a decree, his disqualification cannot be set up as a ground for a writ of habeas corpus. *Tindall v. Nisbet* (1901) 113 Ga. 1114, 55 L.R.A. 225, 39 S. E. 450, wherein a receiver was adjudged in contempt of court and committed because of misapplication of funds, and it was held that the disqualification of the judge must be considered as waived, since no objection was raised prior to the hearing on a writ of habeas corpus.

In *Baldwin v. Ragan* (1909) 6 Ga. App. 529, 65 S. E. 335, it was held that under the statute, disqualification is

a matter which can be waived by consent of the parties, and that consent will be implied where no objection is raised until a motion to set aside a judgment, both parties having submitted the question to the judge to be tried without a jury.

In *Berry v. State* (1903) 117 Ga. 15, 43 S. E. 438, in a prosecution for selling liquor without a license, it was said in the official syllabus: "The disqualification of a judge by reason of relationship to the prosecutor must, if known to the accused or his counsel, be suggested before verdict, and, if not then urged, will not be cause for a new trial. Even if . . . the judge was disqualified, it was too late to raise the question for the first time in the motion for a new trial."

And in *Brown v. Holland* (1900) 111 Ga. 817, 35 S. E. 643, the rule was laid down by the court as follows: "If, after a judgment for money has been rendered in the trial court and affirmed by the supreme court, an 'extraordinary' motion for a new trial, based on the ground that the judge by whom the judgment was rendered was disqualified because of relationship to the plaintiff's attorney, who had a contingent interest in the recovery, can in any case be held good, it certainly cannot when it appears that, before the rendition of the judgment, the defendant's attorney knew of the relationship and knew that the plaintiff's attorney had such an interest."

In *Meeks v. Guckenheimer* (1897) 102 Ga. 710, 29 S. E. 486, the facts relating to the alleged disqualification of the judge were known to counsel, but no question thereon was raised or suggested until after the verdict was rendered. It was said by the court: "Conceding, however, the disqualification to have existed, we rule that, no question having been made upon the legal capacity of the trial judge to preside, his incapacity could not be suggested upon a writ of certiorari sued out to review the judgment. If he had been in fact disqualified to preside on the trial, and such fact was unknown to the losing party, and he was thus prevented from invoking a ruling thereon by the trial judge, his

remedy was to move to set aside the judgment, and not to reverse it."

In *Shuford v. Shuford* (1914) 141 Ga. 407, 81 S. E. 115, in the official syllabus, the court said: "Disqualification of a presiding judge on account of relationship to a party or to one of the attorneys who has a contingent fee in the case may be waived, expressly or impliedly. A party will not be permitted, with knowledge of such disqualification, to try his case before a judge so disqualified, take the chance of winning his suit, and then for the first time raise the question of disqualification. If counsel know of such disqualification, he should make the point in limine. Civ. Code, § 4642."

In *Buena Vista Loan & Sav. Bank v. Grier* (1901) 114 Ga. 398, 40 S. E. 284, by consent of the parties an order was entered that the case should be heard and determined by the presiding judge in vacation without the intervention of a jury. When the case came on to be heard under the order, the bank raised the question that the judge was disqualified by relationship to some of the stockholders within the fourth degree of consanguinity. He overruled this objection, tried the case, and rendered judgment. In affirming that judgment, the court said: "It appeared that, in point of fact, he was related to some of the stockholders of the bank, as alleged, but it also appeared that, at the time the above-mentioned consent order was agreed upon, the officials of the bank in charge of its affairs, and its counsel, knew that he was related to these parties. They did not, however, know the precise degree of relationship. Nevertheless we agree with his Honor of the trial bench in holding that the objection to his trying the case came too late. The fact of relationship being known to the bank, it was certainly charged with the duty of ascertaining what the degree of the relationship was. If those who were conducting its affairs chose, without investigating this matter, to join with Grier in a consent that the judge should hear and dispose of the case in vacation, the bank was bound by their undertaking, and was at the hearing

properly denied the right to take advantage of their gross inattention in the premises. To hold otherwise would subject Grier to a hardship. He was ready to try the case at the term when it was called, and it was the duty of the judge, if disqualified, to procure the services of a judge who was not. Had the objections made to the judge in vacation been sustained, Grier would have lost a term entirely through the fault or negligence of the opposing party."

See also *Kirby v. Johnson County Sav. Bank* (1914) 141 Ga. 499, 81 S. E. 214, wherein it was said in the official syllabus: "Where, in a case in which an application was made for an interlocutory injunction, the judge of the circuit, including the county in which the case was brought, was disqualified to preside on account of relationship to one of the parties, and the judge of another circuit took jurisdiction for that reason, he could not be ousted of jurisdiction by an agreement between some of the parties to the case to waive the disqualification of the judge of the circuit. Nor would this result follow, although in his preliminary order the judge who assumed jurisdiction included a provision that should the disqualification of the judge of the circuit be waived by the plaintiffs and defendants so that it could be heard before the judge of the circuit in which it was pending, the latter 'may take charge of said case and grant such order as he may see proper, but on failure to waive this disqualification the case will be heard before me at the time and place above specified.' Under such facts there was no error in overruling an objection by the plaintiffs to the hearing of the application for injunction by the judge who had assumed jurisdiction because of the disqualification of the resident judge of the circuit, one of the defendants, who had not waived the disqualification, insisting upon such hearing."

#### *IV. Under statute forbidding disqualified judge to sit.*

##### *a. Rule stated.*

Where a statute providing what shall disqualify a judge provides also

that a judge shall not sit in a case wherein he is thus disqualified, the disqualification is generally held to go to the jurisdiction, and it cannot be waived by the parties.

**California.**—*People ex rel. Carrillo v. De la Guerra* (1864) 24 Cal. 73.

**Florida.**—*Ochus v. Sheldon* (1868) 12 Fla. 138.

**Massachusetts.**—*Sigourney v. Silbey* (1838) 21 Pick. 105, 32 Am. Dec. 248; *Gay v. Minot* (1849) 3 Cush. 352; *Richardson v. Welcome* (1850) 6 Cush. 331.

**Michigan.** — *Peninsular R. Co. v. Howard* (1870) 20 Mich. 18; *Stockwell v. White Lake* (1871) 22 Mich. 341; *Horton v. Howard* (1890) 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112.

**New York.**—*Post v. Black* (1847) 5 Denio, 66; *Tiffany v. Gilbert* (1848) 4 Barb. 320; *Oakley v. Aspinwall* (1850) 3 N. Y. 547; *Converse v. McArthur* (1854) 17 Barb. 410; *Schoonmaker v. Clearwater* (1863) 41 Barb. 200, affirmed in (1864) 1 Keyes, 310, 1 Abb. App. Dec. 341; *People v. Connor* (1894) 142 N. Y. 130, 36 N. E. 807; *Murdock v. International Tile & T. Co.* (1895) 14 Misc. 225, 35 N. Y. Supp. 668; *Kane v. Hutkoff* (1902) 38 Misc. 678, 78 N. Y. Supp. 262, reversed on other grounds in (1903) 81 App. Div. 105, 81 N. Y. Supp. 85; *People v. Whitridge* (1911) 144 App. Div. 493, 129 N. Y. Supp. 300; *Seaward v. Tasker* (1913) 143 N. Y. Supp. 257.

**Texas.**—*Chambers v. Hodges* (1859) 23 Tex. 104; *Fellrath v. Gilder* (1881) 1 Tex. App. Civ. Cas. (White & W.) 599; *Newcome v. Light* (1882) 58 Tex. 141, 44 Am. Rep. 604; *Abrams v. State* (1893) 31 Tex. Crim. Rep. 449, 20 S. W. 987; *Casey v. Kinsey* (1893) 5 Tex. Civ. App. 3, 23 S. W. 818; *Dallas v. Peacock* (1895) 89 Tex. 58, 33 S. W. 220; *Jouett v. Gunn* (1896) 13 Tex. Civ. App. 84, 35 S. W. 194; *Gresham v. State* (1902) 43 Tex. Crim. Rep. 466, 66 S. W. 845, 15 Am. Crim. Rep. 483; *Gulf, C. & S. F. R. Co. v. Looney* (1906) 42 Tex. Civ. App. 234, 95 S. W. 691; *Lee v. British-American Mortg. Co.* (1908) 51 Tex. Civ. App. 272, 115 S. W. 320; *Summerlin v. State* (1913) 69 Tex. Crim. Rep. 275, 153 S. W. 890;

*Seabrook v. First Nat. Bank* (1914) — Tex. Civ. App. —, 171 S. W. 247.

**Wisconsin.** — *Hibbard v. Odell* (1863) 16 Wis. 635; *Case v. Hoffman* (1898) 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *McIntosh v. Bowers* (1910) 143 Wis. 74, 126 N. W. 548.

"The objection reaches further than the mere rights of parties to the suit. It involves the administration of justice before unprejudiced and impartial tribunals, whose judicial acts the public are interested in placing above the plane of criticism or reproach. If a decree of an inferior court may be sustained because an appeal will lie, what shall be done when a decree of a court of last resort is passed and entered by judges interested or related to the parties? It cannot be corrected by appeal. The statute applies to all judges, and to all courts, and renders their acts *coram non judice*. In *Peninsular R. Co. v. Howard* (1870) 20 Mich. 18, it was said: 'It is not a matter of discretion with the judge or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all when he is thus interested or when he may possibly be subjected to the temptation. His powers are absolutely subject to this limitation.' And in *Stockwell v. White Lake* (1871) 22 Mich. 341, it was said: 'The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.'" *Horton v. Howard* (1890) 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112.

#### *b. Application of rule.*

##### *1. Express waiver.*

*Oakley v. Aspinwall* (1850) 3 N. Y. 547, is a leading case wherein it was held that where a statute provides that a disqualified judge shall not sit, consent cannot be given. In an argument before the court of appeals it appeared that one of the justices was related within the prohibited degree to



the respondent. This fact was known to both parties, one of whom consented that he should sit, and the other, the respondent, particularly urged it. Under the circumstances the judge retained his seat, but his opinion and vote were adverse to the party whose counsel was mainly instrumental in inducing him to serve. In sustaining a motion for a reargument the court said: "The provisions of our Revised Statutes on this subject profess to be merely declaratory of universal principles of law, which makes no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares that 'no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties.' 2 Rev. Stat. 275, § 2; Revisers' Notes, 3 Rev. Stat. 694. After so plain a prohibition, can anything more be necessary to prevent a judge from retaining his seat in the cases specified? He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit, and then the revisers of our law declared that they intended to embody this universal sentiment in the form of a statutory prohibition, and so they placed this explicit provision before the legislature, who adopted it without alteration and enacted it as the law. The exclusion wrought by it is as complete as is in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will occupy the latter, it must be only as an idle spectator, and not as a judge. He cannot sit as such. The spirit and language of the law are against it. Having disqualified him from sitting as a judge, the statute further declares that he can neither decide nor take part in the decision of the cause, as to which he is divested of the judicial function. Nor ought he to wait to be put in mind of his disability, but should himself suggest it and withdraw, as the judge, with great propriety, attempted to do in the present

case. He cannot sit, says the statute. It is a legal impossibility, and so the courts have held it. *Edwards v. Russell* (1839) 21 Wend. (N. Y.) 63; *Foot v. Morgan* (1841) 1 Hill (N. Y.) 654. The law applies as well to the members of this court as to any other; or if there be any difference it is rather in favor of its more stringent application to the judges of a court of last resort, as well because of its greater dignity and importance as a tribunal of justice, as that there is no mode of redress appointed for the injuries which its biased decisions may occasion. The law and the reasons which uphold it apply to the judges of every court in the state, from the lowest to the highest. It was, however, urged at the bar that although the judge were wanting in authority to sit and take part in the decision of this cause, yet that, having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and in an answer to this motion. But where no jurisdiction exists by law, it cannot be conferred by consent,—especially against the prohibitions of a law which was not designed merely for the protection of the party to a suit, but for the general interests of justice. *Low v. Rice* (1811) 8 Johns. (N. Y.) 409; *Clayton v. Per Dun* (1816) 18 Johns. (N. Y.) 218; *Edwards v. Russell* (N. Y.) *supra*; *Sigourney v. Sibley* (1838) 21 Pick. (Mass.) 101, 32 Am. Dec. 248. It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estima-

tion of mankind. The party who desired it might be permitted to take the hazard of a biased decision if he alone were to suffer for his folly, but the state cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act, when he should have forbore, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attitude which the counsel for the moving party in this case assumed toward the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience, are enough to show that, whatever a party may consent to do, the state cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the law under consideration."

In *Converse v. McArthur* (1854) 17 Barb. (N. Y.) 410, an action to recover the amount required by an order to be paid by the defendant for the support of his mother, it appeared that the order had been made by consent of counsel for the defendant, who afterward objected on account of the disqualification of one of the judges. The court below decided that the defendant was precluded from making any opposition to the order, but the appellate court, reversing the decision and granting a new trial, said: "It is insisted that the defendant is estopped, because the order was entered by consent of his attorney. There are some cases, or rather dicta, perhaps, to that effect. *Hunter v. Bennisson*, (1655) Hardr. 44, 145 Eng. Reprint, 372; *Bronson, Ch. J., Oakley v. Aspinwall* (1850) 3 N. Y. 562; 3 Bl. Com. 298; *Reg. v. Cheltenham* (1841) 1 Q. B. 475, 113 Eng. Reprint, 1214, 1 Gale & D. 167, 10 L. J. Mag. Cas. N. S. 99. And such seems to be the rule as to challenges to jurors. But in this case, as to the entry of the orders, the proceedings were in invitum; and besides, the act of a party as judge in

his own cause, as we have seen, is simply void, under all circumstances. And perhaps this is the safe and better rule, where the judge is incompetent from interest or relationship. The statute is peremptory that he shall not sit. It seems to me there should be no exception, unless, perhaps, where, by the provisions of the Constitution, the legislature has no power to prevent a failure of justice by transferring the cause to another jurisdiction."

In *People v. Whitridge* (1911) 144 App. Div. 493, 129 N. Y. Supp. 300, the New York statute was again construed as peremptory. It was argued that counsel, by consenting that the justice should hear the cause, and by assuring him that there was no legal impediment to his doing so, had estopped himself and his clients from afterwards raising the question that the justice was in fact disqualified. But it was said: "Such an interest goes to the very jurisdiction of the judge to sit as such, and while parties in civil actions may by stipulation waive any right which is personal to themselves, they cannot, by consent, confer jurisdiction to act as judge upon one whom the statute says shall have no such jurisdiction."

And in *Kane v. Hutkoff* (1902) 38 Misc. 678, 78 N. Y. Supp. 262, reversed on other grounds in (1903) 81 App. Div. 105, 81 N. Y. Supp. 85, it was held that a justice of the supreme court, temporarily acting as justice of the appellate division, was deprived of jurisdiction to determine a case in the former court, and that, on grounds of public policy, the disqualification could not be waived.

The waiver of objection to the disqualification of a judge of the surrogate court appears to be an exception to the rule as laid down in the New York courts. In addition to his general disqualification as a judicial officer a surrogate is disqualified from acting, first, where he is, or claims to be, an heir or some of the kin to the decedent, or a devisee or legatee of any part of the estate; second, where he is subscribing witness, or is necessarily examined, or to be examined, as

a witness to a written or nuncupative will; third, where he is named as executor, trustee, or guardian, in any will or deed of appointment involved in the matter, and it has been held that an objection to the power of the surrogate to act, based upon a disqualification established by special provision of law other than those enumerated, is waived by an adult party to a special proceeding before him, unless it is taken at or before the joinder of issue by that party, or where an issue in writing is not formed at or before the submission of the matter or question to the surrogate. In *Re Hopkins* (1888) 6 Dem. 13, 19 N. Y. S. R. 528, 3 N. Y. Supp. 661, holding that it was incumbent on the petitioner, if he wished to avail himself of the incompetency of the surrogate by reason of his wife's interest in the will, to have interposed appropriate objections before the matter was submitted on the depositions of witnesses, and not having done this, but having filed a consent in writing that the subscribing witnesses should be examined, he had waived his right to object to the disqualification. See also *Re Hancock* (1883) 91 N. Y. 284. In that case the surrogate was petitioned for special letters of administration authorizing the preservation and collection of the goods of the deceased, and a stipulation of counsel filed under which the surrogate took possession of the property pending certain litigation over the will, which was finally admitted to probate. While the securities were in the possession of the surrogate, many of them were reduced to money, which he appropriated to his individual use. On discovery of these facts, application was made for a new trial on the ground of the disqualification of the surrogate by reason of interest. The supreme court ((1882) 27 Hun (N. Y.) 78) affirmed the granting of the motion, citing the statute and, following the decided cases, held that the proceedings because of interest were void. This decision, however, was reversed in the court of appeals on two grounds, first, that the interest of the surrogate was too remote to disqualify him, and, second, that he was placed

in this position by the wish and consent of the party complaining, who had acquiesced in the probate of the will, and could not object to the disqualification.

In *Summerlin v. State* (1913) 69 Tex. Crim. Rep. 275, 153 S. W. 890, construing a constitutional provision and the statute, it was said: "It has always been held that where a judge is disqualified, he cannot be permitted to sit in the case, even with the consent of the parties; that such consent could not remove the disqualification or incapacity and authorize the judge to sit against the prohibition of the law. These provisions of the law are designed, not merely for the protection of the parties to the suit, but for the general interest of society."

And in *Gresham v. State* (1902) 43 Tex. Crim. Rep. 466, 66 S. W. 845, 15 Am. Crim. Rep. 483, during a trial for criminal libel, the judge discovered that he and the defendant were related within the prohibited degree, and offered to recuse himself, but was induced to try the case by consent of the defendant. On appeal the conviction was reversed on the ground that consent of the parties cannot waive the statutory disqualification of a judge.

Similarly, in *Abrams v. State* (1893) 31 Tex. Crim. Rep. 449, 20 S. W. 987, it was held that the fact that counsel for defendant first proposed to try the case before the judge, and a further agreement not to raise the question of his competency, did not legally capacitate him to sit in the cause. "The consent of the parties could not remove his incapacity or restore his competency against the prohibitions of the law, which were designed not merely for the protection of the party to the suit, but for the general interest of justice."

In *Dallas v. Peacock* (1895) 89 Tex. 58, 33 S. W. 220, in answer to certain certified questions, it was held that if a judge is disqualified, the parties cannot waive the disqualification.

And in *Fellrath v. Gilder* (1881) 1 Tex. Civ. Cas. (White & W.) 599, it was said: "Even the consent of the parties could not confer upon him the

authority to do more than transfer the case."

In *Chambers v. Hodges* (1859) 23 Tex. 104, the statute in force at the time of the rendition of the judgment recognized interest as a disqualification, and it was held that the parties could not remove this disqualification in a judge by their waiver of exceptions, and thus make him competent to sit in the case and render a judgment by a confession. It was said: "We conclude that the presiding judge, being interested, was absolutely incapacitated to take cognizance of or sit in the case. The consent of parties could not remove his incapacity, or restore his competency against the prohibition of the law, which was designed not merely for the protection of the party to the suit, but for the general interests of justice. And, consequently, the judgment rendered by him was a nullity, and left the case remaining undisposed of, as completely as if the judge had not been present at the court."

Where a judge is disqualified by statute, it is not necessary that this fact should be made to appear by the affidavit of the opposite party, nor that it should appear before joining issue. If the judge knows of the disqualification, he should remove the case on his own knowledge, and if he does not, his judgment must be reversed. *Hibbard v. Odell* (1863) 16 Wis. 635.

In *McIntosh v. Bowers* (1910) 143 Wis. 74, 126 N. W. 548, it was said: "Our statute wisely provides that a judge of a court of record who is interested in any action or proceeding 'shall not have power' to hear and determine the action or proceeding, or make any order therein, except by consent of the parties. Stat. 1898, § 2579. There was no consent here, and could be none as to the interests of the minors. This statute deprives the judge of power, and orders made in violation of it are not only irregular, but absolutely void, and hence subject to collateral attack."

The same rule has been applied when the disqualified judge has acted simply as one of a bench composed of

several judges, though the vote of the disqualified judge was not necessary to the decision; and with greater force the reason of the rule applies when such judge gave the casting vote and decided the cause. *Case v. Hoffman* (1898) 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 890, 74 N. W. 220, 75 N. W. 945, wherein a motion was made to vacate a judgment rendered in the appellate court on the ground that one of the justices was disqualified by statute, and it was ordered that the cause be reargued.

Compare *Rector v. Drury* (1851) 4 Chand. (Wis.) 24, 3 Pinney, 298, wherein it was held that objection to the competency of a justice because of kinship with the parties may be waived by joining issue in the suit, and with stronger reason by confessing the cause of action and suffering default, and that after final judgment has been rendered, it is too late to raise the objection.

#### *2. Implied waiver.*

Necessarily, there can be no implied consent to the disqualification of a judge under those statutes which have been interpreted as depriving the court of jurisdiction, and where express consent of the parties will not be allowed.

In *Sigourney v. Sibley* (1838) 21 Pick. (Mass.) 105, 32 Am. Dec. 248, in the administration of a decedent's estate, a petition for partition was made and the decree appealed from. It appeared that evidence was offered to show the interest of the judge, to the admissibility of which the appellees objected because no motion had been made in the court below to transfer the cause to another county, notwithstanding the appellants were apprised of the supposed interest of the judge, but it was held that under the statute this did not waive the objections, the court saying: "The court are also of the opinion that the jurisdiction is not aided by the consideration that no exception was taken on this ground, and no application was made by the appellants below to remove the case to another county. It is a general rule that want of jurisdiction, especially

of a court of limited and special jurisdiction, cannot be aided by any waiver of exceptions, or even by express consent. If this is true in ordinary cases, it is so a fortiori, in a case of a private decree, granting administration, which binds not only all those who happen to be before the court as litigant parties, but all those who, as creditors, heirs, or otherwise, may be interested, directly or remotely, in the settlement of the estate."

In *Gay v. Minot* (1849) 3 Cush. (Mass.) 352, an appeal from a decree of the judge of probate allowing and proving the will of decedent, the issue was raised as to the disqualification of the judge. It appeared that at the time of the decease of the testator, the judge was indebted to him on a promissory note secured by mortgage. Notwithstanding this, the will was offered before him and proved; afterwards the executors sold the note and mortgage for their full value and the will was again offered and admitted to probate. It was held that the interest of the judge rendered the proceedings void, and the question might be raised on appeal. The court said: "The court are of opinion that this relation creates an interest of a like kind with that of being a creditor, and, under the statute, divested the judge of his jurisdiction. Nor was his jurisdiction restored by an assignment and transfer of the note and mortgage after the first and before the second probate of the will. The case being *coram non judice*, the first probate was not voidable merely, but void, incapable of being made good by confirmation, waiver, or ratification on the part of those interested."

In *Richardson v. Welcome* (1850) 6 Cush. (Mass.) 331, an action of assumpsit was originally commenced and tried before a justice of the peace, and on appeal tried in the court of common pleas. In the latter court, after the case had been called for trial, and the plaintiff had commenced reading his writ, the defendant stated that he had a motion to submit to dismiss the action on the ground of interest of the justice of the peace. The trial judge directed the trial to proceed, and

held that since the defendant knew the facts four days before, he had waived objection to the disqualification of the justice of the peace. The appellate court dismissed the action, saying: "The defendant's knowledge of the fact alleged in his motion, four days before the trial in the common pleas, and his omission to make the motion until the case was called on for trial and the writ read to the jury, seem to us wholly insufficient to constitute a waiver of his objection to the gross misconduct of the magistrate. Matters of form, which do not affect the merits of the controversy, nor the regular and fair administration of justice, are held to be waived, if not excepted to at an early stage of the cause. And a party who consents to submit his cause to the decision of a referee whom he knows to be interested or partial cannot object to the referee's decision on the ground of his interest or partiality. But the present defendant did not choose his own judge. Nor is the matter of his motion matter of form only. It affects the administration of justice; and the motion is in the nature of an exception to the magistrate's jurisdiction. Such exception may be taken in any stage of a cause."

But see *Crosby v. Blanchard* (1863) 7 Allen (Mass.) 385, wherein it was said: "If there was any valid objection to the impartiality of the judge, by reason of the conversation between him and the counsel for the plaintiff, which would have rendered it irregular or improper for him to proceed with the trial such objection was waived by the course pursued at the trial by the counsel for the defendants. He knew all the facts on which the motion for a new trial is founded before the case was argued, and elected, notwithstanding such knowledge, to go on and finish the trial. Having thus taken his chance for obtaining a verdict, he cannot, now that he finds it is against his clients, avail himself of the facts previously within his knowledge to get rid of it. The same rule is applicable to the clients. They are bound by the knowledge and acts of their counsel, and they cannot, with-

out a breach of good faith and a disregard of that frankness which ought to characterize all judicial proceedings, take their chance for a favorable verdict, reserving a right to impeach it or set it aside, if it happens to be against them, for a cause which was previously well known to their counsel."

In *Seaward v. Tasker* (1913) 143 N. Y. Supp. 257, the court said: "If a biased judge sits as a member of an appellate court, such court, on that fact being brought to its attention, must set aside its determination and allow a reargument. . . . The presence of such a biased member affects the substantial right of the litigant."

In *Murdock v. International Tile & T. Co.* (1895) 14 Misc. 225, 35 N. Y. Supp. 668, an action in equity to foreclose a mechanics' lien, the referee did not report the form of the judgment and it was settled by the court. It was said: "The Constitution provides that no judge shall sit in review of his own decision, and, technically, I am disqualified from taking any part in this appeal, for the reason that the form of judgment was settled by me, and I granted an allowance. On the argument I suggested that there was a doubt in my mind on this question, and the attorneys agreed to waive the point. The disqualification of a judge cannot be waived, and if the judgment is rendered by this general term, the same could be set aside on motion, for the reasons stated."

In *People v. Connor* (1894) 142 N. Y. 130, 36 N. E. 807, the statute was applied to a criminal case. It appeared that a trial was had before a court composed of the county judge and two justices of the peace, one of whom was related to the defendant within the sixth degree, and so incapable of acting as a member of the court. The trial proceeded without mention of this relationship and resulted in a verdict of guilty. In support of a motion in arrest of judgment, the disqualification of the justice was made known and the verdict was set aside, the court holding that the right of objection had not been waived.

In *Schoonmaker v. Clearwater*

(1868) 41 Barb. (N. Y.) 200, the defendants in an action of trover justified the sale of the property claimed by the plaintiff, under an execution issued on a judgment rendered in their favor by a justice of the peace who was related to one or both of the defendants. The judge upon the trial held that the judgment was absolutely void. In affirming this ruling, the appellate court, after reviewing the authorities, said: "The weight of the authorities which I have cited preponderates strongly in favor of the doctrine that a judgment rendered by an officer related to either of the parties is absolutely void, although that question was not distinctly presented in most of them. More especially is such the case in courts of special and limited jurisdiction, whose powers are derived from the statute alone. The statute is very explicit that he cannot sit as a judge in any such case. Its language is very plain that 'no judge of any court can sit as such in any cause,' etc., 'in which he would be excluded as a juror by reason of consanguinity or affinity to either of the parties.' Does it mean that he may sit if not objected to; that his sitting may be waived by the parties; that none but the parties can object, and that unless objected to in the proceeding he can sit? If it did, then it would be a construction qualifying this very emphatic language, so as to confine it to his sitting in some cases and being excluded in others. The statute never was intended for any such purpose. Its design, spirit, and object was to prevent corruption and favor in our courts of justice, and to free them entirely from even a suspicion of bias or partiality. It was, I think, intended to make the test of relationship an essential element of jurisdiction which could not be waived or avoided. Its language is broad, clear, and emphatic, and when in violation of it a judge assumes to do what he is most emphatically prohibited from doing, all his acts are *coram non iudice*, and of no more effect than if a stranger had thus taken upon himself powers of such a character without a semblance of right or authority. He is entirely

without jurisdiction of the person of the party, because the law says he cannot sit, and being without authority, his exercising jurisdiction is not an error of judgment alone, to be corrected on review before a higher tribunal. It does not present the case of an inferior court, which has acquired jurisdiction and errs in exercising it, but one where there is an entire failure of original jurisdiction, which renders the whole proceeding void and of no effect."

In the appeal of the same case from the supreme court, under the title, *Chambers v. Clearwater* (1864) 1 Keyes (N. Y.) 310, 1 Abb. App. Dec. 341, it was said: "The reason upon which judgments palpably illegal and erroneous will yet furnish a justification to parties executing process under them, and will be held valid in all collateral proceedings, is that the party affected by them has waived his rights. The waiver, in most cases of this kind, is tacit, and consists in an omission to appeal to bring a writ of error. The defendant is, therefore, held to have consented that the judgment may stand. But if, when he expressly consents, by his counsel, in the most formal and authentic manner, and yet it is not held valid, the matter must be one in which no consent will avail. It must, in short, be void; and this court must be held to determine, in the case referred to, that a judgment attempted to be rendered by a judge who is disqualified by reason of consanguinity with one of the parties is void in the most extreme sense known to the law, and, therefore, entirely incapable of being made good by any omission, waiver, or express consent."

In *Tiffany v. Gilbert* (1848) 4 Barb. (N. Y.) 320, a judgment was rendered by a justice of the peace not residing in the same town with either of the parties, nor in an adjoining town, in violation of a statute. It was held that the judgment was erroneous, the omission of the defendant in failing to plead to the jurisdiction not being a waiver of the disqualification.

In *Post v. Black* (1847) 5 Denio (N. Y.) 66, the question arose on a

justice's return to a certiorari, stating that he was related to one of the parties, but that nothing was said on the subject on the trial. After reciting the statute, the court reversed the judgment, holding that there could be no waiver.

But in a case from the same jurisdiction, *Baldwin v. Calkins* (1833) 10 Wend. (N. Y.) 167, decided before the adoption of the Code, wherein objection was taken by the plaintiffs in error on the argument of an appeal from the assessment of damages due to the erection of a dam, that the judges who made the assessment were interested, it appeared that notice of the time and place of meeting for the purpose of assessing damages was given to the plaintiffs, and that they attended; that they asked an adjournment, which was granted, and that they afterwards attended and made no objection on the ground of the supposed interest of the judges. It was, therefore, held that if there had existed any such objection, it was waived, the court saying: "Consent cannot give jurisdiction, but cures irregularity. . . . The parties appeared and made no objection; this was an admission of the competency of the judges."

In *Seabrook v. First Nat. Bank* (1914) — Tex. Civ. App. —, 171 S. W. 247, the appellants assailed the judgment on the ground of the disqualification of the judge, and it was held that the objection could not be waived, the court saying: "The court may have ruled correctly, but disqualification of the judge is not tested by the correctness of his rulings. It has been held that a disqualified judge cannot even enter a decree or order agreed to by all parties. *Jouett v. Gunn* (1896) 13 Tex. Civ. App. 84, 35 S. W. 194. The question of disqualification could be raised on motion for new trial."

In *Lee v. British-American Mortg. Co.* (1908) 51 Tex. Civ. App. 272, 115 S. W. 320, a suit in the nature of a bill of review to set aside a judgment, the court said: "The averments with reference to the disqualification of the trial judge, on account of interest and on account of having formerly been

counsel in the case, if true, renders void the judgments entered by him. . . . Although it does not appear from the record that any objection was urged to his disqualification at the time these judgments were entered, it is held to be a question that affects the jurisdiction and power of the court to act, and one which cannot be waived."

In *Gulf, C. & S. F. R. Co. v. Looney* (1906) 42 Tex. Civ. App. 234, 95 S. W. 691, the question of disqualification of the judge because of relationship was not raised until after the case had been decided. Appellant had moved for a new trial, but the court held that this was immaterial, "because if the judge was disqualified, it was not too late to raise the question in that manner."

Where a judge, disqualified by reason of having been of counsel, entered a consent decree of partition, appointing commissioners whose report would be final, it was held that his act in making it a judgment would be the adjudication, and the rendering of a consent decree should not be regarded differently from any other disposition of the case. *Jouett v. Gunn* (Tex.) supra.

In *Casey v. Kinsey* (1898) 5 Tex. Civ. App. 3, 23 S. W. 818, in an action of trespass to try title, it appeared that the judge trying the case was in possession of and claimed title to the land in controversy under a title adverse to the appellants, and that this fact was unknown until after the trial had begun and was nearly disposed of. It was held that the judge was disqualified and the objection was timely.

In *Newcome v. Light* (1882) 58 Tex. 141, 44 Am. Rep. 604, a suit for an accounting of community property, it appeared that the wife had brought an action for divorce, which was dismissed. The husband subsequently brought suit for divorce, and the judge who was granted the decree had appeared as counsel in the first suit. It was held that the disqualification which existed because of interest could not be waived by implication, and that the decree of divorce was void.

In *Horton v. Howard* (1890) 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112, it appeared that the judge was related by blood and marriage to the complainants, and it was held that the decree made by him was void and could be attacked collaterally. In construing the statute, which provides that "no judge of any court can sit as such in any cause in which he is a party, or in which he is interested . . . by reason of consanguinity or affinity to either of the parties," the court said: "This statute, mandatory in its terms, voices the universal sentiment of mankind excluding judges from sitting in cases where they are parties or are interested. It extends and applies the prohibition of the common law, relative to jurors sitting in cases of kinship or affinity by marriage, to judges, and disqualifies them within the prohibited degrees, which at the common law have been held to extend to the ninth. . . . Nothing can be claimed by way of estoppel where the party against whom the judgment has been rendered or decree pronounced has neither appeared nor consented to the exercise of judicial functions by the disqualified judge."

And see *Ochus v. Sheldon* (1867) 12 Fla. 138, wherein it appeared that the judge who presided at the rendition of the judgment was interested in the result of the suit. It was held that as no waiver had been made below, the judgment should be reversed, but the court refused to pass on the question of the admissibility of such waiver under the statute, saying: "It is a canon as old as the common law itself that no man shall be permitted to give judgment in his own cause. Vide 3 Bl. Com. p. 298, note a. It seems, however, that in proceedings under the common law this objection might be waived by the defendant so as to preclude him from taking advantage of it (id. note 11), and such seems to have been the rule in our courts, until the enactment of the statute in 1862, which provides 'that no judge of any court, or justice of the peace, shall sit or preside in any cause to which he is a party, or which he is interested in, or which he would be excluded from



being a juror by reason of interest, consanguinity, or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a competent tribunal.' The second section of the act provides 'that the judge or justice so incompetent, shall retire of his own motion and without waiting for an application to that effect; that any and all judgments, decrees and orders, made by a judge or judges so incompetent, shall be of no force or validity, and are hereby declared to be null and

void, except an order for the trial of the cause, as hereinbefore provided.' Pamph. Laws 1862, p. 13. There is no evidence in the record before us that the defendant had waived his right to object to the presiding judge as an interested party, even if such waiver be admissible under the construction to be given to the 2d section of the act. And in the absence of such evidence, we think that the objection under this assignment is well taken, and is fatal to the judgment rendered in the court below." W. M. C.

ALBERT W. CROCKER et al.

v.

ANNIE L. CROCKER et al.

*Massachusetts Supreme Judicial Court—June 25, 1918.*

(230 Mass. 478, 120 N. E. 110.)

### **Will — compensation to disappointed legatees.**

1. Where the will provides for the disposition of the entire residue caused by the election of the widow against the will, the principle of equitable compensation to legatees disappointed by her election cannot be applied.

[See note on this question beginning on page 1628.]

### **— construction — intent.**

2. The cardinal rule for interpretation of wills is to ascertain from the testamentary words, construed according to their natural meaning, the intent of the testator.

### **Evidence — presumption — construction of will.**

3. It will be presumed in the construction of a will that testator had in mind the possibility that his wife might waive the provisions of the will in her favor.

### **Will — election against — loss in residuary legatees.**

4. The loss caused by the election of the widow against the will, which reduces the fund available for satisfaction of legacies, must fall upon the residuary legatees.

### **— acceleration of remainder.**

5. In case of bequest of the balance of the estate to residuary legatees they will take the fund made available by the

election of the widow to take against the will, in preference to acceleration of the remainder.

[See 23 R. C. L. 557.]

### **— elimination of provisions.**

6. A will, the provisions of which in favor of the widow have been waived by her, will be interpreted as if it contained no such provisions.

### **— residue — death of recipient — intestacy.**

7. In case of death, before final distribution, of one to whom a share of residue created by election of the widow against the will had been given, it will become intestate and cannot again fall into the residue.

### **— general rule of compensation.**

8. Loss to legatees by the election of the widow to take against the will ought to be apportioned as nearly equally as may be upon other legatees, unless a different purpose is established by the will.

APPEAL by respondents from a final decree of the Supreme Judicial Court for Middlesex County (Crosby, J.) to the full court, for the determination of a petition for instructions as to the distribution of the income under a trust created by the will of William B. Spalding, deceased. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Frank E. Dunbar, Hartley F. Atwood, and H. La Rue Brown for appellants.

Mr. Clarence L. Newton, for appellee White:

An examination of what the testator in fact intended will assist in ascertaining the true legal intention of the testator as expressed in his will under the given conditions.

Tucker v. Seaman's Aid Soc. 7 Met. 188; Noyes v. Pritchard, 148 Mass. 140, 19 N. E. 162; Reimer's Estate, 159 Pa. 212, 28 Atl. 186; Lynch v. Spicer, 53 W. Va. 426, 44 S. E. 255; Cook v. Lanning, 40 N. J. Eq. 369, 3 Atl. 132; Blight v. Hartnoll, L. R. 23 Ch. Div. 218, 52 L. J. Ch. N. S. 672; 48 L. T. N. S. 543, 31 Week. Rep. 535; Thayer v. Wellington, 9 Allen, 283, 85 Am. Dec. 753; Re Batchelder, 147 Mass. 465, 18 N. E. 225; Dunshee v. Dunshee, 251 Ill. 405, 96 N. E. 298.

The object of the court is to carry out the will and intent of the testator, which is the same whether or not the widow waives the will.

Walton v. Draper, 206 Mass. 20, 91 N. E. 884; Anderson v. Bean, 220 Mass. 360, 107 N. E. 964; Dove v. Johnson, 141 Mass. 287, 5 N. E. 520; Dunshee v. Dunshee, 263 Ill. 188, 104 N. E. 1100; Upham v. Emerson, 119 Mass. 509; Sawyer v. Freeman, 161 Mass. 543, 37 N. E. 942; Holdren v. Holdren, 78 Ohio St. 276; Brigham v. Shattuck, 10 Pick. 306; Aiken v. Comstock, 221 Mass. 444, 109 N. E. 359; Welch v. Hill, 218 Mass. 327, 105 N. E. 1067; Sanger v. Bourke, 209 Mass. 481, 95 N. E. 894; Firth v. Denny, 2 Allen, 468; Re Batchelder, 147 Mass. 465, 18 N. E. 225; Thayer v. Wellington, 9 Allen, 283, 85 Am. Dec. 753; Lombard v. Boyden, 5 Allen, 249; Falkner v. Butler, 1 Ambl. 514, 27 Eng. Reprint, 332; Aveling v. Northwestern Masonic Aid Asso. 72 Mich. 7, 1 L.R.A. 528, 40 N. W. 28.

The doctrine of acceleration does not apply.

Woodburn's Estate, 151 Pa. 586, 25 Atl. 145; Plympton v. Plympton, 6 Allen, 178; Firth v. Denny, 2 Allen, 468; Holdren v. Holdren, 78 Ohio St. 276, 18 L.R.A. (N.S.) 272, 85 N. E. 537; Sawyer v. Freeman, 161 Mass. 543, 37 N. E.

942; Jones v. Knappen, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630; Wood v. Wood, 1 Met. (Ky.) 512.

The fact that the renounced legacy is in the form of income furnishes no reason why it should not be used to reimburse the other legatees proportionately, so far as possible, for the sums contributed by them to the share of the widow.

Sawyer v. Freeman, 161 Mass. 543, 37 N. E. 942; Shreve v. Shreve, 176 Mass. 456, 57 N. E. 686; Dunshee v. Dunshee, 251 Ill. 405, 96 N. E. 298; Re Batchelder, 147 Mass. 465, 18 N. E. 225.

The words "equal shares" show that the enjoyment of the income was several, and not joint.

Loomis v. Gorham, 186 Mass. 444, 71 N. E. 981; Aiken v. Comstock, 221 Mass. 444, 109 N. E. 359; Shattuck v. Wall, 174 Mass. 167, 54 N. E. 488.

When a bequest is given to more persons than one, and their enjoyment of the same is several and not joint, the share of one who dies remains undivided property.

Frost v. Courtis, 167 Mass. 251, 45 N. E. 687; Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743; Stanwood v. Stanwood, 179 Mass. 223, 60 N. E. 584; Bancroft v. Fitch, 164 Mass. 401, 41 N. E. 661; Shattuck v. Wall, 174 Mass. 167, 54 N. E. 488; Sias v. Chase, 207 Mass. 372, 93 N. E. 802; Lyman v. Coolidge, 176 Mass. 7, 56 N. E. 831; Dresel v. King, 198 Mass. 546, 126 Am. St. Rep. 459, 85 N. E. 77; Worcester Trust Co. v. Turner, 210 Mass. 115, 96 N. E. 132.

Mr. Lester M. Bacon also for appellee White.

Mr. F. P. Marble for Lowell Humane Society.

Rugg, Ch. J., delivered the opinion of the court:

This is a bill for instructions brought by trustees under the will of William B. Spalding, who died in 1912, leaving a widow and, as his next of kin, a nephew, Edward H. Nichols, since deceased, and a niece, Annie L. Crocker. His widow waived the provisions of the will

and still survives. Her waiver causes doubt as to the disposition of the estate under the will. It is apparent from other clauses of the will that there is to be no final distribution of the estate, at least until after the death of the wife. The clauses governing the issues now presented are in these words:

"Fifth. All the rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath to my nephew Edward H. Nichols of Brookline in the county of Norfolk, Albert W. Crocker and Frederick Bailey both of said Lowell, and their successors, in trust, to hold and manage the same and dispose of the income thereof in the following manner: I direct my said trustees to pay to my wife Mary E. Spalding during the term of her life, one third of the net income of the principal of the trust estate herein created, quarterly, or as much oftener as they deem best; to my nephew Edward H. Nichols of said Brookline, and to my niece Annie L. Crocker, wife of Albert W. Crocker of said Lowell, each the sum of \$1,500 during the term of their lives; to the Lowell Humane Society of Lowell, Massachusetts, semiannually, or as much oftener as they deem best the sum of \$1,500; and the balance of the income of the principal of the trust estate quarterly, in equal shares to my said nephew Edward H. Nichols, and to my said niece Annie L. Crocker, during the term of their lives."

"Eighth. In case either my said nephew or my said niece dies before my said wife, then I direct my said trustees to pay one third of the net income of the trust estate which the deceased received during his or her lifetime to the survivor, quarterly, for and during the term of his or her life, and one third to my said wife, quarterly, during the term of her life, and one third semiannually in equal shares to said Lowell Humane Society and said Lowell General Hospital."

The cardinal and familiar rule in the interpretation of wills is to as-

certain from the testamentary words, construed according to their natural meaning, the intent of the testator, and then to give effect to that intent unless prohibited by some positive rule of law. It is manifest from this will that the testator made no provision for the event which has happened, namely, the waiver by his widow of the provisions made by the will for her benefit. It is to be presumed, however, that the testator had in mind the possibility that she might pursue that course, and knew that he could

Will—  
construction—  
intent.

Evidence—  
presumption—  
construction  
of will.

not by his will prevent her from doing so. Upham v. Emerson, 119 Mass. 509, 513; Sawyer v. Freeman, 161 Mass. 543, 547, 37 N. E. 942. It is not for the court to speculate as to what the testator might have done if the exact situation which has arisen had in truth been in his mind when making his will, but to determine the meaning of the words actually used, and apply that meaning to the facts presented. The effect of the waiver by the widow and the assertion of her statutory rights is to reduce the estate available for the payment of the legacies. Other legatees must lose as a result of her action. The consequence, in the absence of expression of testamentary intent to the contrary, is that the loss must fall upon the residuary legatees.

Will—election  
against—loss in  
residuary  
legatees.

legatees because no definite sum or specific legacy is given to them. They take whatever is left undisposed of by other provisions. Firth v. Denny, 2 Allen, 468, 471; Pace v. Pace, 271 Ill. 114, 120, 121, 110 N. E. 878. Clause fifth of this will is a true residuary clause in form and substance. But it has within itself preferences and provisions for a final residue; one third is given to his widow; three annuities, each of \$1,500, are given to three different persons; and "the balance" which in this connection is equivalent to a gift of the final rest, residue, and

remainder, is divided equally between his niece and nephew. The word "balance" in its collocation is broad enough to include the income which, but for her waiver, would

—acceleration  
of remainder.

have gone to the widow. It is natural to presume that such income, undisposed of directly in the event which has occurred, should go to the residuary legatees in preference to others. That is the effect of the words which now have become operative. *Chase v. Dickey*, 212 Mass. 555, 565, 99 N. E. 410; *Re Batchelder*, 147 Mass. 465, 468, 18 N. E. 225; *Thayer v. Wellington*, 9 Allen, 283, 85 Am. Dec. 753; *Blight v. Hartnoll*, L. R. 23 Ch. Div. 218, 52 L. J. Ch. N. S. 672, 48 L. T. N. S. 543, 31 Week. Rep. 535. Since the widow has waived its provisions in her favor, the will is to be interpreted as if it

—elimination  
of provisions.

contained no provision for her. *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575.

The reasonable interpretation of the fifth clause, which alone was operative up to December 16, 1913, when the nephew died, is that the three annuities shall be paid in full, and that the entire rest, residue, and remainder of the income shall be divided equally between the nephew and niece.

For the period since December 16, 1913, the eighth clause also must be considered. Disposition there is made, in the event of the death of either the niece or the nephew during the life of his wife, of the share in the net income theretofore received by the one deceasing. The net income received by the nephew during his life was made up of the \$1,500 annuity and one half the income of the final residue. The provision of clause eighth is that one third of this total share shall go to the survivor, one third to the wife, and one third equally to two charities. The provision for the wife is as if never made because of her waiver. Its distribution must be determined. That clearly falls into

the residue of the estate, and is governed by the terms of the residuary clause. Under the terms of that clause, one half the final residue goes to the niece and one half to the nephew. But the nephew cannot take because dead. As to that share of the income there is intestacy. No provision is made by the will for the contingency which has happened. The residuary clause itself is silent in this particular. Where a legacy lapses which is a part of the residue it cannot fall again —residue—  
—death of  
recipient—  
intestacy.

into the residue. It must pass as intestate property. *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831; *Dresel v. King*, 198 Mass. 546, 126 Am. St. Rep. 459, 85 N. E. 77.

This is not a case where the waiver by the widow works acceleration of other shares, because the scheme of the will in its other clauses makes plain the testamentary desire that the ultimate disposition of the trust shall not become operative until the death of the wife, niece, and nephew.

This is not a case for the application of the rule as to equitable compensation to legatees disappointed in realizing the full benefactions provided by the testator because of his widow's waiver, and the consequent depletion of the share they would otherwise receive. Loss resulting in that way to particular legatees ought to be apportioned as nearly

—compensation  
to disappointed  
legatees.

equally as may be —general rule  
of compensation.  
upon other legatees, unless a different purpose is established by the will. *Firth v. Denny*, 2 Allen, 468; *Plympton v. Plympton*, 6 Allen, 178. But the general rule in this class of cases already alluded to with supporting authorities is that there is a presumption that such loss was intended to fall on the residuum unless a different purpose is disclosed by the will. This rule is the one applicable to the facts here disclosed. Reading the will with all reference to the widow

eliminated, there is not any manifest method under the present circumstances to apportion the loss in a way to effectuate a testamentary purpose shown by the words used. It is more consonant with the general purpose of the testator in view of the fixed rules of law with reference to which his will must be interpreted, not to invoke the rule often denominated "Satisfaction of disappointed legatees." Indeed it would seem that disappointment in expectation is not the true ground for conferring a right to contribution, and that such right is raised only when, if not allowed, the purpose of the will is defeated, as, for example, in *Shreve v. Shreve*, 176 Mass. 456, 57 N. E. 686. That case is distinguishable from the case at bar. That was a case where, as between two children of the testator, the will manifested a plain purpose to make a proportional distribution. The waiver of the widow, considered by its effects alone, wrought a great disturbance of that proportion. In order to preserve that proportion and thus effectuate the intent of the testator, it was necessary to apply the principle of satisfaction of disappointed legatees. A somewhat similar decision is *Adams v. Legroo*, 111 Me. 302, 89 Atl. 63. The present case is different in the general frame of the will.

The decree of the single justice must be modified in 3 (b) by substituting "one half ( $\frac{1}{2}$ )," being the one

third ( $\frac{1}{3}$ ) due her by the express terms of clause eighth as her share of the part formerly received by Edward H. Nichols, plus one sixth, being the one half due her under the terms of the residuary part of clause fifth, of the one-third share given by clause eighth to the widow, of the part formerly received by Edward H. Nichols, which one-third share has fallen into the residue by the widow's waiver, for "one third ( $\frac{1}{3}$ )," and, in the clause indicating the share to Annie L. Crocker and Myra N. White as heirs at law, by striking out "one third ( $\frac{1}{3}$ )" and substituting therefor "one sixth ( $\frac{1}{6}$ )," and, as thus modified, is affirmed.

Decree accordingly.

#### NOTE.

The decisions dealing with the right of legatees or devisees, the gift to whom is impaired by the election of another beneficiary to take against the will, are collated in the annotation following the case of *SELICK v. SELICK*, post, 1628. The reported case (*CROCKER v. CROCKER*, ante, 1617) is of interest for its holding that compensation out of the renounced provision is not a necessary sequel to disappointment in expectation, and cannot be claimed as of right, but will take place only where it is best adapted to carry into effect the expressed intention of the testator with respect to the various legatees affected.

WILLIAM R. SELICK

v.

ARTHUR F. SELICK et al., Appts.

*Michigan Supreme Court — August 9, 1919.*

(207 Mich. 194, 173 N. W. 609.)

**Will — election against life estate — acceleration.**

1. The remainder will not be accelerated, but the estate will be sequestered for the reimbursement of the disappointed residuary legatees, where a widow to whom a life estate is given, with remainder to others, elects to take against the will to the depletion of the residuary estate.

[See note on this question beginning on page 1628.]

— life estate — bequest to use and enjoy.

2. The widow takes merely a life estate under a will bequeathing to her

a certain sum to be used and enjoyed by her during her life, and at her death to be divided among others.

[See 17 R. C. L. 620.]

**APPEAL** by defendants from a decree of the Circuit Court for Van Buren County, in Chancery (Des Voignes, J.) in favor of plaintiff, in a suit for the construction of the will of William J. Sellick, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Alfred J. Mills, for appellants:

If the widow had died immediately after the death of the testator, the legacy would have at once passed to defendants, and not to the residuary legatee.

*Glover v. Reid*, 80 Mich. 233, 45 N. W. 91.

A life estate may be created by will without the intervention of a trustee.

*Wixon v. Watson*, 214 Ill. 158, 73 N. E. 306; *Thomp. Wills*, p. 658; *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350, 70 N. E. 593; *Reiff's Estate*, 124 Pa. 145, 16 Atl. 636; *French v. Hatch*, 28 N. H. 331; *Barker v. Clark*, 72 N. H. 334, 56 Atl. 747; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Philips v. Crews*, 65 Ga. 274; *Hitchcock v. Clendennin*, 6 Mo. App. 99; 16 Cyc. 650; *Wells v. Prince*, 9 Mass. 508; *Freeman v. Knight*, 37 N. C. (2 Ired. Eq.) 72; *Montgomery v. Brown*, 25 App. D. C. 490; *Shallcup v. Cronley*, 117 Ky. 547, 78 S. W. 441; *Smith v. Van Ostrand*, 64 N. Y. 278; *Re Talmage*, 32 App. Div. 10, 52 N. Y. Supp. 710, affirmed in 160 N. Y. 704, 57 N. E. 1112.

A bequest of the use of money to a person for life, and then over, is to be deemed a gift of the interest only, and not an absolute gift.

*Field v. Hitchcock*, 17 Pick. 182, 28 Am. Dec. 288; *Re Moor*, 163 Mich. 353, 128 N. W. 198; *Spooner v. Phillips*, 62 Conn. 62, 16 L.R.A. 461, 24 Atl. 524; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; 16 Cyc. 615, note 99; *Miller v. Williamson*, 5 Md. 219; *Shallcup v. Cronley*, 117 Ky. 547, 78 S. W. 441; *Re McDougall*, 141 N. Y. 21, 35 N. E. 961; *Smith v. Van Ostrand*, 64 N. Y. 281; *Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676; 2 *Alexander, Wills*, pp. 1399 et seq.; *Newman v. Willetts*, 52 Ill. 98; *Conover v. Cade*, 184 Ind. 604, 112 N. E. 7; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674; *Michigan Trust Co. v. Hertzig*, 133 Mich. 515, 95 N. W. 531; *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600; *Burns v. Burns*, 132 Mich. 441, 93 N. W. 1077; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111.

The language used in the will is plain and unambiguous, and therefore the purpose and intention of testator must be gathered from the will itself.

*Re Moor*, 163 Mich. 357, 128 N. W. 198; *Re Blodgett*, 197 Mich. 461, 163 N. W. 907.

The election of the widow to take under the law and the waiver of her life estate have the same result as her death, and accelerate the right of the remaindermen and entitled them to the fund.

*Re Schulz*, 113 Mich. 592, 71 N. W. 1079.

The residuary legatee's share of the estate is not lessened more than would have been the case if the widow had died immediately after the decease of her husband, and if it should be conceded that the acceleration of the payment of the twenty-five thousand dollars (\$25,000) would diminish the residuary estate, the plaintiff could not be heard to complain.

*Church Home v. Morris*, 99 Ky. 317, 36 S. W. 2; *Ferguson's Estate*, 138 Pa. 208, 20 Atl. 945; *Vance's Estate*, 141 Pa. 201, 12 L.R.A. 227, 23 Am. St. Rep. 267, 21 Atl. 643.

A residuary legatee takes only what remains after the debts, expenses, and other legacies have been satisfied. He cannot call upon the other legatees to contribute to his loss.

2 *Alexander, Wills*, p. 1022; *Re Goggin*, 43 Misc. 233, 88 N. Y. Supp. 557.

Mr. Thomas J. Cavanaugh, for appellee:

Where property is devised to another, and in the same instrument it is provided that so much of the property as remains at the death of that other shall go to others, the limitation over is void.

*McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269; *Killefer v. Basset*, 146 Mich. 1, 109 N. W. 21; *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271; *Turnbull v. Johnson*, 153 Mich. 228, 116 N. W. 1009; *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004; *Moran v. Moran*, 143 Mich. 322,

5 L.R.A.(N.S.) 323, 114 Am. St. Rep. 648, 106 N. W. 206.

It is also a cardinal principle in interpretation of wills to carry out the intention of the testator if such intention is lawful.

Bailey v. Bailey, 25 Mich. 185; Eyer v. Beck, 70 Mich. 181, 38 N. W. 20; Glover v. Reid, 80 Mich. 233, 45 N. W. 91; Jones v. Deming, 91 Mich. 481, 51 N. W. 1119; Bateman v. Case, 170 Mich. 617, 136 N. W. 590; White v. Grand Rapids & I. R. Co. 190 Mich. 4, 155 N. W. 719.

If this was an absolute bequest to the widow of \$25,000, with the right to use and enjoy it, then no remainder could be predicated upon it.

Jones v. Jones, 25 Mich. 402; McKim v. Harwood, 129 Mass. 75; Bradley v. Warren, 104 Me. 423, 72 Atl. 173; Galligan v. McDonald, 200 Mass. 299, 128 Am. St. Rep. 421, 86 N. E. 304; Stowell v. Hastings, 59 Vt. 494, 59 Am. Rep. 748, 8 Atl. 738; Halliday v. Stickler, 78 Iowa, 388, 43 N. W. 228; Brewster v. Douglas, — Iowa, —, 80 N. W. 304; Hambel v. Hambel, 109 Iowa, 459, 80 N. W. 528; Tarbell v. Smith, 125 Iowa, 388, 101 N. W. 118; Hall v. Palmer, 87 Va. 354, 11 L.R.A. 610, 24 Am. St. Rep. 653, 12 S. E. 618; Moran v. Moran, 143 Mich. 322, 5 L.R.A.(N.S.) 323, 114 Am. St. Rep. 648, 106 N. W. 206; Bradley v. Carnes, 94 Tenn. 27, 45 Am. St. Rep. 696, 27 S. W. 1007.

The general rule of acceleration appears to be that the rejected legacy should be invested and the earnings applied to make up for the loss to the disappointed legatee.

1 Pom. Eq. Jur. 2d ed. §§ 517, 780-856; 1 Woerner, Administration, 273; Jones v. Knappen, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 680; Latta v. Brown, 96 Tenn. 343, 31 L.R.A. 840, 34 S. W. 417; Jennings v. Jennings, 21 Ohio St. 56; Colvert v. Wood, 93 Tenn. 454, 25 S. W. 963; McReynolds v. Counts, 9 Gratt. 242; 16 Cyc. 651; 24 Am. & Eng. Enc. Law, 2d ed. 418; Miller v. Miller, 91 Kan. 1, L.R.A.1915A, 674, 136 Pac. 953, Ann. Cas. 1917A, 918; Cotton v. Fletcher, 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1915A, 1225; Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219; Wakefield v. Wakefield, 256 Ill. 296, 100 N. E. 275, Ann. Cas. 1913E, 414; Miller v. Rowan, 251 Ill. 344, 96 N. E. 285; Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040; Bell v. Nye, 255 Ill. 283, 42 L.R.A.(N.S.) 1127, 99 N. E. 610; 2 Alexander, Wills, 838; Holdren v. Holdren, 18

L.R.A.(N.S.) 275, note; Hinkley v. House of Refuge, 40 Md. 461, 17 Am. Rep. 617; 2 Story, Eq. Jur. 1083.

Fellows, J., delivered the opinion of the court:

This case involves the construction of the will of William J. Sellick, late of Paw Paw, Van Buren county, and the effect as between certain of the legatees of the election of the widow to take under the statute. Mr. Sellick left real estate inventoried at \$8,500, and personal property inventoried at upwards of \$176,000. He left a widow, Caroline Sellick, and one son, William R. Sellick, the plaintiff, now grown to manhood, who was the child of a former wife. He also left collateral kindred, including the defendants Arthur F. Sellick, a nephew, and Gertrude Sellick, a niece. To his collateral kindred other than defendants he gave varying sums aggregating \$15,000. By the second clause of his will he gave to each of the defendants \$5,000. The first clause of his will is as follows: "I give, devise, and bequeath to my wife, Caroline Sellick, twenty-five thousand dollars (\$25,000), to be used and enjoyed by her during her life, and at her death to be equally divided between my nephew, Arthur F. Sellick, and my niece, Gertrude Sellick."

The residue of his estate he gave to his son, the plaintiff. The widow elected to take under the statute. The trial judge construed the first clause of the will, when taken in connection with the second clause, which gave each defendant \$5,000, and the residuary clause, as giving the widow absolutely \$25,000, and accordingly held that the defendants took nothing under such clause. This rendered unnecessary the determination of the other questions involved. From a decree in accordance with these views the defendants appeal, and it is here urged by their counsel that the first clause of the will gave the widow a life estate, with remainder over to them; that by the election of the widow to take under the statute her life es-

tate is at an end, and that, applying the doctrine of acceleration of remainders, they are now entitled to said sum of \$25,000. On the other hand, it is insisted by counsel for the appellee that the bequest to the widow gave her an absolute estate; that the bequest falls within that class of bequests controlled by *Jones v. Jones*, 25 Mich. 401, and kindred cases, and that the decree should be affirmed. It is further insisted by appellee's counsel that, if we decline to follow this contention and accept the view that a life estate only was given the widow, still we should not apply the doctrine of acceleration of remainders, but that such life estate, given to the widow by the will, should be sequestered to reimburse the plaintiff in part for the depletion of his bequest occasioned by the payment out of it of the sums necessary to make up the widow's statutory share. In short, that he is known in the law as a disappointed legatee, and that the doctrine of acceleration of remainders should not be adopted at the expense of disappointed legatees.

We are not disposed to take time or space in differentiating between the instant case and *Jones v. Jones*, *supra*, and kindred cases. Under the repeated decisions of this court, the

Will—life estate—bequest to use and enjoy.

clause of Mr. Sellick's will above quoted gave the widow the use of \$25,000 for her life, a life estate, and it gave her no more. *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634; *Re Moor*, 163 Mich. 353, 128 N. W. 198; *Bateman v. Case*, 170 Mich. 617, 136 N. W. 590; *Laberteaux v. Gale*, 196 Mich. 150, 162 N. W. 968. The opinions in these cases, together with the authorities cited in them, establish beyond doubt that under the language found in this clause Caroline Sellick took but the life use of \$25,000. While it is true that the entire will must be considered, we find nothing

at variance from this conclusion in any of its provisions. The fact that the testator gave each of the defendants \$5,000, to be paid presently, in no way modifies the plain unambiguous language of clause 1 by which he gave them \$25,000, to be paid upon the death of his wife.

This brings us at once to the interesting and novel questions in the case. It must be conceded at the outset that the decisions of the court of last resort of the state of Pennsylvania sustain the contention of defendants' counsel unequivocally. *Coover's Appeal*, 74 Pa. 143; *Ferguson's Estate*, 138 Pa. 208, 20 Atl. 945; *Vance's Estate*, 141 Pa. 201, 12 L.R.A. 227, 23 Am. St. Rep. 267, 21 Atl. 643. Is the rule laid down by the Pennsylvania court supported by the weight of authority and by equitable principles? Should the doctrine of acceleration of remainders be applied where by its application the remainderman gets more than the will gave to him, and legatees, either specific or residuary, get less? To these questions we shall now direct our attention.

Some support is given defendants' contention by the holding of the court of appeals of Kentucky in *Church Home v. Morris*, 99 Ky. 317, 36 S. W. 2. But in that case it was said: "There is no reason whatever, in this case, to depart from the direct command of the testator to distribute this estate in the manner in which he directs it to be done. It might be different if an intention was apparent to benefit certainly the residuary legatees, and the bulk of the estate was expected to be left for them. In such event, they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator."

And *Sherman v. Baker*, 20 R. I. 446, 40 L.R.A. 717, 40 Atl. 11; *Dean v. Hart*, 62 Ala. 308; *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. 332, and *Adams v. Gillespie*, 55 N. C. (2 Jones, Eq.) 244, give color to de-



fendants' claim. But some of these cases only consider the general doctrine of acceleration of remainders, and do not determine that such doctrine should be applied where, by an election not to take under the will, other legacies to other legatees are diminished.

That the determination of the life estate by act other than the death of the life tenant is as effective to let the remainderman into possession as the death of the life tenant, that the time of taking possession is accelerated by such act, is generally recognized in this country and in England. Thus in *Jull v. Jacobs*, 35 L. T. N. S. 153, the testator gave a life estate to his daughter, with remainder over to her children on their becoming of age. The daughter witnessed the will, thus incapacitating her from taking the life estate. The life estate having failed from this fact, it was held that the children who took the fee should be let into possession at once, Vice Chancellor Malins remarking: "Then, taking away her life estate, does that cause an intestacy as to the life, or an acceleration of the estate in remainder? It is clear that the children are postponed because of the mother's life estate, but if she does not take the life estate, why should they be postponed? It is a mere accident, through ignorance on the part of the testator, and I think that, as the tenant for life cannot take, the reason for postponing the children ceases."

In the case of *Lainson v. Lainson*, 18 Beav. 1, 52 Eng. Reprint, 1, 23 L. J. Ch. N. S. 170, 17 Jur. 1044, 2 Week. Rep. 82, 1 Eng. Rul. Cas. 194, the testator gave an estate for life to A., and on his decease to B. in tail. By a codicil he revoked the devise to A. It was held that the estate of B. was accelerated, and that he took at once. A similar result was reached on a similar state of facts in *Eavestaff v. Austin*, 19 Beav. 591, 52 Eng. Reprint, 480. But it has also been held in England that where the heir takes against the will under which he received con-

siderable benefit, those devisees and legatees disappointed by such election may not have a lien upon the estate, but may require such heir to account for the whole amount received by him under the will. *Greenwood v. Penny*, 12 Beav. 403, 50 Eng. Reprint, 1115.

This court has recognized the doctrine of acceleration of remainders upon the termination of the life estate of the widow by her election to take under the statute. *Re Schulz*, 113 Mich. 592, 71 N. W. 1079. But that was a case where none of the legatees were in any way harmed by the application of the doctrine. By the election of the widow to take under the statute their bequests were proportionately diminished, and by the acceleration of their remainders they were proportionately reimbursed.

The supreme court of Ohio in *Millikin v. Welliver*, 37 Ohio St. 460, has also recognized the doctrine of acceleration of remainders. But that case, like the *Schulz* Case, did not involve a disappointed legatee whose legacy was depleted to make up the sum paid to the widow for her statutory right. This was pointed out by that court in the later case of *Holdren v. Holdren*, 78 Ohio St. 276, 18 L.R.A. (N.S.) 272, 85 N. E. 537, where the court quoted from the former case and said: "This holding is based upon the doctrine of acceleration, but it must be understood as limited to cases in which that doctrine is applicable; otherwise it is too broad. In that case there was no disappointed legatee, but all of the estate went to the remainderman. It is well settled, when a widow elects not to take under a will, but to take under the law, her portion under the will will be sequestered to compensate those beneficiaries under the will whose shares are cut down by her election."

And this is but a reiteration of the early case of *Jennings v. Jennings*, 21 Ohio St. 56.

So likewise the court of appeals of Maryland recognized the doctrine

of acceleration of remainders (*Randall v. Randall*, 85 Md. 430, 37 Atl. 209), but declined to apply it in a case somewhat similar to the instant case (*Hinkley v. House of Refuge*, 40 Md. 461, 17 Am. Rep. 617). Considering the rule, it was there said: "But, while this is the general rule, it is modified under certain circumstances by the application of the principles of equity, where it is apparent that the event producing the acceleration of the time for vesting the remainder in possession is not contemplated by the will, and the result produced would contravene the intention of the testator. In this case, it is manifest that it was never contemplated by the testator that the legacies now claimed as payable presently should be paid before the death of his widow. The renunciation by the widow is an event not provided for by the will; and as by that event a certain portion of the principal or corpus of the estate is withdrawn from the trust intended for the benefit of the children of the daughter and sister of the testator, it is but equitable that they should be indemnified or compensated as far as can be by the appropriation of the benefit renounced by the widow. This is not an application to compel an election, but to have declared the effect of an election already made; and in such case the general and well-established principle applies that a court of equity will assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those disappointed by the election."

And in the later case of *Re Rogers*, 97 Md. 674, 55 Atl. 679, the Maryland court again declined to apply the doctrine, because so to do would be contrary to the intent of the testator.

The supreme court of New Hampshire, in a case similar to the *Schulz Case* (*Parker v. Ross*, 69 N. H. 213, 45 Atl. 576), applied the doctrine of acceleration of remainders, but when that court had before it the question of a disappointed legatee

whose estate had been diminished by the election of the widow, and such diminution differed in proportions from other legatees (*Cotton v. Fletcher*, 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1915A, 1225), the doctrine contended for by the plaintiff here was applied, and the estate given the refractory legatee by the will was held for the purpose of indemnifying the disappointed legatee.

In the case of *Jones v. Knappen*, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630, the court had before it a case quite similar to the instant case. We quote from the syllabus: "The election of the widow, who is made life tenant of her husband's property, to take against his will, does not accelerate the time for distribution so that it may be made during her lifetime, where the remainder is to be divided between specific and residuary devisees, and the result of her election would work inequity by diminishing the residuary, and leaving the specific devisees to be paid in full."

In this case the court quotes the following from *Woerner on Administration*, 119: "The rejection by the widow of the provisions made for her by will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints," and then says: "The controlling and, we think, the more reasonable principle announced in most of these cases is the one expressed by *Woerner*, supra, viz., to use the renounced devises and legacies given by the will to the widow to compensate, as far as may be, the devises and legacies diminished by such renunciation. When the remaindermen are affected pro rata by such renunciation, acceleration of the enjoyment of their devises or legacies, diminished proportionally, will equitably compensate them, so far as possible, for such diminution. But in this case acceleration of en-

joyment would increase the specific pecuniary legacies, to the detriment of the residuary legatees, whose shares only are diminished by the renunciation. Applying the principle stated, the life use of the property given by the will to the widow, and renounced by her, should be used to compensate the residuary legatees, the next of kin of the testator and of his wife."

Another quite similar case to this one is that of *Firth v. Denny*, 2 Allen, 468. We quote the syllabus: "A testator in his will, after various absolute devises and bequests, directed a certain sum to be invested, and the income thereof to be paid to his wife during her life, and, after her death, to be distributed among various legatees in certain specified sums, and gave the rest of his estate to his residuary legatees. He died without leaving issue, and his widow waived the provisions of the will in her behalf, and thereby became entitled to a larger share of his estate than the will gave her. Held, that the residuary legatees are entitled, during the life of the widow, to the income of the fund provided for her, and after her death the principal should go to the legatees named in the will, in like manner as if the widow had accepted the provisions therein made for her."

See, from the same court, *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575.

In *McReynolds v. Counts*, 9 Gratt. 242, the court had before it the question here involved. The widow had renounced the provisions of the will, and it was determined that the disappointed legatees were entitled to the estate renounced for the purpose of reimbursing them the amount of their disappointment, and such estate was placed under the control of the court for such purpose.

Mr. Pomeroy in his work on *Equity Jurisprudence* (1 Pom. Eq. Jur. 4th ed. § 517) says, in considering the question of elections: "The other parties interested as donees under the instrument creat-

ing the necessity for an election are affected by it, when made, in the following manner: If the person on whom the duty of electing rests elects to take in conformity with the will or other instrument of donation, he thereby relinquishes his own property, and must release or convey it to the donee upon whom the instrument had assumed to confer it. If he elects against the will or other instrument of donation, he thereby retains his own property, and must compensate the disappointed donee out of the estate given to himself by the donor. A court of equity will then sequester the benefits intended for the electing beneficiary, in order to secure compensation to those persons whom his election disappoints. This rule is applied in many of the American cases cited below to elections made by widows in favor of their dower and against the testamentary provisions, whereby the interests of other devisees were disturbed. Such disappointed devisees are held entitled to compensation out of the benefits intended to be conferred by the will on the widow, but which she had rejected."

See also *Timberlake v. Parish*, 5 Dana, 346; *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275, Ann. Cas. 1913E, 414; *Fox v. Rumery*, 68 Me. 121; *Lovell v. Charlestown*, 66 N. H. 584, 32 Atl. 160; *Ford v. Ford*, 70 Wis. 19, 54, 5 Am. St. Rep. 117, 33 N. W. 188; *Colvert v. Wood*, 93 Tenn. 454, 25 S. W. 963; *Miller v. Miller*, 91 Kan. 1, L.R.A.1915A, 671, 136 Pac. 953, Ann. Cas. 1917A, 918; *Latta v. Brown*, 96 Tenn. 343, 31 L.R.A. 840, 34 S. W. 417; *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040; *Wood v. Wood*, 1 Met. (Ky.) 512; 2 Alexander, Wills, §§ 837, 838; 1 Woerner, Administration, p. 293, 2d ed., and notes in 12 L.R.A. 227; 14 L.R.A. 293; 18 L.R.A. (N.S.) 272; 27 L.R.A. (N.S.) 602; L.R.A.1915A, 671, and Ann. Cas. 1913E, 416.

We are persuaded that under the great weight of authority the contention of plaintiff's counsel in this regard must prevail. While the

doctrine of acceleration of the time of taking effect of the remainder upon the termination of the life estate by act other than the death of the life tenant (i. e., by the election of the widow to take under the statute) must be recognized and applied in proper cases, such doctrine should not be applied where, by the

election, a portion only of the legacies are diminished in order to make up the amount required by the statute to satisfy the widow's statutory rights. And that this should be true whether the legacy diminished be a specific or a residuary one. Under such circumstances the disappointed legatee may, in a court of equity, compel the sequestration of the legacy to the refractory legatee for the purpose of diminishing the amount of his disappointment.

Manifestly this is in consonance with equitable principles. In the instant case the residuary fund given to the plaintiff has been diminished by many thousand dollars in order to discharge the claim of the widow resulting from her election. To adopt defendants' claim would give to them the \$25,000 many years before the time fixed by the testator for its payment. They

would not only receive the amount given them by the will, but they would also receive the widow's life estate renounced by her to the disadvantage of the plaintiff. Equitable principles do not require that this should be done.

We are asked to fix the present worth of the widow's life use of the \$25,000 with a view of finally closing the estate and disposing of all matters at once. The parties interested are all of age, and may make such adjustment as they may desire, but we do not feel empowered to fix the present worth of the widow's use and direct its present payment. We see no occasion, however, to longer hold the estate open. A trustee may be appointed to handle this fund of \$25,000. He shall annually pay the income thereon to the plaintiff during the life of the widow, and upon her death pay the corpus to defendants in equal shares.

It follows that the decree must be reversed, and one here entered in conformity with this opinion. The defendants will recover costs of this court. Neither party will recover costs of the Circuit Court.

Bird, Ch. J., and Ostrander, Moore, Steere, Brooke, Stone, and Kuhn, JJ., concur.

### ANNOTATION.

#### Compensation of legatees disappointed by another's election against the will, out of the renounced provision.

Ordinarily, if a testator has attempted to dispose of property not his own and has also given a benefit to the person to whom that property belonged, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition. If he insists on retaining his own property which the testator has attempted to give to another person, equity will appropriate the gift made to him, so far as may be necessary, for the purpose of making satisfaction out of it to the persons whom he has disappointed by the assertion of his rights.

Connecticut. — Farmington Sav.

Bank v. Curran (1899) 72 Conn. 342, 44 Atl. 473.

Illinois. — Wilbanks v. Wilbanks (1856) 18 Ill. 17; Carper v. Crowl (1894) 149 Ill. 465, 36 N. E. 1040; Dunshee v. Dunshee (1914) 263 Ill. 188, 104 N. E. 1100 (obiter) affirming 182 Ill. App. 594.

Maryland. — Marriott v. Badger (1854) 5 Md. 306.

Minnesota. — Brown v. Brown (1890) 42 Minn. 270, 44 N. W. 250.

New Jersey. — Young v. Young (1893) 51 N. J. Eq. 491, 27 Atl. 627; Hattersley v. Bissett (1893) 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187.

**New York.**—*Havens v. Sackett* (1857) 15 N. Y. 365.

**Ohio.**—*Bebout v. Quick* (1909) 81 Ohio St. 196, 90 N. E. 162.

**Pennsylvania.**—*Lewis v. Lewis* (1850) 13 Pa. 79, 53 Am. Dec. 443; *Armstrong v. Walker* (1892) 150 Pa. 585, 25 Atl. 53; *Cooley v. Houston* (1911) 229 Pa. 495, 78 Atl. 1129, subsequent appeal in (1915) 247 Pa. 590, 93 Atl. 624.

**South Carolina.**—*Lawton v. Hunt* (1850) 23 S. C. Eq. (4 Strobb.) 1.

**Tennessee.**—*Colvert v. Wood* (1894) 93 Tenn. 454, 25 S. W. 963; *Johnston v. Osmont* (1900) — Tenn. —, 59 S. W. 644.

**Virginia.**—*Kinnard v. Williams* (1836) 8 Leigh, 400, 81 Am. Dec. 652.

**England.**—*Whistler v. Webster* (1794) 2 Ves. Jr. 367, 30 Eng. Reprint, 676, 2 Revised Rep. 260, 10 Eng. Rul. Cas. 316; *Cavan v. Pulteney* (1795) 2 Ves. Jr. 544, 30 Eng. Reprint, 768; *Green v. Green* (1816) 19 Ves. Jr. 669, 34 Eng. Reprint, 612, 2 Meriv. 95, 35 Eng. Reprint, 873; *Dillon v. Parker* (1818) 1 Swanst. 359, 36 Eng. Reprint, 422, 1 Wils. Ch. 253, 37 Eng. Reprint, 110, 18 Revised Rep. 72; *Ker v. Wauchope* (1819) 1 Bligh, 1, 4 Eng. Reprint, 1; *Gretton v. Haward* (1819) 1 Swanst. 409, 36 Eng. Reprint, 443; *Howells v. Jenkins* (1863) 1 De G. J. & S. 617, 46 Eng. Reprint, 244, 32 L. J. Ch. N. S. 788, 9 L. T. N. S. 184, 2 New Reports, 539, 11 Week. Rep. 1050; *Rogers v. Jones* (1876) L. R. 3 Ch. Div. 688; *Re Hancock* [1905] 1 Ch. 16, 74 L. J. Ch. N. S. 69, 53 Week. Rep. 89, 91 L. T. N. S. 737.

This principle is also applied in cases where a surviving husband or wife is required to elect between the provision made by the will and the provision made by law; so where the result of an election to take against the will has the effect to impair gifts made to other legatees or devisees, the renounced provision is, ordinarily, first to be applied to the indemnifying of such legatees or devisees.

**Alabama.**—*Dean v. Hart* (1878) 62 Ala. 308.

**Illinois.**—*Wakefield v. Wakefield* (1912) 256 Ill. 296, 100 N. E. 275, Ann.

Cas. 1913E, 414; *Pace v. Pace* (1915) 271 Ill. 114, 110 N. E. 878.

**Kentucky.**—*Timberlake v. Parish* (1837) 5 Dana, 346; *Wood v. Wood* (1859) 1 Met. 512.

**Maine.**—*Adams v. Legroo* (1913) 111 Me. 302, 89 Atl. 63.

**Maryland.**—*Hinkley v. House of Refuge* (1874) 40 Md. 461, 17 Am. Rep. 617.

**Massachusetts.**—*Firth v. Denny* (1861) 2 Allen, 468; *Sawyer v. Freeman* (1894) 161 Mass. 543, 37 N. E. 942; *Shreve v. Shreve* (1900) 176 Mass. 456, 57 N. E. 686.

**New Hampshire.**—*Cotton v. Fletcher* (1914) 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1915A, 1225.

**New York.**—*Sarles v. Sarles* (1837) 19 Abb. N. C. 322; *Tehan v. Tehan* (1894) 83 Hun, 368, 31 N. Y. Supp. 961; *Re Lawrence* (1902) 37 Misc. 702, 76 N. Y. Supp. 653; *Kirchner v. Kirchner* (1911) 71 Misc. 57, 127 N. Y. Supp. 399.

**Ohio.**—*Maskell v. Goodall* (1858) 2 Disney, 282; *Jennings v. Jennings* (1871) 21 Ohio St. 56; *Holdren v. Holdren* (1908) 78 Ohio St. 276, 18 L.R.A. (N.S.) 276, 85 N. E. 537; *Dunlap v. McCloud* (1911) 84 Ohio St. 272, 35 L.R.A. (N.S.) 851, 95 N. E. 774; *Wilson v. Hall* (1892) 6 Ohio C. C. 570, 3 Ohio C. D. 589.

**Pennsylvania.**—*Cauffman v. Cauffman* (1877) 17 Serg. & R. 16; *Sandoe's Appeal* (1870) 65 Pa. 314; *Gallagher's Appeal* (1878) 87 Pa. 200; *Heineman's Appeal* (1879) 92 Pa. 95; *Young's Appeal* (1884) 108 Pa. 17; *Batione's Appeal* (1890) 136 Pa. 307, 20 Atl. 572; *Vance's Estate* (1891) 141 Pa. 201, 12 L.R.A. 227, 23 Am. St. Rep. 267, 21 Atl. 643; *Evans's Estate* (1892) 150 Pa. 212, 24 Atl. 642, affirming (1891) 8 Lanc. L. Rev. 321; *McIntosh's Estate* (1893) 158 Pa. 523, 27 Atl. 1044, 1047, 1048; *Portuondo's Estate* (1898) 185 Pa. 472, 39 Atl. 1105; *Lyon's Estate* (1894) 15 Pa. Co. Ct. 353; *Collins's Estate* (1901) 10 Pa. Dist. R. 249; *Cummings's Estate* (1904) 13 Pa. Dist. R. 462; *Gallagher v. Gallagher* (1906) 16 Pa. Dist. R. 458; *Heraty's Estate* (1913) 22 Pa. Dist. R. 847; *Leven-good's Estate* (1909) 38 Pa. Super. Ct.

491; *Re McCombs* (1901) 32 Pittsb. L. J. N. S. 218.

Rhode Island.—*Sherman v. Baker* (1898) 20 R. I. 613, 40 Atl. 765.

Tennessee.—*Latta v. Brown* (1896) 96 Tenn. 343, 31 L.R.A. 840, 34 S. W. 417; *Meek v. Trotter* (1915) 133 Tenn. 145, 180 S. W. 176.

Vermont.—*Jones v. Knappen* (1891) 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630.

Virginia. — *Mitchell v. Johnson* (1835) 6 Leigh, 461; *McReynolds v. Counts* (1852) 9 Gratt. 242; *Findley v. Findley* (1854) 11 Gratt. 434; *Morris v. Garland* (1883) 78 Va. 215.

The principle upon which the doctrine of compensation vests is explained in *Streatfield v. Streatfield* (1736) Cas. t. Talb. 182, 25 Eng. Reprint, 724, in which it was said by Lord Talbot, L. C.: "When a man takes upon him to devise what he has no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely but not partially under it, . . . there being a tacit condition annexed to all devises of this nature that the devisee do not disturb the disposition which the devisor hath made."

And in *Bebout v. Quick* (1909) 81 Ohio St. 196, 90 N. E. 162, it is said: "The foundation of the doctrine is the intention of the author of the instrument. The intention extends to the entire disposition, for the attempt to dispose of the property of another, though ineffectual as a disposition, is clearly indicative of that intention. It is to prevent the frustration of that intention by the failure of any of its parts that in cases of this character the donee is required either to make good the attempted disposition of his property or to relinquish the benefit proposed by the instrument."

In *Cauffman v. Cauffman* (1827) 17 Serg. & R. (Pa.) 16, it is said: "The principal question is whether such taking induces absolute forfeiture, or only imposes an obligation to indemnify the claimants when it disappoints them. In England, though decisions and dicta have been both ways, the latest authorities seem to sanction the doctrine of compensation

that, when a case of election is raised, it does not give a right to retain the thing itself, though it gives a right to compensation out of the thing devised, to a legatee attempting to defeat the devise to others. Chancery would sequester the thing devised, to make compensation and satisfaction to the disappointed devisee."

By the doctrine of sequestration to make compensation, the intention of the testator, so far as circumstances will admit, is effective; by the doctrine of forfeiture, that intention in many cases would be defeated. *Ibid.*

In *Vance's Estate* (1891) 141 Pa. 201, 12 L.R.A. 227, 23 Am. St. Rep. 267, 21 Atl. 643, it is said: "Such interference is the pure creation of equity, and had its origin in the doctrine of equitable election, which compelled one taking a benefit under a will to acquiesce in other provisions of the same instrument which for any reasons were not binding upon him. Equity compelled him to elect, and, if he chose to assert his prior rights against the will, the chancellor treated the provision of the will in his favor as forfeited, and then used the benefit created by such provision as a fund to be administered so as to carry out, as nearly as might be, the purposes of the testator, which would otherwise fail. . . . It was long a debatable question whether the refractory legatee forfeited absolutely all the benefits intended for him by the will, or only so much as might be required to make good that part of the scheme of the testator which his action had disappointed. The question can hardly be said to be entirely at rest yet; but, though the foundation of the chancellor's action is a forfeiture by the assertion of a conflicting right, yet the better opinion now certainly is that such forfeiture will be enforced only so far as may be necessary to make good the failure of the testator's other intent; in other words, it is forfeiture only for the purpose and to the extent of compensation."

Where the provision given is inferior in value to that which the refractory devisee has elected to take, so that the disappointed devisee must be

a loser in any event, the case is not one of compensation out of the gift made by the will to the refractory devisee, but of forfeiture. *Lewis v. Lewis* (1850) 13 Pa. 79, 53 Am. Dec. 443.

The amount of the compensation payable to the legatees who are disappointed by the election is to be ascertained at the date of the death of the testator, and not at the time when the election is made. *Re Hancock* [1905] 1 Ch. (Eng.) 16, 74 L. J. Ch. N. S. 69, 53 Week. Rep. 89, 91 L. T. N. S. 737.

In *CROCKER v. CROCKER* (reported herewith) ante, 1617, it is said that it would seem that disappointment in expectation is not the true ground for conferring a right to contribution, and that such right is raised only when, if not allowed, the purpose of the will is defeated.

In *CROCKER v. CROCKER*, testator gave his residuary estate, both real and personal, in trust to pay to his wife one third of the net income during her life, to a nephew, a niece, and a humane society the sum of \$1,500 per annum, and the balance of the income of the principal of the trust estate to the nephew and niece during the term of their lives. The effect of the waiver by the widow and the assertion of her statutory rights was to reduce the estate available for the payment of legacies, the loss ultimately falling upon the residuary legatees. It was held that the income which, but for her waiver, would have gone to the widow, and which was undisposed of directly in the event of her election against the will, passed to the residuary legatees by the terms of the residuary part of the clause above set forth, directing the payment of the "balance of the income" to the nephew and niece during their lives, and that the doctrine of compensation was therefore inapplicable; the result being that upon the death of the nephew in the lifetime of the wife,—in which event the testator directed that one third of the share of the income which the nephew received during his lifetime should go to the survivor, one third to the wife, and one third to certain charities—there was an intestacy as to one half of the one third

of the share of the income of the nephew given over to the testator's wife upon the nephew's decease. The court said: "This is not a case for the application of the rule as to equitable compensation to legatees disappointed in realizing the full benefactions provided by the testator because of his widow's waiver and the consequent depletion of the share they would otherwise receive. Loss resulting in that way to particular legatees ought to be apportioned as nearly equally as may be upon other legatees unless a different purpose is established by the will. *Firth v. Denny* (1861) 2 Allen (Mass.) 468; *Plympton v. Plympton* (1863) 6 Allen (Mass.) 178. But the general rule in this class of cases, already alluded to with supporting authorities, is that there is a presumption that such loss was intended to fall on the residuum unless a different purpose is disclosed by the will. This rule is the one applicable to the facts here disclosed. Reading the will with all reference to the widow eliminated, there is not any manifest method under the present circumstances to apportion the loss in a way to effectuate a testamentary purpose shown by the words used. It is more consonant with the general purpose of the testator, in view of the fixed rules of law with reference to which his will must be interpreted, not to invoke the rule often denominated 'Satisfaction of disappointed legatees.' Indeed it would seem that disappointment in expectation is not the true ground for conferring a right to contribution, and that such right is raised only when, if not allowed, the purpose of the will is defeated, as, for example, in *Shreve v. Shreve* (1900) 176 Mass. 456, 57 N. E. 686. That case is distinguishable from the case at bar. That was a case where, as between two children of the testator, the will manifested a plain purpose to make a proportional distribution. The waiver of the widow, considered by its effects alone, wrought a great disturbance of that proportion. In order to preserve that proportion and thus effectuate the intent of the testator, it was necessary

to apply the principle of satisfaction of disappointed legatees. A somewhat similar decision is *Adams v. Legroo* (1913) 111 Me. 302, 89 Atl. 63. The present case is different in the general frame of the will."

**Conflict between doctrine of acceleration and claim of disappointed legatees to compensation.**

It is a general rule that, unless a contrary intention on the part of the testator is manifest, an election to take against a will by which a life interest is given to the refractory legatee is equivalent to the termination of such interest, and accelerates the gift over, upon the theory that the life estate or interest is presumably to be regarded as in the nature of a charge upon the gift over, the abolition of which permits the ultimate disposition to take immediate effect.

But the claim of the donee of the gift over to immediate enjoyment may, where the election to take against the will has had the effect to disappoint other legatees or devisees, be met by the claim of such beneficiaries to be compensated out of the life estate.

Which of these claims is to take precedence is wholly a matter of testamentary intention. Compensation cannot be claimed as a matter of right.

In *Adams v. Legroo* (Me.) supra, it is said, with reference to the doctrine that a renounced testamentary provision for a husband or wife may be sequestered for the benefit of legatees or devisees whose portions have been diminished as a result of the renunciation: "This doctrine is a qualification of the general rule that a gift over shall take effect upon the termination of the particular estate or interest, however such termination is effected, by holding that the rule must yield to an obvious intention to the contrary deduced from the manifest purpose of the testator in the disposition of his bounty, which it is presumed he desired to have carried out so far as possible. Hence, the well-settled principle that equity will interpose, if necessity requires it, to preserve a superior or preferred intent of the testator from destruction."

It should be noted that, though the

doctrine of compensation may operate to defer enjoyment, it does not defer vesting. See discussion of this point in annotation appended to *Young v. Harris*, ante, 480, on effect of Failure or renunciation of the precedent life estate given by a will to accelerate the vesting of a remainder limited thereon, where enjoyment is postponed by the allotment of dower or the necessity of compensating disappointed legatees.

Where the persons disappointed by the election to take against the will are specific or general legatees or devisees, it is clear that the intention of the testator is best carried into effect by sequestering the renounced provision for their benefit, since, in such case, the remainderman gets at least what the will gave him, while the specific legatees or devisees get as nearly what was given them as the magnitude of the renounced provision will allow. See *Timberlake v. Parish* (1837) 5 Dana (Ky.) 346; *Adams v. Legroo* (Me.) supra; *Cotton v. Fletcher* (1914) 77 N. H. 216, 90 Atl. 510, Ann. Cas. 1915A, 1225; *Sarles v. Sarles* (1887) 19 Abb. N. C. (N. Y.) 322; *Re Lawrence* (1902) 37 Misc. 702, 76 N. Y. Supp. 653; *Wilson v. Hall* (1892) 6 Ohio C. C. 570, 3 Ohio C. D. 589; *Sandoe's Appeal* (1870) 65 Pa. 314; *Evans's Estate* (1892) 150 Pa. 212, 24 Atl. 642; *McIntosh's Estate* (1893) 153 Pa. 528, 27 Atl. 1044; *Re McCombs* (1901) 32 Pittsb. L. J. N. S. (Pa.) 218; *Collins's Estate* (1901) 10 Pa. Dist. R. 249; *Cummings's Estate* (1904) 13 Pa. Dist. R. 462; *Levengood's Estate* (1909) 88 Pa. Super. Ct. 491; *Heraty's Estate* (1915) 22 Pa. Dist. R. 847; *Sherman v. Baker* (1898) 20 R. I. 613, 40 Atl. 765; *Latta v. Brown* (1896) 96 Tenn. 343, 31 L.R.A. 840, 34 S. W. 17.

In *Sherman v. Baker* (1898) 20 R. I. 613, 40 Atl. 765, it is said: "While the renunciation of a life estate accelerates the estate in remainder, so that the remainderman has the right to immediate possession if the estate be sufficient, yet, if there is a deficiency, it would clearly violate the expressed intention of the testator to admit the remaindermen to a present division, with the result of compelling



legacies to await the death of the tenant in dower, which he intended to have paid at once, and of advancing those which he said should be paid after the death of his wife. Accordingly, to adjust these conflicting rights as nearly as may be, it has been held that the enjoyment of income by remaindermen should be postponed until legacies intended to take effect at once can be made up."

That the right to compensation out of the renounced provision is, however, not absolute, but depends upon the presumed intention of the testator, is evidenced in the case of *Snead v. Shreve* (1861) 31 Mo. 416. There testator, who had devised all his real estate in a certain city to a daughter and granddaughter, devised his home farm to two other daughters and to the survivors of them, giving to his wife the use and profits of such farm during her natural life, or until marriage, and further provided that, in case his wife should not accept the provision and legacies made for her, "the said provision and legacies and bequests by me hereinbefore given and intended her shall cease and be null to all intents and purposes, anything in this, my last will, to the contrary notwithstanding." The widow renounced the provisions of the will, and dower was allotted her in part in the city real estate devised to the granddaughter, who thereupon sued to procure compensation for the damages caused by the widow's election. The court, however, refused to decree such compensation until it should be more perfectly acquainted with the situation, saying: "It is a rule of law that courts, in the interpretation of wills, should endeavor to place themselves in the situation of the testator, and avail themselves of all the knowledge he possessed in relation to his family and estate which would furnish any aid in ascertaining his intention. From a want of knowledge of the net annual value of the provisions made for the support of the widow and of her infant children during minority, we are embarrassed in the construction of this will. The provision for the support of minor children has been

diminished by the portion taken by the widow for her dower. If the compensation claimed by the plaintiffs would take away a support for the children or child during minority, a plain intention on the part of the testator to do this, or some rule of law, would only warrant the court in giving an interpretation to the will that would cause such a result. On the other hand, if the compensation demanded can be awarded without depriving the minor child of an adequate support, and thus leave it in as advantageous a state as though the will had not been renounced by Mrs. Shreve, there would seem to be no great hardship in it."

And in *Sawyer v. Freeman* (1894) 161 Mass. 543, 37 N. E. 942, where testator gave his executors a certain sum in trust for his widow during life, and upon her death to pay the entire sum "and all income thereof then in their hands" to a daughter, with alternative provisions in case the daughter should not be living at the death of her mother, or should die without leaving issue, thereby creating a remainder contingent upon her survivorship, it was held that the income renounced by the widow should be accumulated during her lifetime for the benefit of the remainderman, although the widow's renunciation had the effect to disappoint certain pecuniary legatees. This decision is based on the view that the testator apparently had both income and principal in mind in providing for the gift over. Three justices, however, dissented from this conclusion, taking the view that the phrase, "all income thereof then in their hands," was used by the testator as referring simply to any income which might accrue between the last payment to the widow and her decease.

In *Klenke's Estate* (1904) 210 Pa. 575, 60 Atl. 167, it was held that there was no occasion for sequestration or postponement of distribution where the persons disappointed by the widow's election were both specific legatees, both were accelerated in possession by such election, and neither had any claim to precedence over the other.

**— residuary legatees.**

That the enjoyment of the remainderman should be postponed for the purpose of compensating disappointed residuary legatees is not so clear, and the decisions upon the point exhibit a variety of conclusions.

As holding that the renounced provision is to be sequestered where the election results in diminishing the residuary estate only, see, in addition to *SELICK v. SELICK* (reported herewith) ante, 1621: *Hinkley v. House of Refuge* (1874) 40 Md. 461, 17 Am. Rep. 617, where, by the renunciation of the widow, a certain portion of the principal or corpus of the estate was withdrawn from a trust intended for the benefit of the children of the daughter and sister of the testator created in the residuary estate; *Firth v. Denny* (1861) 2 Allen (Mass.) 468, *Kirchner v. Kirchner* (1911) 71 Misc. 57, 127 N. Y. Supp. 399, and *Jones v. Knappen* (1891) 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630, where it was held that the time for distribution would not be accelerated by the widow's renunciation of the life estate given her, where the remainder was to be divided between specific and residuary devisees and the result of election would work inequity by diminishing the residuary and leaving the specific devisees to be received in full; *Shreve v. Shreve* (1900) 176 Mass. 456, 57 N. E. 686, where the widow's renunciation operated to diminish the amount of the residuary estate, which, by the provisions of the will, was to be held in trust, and the income of one half paid to one of testator's sons and the income of the other half divided between the widow and another son; *McReynolds v. Counts* (1852) 9 Gratt. (Va.) 242, where the testator devised his real estate to his wife for life and at her death to her son, directing a division of his personal estate, after payment of debts, into equal shares to be given to his descendants; and *Morris v. Garland* (1883) 78 Va. 215, where the testator directed his executors to set apart \$50,000 worth in par value of his stocks and bonds to pay the interest or dividends thereof to his wife during her natural life, and at

her death gave the stocks and bonds to the use of an adopted daughter and her children.

In *Holdren v. Holdren* (1908) 78 Ohio St. 276, 18 L.R.A. (N.S.) 272, 85 N. E. 537, where testator devised one sixth of his real estate to his widow for life, and at her death to a son, and the remaining five sixths to others, and the widow elected to take her dower and distributive share, the value of which exceeded the value of her life estate in the one sixth, it was held that the remainder in the one sixth would not be accelerated, but that the widow's life estate would be sequestered to compensate the disappointed devisees.

In *Portuondo's Estate* (1898) 185 Pa. 472, 39 Atl. 1105, testator gave the residue of his estate in trust to pay two thirds of the net income arising therefrom to his wife during her natural life, and the remaining third of said net income to his mother. In case of the death of his wife during the lifetime of the mother, the whole principal of the estate was to be divided into three parts of which he gave one third to a stepdaughter absolutely, another third in trust for the children of his stepson, and to his mother the remaining third. The widow elected to take the share of his estate to which she was entitled under the intestate laws, whereby the plan of the testator was frustrated and the trust estate which he undertook to establish for the support of his wife and mother was destroyed to the extent of having one half of the principal thereof taken away. It was held that payment of the bequest to those in remainder was not accelerated, but that it was the duty of the court to preserve for the mother the income which the testator intended for her during the life of his widow.

In *Meek v. Trotter* (1915) 133 Tenn. 145, 180 S. W. 176, it was held that a life estate renounced by the widow would be sequestered for the benefit of disappointed residuary legatees, where it was manifest from the will that they were peculiarly preferred objects of the testator's bounty. The court, however, dissented from the remarks made in *Vance's Estate* (1891)

141 Pa. 201, 12 L.R.A. 227, 23 Am. St. Rep. 267, 21 Atl. 643, *infra*, that the residuary estate must bear the whole loss incident to a dissent, "unless there is a plain intention in the will that the residuary legatee is the preferred object of testator's bounty," remarking that "this places the rule on an illusory and unsatisfactory basis."

In other instances the view has been adopted that the residuary estate must bear the whole loss unless it is plainly the intention of the will that the residuary legatee is a preferred object of the testator's bounty. Thus, in *Church Home v. Morris* (1896) 99 Ky. 317, 36 S. W. 2, it is said: "While the amount of the residuary estate is lessened to the extent of the widow's allotment, they cannot complain, because they were only to get what was left after payment in full of the specific legacies. They are benefited to some extent because they get their specific legacies at once instead of waiting until the widow's death; and it is not for the court to attempt an adjustment of their profit and loss accounts by withholding from the principal objects of the testator's solicitude the estate intended for them. . . . It might be different if an intention was apparent to benefit certainly the residuary legatees and the bulk of the estate was expected to be left for them. In such event they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator."

In *Ferguson's Estate* (1890) 138 Pa. 208, 20 Atl. 945, it is said that, though the residuary legacies be thereby lessened in amount, that is the unavoidable incident of such legacies.

See also, to the same effect, *McGinnis v. McGinnis* (1846) 1 Ga. 496.

In *Collins's Estate* (1901) 10 Pa. Dist. R. 249, it is said that ordinarily equity will follow the order which is mapped out by the will, simply advancing the gifts in respect to time and leaving the loss to fall upon the

residuary legatee as the last in the estimation of the testator.

In *Vance's Estate* (Pa.) *supra*, the court in holding that acceleration will not be postponed for the purpose of compensating residuary legatees, said: "The amount of the legacies actually coming to the legatees is only one incident of a will. The order of precedence is another, and it does not seem necessary that the latter should be disturbed because of a change in the former. Hence no provision of the will ought to be interfered with by the court except for the preservation of one of superior or at least equal rank in the testator's scheme, and as residuary gifts are from their nature ordinarily the lowest in rank, no others can be interfered with for the sake of benefiting them. From their very definition, they come in last, and the testator, with knowledge of this fact, declares that they shall get nothing until after all others are paid in full. Mere diminution of the amounts coming to the residuaries does not in any way justify interference in the regular and established order of priority. When, therefore, it is said, as in *Sandoe's Appeal* (1870) 65 Pa. 314, that equity will sequester the benefit intended for the wife to secure provision for those who are disappointed by her action, the disappointment to be understood is the failure of the testator's intent in regard to other beneficiaries. These will be protected, not for their own sakes, but of necessity, in order to preserve the wishes of the testator, and such necessity does not extend to the interference with any beneficiaries prior in rank for the sake of the residuaries. One of the chances the latter take from the nature of their position is that the share coming to them may undergo changes in amount before the period of distribution. There is no force in the argument that the general pecuniary legatees have no cause of complaint at being postponed until the death of the widow, as their legacies by the terms of the will are not payable until that event, for neither are the residuary legacies. The advancement of the time of payment is

the legal consequence of the termination of the purpose of the postponement, and both the definite and the residuary legacies share this advantage in common. To postpone the definite legatees, and transfer the income of their legacies to the residuaries during the widow's life, is not in furtherance of any direction of the will, but in direct violation of the testator's intent that the definite legacies should be paid in full before the residuaries get anything. Nor is it in pursuance of the equitable doctrine of sequestration of the benefits intended for the widow, for, as already said, that never ought to reverse the testator's order of priority. Nor does it even accomplish, except by accident, its nominal purpose of preserving the relative amounts as they were at the testator's death. The exact figures in the present case we have not before us, but the possibilities of the plan adopted were shown very forcibly by the illustration of one of the appellants' counsel at the argument. If the general legacies were \$100,000, and the residue at the time of the testator's death \$5,000, the sequestration of the interest on the former for the benefit of the latter would give the latter an income of 100 per cent a year during the widow's life. Of course no court of equity would apply the plan without modification to such a case, and the omission of the court in *Firth v. Denny* (1861) 2 Allen (Mass.) 468, to require the exact figures was probably because it was understood all around that, even with the income during the widow's life, the residuaries would still be the losers. But such a possible result could only be avoided by a balancing of accounts in each case that would be beyond the sphere even of a court of equity. How far a sum in hand is preferable, or otherwise, to a larger sum at an indefinite future date, is a

problem with too many elements of personal preference, necessity, and circumstance, to be solved by a court upon the rates of interest and tables of the expectancy of life. As said in *Ferguson's Estate* (1890) 138 Pa. 208, 20 Atl. 945, the law must have a settled and uniform rule, and it is that, as to provisions in a will for legacies subordinate to a life interest in the widow and contingent upon her death, or payment of which is postponed till then, her election to take against the will is equivalent to her death. By such election the widow takes her share as if the husband had died intestate, and the will then operates on the rest of the estate precisely as if the widow were dead. A court of equity will interpose, if necessity requires, to preserve the intention of the testator from destruction, but such interposition never should take place in favor of a subordinate as against a preferred or superior intent, and therefore never in favor of a residuary as against a definite legatee, unless upon a plain implication in the will that the residuary legatee was in fact a preferred object of the testator's bounty."

In *Adams v. Legroo* (1913) 111 Me. 802, 89 Atl. 63, testatrix made various pecuniary bequests by her will, and by codicil gave "prior to any of the bequests in my said will," a sum of money constituting about half of her estate in trust to use the income therefrom, and so much of the principal as should be necessary, for the comfortable maintenance and support of her husband, and at his decease, if any of said fund should remain unexpended, gave such balance to certain persons therein named, it was held that the interest of the remaindermen in the trust fund took precedence of the interest of the residuary legatees in the will.

E. S. O.

FEDERAL LIFE INSURANCE COMPANY, Plff. in Err.,  
v.  
STANLEY LEWIS.

Oklahoma Supreme Court — May 18, 1919.

(— Okla. —, 183 Pac. 975.)

**Insurance — disability — construction of policy — payment of premium by insurer.**

1. In an action on an insurance policy which contains the provision "that if the insured shall furnish due proof of total permanent disability that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations, the company agrees to pay regularly for the insured the premiums," then in the same section contains the further provision, "if, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium-paying period, the company's obligation to pay the premiums shall cease," that said sections are ambiguous and contradictory, but, when construed together, must mean that if the insured is totally disabled, and will probably be so for life, he comes within the provision of the policy requiring the company to pay the premiums.

[See note on this question beginning on page 1643.]

**— ambiguous policy — construction.**

2. Where the meaning of language in a policy of life insurance is ambiguous or susceptible of two different constructions, the same will be strictly construed against the insurer, and that construction adopted which is most favorable to the insured.

[See 14 R. C. L. 926.]

**— waiver of proof of disability.**

3. The provision in the insurance policy requiring proof of total disability to be furnished the company within a certain definite time is waived by the company denying liability within such time upon other grounds than failure to furnish proof of total disability.

[See 14 R. C. L. 1349.]

**Appeal — admission of unnecessary evidence — nonprejudice.**

4. Under § 4759 of Revised Laws of

Headnotes 1-4 by MCNEILL, J.

1910, the allegation of any appointment of authority is taken as true, unless the denial of the same be verified by affidavit of a party, his agent or attorney. The plaintiff alleged that a certain party was the agent of defendant, which allegation was undenied, as above required. Evidence was offered on the trial of the cause to establish the agency thus admitted. Held, that the reception of the same was not prejudicial error.

[See 2 R. C. L. 250.]

**On Petition for Rehearing.**

**Pleading — denial of authority of agent — verification.**

5. To deny appointment or authority of an agent, which are allowed in the petition, the answer must be verified.

**ERROR** to the District Court for Oklahoma County (Oldfield, J.) to review a judgment in favor of plaintiff in an action brought to recover back the amount of a premium on a life insurance policy, paid by plaintiff under protest. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. B. O. Young, for plaintiff in error:

Plaintiff failed to prove that he was totally and permanently disabled, and

that he would be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations.

*Eoff v. Lair*, — Okla. —, 156 Pac. 185.

Plaintiff failed to prove that he had furnished "due proof" of total permanent disability, and that he would be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations.

*Jarvis v. Northwestern Mut. Relief Asso.* 102 Wis. 546, 72 Am. St. Rep. 895, 78 N. W. 1089; *Palatine Ins. Co. v. Lynn*, 42 Okla. 486, 141 Pac. 1167; *Commercial Union Assur. Co. v. Shults*, 37 Okla. 95, 130 Pac. 572.

Plaintiff failed to prove that the agent of the defendant company had waived the furnishing of "due proof" of total permanent disability, and that plaintiff would be continuously and permanently prevented thereby, for life, from pursuing any and all gainful occupations.

4 *Cooley*, Briefs on Ins. 3487; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. 155; *Bush v. Westchester F. Ins. Co.* 63 N. Y. 531; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635; *Bowlin v. Hekla F. Ins. Co.* 36 Minn. 433, 31 N. W. 859; *Harrison v. Hartford F. Ins. Co.* 59 Fed. 732; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. 155; *Lohnes v. Insurance Co. of N. A.* 121 Mass. 439; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L.R.A. 216, 6 Am. St. Rep. 144, 15 Atl. 353; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198, 43 N. W. 954; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Deming Invest. Co. v. Shawnee F. Ins. Co.* 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918; 1 *Mechem*, Agency, §§ 1062, 1063; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 579, 69 Pac. 938; *Gish v. Insurance Co. of N. A.* 16 Okla. 59, 13 L.R.A.(N.S.) 826, 87 Pac. 869; *Union Mut. Ins. Co. v. Huntsberry*, 57 Okla. 89, 156 Pac. 327; *State Mut. Ins. Co. v. Craig*, 27 Okla. 90, 111 Pac. 325; *Phoenix Ins. Co. v. Ceaphus*, 29 Okla. 608, 119 Pac. 583; *Home Ins. Co. v. Ballard*, 32 Okla. 723, 124 Pac. 316; *Des Moines Ins. Co. v. Moon*, 33 Okla. 437, 126 Pac. 753; *Modern Woodmen v. Weekley*, 42 Okla. 25, 139 Pac. 1138.

Plaintiff failed to prove that the defendant company was estopped to require "due proof" of total permanent disability, and that plaintiff would be continuously and wholly prevented

thereby, for life, from pursuing any and all gainful occupations.

*Jones v. Citizens' State Bank*, 39 Okla. 393, 135 Pac. 373; *Farmers' State Bank v. Keen*, — Okla. —, 167 Pac. 207; *Spaulding v. Thompson*, — Okla. —, 159 Pac. 509; *Kaufman v. Boismier*, 25 Okla. 252, 105 Pac. 326; *Berry v. Oklahoma State Bank*, 50 Okla. 484, L.R.A. 1916A, 731, 151 Pac. 210; *Commercial Union Assur. Co. v. Shults*, 37 Okla. 95, 130 Pac. 572; *Farmers' State Bank v. Jordon*, — Okla. —, 160 Pac. 53; *New York Plate Glass Ins. Co. v. Wright*, — Okla. —, 160 Pac. 54; *Gaar, S. & Co. v. Rogers*, 46 Okla. 67, 148 Pac. 161.

*Mr. J. K. Wright*, for defendant in error:

The evidence establishes that insured was totally unable to perform any material portion of any and all gainful occupations from the date of injury to the time of trial.

*Lobdill v. Laboring Men's Mut. Aid Asso.* 69 Minn. 14, 38 L.R.A. 537, 65 Am. St. Rep. 542, 71 N. W. 696; *Continental Casualty Co. v. Wynne*, 36 Okla. 325, 129 Pac. 16; *Shawnee L. Ins. Co. v. Watkins*, 53 Okla. 188, 156 Pac. 181.

Insured, acting personally and through his sister, notified the resident general state agent of the company of his disability, and asked said general state agent to grant him the relief provided for in the clause of his policy under the heading, "premium paid by company if insured is totally disabled."

*Armstrong, B. & Co. v. Crump*, 25 Okla. 452, 106 Pac. 855; *Home Ins. Co. v. Mobley*, 57 Okla. 692, 157 Pac. 324.

Defendant, by reason of its acts and conduct, waived any further proof of plaintiff's disability, and is estopped to deny the power and authority of the agent of the company.

*American Nat. Ins. Co. v. Donahue*, 54 Okla. 294, 153 Pac. 819; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Flanders, F. Ins.* 542; *May, Ins.* § 469.

The company, being bound by the waiver of further proof, is now estopped from requiring "due proof" to have been made.

*Armstrong, B. & Co. v. Crump*, supra; *Spaulding v. Thompson*, — Okla. —, 159 Pac. 509.

McNeill, J., delivered the opinion of the court:

This is an appeal from the district court of Oklahoma county in an action wherein Stanley Lewis was plaintiff and Federal Life Insurance Company was defendant. The parties will be referred to according to the position they occupied in the court below. From a judgment in favor of Lewis, the insurance company has appealed.

The material facts are as follows: Stanley Lewis obtained a life insurance policy from the defendant company, said policy containing the following provision, to wit: "After premiums shall have been paid for one year and before default in the payment of any subsequent premium, if the insured shall furnish due proof of total permanent disability by bodily injuries or disease, and that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations, the company, by an indorsement in writing upon this policy, will agree to pay annually for the insured the premiums, if any, which shall thereafter become payable during the continuance of such total disability, provided such proof shall be furnished to the company before the insured shall attain the age of sixty years. In any such case the premium so paid shall not be a lien on this policy or charge against the insured, and the cash loans and values of this policy in the same amounts as if the premiums were being paid by the insured. If, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium-paying period, the company's obligation to pay the premiums shall cease, and the insured shall resume payment of premiums in accordance with this policy on the first due date following such recovery."

The premiums on the policy were due and payable on the 30th day of September each year. After the policy had been in force and effect for several years, in April, 1915, the

plaintiff, Lewis, received a gunshot wound in one hand. The evidence disclosed that for about fourteen weeks he was confined to his bed, and then was unable to get out of his bed without the use of a cane. Besides losing several fingers on the left hand, his legs were very weak and unsteady. The doctor stated he was suffering from ataxia tabes dorsalis, considered generally as an incurable disease; his limbs were very weak and trembling, he had practically no control over them, and walked with great difficulty, and several times a strong wind caused the plaintiff to fall.

The evidence disclosed that, prior to September 30, 1915, he had a conversation with T. J. Wood, the state agent of the company, in regard to the insurance, and informed the agent that the policy contained the provision that the company would pay the premium during such time as he was totally disabled; that the agent informed him there was something the matter with his head; that there was nothing wrong with him, and that he did not come under that clause of the policy. The sister of the plaintiff also testified that she had informed Mr. Wood, the state agent, as to his condition. On September 30, 1915, the plaintiff made payment of the insurance by giving a note for part and paying part, and the note was eventually paid, but paid by the plaintiff under protest. There was some correspondence between him and the company in which he advised them he was paying the premium under protest, and after making the payment he filed suit to recover the same back. For the year 1916 the company required certain affidavits as to his condition, which were furnished, and it paid the insurance for that year. The plaintiff below pleaded that he had not furnished any proof of his condition for the year 1915 for the reason the company waived the proof and had denied liability. The defendant company introduced no evidence, and the court instructed the jury to return a verdict for the

plaintiff and against the defendant for the amount paid. From said judgment the defendant appeals.

The first assignment of error that the defendant company alleges is that the plaintiff failed to prove that he was totally and permanently disabled, and that he would be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations; that the provision in the policy provided: "If the insured shall furnish due proof of total permanent disability by bodily injuries or disease, and that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations;" and the same section further provides: "If, however, the insured shall recover so as to be able to engage in any gainful occupation during the premium-paying period, the company's obligation to pay the premiums shall cease, and the insured shall resume the payment of premiums, in accordance with this policy, on the first due date following such recovery."

The defendant argues that the evidence does not disclose that the plaintiff would be permanently disabled for life, but it is admitted that the company accepted his condition as coming within that provision of the policy, and paid the premiums for the year 1916.

The doctor testified that the disease was considered usually incurable, and his condition was very unfavorable. To admit of the technical interpretation of said policy which the defendant company attempts to invoke in the case at bar would make the policy ambiguous and contradictory and meaningless in part. In the first case, they have the provision in the policy that, if permanently disabled, he must be in such a condition that he will be permanently and wholly disabled for life from pursuing any and all gainful occupations. In the same section it provides if, however, he should recover and be able to engage in a gainful occupation, then he should again assume to pay the

premiums. The evidence at the trial disclosed that the plaintiff had been disabled up to the time of the trial, which was January 5, 1917, or almost two years after the injury, and at the time of the trial the company had also recognized the fact that he was totally disabled, and had paid the premiums on the insurance policy for the year prior thereto. We think a fair construction of the provisions of the policy, when construed together, must be that if the insured was totally disabled, then they should pay the insurance premium. The word "total" disability is construed by this court in the case of *Continental Casualty Co. v. Wynne*, 36 Okla. 325, 129 Pac. 16, which states as follows: "'Total disability,' under the provisions of an accident insurance policy, does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It exists, although the insured may be able to perform a few occasional or trivial acts relating thereto, if he is not able to do any substantial portion of the work connected with his occupation."

We do not think that the company could ask the court to construe the clause that the plaintiff did not come within the provision of this section, when it itself was recognizing him as coming within the provision of the clause, and was paying the insurance at the time of the trial, for the same injuries that he was claiming the benefits therefrom in 1915. The evidence disclosed at the time of the trial he was showing some improvement from his previous condition. The rule as laid down by this court in the case of *Shawnee L. Ins. Co. v. Watkins*, 53 Okla. 188, 156 Pac. 181, is as follows: "Where the meaning of language in a policy of life insurance, or in the application therefor, is ambiguous or susceptible of two different constructions, the same will be strictly construed against the insurer, and that con-

Insurance—  
ambiguous  
policy—con-  
struction.



struction adopted which is most favorable to the insured."

The policy first provides that the insured must prove that he will be totally disabled for life from continuing any gainful occupation. The same section then provides, if he recovers or does assume any gainful occupation, he must then pay his premiums. In this case they are asking us to construe only the first portion of said section, but, by construing them together, we think

—disability—  
construction of  
policy—payment  
of premium by  
insurer.

the liberal construction means "total disability," and that he probably will be so for life. We

think, as to this assignment of error, there is no merit.

The second assignment of error is that the plaintiff failed to furnish due proof of total permanent disability. The policy contained the provision that if the insured shall furnish due proof prior to the time of default. The accident occurred in April; the premium was not due until September 30th. The plaintiff stated that he talked to the state agent twice during that time, and the agent informed him that he did not come within the clause as provided in the policy. At no time did the agent inform him in regard to the proof necessary, nor what proof was required, nor that the company would furnish blanks to make out his proof thereon, but denied liability, in that plaintiff did not come within that clause. Our court has held in the case of Oklahoma F. Ins. Co. v. Wagester, 38 Okla. 291, 132 Pac. 1071, and American Nat. Ins. Co. v. Donahue, 54 Okla. 294, 153 Pac. 819: "A provision in an insurance policy requiring proof of loss to be furnished the company within

—waiver of  
proof of dis-  
ability.

a certain definite time is waived by the company deny-

ing liability within said time upon other grounds than failure to furnish proof of loss."

The sister of the plaintiff also informed the company as to the condition of the plaintiff, and when the

plaintiff demanded of the state agent upon two occasions to fix the policy, to give him the benefit of the total disability clause, the state agent replied that he did not come within the provision of said clause. This was a denial of liability. The defendant claims the cases above cited, Oklahoma F. Ins. Co. v. Wagester and American Nat. Ins. Co. v. Donahue, are distinguishable; but in this we cannot agree.

The next assignment is that there is no evidence that T. J. Wood was the state agent of the company. The plaintiff alleged in his petition that T. J. Wood was the state agent, with full power and authority. This was denied, but not under oath. The plaintiff introduced certain evidence to show that Wood was the state manager, and the receipts were signed by Wood as state manager. At the trial of the case the court stated: "I presume you intend to show that Wood is the agent." The attorney for the plaintiff replied, "Yes; but that is admitted, however." To this the company made no objection that they were admitting that Wood was the agent. Defendant admits that the statute requires the allegation of agency should be denied under oath, or the same should be taken as true, but states the fact that the plaintiff, in addition to relying on the denial, introduced certain evidence, and he thereby waived all of his rights under the provision. In this we cannot agree, as stated by this court in the case of Armstrong, B. & Co. v. Crump, 25 Okla. 452, 106 Pac. 855: "The allegation of any appointment or authority is taken as true, unless the denial of the same be verified by affidavit of a party, his agent or attorney. The defendant alleged that a certain party was the agent of plaintiff, which allegation was undenied, as above required. Evidence was offered on the trial of the cause to establish the agency thus admitted. Held, that the reception of the same was not prejudicial error."

The defendant relied on the case

of *Spaulding v. Thompson*, — Okla. —, 159 Pac. 509, but there the court stated: "But if he raises an issue thereon by introducing evidence to establish the truthfulness of said indorsement, it is too late then to complain if the defendant accepts the issue and attacks the indorsement and plaintiff's evidence substantiating the same with adverse evidence."

There was no evidence to show that Wood was not the state agent, or had no authority; but when plaintiff's attorney in the case below informed the court that it was admitted, the company's attorney did not deny this, or attempt to raise the issue thereon. The holding of the above case is to the effect that in the case at bar, although the defendant company's answer is not verified, still, after the plaintiff had introduced some evidence tending to prove that Wood was the state agent, the defendant company would have had the right then to introduce evidence contradicting that allegation; but in the case where the answer is not verified, and the plaintiff introduced some evidence to support the allegations, and the defendant introduced none, there can be no question, so far as the defendant is concerned; his pleadings neither denied the allegation, and he offered no evidence to deny it, so it must be taken and admitted as true. Section 3464, Revised Laws 1910, is as follows: "All life insurance companies doing business under the laws of this state shall be required to maintain a general agency within the state, in charge of a resident general agent."

The proof disclosed, and the allegations were, that Wood was the resident and general agent. The pleadings admit this fact, and the evidence supports the fact. Without any evidence to the contrary, there can be no merit in this assignment of error.

The defendant alleges the introduction of immaterial testimony, but this assignment of error is not well taken. The evidence was un-

contradicted, and the evidence introduced on behalf of the plaintiff proved the allegations of the petition, and was not even denied. In a case where the court rendered judgment for plaintiff upon the evidence, it cannot be said that the introduction of immaterial evidence could be a proper assignment of error unless the court based its judgment upon the immaterial evidence.

Appeal—admission of unnecessary evidence—nonprejudice.

The evidence in this case was uncontradicted. There was no dispute as to the facts in the case, but the only questions presented were, did the defendant waive proof of loss by denying the liability? This fact was undenied, and was not even contradicted in any way or by any inference. Therefore as to that question there was no issue.

The interpretation of the policy was the only other question. That fact was undenied. Although it is true that the doctor stated that, as to whether the plaintiff would ever be able to do any work, he was not positive, but that his disease was considered incurable, so on this question we think there was but one conclusion that could be reached from the evidence, there being no evidence offered on behalf of the defendant, nor was the evidence on behalf of the plaintiff contradicted in any way whatever. The plaintiff having made out his case, no evidence being offered by the defendant, it was not error for the court to render judgment upon the evidence in favor of plaintiff and against the defendant.

Sharp, Rainey, Harrison, Pitchford, and Johnson, JJ., concur.

A petition for rehearing having been filed, the following Per Curiam response was handed down October 7, 1919:

The plaintiff in error, on petition for rehearing, suggests that the court in the opinion should have passed upon the question of the authority of the agent Wood, and not upon the question of whether Wood

was the agent, for the reason that the company did not deny that Wood was the agent, but denied his authority. The petition alleges that Wood was the agent, with full power and authority to act. The company in its answer admits he was agent, but denies his authority, but the denial was not verified. The rule adopted by this court as to verification of an answer, in denying either

Pleading—denial  
of authority of  
agent—verification.

the appointment or  
authority of the  
agent, is the same,  
the court holding

that, in order to deny the appointment or authority of the agent, the answer must be verified; otherwise the allegations of agency or authority, as alleged in the petition, will be taken as true. This court, in the case of Chicago, R. I. & P. R. Co. v. Mitchell, 19 Okla. 579, 101 Pac. 850, held in substance:

Where the allegations of the petition set up the authority of the

agent, and the defendant denies this authority, and the answer was sworn to by the attorney, but not in compliance with the statute, which provides what is necessary for the attorney to allege before he may verify a pleading, does not bring the denial within the statute, and is not sufficient to raise the issue of authority. The fact that plaintiff may have introduced some evidence in the court below to prove authority, under the cases cited in the opinion, would not be prejudicial error.

The defendant introduced no evidence to show lack of authority; therefore the authority of the agent as alleged in the petition will be taken as true.

The petition for rehearing is therefore denied.

Owen, Ch. J., and Rainey, Kane, Johnson, Pitchford, and Higgins, JJ., concur.

## ANNOTATION.

### Construction of provision for payment of premiums by insurer.

Provisions for the payment of premiums by the insurer in case of total disability are of comparatively recent origin, and their development appears to be in the formative period, through which all new clauses usually pass before a standardized clause is adopted. There is as yet little authority dealing with the construction of these provisions.

It will be observed that in the reported case (*FEDERAL L. INS. CO. v. LEWIS*, ante, 1637), a provision of a section of the policy that if the insured shall furnish due proof of total permanent disability, and that he will be continuously and wholly prevented thereby, for life, from pursuing any and all gainful occupations, the company agrees to pay regularly for the insured the premiums, was held ambiguous and contradictory when taken with a further provision of the same section, that "if, however, the insured shall recover so as to be able to engage in any gainful occupation, during the

premium-paying period, the company's obligation to pay the premiums shall cease," and the court held that the provisions, construed together, meant that if the insured is totally disabled, and will probably be so for life, he comes within the provision requiring the insurer to pay the premiums.

But one other case has been disclosed in which the court has been called upon to construe a provision of the character under consideration.

In *Wick v. Western Union L. Ins. Co.* (1918) 104 Wash. 129, 175 Pac. 953, the controversy related to the construction of a clause entitled "Total Disability," and providing that "if the insured, before attaining the age of sixty years, shall furnish due proof that he has, before default in the payment of any premium, become wholly disabled by bodily injury or disease, and will be permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, the company will pay for said

insured all premiums which shall become due and payable during the continuance of such disability. The premiums so paid shall not become a charge against the insured, and the values in the table of page two hereof shall increase in the same manner as if the premiums were being paid by the insured. The insured shall, upon due date of any premium, if so required by the said company, furnish due proof of the continuance of such disability. If the insured shall fail to furnish such proof, the company's obligation to pay the premiums hereunder shall cease, and the insured shall then resume payment of premiums." The insurer contended that this disability clause meant that if the insured under an existing policy demanded that the insurer pay subsequently accruing premiums, accompanying such demand with proof of total disability, it must pay the premiums so long as the disability continued, but that such obligation was not placed upon the insurer where the demand was made and proof of disability were furnished after the expiration of the period of grace allowed for the payment of the premium, default in payment, and cancelation of the policy by the company. The insured, however, claimed that the contract meant that if, at any time before reaching the age of sixty years, the insured furnished proof that he had become totally disabled before default in the payment of any premium, then the insurer must pay all premiums. The court construed the provisions in connection with the "Consideration" and "Grace" provisions of the policy, and held that the contract was one of term insurance, and that the word "has," in the clause "shall furnish proof that he has," was used in the present tense, and that it was necessary that proof of disability be furnished before default in the payment of any premium, and that there could be no recovery on the policy where proof of total disability was not furnished until after default in the payment of the premium, the expiration of the days of grace provided for, and cancelation of the policy. The court

said: "Certain rules are recognized for the construction of written contracts for the purpose of ascertaining from the language the extent to which the parties intended to be bound; and it is the duty of courts to observe them, and not attempt to vary, change, or withhold their application. The first and most important of such rules is that the intent of the parties, as expressed in the words they have used, must govern. With such understanding counsel for appellant, protesting inability to see how there can be two opinions as to what the total disability clause means, present their view by quoting from the clause as follows: 'If the insured, before attaining the age of sixty years, shall furnish due proof that he has, before default in the payment of any premium, become wholly disabled, . . . the company will pay for the said insured all premiums, etc.' And it is seriously contended, considering the words and punctuation, that the insured has, under this contract, until just before he is sixty years of age to furnish proof that at some prior time (say a quarter of a century ago), while he was not yet in default of premium payment, he became totally disabled, without losing his rights under the contract. A clumsy arrangement of words, even coupled with the 'comma fault,' will not be allowed to contravene a reasonable interpretation according to the intention of the parties at the time of using them. In the language last above quoted, it is to be noticed that the word 'has' is used only once. Now, if in its stead the word 'had' or 'did' was employed, and no portion of the policy on this particular point considered other than this, thus altered, there would be force in the argument made; but the word 'has' is quite significant. It is a word which is always used in the present tense. So that the words 'shall furnish proof that he has' mean at the present time; and, taken in connection with the other language in the part of the total disability clause quoted, mean that he shall 'furnish' the proof before 'default in the payment of any premium.' In addition, the rule for the construe-

tion of contracts first mentioned is qualified or extended in such way that the intention of the parties is to be gathered, not from detached parts of the instrument, but from the whole of it. Other portions of the policy in this instance may be noticed with advantage. Further on, in the total disability clause, in speaking of the payments the company will make for the insured, they are described as those 'which shall become due and payable during the continuance of such disability.' Not those which 'did' or 'had' become due, but those which 'shall' become due. Thus showing the plan by which, if the insured become totally disabled and prevented thereby from pursuing any gainful occupation, and furnish proof thereof before default in the payment of any premium, then the company, for the insured, will make all payments of premiums which shall become due and payable during the continuance of such disability. Such a plan is manifestly designed to save the insured, in misfortune, from a forfeiture of his rights under a policy of 'term insurance,' which otherwise gives the insured only the right, upon the payment of a premium, to insurance upon his life for the term paid for, and the right to continue that insurance from term to term, at the same rate. Other language in this same clause may be considered. It provides: 'The insured shall, however, upon due date of any premium, if so requested by the company, furnish due proof of the continuance of such disability. If the insured shall fail to furnish such proof, the company's obligation to pay the premium hereunder shall cease and the insured shall then resume payment of premiums.' This provision contemplates a possible restoration of the insured from total disability (a change by no means improbable), whereupon the company in its turn is to be relieved from the obligation of paying premiums for the insured. But if appellant's idea of what this contract means shall prevail, when and by what means shall the company ever know of any relief to the insured from total disability? Obviously the insured would gain nothing

by giving such information, but, on the contrary, would profit by withholding it until just before he became sixty years of age, or, if he die before reaching that age, for his beneficiary then to furnish proof to the company that years ago, and prior to the expiration of a period of term insurance, the insured became totally disabled, and in either of such cases hold the company liable, and thus deprive it of any possible opportunity under this part of the contract. There are a number of other provisions in the policy that point this same way, only two of which need be considered: First. Under the clause 'consideration,' it is stated to be 'the advance payment in cash . . . of an annual premium of \$23.70 for term insurance for one year ending on the 1st day of May, 1915, and the payment of an equal amount upon each anniversary date until the date of the death of the insured.' Second. In the clause entitled 'Grace in Payment of Premiums,' it says: 'In the payment of all premiums hereunder after the first policy year there will be allowed a grace of one month (not less than thirty days) . . . during which time this policy shall remain in full force and effect.' It is to be observed that the provision with reference to grace in payment of premiums is required by subdivision 1, § 6059-184. Rem. Code, in all such life insurance policies after January 1, 1912. Clearly, these two features, 'Consideration' and 'Grace in the Payment of Premiums,' make the contract one of 'term insurance;' that is, insurance in force during the term or period for which a consideration of premium has been paid and the grace period of thirty days. It is so declared by the words, 'during which time this policy shall remain in full force and effect,' which words, of themselves, are at once useless unless they constitute a limitation as to time upon the vitality of the contract. With what success shall it be contended that such language, which by the statute is required to be placed in all annual premium payment life insurance policies, is not out of harmony with the heavy obligations sought to be imposed upon the

Greenway avenue only by way of Burnet avenue.

At 4:50, on the morning of June 23, 1912, a fire broke out in the Malleable Iron Company's plant. At this time a freight train consisting of fifty-four cars, and 2,160 feet in length, was approaching on the West Shore tracks from the west. The engineer of this train, one Johnson, is now dead. But its fireman testified that he discovered the fire as he crossed James street, some 2 miles away. When a mile distant he could locate it. Johnson had a regular train. On at least five or six trips he had been over the road in this neighborhood with the same fireman. We may assume that he knew the general situation and the communicating streets, for the general view towards the canal for much of the way was not obstructed by buildings or other obstacles. As the engine approached Beach street the tracks were straight, and the engineer could see, standing on the tracks ahead of him, 150 feet east of Greenway avenue, another freight train.

Meanwhile the fire department of the city of Syracuse was attempting to reach and extinguish the fire. One hose cart crossed the canal and came northerly on Beach street with its gong clanging. It was a still morning. There was not much noise on the engine. The gong could be heard for a distance of three or four blocks. The train was going slowly at from 2 to 6 miles an hour. It could have been stopped within 30 or 40 feet. It did not stop, however, and the engine reached the crossing as the hose cart approached it. The fireman, seeing that there would be delay, knowing that they could reach the fire only by means of Burnet avenue, turned to the right over the fields and so came to Teall avenue. Their course could be observed from the engine. Their object could have been divined. But when Teall avenue was reached the engine had just passed that crossing also and the hose cart was again blocked.

▲ second hose cart came south on

Teall avenue to Burnet avenue. Its gong was also clanging as it turned easterly towards Greenway avenue. Between the two avenues it must have been slightly ahead of the engine, for as it turned south on Greenway avenue and came to the crossing the engine was just passing.

While between Teall avenue and Greenway avenue the engineer had been signaled from the freight train standing on the tracks ahead to stop. He shut off steam, but almost immediately the first freight train began to move and he was signaled to follow. As the engine passed Greenway avenue the captain of the hose cart called to someone on the engine asking why they did not stop and let the hose cart by. That person's lips were seen to move apparently in reply, but what he said was not heard. Again when the train was partly over the crossing someone upon it signaled to the engineer to stop, evidently with the idea of cutting the train and so allowing the hose cart to pass through. This operation would have taken two minutes. The engineer did not see or did not heed this signal, although there was not much smoke over the train to hide his view. Although he knew of the location of the fire and must have appreciated the need of haste, he continued on slowly without stopping until the crossing was clear. No train was following him. A delay of fifteen minutes ensued. As a result much greater damage was done by the fire than would have occurred had the hose carts been able to reach the scene promptly. It is for this damage that the action is brought.

With evidence in the case which would justify a jury in finding such facts as have been here outlined, the appellate division has held that the complaint should be dismissed. In this we think it erred. Whether the defendant made reasonable use of its rights in view of the situation which confronted it may well be a matter upon which

*Trial-question  
for jury—  
railway inter-  
fering with fire  
department.*

the shop. The fire department promptly responded to an alarm sent it, and despatched several fire engines to the scene of the fire. When the engines reached the railroad crossing, a half square from the fire, their further progress was obstructed by the gates to the crossing, which were then closed. A train of empty cars was then approaching the crossing from the east, and within about 400 feet of it. At the same time another train of empty cars was approaching from the west, but at somewhat greater distance. The gates were closed to give the trains exclusive right of way over the crossing, and they remained closed until both trains had cleared, a period of from ten to thirteen minutes, during which time the fire engines were prevented from proceeding to the fire. The plaintiff's contention was that this delay was the result of the defendant's negligence, and that it increased materially his loss from the fire. The action, charging negligence, was brought to recover compensation. A nonsuit was directed, and from the refusal of the court to take it off we have this appeal.

If the evidence submitted would have supported a finding of failure on part of the defendant's employees to perform a manifest duty important to the plaintiff by way of preventing the injury which he claims to have sustained, the case should have been submitted to the jury; otherwise the court was right in directing a nonsuit. By the term "manifest duty" we mean a duty which it would be wilfulness or wantonness to disregard, as distinguished from a duty the nonobservance of which is to be referred to inattention or thoughtlessness. The former is always predicated on purpose or design, the latter never. If the employees of the defendant company knew when their several trains were approaching the crossing, that a fire was endangering or destroying the plaintiff's property but a half square distant, and that the use of the crossing by the railroad com-

pany for its own purpose would prevent the fire engines from reaching the scene of the fire and rendering timely service in extinguishing the fire, it would have been a

Railroad—duty to remove obstruction from path of fire apparatus.

manifest duty resting on them to do whatever was reasonably practicable to remove any obstruction to the immediate crossing of the fire engines. When it is sought to charge a railroad company with negligence for allowing such obstruction as here occurred, it is first of all essential that it be made to appear that those in charge

of the trains, who were directly responsible for their control, knew, or ought to have known, when they were employing or about to employ the crossing with their trains, of the unforeseen conditions existing which made such employment, or use of the crossing, likely to cause the injury for which recovery is sought. We see nothing in the evidence indicating even in remote way that any of the defendant's employees knew of the existence of this particular fire. It does not appear that it was at any time within their view. They saw that the gates were closed as they passed along on the tracks, and they saw the fire engines standing there awaiting their removal, and they may or may not have heard the call

Evidence—burden of proof—knowledge of railroad employees.

of the several bystanders, who testified that they called, "Cut the train," but this comes very far short of showing such knowledge of the situation as would charge them with a manifest duty to do something out of the usual to meet an emergency that could not have been foreseen, and about which they could at best only conjecture. In what we have said we include as well the gateman or flagman. It does not appear that he saw, or could have seen, the fire from where he was placed. One witness testified that, having himself discovered the fire, he told the

—knowledge—sufficiency.

L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, affirming (1908) 139 Ill. App. 116.

Indiana.—Cleveland, C. C. & St. L. R. Co. v. Tauer (1911) 176 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758.

Iowa.—Bosch v. Burlington & M. R. Co. (1876) 44 Iowa, 402, 24 Am. Rep. 754.

Kansas.—Walker v. Missouri P. R. Co. (1915) 95 Kan. 702, 149 Pac. 677.

Massachusetts.—Metallic Compression Casting Co. v. Fitchburg R. Co. (1872) 109 Mass. 277, 12 Am. Rep. 689; Hyde Park v. Gay (1876) 120 Mass. 589.

Michigan.—Clark v. Grand Trunk Western R. Co. (1907) 149 Mich. 400, 112 N. W. 1121, 12 Ann. Cas. 559; Valentine v. Minneapolis, St. P. & S. Ste. M. R. Co. (1908) 155 Mich. 151, 118 N. W. 970.

Minnesota. — Erickson v. Great Northern R. Co. (1912) 117 Minn. 348, 39 L.R.A.(N.S.) 237, 135 N. W. 1129, Ann. Cas. 1913D, 763, 3 N. C. C. A. 490; Bodkin v. Great Northern R. Co. (1914) 124 Minn. 219, 144 N. W. 937, Ann. Cas. 1915B, 705.

Missouri.—Hurley v. Missouri, K. & T. R. Co. (1913) 170 Mo. App. 235, 156 S. W. 57.

New York.—Phenix Ins. Co. v. New York, C. & H. R. R. Co. (1907) 122 App. Div. 113, 106 N. Y. Supp. 696, affirmed in (1909) 196 N. Y. 554, 90 N. E. 1164. And see *GLOBE MALLEABLE IRON & STEEL CO. v. NEW YORK C. & H. R. R. Co.* (reported herewith) ante, 1648. Compare *Mott v. Hudson River R. Co.* (1863) 1 Robt. 585.

Pennsylvania.—KIRSTEIN v. PHILADELPHIA & R. R. Co. (reported herewith) ante, 1646.

Thus it was said in *Hurley v. Missouri, K. & T. R. Co.* (1913) 170 Mo. App. 235, 156 S. W. 57: "If one knowingly interferes with the efforts of those engaged in putting out a fire, and such interference results in a greater loss by the fire than would have been otherwise sustained, such person ought to be held liable. And if such person, after full knowledge of the facts and the situation, negligently or wilfully conducts himself so as to cause an interference directly

resulting in loss, he ought to be held liable."

### *b. Application of rule.*

#### *1. Negligent operation of train or car.*

In *Erickson v. Great Northern R. Co.* (1912) 117 Minn. 348, 39 L.R.A.(N.S.) 237, 135 N. W. 129, Ann. Cas. 1913D, 763, 3 N. C. C. A. 490, it appeared that in the attempt to extinguish a fire in a hotel owned by the plaintiff, the firemen ran a line of hose across the tracks of the defendant railroad company, and while the hose was being used a locomotive operated by the servants of the defendant ran over and cut the same, thereby causing a delay, during which the fire became uncontrollable and destroyed the plaintiff's premises. The court held that the acts of those in charge of the locomotive, in running over the hose, constituted negligence, as it appeared that it was broad daylight, the fire could easily be seen from the locomotive, and both the engineer and a watchman had notice of the same, the court upholding a submission to the jury by the court below in the following form: "It was not the duty of the engineer to look for hose stretched across the track, but if he knew that a hose in use to put out a fire was across the track, it was his duty not to cut it if he could avoid doing so without danger to himself or other persons. If he did not know that it was across the track, but did know that a fire was in progress in the city near the track, and knew that the situation and conditions were such as to make it reasonable to anticipate that his engine might interfere with the work of extinguishing the fire, and after such knowledge he failed to exercise ordinary care under the circumstances to avoid cutting the hose, actionable negligence might be found."

That decision was followed in *Bodkin v. Great Northern R. Co.* (1914) 124 Minn. 219, 144 N. W. 937, Ann. Cas. 1915B, 705, a case arising from the same transaction, wherein the plaintiffs sought to recover the value of articles lost in the destruction of the hotel.



In *Metallic Compression Casting Co. v. Fitchburg R. Co.* (1872) 109 *Mass.* 277, 12 *Am. Rep.* 689, it appeared that the only available source of water for the extinguishment of a fire on the plaintiff's premises was accessible only by crossing the tracks of the defendant railroad company, and for this purpose a hose line had been placed across the tracks and the water was being pumped on the fire with successful results when a freight train, controlled and operated by the defendant company, came along the tracks, and despite the warnings of the firemen, and notice, on the part of the crew, of the location of the hose, the train was carelessly run over the hose, severing it and cutting off the supply of water, whereby the plaintiff's buildings were destroyed by the fire. In an action to recover the damage caused the plaintiff, the court held that the negligent acts of the defendant's servants were the proximate cause of the plaintiff's loss, for which the defendant must be held liable.

In *Little Rock Traction & Electric Co. v. McCaskill* (1905) 75 *Ark.* 133, 70 *L.R.A.* 680, 112 *Am. St. Rep.* 48, 86 *S. W.* 997, 18 *Am. Neg. Rep.* 1, it appeared that a line of hose conveying water used in extinguishing a fire in the plaintiff's dwelling was run over and severed by a street car operated by the defendant company, whose motorman testified that he did not see the hose, but was watching the fire. The court held, following the decision in *Metallic Compression Casting Co. v. Fitchburg R. Co.* (*Mass.*) *supra*, that the facts showed a wilful disregard of the rights of plaintiff, on the part of the defendant's servants, whose acts constituted the proximate cause of the complainant's damage. A charge to the jury in the following form was held to be proper: "The jury is instructed that if they find that the fire hose was negligently cut by defendant's car, and the flow of water was thereby diverted from the house which was being consumed by fire and in which plaintiff's goods were, and that such diversion of the water severely im-

paired the power of the fire company in its efforts to control and subdue said fire, and thereby rendered it impossible for the plaintiff to rescue from said fire and save a large amount of property, which, in the absence of the cutting of said hose and the consequent impairment of the water supply, the plaintiff could and would have saved, you will find for the plaintiff."

In *Hurley v. Missouri, K. & T. R. Co.* (1913) 170 *Mo. App.* 235, 156 *S. W.* 57, it appeared that public firemen, fighting a fire in plaintiff's property, extended a line of hose across the tracks of the defendant railroad company, and with the water so obtained had controlled and confined the fire to a small annex of the main building, an elevator. About this time a long freight train, in charge of the defendant's servants, proceeded down the tracks despite the warnings of firemen and bystanders, and the evidences of the fire, which could be seen a great distance off, and stopped directly opposite the fire and a few hundred feet from the line of hose. Thereupon the engineer of the train ordered the removal of the hose or threatened to run over and cut it, stating that several of the freight cars contained a large quantity of dynamite, which was in danger of exploding because of the proximity of the fire. By reason of these threats and the evident intention of the defendant's engineer to run over the hose, the fire chief ordered the same to be uncoupled and allowed the train to proceed. The plaintiff claimed, and the evidence showed, in an action to recover the damage to his property, that the delay caused by the uncoupling of the hose and the passage of the train resulted in the fire gaining headway and destroying both the annex and the main elevator building. The court upheld the verdict of the jury in the plaintiff's favor, holding that the engineer wilfully disregarded the signals given to stop his train, and proceeded to a point where it was necessary to stop the work of fighting the fire in order to allow the train to pass; that know-

ing of the fire he wilfully drove to a point where he knew there was danger and where the presence of the train necessitated an interruption of the work of the firemen, and that therefore the defendant was liable for the damages incident to its servant's wrongful and negligent acts.

Where it appeared that fire hose was extended across the tracks of the defendant railroad company in order to combat a fire in buildings insured by the plaintiff, and further that the defendant's servants, with the knowledge of the circumstances, carelessly drove a train in their charge over the hose, thereby causing a delay and interference with the firemen's efforts to extinguish the fire, the court held that the defendant company was liable for the increased loss caused by the negligent acts of its servants. *Phenix Ins. Co. v. New York C. & H. R. R. Co.* (1907) 122 App. Div. 113, 106 N. Y. Supp. 696, affirmed in (1909) 196 N. Y. 554, 90 N. E. 1164.

In *GLOBE MALLEABLE IRON & STEEL CO. v. NEW YORK C. & H. R. R. Co.* (reported herewith) ante, 1648, it appeared that at an early hour on a summer's morning fire broke out in buildings owned by the plaintiff, which were situated near the defendant's tracks over which it was necessary for the fire apparatus to pass in order to reach the fire. In an attempt to do this a fire hose cart proceeded down an avenue leading to the railroad tracks and in full view of an approaching train, but seeing that the latter was not going to stop, the fire cart changed its course to a lane parallel with the tracks in order to reach another crossing, all the time being in view of the engineer of the train. On reaching this crossing the driver of the hose wagon found that this too was blocked, the engineer having failed to stop the train, which was a long freight train. The engineer was signaled to stop, in order to cut the train and allow the apparatus to pass over the tracks, which operation would have taken but two minutes, but despite the warnings and signals, and the evidences of a large fire and the need of haste, the engi-

neer proceeded slowly until the crossing was cleared, causing a delay of some twenty minutes. The court holds that it was error to refuse to submit to the jury the question whether the defendant made reasonable use of its rights in the emergency, that the jury might well have found that the engineer had seen the hose cart in its attempt to make the first crossing, and therefore they were negligent in not leaving the second crossing clear, or having blocked the crossing they should have cut the train and diminished the delay from fifteen to two minutes; that clearly there was a question of fact upon which the jury was entitled to pass.

But compare *Mott v. Hudson River R. Co.* (1863) 1 Robt. (N. Y.) 585, which has apparently been overruled by the more recent decisions in that state, which have been heretofore set forth, wherein it appeared that fire broke out in buildings owned by the plaintiff, and the municipal fire department, in its efforts to extinguish the same, extended fire hose across the defendant's railroad tracks. It further appeared that a train operated and controlled by the defendant's servants proceeding along the track was signaled to stop by the firemen, but proceeded on its way, and in so doing severed the hose, causing a serious delay in securing water, and thereby resulting in a greater loss from the fire. The court held that the defendant's servants were not negligent in refusing to stop on receiving signals from the firemen to that effect, and further that the cutting of the hose was not the proximate or immediate cause of the injury to the plaintiffs, saying: "The act of the defendants was not the immediate cause of the injury to the plaintiffs; it was only immediately the cause by destroying the instruments used to prevent injury. It is true, they were then actually in use, but the same principle must govern if they were just being prepared to be used on their way, or even kept in readiness for use. If the hose cart was on its way to the fire and interrupted by illegal obstructions in the

street, or injured by a locomotive, the plaintiffs might have lost the benefit of it; or if anyone negligently lost the key of its house, so that it could not be got out in time, or if anyone having contracted to repair the hose within a certain time failed to do it—in all these cases the negligence of the delinquent party might more or less contribute to the result of destroying the plaintiffs' property, yet as a result of the negligence, the consequences would be too remote to make him liable for damages." But in a strong dissenting opinion, which seems to have been followed by later decisions, it was said: "Cutting or destroying fire hose provided for use by a community, when no fire existed and the hose was not in actual use at the time of the cutting, would not give a member of that community, whose house should afterwards be burned down, a right of action for damages caused by the destruction of his house, although it might be ever so probable or clear that if the hose had not been cut, its use would have enabled the owner of the house to extinguish the fire and save his property. The damages would in that case be too remote; that is, they would be so remote that other acts or negligence intervening might be chargeable, to some extent, with the disaster; and courts will not speculate in such cases, in order to determine whether any, or how much, of the damage is due to a particular act complained of. But in the present instance, the hose was actually conveying water upon the plaintiffs' burning building, and rapidly extinguishing the fire, when it was cut. The plaintiff was instantly deprived by this act of the flow of water upon his house, and the flames that had been going out under the action of the hose immediately rose and destroyed that and other property owned by him. It would be difficult to state a case of more direct or immediate damage resulting from a specific act. Injuries, for example, sustained by being thrown from a wagon in consequence of the wheel being knocked off by coming in contact with

an obstruction negligently left in the carriageway, would seem to be more remote damage than the one under consideration; and yet such an injury has never been regarded as too remote to permit the maintenance of an action for damages caused by it."

In *Valentine v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 155 Mich. 151, 118 N. W. 970, it appeared that the servants of the defendant negligently placed a burning car opposite the property of the plaintiff which he and others were attempting to save, whereby the persons engaged in fighting the flames were driven away and the property was consumed. The court held on the evidence that the following instruction was correct: "If you find that the crew of the switch engine, against the protest of the plaintiff, did negligently pull and place a burning car directly opposite to his timber on the windward side, in such position that it was evident that the burning car would injure the timber he was trying to save, and drive away those trying to protect it, and if you find from the evidence that the destruction of the timber, which otherwise might and would have been saved, was caused by that act, then the plaintiff is entitled to recover such damages as resulted from that act."

In *White v. Colorado C. R. Co.* (1879) 5 Dill. 428, Fed. Cas. No. 17,543, it appeared that the defendant railroad company stored a quantity of gunpowder in its warehouse, in which, at the time, was a shipment of goods belonging to the plaintiff. The warehouse was destroyed by fire, it being shown that the firemen were prevented from entering or approaching the building by reason of the presence of the explosives. In this action to recover the value of the plaintiff's goods, which were destroyed, the court held that the railroad company was negligent in storing the powder in the same warehouse with the goods of the plaintiff, and was liable for the loss occasioned to the latter, saying: "The fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the

result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. 'Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause.'"

See also *Crissey & F. Lumber Co. v. Denver & R. G. R. Co.* (1902) 17 Colo. App. 275, 68 Pac. 670, wherein it was held that a cause of action was stated by a complaint alleging that a car of powder was placed near a fire, that "the defendant railroad company negligently failed to remove said car of powder from its exposed position when the fire originated, as it was its duty to do; also that, by reason of the improper placing in such an exposed condition of the car of powder and the failure to remove it, the fire department of the city, which had come upon the premises with their appliances for the purpose of extinguishing the fire, were deterred and prevented in their efforts so to do, and as they might otherwise have done, by reason of the great peril and imminent danger to life and limb to which the firemen were exposed."

*2. Negligence presumed from violation of statute.*

In *Houren v. Chicago, M. & St. P. R. Co.* (1908) 236 Ill. 620, 20 L.R.A. (N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, affirming (1908) 139 Ill. App. 116, it appeared that the defendant railroad company had allowed a long train of freight cars to remain on its tracks, crossing a public road and blocking the same contrary to a statute (Hurd's Rev. Stat. 1908, chap. 114, ¶ 77), whereby the municipal fire department was delayed for a period of thirty-five minutes in responding to an alarm of fire. In consequence the plaintiff's dwelling was destroyed. The court held that the blockade of the roadway was the proximate cause of the complainant's loss, as it appeared that his house did not catch fire until nearly an hour after the alarm had been given, and that a two-way fire hydrant was situated in the

immediate vicinity so that it could reasonably be inferred that the fire could have been controlled had not the necessary apparatus been precluded from arriving on the scene by reason of the defendant's negligent acts. The court said: "It seems clear to us that if a prudent man of experience had reflected upon the probable consequences of entirely closing up this street in a great city, he would have foreseen, first, that to so close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of teams, engines, and other appliances of the fire department; third, that if the travel of the fire department was so obstructed and delayed, any fire which the men of that department were seeking to reach would be more extensive and do greater damage than if the obstruction and delay had not taken place." The court held further that the violation of the statute, referred to above, was negligence, as a matter of law, thus distinguishing the case from those cases wherein the acts complained of were not violations of the law, and therefore knowledge of the fire on the part of the railroad company was essential. See the cases abstracted in the subdivision "Limitation of rule."

Where it appeared that the fire apparatus of a municipal department was unable to proceed to a fire in the plaintiff's greenhouse, because of the blocking of a railroad crossing by a train operated by the defendant company, which was allowed to stand on the crossing for a period of time over ten minutes, in violation of the requirements of the statute (Burns's Anno. Stat. 1908, § 2671), the court held that the violation of the law constituted negligence per se, and for the damage caused to the plaintiff by the defendant's interference with the fire department the defendant was liable. *Cleveland, C. C. & St. L. R. Co. v. Tauer* (1911) 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758.

In *Hyde Park v. Gay* (1876) 120 Mass. 589, it appeared that fire hose was laid across tracks on which the

defendant was operating a gravel train, and further, that the day being a Sunday, the firemen had no cause to believe that the tracks were being used for the operation of a train. The defendant, nevertheless, in contravention of the statute forbidding the operation of a train on the Lord's day, was running its gravel train, which ran over and severed the hose. The court held that the defendant was guilty of negligence per se, having violated the statute by operating a train on Sunday, aside from the question of negligence in cutting the hose.

## II. *Limitation of rule.*

Though the operation of a railroad train interferes with the work of a fire department while it is attempting to extinguish a fire the railroad company is not liable for the consequences of that interference unless the employees of the railroad company have knowledge of the fire or of the presence of the apparatus of the fire department, or in the exercise of due care should have such knowledge. *American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co.* (1906) 12 L.R.A.(N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 Ann. Cas. 626; *Louisville & N. R. Co. v. Scruggs* (1909) 161 Ala. 97, 23 L.R.A.(N.S.) 184, 135 Am. St. Rep. 114, 49 So. 399; *Bosch v. Burlington & M. R. Co.* (1876) 44 Iowa, 402, 24 Am. Rep. 754; *Walker v. Missouri P. R. Co.* (1915) 95 Kan. 702, 149 Pac. 677; *Clark v. Grand Trunk Western R. Co.* (1907) 149 Mich. 400, 112 N. W. 1121, 12 Ann. Cas. 559; *KIRSTEIN v. PHILADELPHIA & R. R. Co.* (reported herewith) ante, 1646.

Thus, in *Louisville & N. R. Co. v. Scruggs* (1909) 161 Ala. 97, 23 L.R.A.(N.S.) 184, 135 Am. St. Rep. 114, 49 So. 399, it was held that the defendant railroad company was not liable for damages to the plaintiff's property caused by the inability of the public firemen to lay a line of hose across the defendant's tracks. It appeared that a freight train, operated in the usual course of business, had stopped in such a manner as to block the ingress of firemen to the burning building. None of the defendant's servants or agents had knowledge of the fire or

the damage caused by their acts. The court said: "In respect to legal responsibility to a third person, there is, we think, a distinction to be drawn between an active and a passive use, in the enjoyment of one's property rights. To illustrate: If, in the present case, the fire hose had been laid from the hydrant, across the tracks of the defendant, to the fire, and the defendant's servants, with knowledge of the existing conditions as to the fire and the laying of the hose, had wilfully or negligently run the train of cars over the hose, destroying it, and thereby prevented the extinguishing of the fire, a legal liability for such conduct would have arisen. That would have been an active use of one's property in violation of the maxim '*Sic utere tuo ut alienum non lædas.*' On the other hand, if (as was the case here) the defendant's train of cars was already rightfully standing on its tracks intervening the hydrant and the plaintiff's burning house, and the defendant merely failed or refused to promptly move its train out of the way when requested so to do, in order that the hose might be laid across its tracks, there would be no case for the application of the above-quoted legal maxim. In the latter instance the use would be merely passive. The law imposes no duty on one man to aid another in the preservation of the latter's property, but only the duty not to injure another's property in the use of his own."

In *KIRSTEIN v. PHILADELPHIA & R. R. Co.* (reported herewith) ante, 1646, it appeared that fire apparatus was delayed in reaching a fire in the plaintiff's building by reason of the passing of trains over the defendant's tracks, which crossed the highway over which the fire engines were traveling. The court held that the defendant company could not be held liable for its interference with the firemen unless it could be shown that its servants had knowledge of the circumstances or should have known of the situation by reason of the surrounding facts, and therefore wilfully neglected to remove the obstruction to the fire engines, saying in part: "If the employees of

the defendant company knew, when their several trains were approaching the crossing, that a fire was endangering or destroying the plaintiff's property but a half square distant, and that the use of the crossing by the railroad company for its own purpose would prevent the fire engines from reaching the scene of the fire and rendering timely service in extinguishing the fire, it would have been a manifest duty resting on them to do whatever was reasonably practicable to remove any obstruction to the immediate crossing of the fire engines. When it is sought to charge a railroad company with negligence for allowing such obstruction as here occurred, it is first of all essential that it be made to appear that those in charge of the trains, who were directly responsible for their control, knew, or ought to have known when they were employing, or about to employ, the crossing with their trains, of the unforeseen conditions existing which made such employment or use of the crossing likely to cause the injury for which recovery is sought. We see nothing in the evidence indicating even in remote way that any of the defendant's employees knew of the existence of this particular fire."

In *Clark v. Grand Trunk Western R. Co.* (1907) 149 Mich. 400, 112 N. W. 1121, 12 Ann. Cas. 559, it was said that if the servants of the defendant, being in charge of a freight train, had notice of the presence of fire hose on the tracks, and proceeded and carelessly ran over and severed the hose, thereby occasioning such delay that the destruction of property of the plaintiff was the direct and necessary result of their carelessness, the plaintiff could recover such damages as were consequent upon the delay. But it was held that actual notice of the presence of the hose on the track must be shown, as the defendant's servants could not be charged with negligence in not looking for and discovering the hose.

In *American Sheet & Tin Plate Co. v. Pittsburgh & L. E. R. Co.* (1906) 12 L.R.A. (N.S.) 382, 75 C. C. A. 47, 143 Fed. 789, 6 Ann. Cas. 626, an action to recover damages to the plaintiff's prop-

erty, which was destroyed by fire, it appeared that the property was so situated that it was bounded on one side by the right of way of the defendant railroad company. The fire which destroyed the plant was discovered at about 10 o'clock in the evening, and the municipal fire department was immediately summoned and promptly arrived on the scene. The firemen were preparing to lay a line of hose across the defendant's tracks when a freight train, operated by an employee of the defendant, was seen approaching. There was evidence to the effect that the engineer was signaled to stop and on doing so was informed that the building was on fire; and that the firemen were about to cross the tracks with a line of hose, and was requested by his informant, the night superintendent of the works, "to back up." The locomotive driver said that he could not back up as another train was following him, but that he would "cut" his train to allow the placing of the hose. To this the superintendent answered that cutting the train would take too long, and if it couldn't be backed up, to proceed and get it out of the way. Accordingly, the engineer immediately pulled out. On the question whether the defendant was guilty of conduct amounting to a tort in not stopping its train, the court held that while a corporation is liable for a wanton and wilful neglect and interference with the duties of firemen engaged in extinguishing a conflagration, still actual knowledge of the situation must be shown, followed by a wilful and wanton disregard of the right of the public firemen in the emergency. The court said: "To be a ground of liability, such interfering use must be a wilful one. Conflagrations along the right of way of a railroad company are not of such frequent occurrence as to make them, as it were, normal conditions surrounding the running of its trains. Such conditions are exceptional, and actual knowledge of the same must be affirmatively shown before liability can be predicated thereon. Not only must the knowledge be brought home to those in charge of the train, that a fire is in

existence near its right of way, but also that the running of a train past it, or the stopping of one in front of it, will interfere with the work of extinguishment, and increase the public or private danger. Moreover, the use of the property of a railroad company is a quasi public use, and the proper operation and running of its trains, in the interest of the public and for the promotion of its safety, are required to be conducted with regularity upon prearranged plans and schedules. It would be intolerable and unjust, if railroad companies were compelled, at their peril, to stop trains, whether passenger or freight, every time an unauthorized signal was given them so to do, or even every time those conducting them were aware that a fire existed along their route, whether from personal observation or from information thereof otherwise conveyed unless there was reason also to know that, by keeping on, they would interfere with means used and efforts made for the extinguishment thereof. They would have no right to run across hose, observed, or which ought to have been observed, lying across the tracks for the purpose of extinguishing a fire, and they must be held to the duty of exercising due care in proceeding, where a fire is visible near their route, or where they have information otherwise that it exists; but in all cases, knowledge of the conditions from which the exigency arises, or facts from which it may be imputed, must be shown before liability for not acting in accordance with such exigency can attach." Moreover, the court held that the defendant's servant, the engineer, on being informed of the situation, exercised his best judgment, and that under all the circumstances it must be held that his decision was a wise and prudent one.

In *Walker v. Missouri P. R. Co.* (1915) 95 Kan. 702, 149 Pac. 677, it appeared that a train operated by the servants of the defendant company was stopped on a public street for the purpose of repairing a broken brake. Without the knowledge of the train crew, municipal fire apparatus was delayed for a period of five minutes on

its way to extinguish a fire on property of the plaintiff. The court held that the facts showed no negligent interference with the firemen on the part of the defendant, as the stopping of the train was necessitated by the rule of "safety first," which required that the broken part should be repaired. The court said: "If there was no legal justification or excuse for stopping the defendant's train on Central avenue, the instructions of the court, the verdict of the jury, and the judgment are right and proper, but on the other hand, if there was legal justification or excuse for stopping the train with cars across Central avenue, the defendant should not be held liable. The findings of the jury show that the train was stopped because the brake rigging on the locomotive had fallen down and was dragging on the tracks. The evidence shows that this was liable to derail the cars. In order to escape liability for stopping on Central avenue, was it necessary for the defendant to pull its train off that avenue, and take the chances of wrecking the train, destroying its property and that carried by it, and of injuring its employees and others who might be near the track? We think not."

In *Bosch v. Burlington & M. R. Co.* (1876) 44 Iowa, 402, 24 Am. Rep. 754, it appeared that the defendant railroad company had so used and encumbered a portion of a street owned by it and used for railroad purposes that firemen were unable to make use of the same in endeavoring to extinguish a fire which destroyed the plaintiff's property. The court held that the plaintiff could not recover the damages sustained, since the blocking of the street and its use by the defendant were not the direct and proximate result of the wrongs complained of, saying: "We suppose, without question, that if one should in any manner, by cutting the hose, disabling the engine or the like, stop the stream of water by reason of which act property is destroyed, he would be liable, because the damages are the direct and proximate result of his act. But in the case at bar the building of the railroad

tracks and depots, the widening and filling the streets, have no connection with the fire, nor with the hose or other apparatus of the fire companies.

They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery." W. J. K.

ANNIE LEE TAYLOR, Plff. in Err.,

v.

J. M. SANFORD, Admr., etc., of R. H. Sanford, Deceased.

*Texas Supreme Court — April 2, 1917.*

(108 Tex. 340, 193 S. W. 661.)

**Deed — delivery — mailing — death of grantor.**

1. Executing and recording a deed and mailing it to the grantee passes the title, although the latter does not receive and accept it until after the grantor's death.

[See note on this question beginning on page 1664.]

**— delivery — what sufficient.**

2. If a deed is so disposed of by the grantor as clearly to evince an intention on his part that it shall have effect as a conveyance, it is a sufficient delivery.

[See 8 R. C. L. 978.]

**Gift — right to give property.**

3. One may give away his property as he chooses if no rights of creditors intervene.

[See 12 R. C. L. 954.]

**Deed — power to regain possession — effect.**

4. That one who has deposited a deed in the mail with intention to de-

liver it to the grantee may regain possession of it before it reaches the grantee does not destroy its effect as a conveyance.

[See 8 R. C. L. 986.]

**Gift — acceptance after death of donor.**

5. Acceptance of a gift after death of the donor is sufficient if the donee did not know of it prior to that event.

[See 8 R. C. L. 1017, 1018.]

**— presumption of assent.**

6. A delivered instrument plainly amounting to a deed of gift should operate by a presumed assent until dissent or disclaimer appears.

[See 8 R. C. L. 1000.]

**ERROR** to the Court of Civil Appeals for the Seventh Supreme Judicial District to review a judgment affirming a judgment of the District Court for Randall County (Browning, J.) in favor of plaintiff in a suit to cancel a deed. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. A. S. Rollins and J. C. Hunt for plaintiff in error.

Messrs. Madden, Trulove, & Kimbrough, for defendant in error:

The mere fact that the maker of a deed has it recorded and returned to him does not place it beyond his control, or constitute ipso facto a delivery to the grantee.

Johnson v. Johnson, 38 Tex. Civ. App. 385, 85 S. W. 1023; Croom v. Jerome Hill Cotton Co. 15 Tex. Civ. App. 328, 40 S. W. 146; Parker v. Stephens, — Tex. Civ. App. —, 39 S.

W. 165; Tuttle v. Turner, 28 Tex. 773; Van Hook v. Walton, 28 Tex. 59; McLaughlin v. McManigle, 63 Tex. 553; Burke-Mobray v. Ellis, 44 Tex. Civ. App. 21, 97 S. W. 321; Cravens v. Rossiter, 116 Mo. 338, 38 Am. St. Rep. 606, 22 S. W. 736; Parmelee v. Simpson, 5 Wall. 81, 86, 18 L. ed. 542, 543; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Givens v. Ott, 222 Mo. 395, 121 S. W. 26; Alexander v. De Kermel, 81 Ky. 345; Hulick v. Scovil, 9 Ill. 159; Com. v. Jackson, 10 Bush, 424; Davis v. Williams, 57 Miss. 843;



*Chess v. Chess*, 1 Penr. & W. 32, 21 Am. Dec. 350; *Cazassa v. Cazassa*, 92 Tenn. 573, 20 L.R.A. 178, 36 Am. St. Rep. 112, 22 S. W. 560; *Blackman v. Preston*, 123 Ill. 381, 15 N. E. 42.

The so-called deed is, in legal effect, but an offer made by the United States mail to defendant to convey her the property in question on a certain condition; and since she did not receive or accept this offer until after the death of Sanford, it was canceled by his death, and could not be given effect by any attempted acceptance or performance by her subsequent to that time.

9 Cyc. 293, subd. C, 294, subd. B; *Pratt v. Baptist Soc.* 93 Ill. 475, 34 Am. Rep. 187; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L.R.A. 807, 28 N. E. 177; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829, 3 N. E. 601; *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449; *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23; *Younge v. Guilbeau*, 3 Wall. 636, 18 L. ed. 262; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578; *Parmelee v. Simpson*, 5 Wall. 81, 18 L. ed. 542; *Thompson v. Dearborn*, 107 Ill. 87; *Littler v. Lincoln*, 106 Ill. 353; *Derry Bank v. Webster*, 44 N. H. 264; *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. 498; *Kellogg v. Cook*, 18 Wash. 516, 52 Pac. 233; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Phillips v. Henry*, — Tex. Civ. App. —, 135 S. W. 384; *Croom v. Jerome Hill Cotton Co.* 15 Tex. Civ. App. 328, 40 S. W. 146; *Gilbert v. North American F. Ins. Co.* 23 Wend. 43, 35 Am. Dec. 548; *Porter v. Woodhouse*, 59 Conn. 568, 13 L.R.A. 64, 21 Am. St. Rep. 181, 22 Atl. 299; *Gilmore v. Whitesides*, 13 S. C. Eq. (Dud.) 14, 31 Am. Dec. 563.

The holding of the deeds in possession of defendant until the trial, and bringing them into court in a modified form, and tendering them to plaintiff as the administrator of R. H. Sanford, could not be effective to give the deeds validity.

*Thompson v. Dearborn*, 107 Ill. 87; *Littler v. Lincoln*, 106 Ill. 353; *Derry Bank v. Webster*, 44 N. H. 264; *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. 498; *Kellogg v. Cook*, 18 Wash. 516, 52 Pac. 233; *Blass v. Terry*, 156 N. Y. 122, 50 N. E. 953; *Parmelee v. Simpson*, 5 Wall. 81, 18 L. ed. 542; *Croom v. Jerome Hill Cotton Co.* 15 Tex. Civ. App. 328, 40 S. W. 146; *Burke-Mobray v. Ellis*, 44 Tex. Civ. App. 21, 97 S. W.

321; *Gilmore v. Whitesides*, 13 S. C. Eq. (Dud.) 14, 31 Am. Dec. 563; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578; 9 Cyc. 293.

Messrs. Ramsey, Black, & Ramsey also for defendant in error.

**Phillips, Ch. J.**, delivered the opinion of the court:

The suit was by J. M. Sanford, administrator of the estate of R. H. Sanford, deceased, to cancel a deed of R. H. Sanford to Annie Lee Taylor, conveying certain property in Canyon, Texas. The deed was executed and acknowledged by R. H. Sanford on June 14, 1911. It recited that Miss Taylor was to assume the payment of three vendor's lien notes against the property, aggregating \$750, principal, and that a part of its consideration was the conveyance by Miss Taylor to Sanford of a lot in the town of Hamlin, in Jones county, and a 40-acre tract of land in Presidio county. Sanford was the sheriff and tax collector of Randall county. Miss Taylor was his office clerk and stenographer. There was evidence tending to show that Sanford and she had been engaged to be married. She had loaned Sanford some of her private means, which had not been repaid. Sanford was due the state of Texas and Randall county approximately \$1,000 for taxes which he had collected and for which he had not accounted, and was in a state of some financial embarrassment. He committed suicide on June 15, 1911, the day following his execution of the deed to Miss Taylor.

After executing the deed on June 14, Sanford immediately filed it for record in the office of the county clerk, and, on the same day, following its record, mailed it to Miss Taylor, who at that time was visiting her home in another county of the state. He likewise immediately mailed her in the same or a separate inclosure two deeds for her execution, conveying to him the lot in Hamlin and the tract of land in Presidio county, mentioned in his deed to her. Accompanying the

deed to Miss Taylor was the following letter from Sanford, addressed to her.

Canyon, Texas, June 14, '11.

Dear Lee:—I am sending you some deeds to sign, herewith, also enclosed a lot of other papers which are yours. Yours to keep. I want you to have them as I am deeding to you my house and the 4 lots where Cannon lives. The deed I am putting on record here and as soon as it is recorded it will be sent to you. I want you to have the house as it will make you a good living and also furnish you a home. Keep it darling as a gift from me. Under no circumstances don't give it up unless you sell it in order to support yourself. You will see from the deed that there are three notes standing against it that will fall due, one this fall on Sept. 10th, for \$250. Also the interest on the other two will become due at that time, the 2nd note will be due one year from that date and one year later the last one will be due. Of course you can pay them sooner if you choose. Please execute the two deeds to the Hamlin and the Presidio property as drawn, sign them before a notary public and send them to the Co. Clerk at Anson and Marfa to have recorded. Send a dollar with each and have them returned to me here. This is to show a consideration in your deed and is made a part of the consideration. I know you will not feel like you should accept this from me, but you must as it is my wish and I can't think of doing otherwise. It costs me more to write this than you will ever know, but the only satisfaction that I am to get is to know that I am leaving you provided for as my foster and adopted sister. . . . I will send you a draft for \$400. Will send it to the bank there or may send it direct. This will leave you in good shape as the house is well worth \$4,000 and should rent for from \$30 to \$40 per month. I am sure you can get it insured for \$3,000 next time after this policy runs out. I will just leave everything I have in the house and that

you and Mack can dispose of. When you return to see about it, bring this letter and show it to him, and he will understand all. I have foreseen this for some time, but thought I could get it all shaped up. I see that I can't and it is no fault of mine. If I could have gotten it all adjusted, we would have gotten married and lived as happy as is the lot of any couple. I could not marry you tho unless I could provide for you as I wanted to and now this is the only course for me to pursue. You know how some of the people here feel toward me since the city election, and but for that I could go through. They will swear anything and can and will ruin me if I try to stay. Now Darling I know you will forgive me for all the little worries I have caused you in the last few months when it seemed to you that I had changed toward you. It was not that but I just could not tell you. It hurt me more than it did you. No matter what some may think, I know you to be a pure Christian girl sure as there are only very few. Remember me kindly always. Goodbye Darling,

Lovingly,

Dick.

The \$400 is bal. payment on the \$500 I owe you.

Dick.

Miss Taylor received the deed and other documents at Canyon on June 19th, where she immediately went on learning of Sanford's death, his letter or letters to her having been forwarded to her at that place. Her testimony upon the trial was that it was her intention, as soon as she learned of the deed, to accept the property under it and on the terms therein stipulated. She paid off one of the vendor's lien notes against the property, and on July 21, 1911, executed and acknowledged the two deeds which Sanford had sent her for execution in mailing his deed to her. Neither of her deeds was delivered nor tendered for delivery to anyone representing Sanford's estate prior to the time of the trial of the present suit, but during its trial both were tendered by her in open

court, the trial occurring in November, 1911.

The only question in the case is whether there was a delivery of the deed from Sanford to Miss Taylor.

The law prescribes no form of words or action to constitute the delivery of a deed. It will not divest a grantor of his title by declaring his deed effective when his purpose was to withhold it from the grantee. Neither will it deprive the grantee of his rights where it was the grantor's intention to invest him with the title, though there be no manual delivery of the instrument. The question in all such cases is that of the grantor's intention. If the instrument be so disposed of by him, whatever his action, as to clearly evince an intention on his part that it shall have effect as a conveyance, it is a sufficient delivery. 2 Jones, Real Prop. § 1220; 1 Devlin, Deeds, § 269.

**Deed—delivery—what sufficient.**

**—delivery—mailing—death of grantor.**

**Gift—right to give property.**

That such was Sanford's intention with respect to the deed in controversy is, we think, unmistakable. It is clear that the deed was executed, caused to be recorded, and was mailed by him in contemplation of his death, and so as to at once invest Miss Taylor with the title. It is equally certain that he intended the property as a gift to her. Nothing could be more plainly revealed. The property was Sanford's and, no rights of creditors being involved, he had the power to give it away if he chose. If such was his intention, the law should effectuate it, rather than indulge in nice distinctions and thereby thwart what was plainly his purpose. That it was within Sanford's power, at any time before his death, to recall the deed from the mail where he had placed it for transmission to the grantee, and thereby prevent its physical delivery

to her, is immaterial. He did not recall it. Nor did he make any attempt to do so. On the contrary, everything about the transaction shows that at the time his letter was written,—the day before his death,—he regarded it as an executed gift. With this true, and clearly evidencing an intention that the deed should have immediate effect, it is of no consequence that it did not reach the hands of the grantee before his death, or that it was within his power to regain its physical possession. If what the law regards as a delivery had been accomplished, his regaining physical custody of the instrument would not have defeated it. Brown v. Brown, 61 Tex. 56; Henry v. Phillips, 105 Tex. 459, 151 S. W. 533.

**Deed—power to regain possession—effect.**

True, the gift imposed upon Miss Taylor the assumption of the payment of the three notes against the property and her conveyance to Sanford of the lot in Hamlin and the 40-acre tract in Presidio county, and required her acceptance of it, since no person can be made a grantee of property against his will. But she accepted it. She could not be expected to either accept or reject the gift until she knew of it; and since she did not know of it until after Sanford's death, her acceptance of it then sufficed. Burkey v. Burkey, — Mo. —, 175 S. W. 623. As a rule of reason and common sense, a delivered instrument plainly amounting to a deed of gift should operate by a presumed assent until a dissent or disclaimer appears.

**Gift—acceptance after death of donor.**

**—presumption of assent.**

Dikes v. Miller, 24 Tex. 417.

The judgments of the District Court and Court of Civil Appeals are reversed, and judgment is here rendered for the plaintiff in error.

Petition for rehearing denied.

## ANNOTATION.

## Deposit of deed in mail as a delivery.

An examination of the few cases found upon this subject fails to disclose any general rule as to whether or not the mailing of a deed to the grantee is, in itself, sufficient to constitute a delivery, but its sufficiency apparently depends upon the circumstances; i. e., whether the transfer was a gift, or made under conditions creating a presumption of acceptance, whether the mailing was done with the intention on the part of the grantor to effect an immediate transfer of title, and whether the deed was deposited in the mail in accordance with a prior agreement between the parties.

Thus, it was held in the reported case (*TAYLOR v. SANFORD*, ante, 1660) that the executing, recording, and mailing by the grantor, in contemplation of death by suicide, of a deed to his fiancée, as a gift of the property to her, passed the title, upon the ground that the circumstances clearly showed his intention that it should have immediate effect, although the grantee did not receive and accept it until after the grantor's death, and notwithstanding that it recited that the grantee was to assume the payment of certain vendor's lien notes, and that part of the consideration was to be the conveyance of certain property by the grantee.

And in *M'Kinney v. Rhoads* (1836) 5 Watts (Pa.) 343, it was held that the deposit in the postoffice of a deed of assignment in trust, directed to the assignee, whose assent might be anticipated, was as effective to give it immediate operation to protect the property from execution as a delivery of the deed to a messenger; being equally evincive that the grantor considered it as perfected so far as his action was required.

And it was held in *Lynch v. Johnson* (1916) 171 N. C. 611, 89 S. E. 61, where two persons purchased a parcel of land the title to which was taken in

the name of one of them, who subsequently, after receiving his share of the purchase money, executed to the other a deed of his half interest therein, that the deposit, in pursuance of the prior agreement, of the deed, duly executed, in the postoffice, postpaid, directed to the grantee, with the grantor's return address on the envelop, was a delivery, because the deed was thereby placed beyond the grantor's control, and that the title passed as against a subsequent purchaser of the property from the trustee in bankruptcy of the grantor, although the deed was lost and never received by the grantee.

But in *Deere v. Nelson* (1887) 73 Iowa, 186, 34 N. W. 809, where an owner of land, some months after a conversation with his son, in which he gave him the refusal of the land at a certain price, executed, recorded, and mailed a deed thereof to the latter, it was held that such action did not constitute an immediate delivery, because it was not done in pursuance of a previous agreement for the purchase of the land, and that the delivery did not take place until the actual receipt of the deed, and its acceptance by the son, thus completing the sale, and that therefore an attachment levied before the receipt of the deed created a paramount lien on the land.

In *Otto v. Doty* (1883) 61 Iowa, 23, 15 N. W. 578, holding that the receipt of a deed through the mail from a third person, after the grantor's death, was not a delivery, and did not pass the title to the grantee as against a devisee under the grantor's will, because it appeared that the grantor had died the year previous, there is nothing in the report to show that the third person had any authority to make a delivery; at least, any authority that would survive the grantor's death.

G. V. L.

McCLAIN & NORVET, Appts.,  
v.  
LAWRENCE TORKELSON.

FOREST CITY NATIONAL BANK, Garnishee.

FREEBORN COUNTY STATE BANK, ALBERT LEA, Intervener.

*Iowa Supreme Court — October 2, 1919.*

(— Iowa, —, 174 N. W. 42.)

**Bank — effect of Negotiable Instruments Act.**

1. The provision of the Negotiable Instruments Act that a check itself does not operate as an assignment of any part of the funds to the credit of the drawer does not change the rule that a cashing of the check by a nondrawee bank effects such assignment.

[See note on this question beginning on page 1667.]

— cashing of check — effect as assignment of fund.

2. In the absence of statute, the cashing of a check by a bank other than that on which it is drawn operates as an as-

signment pro tanto of the drawer's deposit account, which will prevent subsequent garnishment of that portion of the account by creditors of the drawer.  
[See 5 R. C. L. 492.]

APPEAL by plaintiffs from a judgment of the District Court for Winnebago County (Clark, J.) overruling a demurrer to a petition of intervention in an action brought to recover the amount alleged to be due on a promissory note, and for the issuance of a writ of attachment against defendant's property. *Affirmed.*

Statement by Salinger, J.:

The defendant Torkelson drew checks upon the Forest City National Bank, and against a general checking account, and to an amount not greater than the funds he had on deposit. The Freeborn County State Bank, upon presentation of these checks, paid the same to defendant. The defendant was indebted to the plaintiffs, and they garnished the Iowa bank. The garnishment process was served after the checks had been presented to and paid by the Freeborn County State Bank, and before these checks reached the Iowa bank. The question is whether the presentation to and payment of the checks by the Freeborn County State Bank so operated to assign the funds Torkelson had in the Iowa bank as that when the garnishment was served the last-named bank had no moneys belonging to Torkelson. The trial

court held that there was an effective assignment, and that the garnishment process was served too late to reach any funds of the defendant. The Iowa bank has no concern in the determination of the case. It has deposited the money claimed to have been assigned by Torkelson to await the order of the court, but the plaintiff creditors appeal.

Mr. H. A. Brown for appellants.

Messrs. J. F. D. Meighen and Bennett O. Knudson for appellee intervener.

Salinger, J., delivered the opinion of the court:

I. Unless § 3060a189, Supplement 1913, a part of the Negotiable Instruments Act, has effected a change in pre-existing law, there must be an affirmance. The appellants concede that before the enactment of said statute it was settled in this jurisdiction that presentation to and

the payment of a check by a bank other than the bank of deposit operated to divest the title of the giver of the check in the deposit against which the check was drawn; and the concession is well made. Such payment amounts to an equitable assignment pro tanto of such fund. *Kuhnes v. Cahill*, 128 Iowa, 594, 104 N. W. 1025; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Schollmeyer v. Schoendelen*, 78 Iowa, 426, 16 Am. St. Rep. 455, 43 N. W. 282; *May v. Jones*, 87 Iowa, 188, 54 N. W. 231; *Bloom v. Winthrop State Bank*, 121 Iowa, 101, 96 N. W. 733. To like effect are *Wasgatt v. First Nat. Bank*, 117 Minn. 9, 43 L.R.A. (N.S.) 109, 134 N. W. 224, Ann. Cas. 1913D, 416; *Boswell v. Citizens' Sav. Bank*, 123 Ky. 485, 96 S. W. 797; *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45; *People's Nat. Bank v. Swift*, 134 Tenn. 175, 183 S. W. 725; *Southern Seating & Cabinet Co. v. First Nat. Bank*, 87 S. C. 79, 29 L.R.A. (N.S.) 623, 68 S. E. 962; *Findlay v. Corn Exch. Nat. Bank*, 166 Ill. App. 57; *Farrington v. F. E. Fleming Commission Co.* 94 Neb. 108, 47 L.R.A. (N.S.) 742, 142 N. W. 297.

But appellant insists that our decisions so holding line us with the minority in case law, and that these decisions are in themselves unsound and should be overruled. Assuming, for the sake of argument, that we are with the minority, we still prefer to adhere to our said decisions. In so holding we do not overlook the argument that our rule makes fabrication easy, and that therefore public policy would be better served by the opposite rule. The point has force, but we cannot see our way clear to overturning our settled law, merely because fabrication is possible. That is so nearly always possible that, if that possibility were to control in dealing with former decisions, public policy would suffer more from the unsettled condition of the case law than from the danger suggested.

Leaving, then, the statute out of present consideration, the moment

the defendant obtained payment of his check from the intervening bank his deposit was diminished by the amount of such payment. He himself no longer owned that much of his deposit. Necessarily no creditor of his could thereafter reach that much of the deposit. He could seize nothing which his debtor was not owner of. *Roberts v. Corbin*, 26 Iowa, 327, 328, 96 Am. Dec. 146; *Wasgatt v. First Nat. Bank*, 117 Minn. 9, 43 L.R.A. (N.S.) 109, 134 N. W. 224, Ann. Cas. 1913D, 416. In other words, if the statute has not changed matters, this plaintiff creditor had nothing to seize after the intervening bank paid the check, even though the check was drawn against an ordinary checking account, and was not presented to the drawee bank until after the creditor had garnished it.

II. Has the statute changed the rule? It provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

The construction of this statute has been referred to, but has never been squarely determined in this court. See *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 476; *Smith v. Sanborn State Bank*, 147 Iowa, 640, 30 L.R.A. (N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 669. But Mr. Daniel in the second volume of his work on Negotiable Instruments, at § 1643, says: "The provision of the statute [referring to Negotiable Instruments Statute] that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank is a declaration of the rule that, as against a drawee bank, a check is not an assignment of the fund. But as against the drawer the giving of a check for value on an ordinary bank

Bank-cashing of check—effect as assignment of fund.

(— Iowa, —, 174 N. W. 42.)

deposit should be considered an assignment of the fund pro tanto."

And he construed the Hove Case, supra, to support this pronouncement. The case of Elgin v. Gross-Kelly & Co. 20 N. M. 450, L.R.A. 1916A, 711, 150 Pac. 922, rules that such a statute as this does not change the rule in question, but operates purely as a protection to the drawee bank. So does Bowker v. Haight & F. Co. (C. C.) 146 Fed. 257. To the same effect is 5 C. J. 920, 921, and notes 63, 925, 926; Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Raesser v. National Exch. Bank, 112 Wis. 591, 56 L.R.A. 174, 176, 88 Am. St. Rep. 979, 88 N. W. 618; Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146. And the Hove Case, supra, claims the same for Dillman v. Carlin, 105 Wis. 14, 76 Am. St. Rep. 902, 80 N. W. 932. Construing this section of the statute, we said in Hove v. Stanhope State Bank, 138 Iowa, 39, 115 N. W. 476: "This section was undoubtedly enacted for the purpose of protecting banks against losses which might be occasioned by the double payment of checks on general deposit, and its only intent and purpose is undoubtedly to protect banks only when they are acting in good faith and without any attempt to assist particular persons in the collection of their debts, to the exclusion of others who are equally as much entitled to protection. . . . Giving to the section of the Code under consideration its full force and effect in law actions, we are of the opinion that, where the parties are properly in court in an

equitable action, and where it is shown that the power intended to assign the entire fund is a part thereof, the rule of the cases heretofore referred to should govern, and a party holding such assignment of a fund on general deposit should be protected as against subsequent claimants at least."

Construing this statute provision, it was said in Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 47 L.R.A. (N.S.) 742, 142 N. W. 297: "If the effect of the Negotiable Instrument Act is to adopt the rule that no action against the deposit bank can be maintained upon the check by the holder 'unless and until it accepts or certifies the check,' which it is not necessary now to decide, still that section is not applicable to the facts in this case. This plaintiff is not claiming under the Negotiable Instrument Act."

It may be conceded that Kaesemeyer v. Smith, 22 Idaho, 1, 43 L.R.A. (N.S.) 100, 123 Pac. 943, and Baltimore & O. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, and possibility Boswell v. Citizens' Sav. Bank, 123 Ky. 485, 96 S. W. 797, are to the contrary; but we decline to follow them. We hold that even in <sup>—effect of</sup> Negotiable Instruments Act. a law action the statute has not changed the rule as between the drawer, his creditors, and the bank that pays the check.

The judgment below is affirmed.

Ladd, Ch. J., and Evans and Preston, JJ., concur.

## ANNOTATION.

### Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds.

Prior to the enactment of the Negotiable Instruments Law there were two well-established doctrines as to a check operating as an assignment of the drawer's funds in the drawee bank; the majority rule was that it did not operate as an assignment, the minority rule that it did. There were

a number of consequences that were ordinarily held to depend upon the theory adopted upon this general question. The rights of the holder of the check (1) as against an assignee or receiver of the drawer, (2) as against an executor or administrator of the drawer's estate in case of the drawer's

death before the check is presented or paid, (3) as against an attaching creditor of the drawer,—have generally been governed by the theory adopted upon the general question, as has also the right of the holder to sue the drawee bank. In some jurisdictions some of the above ultimate questions have been decided without basing the decision upon the general theory as to a check as an assignment, but ordinarily these questions have been made to depend upon the general theory as above stated.

The provision of the Negotiable Instruments Act relating to a check operating as an assignment is set out in the reported case (*MCCLAIN v. TORKELSON*, ante, 1665). This provision does not clearly indicate whether all the results that were ordinarily held to depend upon the theory adopted as to a check operating as an assignment were intended to be affected or only the one as to the holder's right to sue the bank. In jurisdictions which hold to the majority view that a check is not an assignment, this question is not of so much importance, for the majority view is that adopted in the Negotiable Instruments Act, but in jurisdictions which hold to the minority view that a check is an assignment, it becomes an important question whether all the consequences that were ordinarily held to depend upon the general theory were affected by this provision or only the one relating to the right of the holder to sue the drawee bank.

That this provision was intended only to deny to the holder the right to sue the bank is the opinion of the reported case (*MCCLAIN v. TORKELSON*). And this is the opinion of other cases. *Hove v. Stanhope State Bank* (1908) 138 Iowa, 39, 115 N. W. 476; *Elgin v. Gross-Kelly & Co.* (1915) 20 N. M. 450, L.R.A.1916A, 711, 150 Pac. 922. See *Farrington v. F. E. Fleming Commission Co.* (1913) 94 Neb. 108, 47 L.R.A. (N.S.) 742, 142 N. W. 297, *infra*.

Under the Negotiable Instruments Act it seems clear that at least the question as to the right of the holder of a check to sue the bank has been settled in the negative. It has been held in a state which formerly con-

strued the law to give to the holder of a check the right to sue the bank that such rule is changed by the Negotiable Instruments Act, and under it the holder cannot sue the bank unless the bank has accepted or certified the check. *Superior Nat. Bank v. National Bank* (1916) 99 Neb. 833, 157 N. W. 1023. It appeared in this case that soon after the check was received by the holder, an officer of the holder called the defendant bank by telephone and inquired whether the check was good. There was a conflict in the evidence as to the exact nature of this conversation, which the court held should have been submitted to the jury, if the liability of the defendant bank depended upon its construction, but it was held that the check could not so be accepted or certified, but must be accepted or certified in writing. It was urged in this case that even if the certification must be in writing, and although the statute expressly provides that the "check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank," still the delivery of the check to the holder for full consideration and the oral statement by the defendant bank that "the check is good," made to the holder while he still had the option to return the check and to refuse to receive it from the drawer in settlement of their account, operated as an equitable assignment of the funds then in the bank to the credit of the drawer of the check. This contention, however, was denied, and accordingly the right of the holder to maintain an action against the bank on the check was denied. It is stated that if the communication by telephone "could be construed with the other evidence as operating as an equitable assignment of the funds in the bank, the purpose of the statute would be thwarted." That a bank cannot be held liable on equitable grounds has been held also in a jurisdiction which, prior to the Negotiable Instruments Act, adhered to the general rule that a check does not operate as an assignment. Thus, in *Rambo v. First State Bank* (1912) 88 Kan. 257, 128 Pac. 182, a bank is



held not liable on equitable grounds to the holder of a check for the amount thereof, which it has refused to pay because the holder acquired the check on the oral representation of the bank that the drawer had funds on deposit to meet the check, that the check was good, and that the holder might safely take it in payment for goods sold the drawer. Without stating what the rule had been prior to the adoption of the Negotiable Instruments Act, it is held in *United States Nat. Bank v. First Trust & Sav. Bank* (1911) 60 Or. 266, 119 Pac. 843, that, under that act, the drawee bank is not liable to the holder unless and until it accepts or certifies the check. The right of the payee of a check to sue the bank was denied in *Baltimore & O. R. Co. v. First Nat. Bank* (1904) 102 Va. 753, 47 S. E. 837, under the Negotiable Instruments Law, although the bank had wrongfully paid the check to an agent of the payee, who had indorsed it without authority, this being held not to be an acceptance or certification. No reference is made to the former rule in this state.

The right of the holder of a check to sue the drawee bank has been denied under the Negotiable Instruments Act in states which previously held to the rule adopted in the act. *Van Buskirk v. State Bank* (1905) 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778. The right of the payee of the check to sue the bank was denied in *Hentz v. National City Bank* (1918) 159 App. Div. 743, 144 N. Y. Supp. 979, on the authority of the Negotiable Instruments Law, and without referring to the previous rule in this state, which adhered to the majority view.

That a check is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and therefore gives the payee no right of action against the drawee nor any valid claim to the fund of the drawer in his hand, is stated also in *Tibby Bros. Glass Co. v. Farmers' & M. Bank* (1908) 220 Pa. 1, 15 L.R.A. (N.S.) 519, 69 Atl. 280, without referring to the Negotiable Instruments

Act, which was adopted in that state in 1901.

In *Gardner v. Moore* (1917) 122 Va. 10, 94 S. E. 162, an action by the payee of an order which the court treated as a bill of exchange, against the drawee, who had not accepted the bill, it was claimed that the bill was an assignment of the fund on which it was drawn. In denying this contention, the court states that the Negotiable Instruments Law provides that a bill of exchange "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof," and therefore the "court cannot declare that to be a common-law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the statute says it shall not so operate."

That an ordinary bank check is not an appropriation of any part of the funds to the credit of the drawer with the bank, and does not constitute any claim or right of action against the bank until it is accepted or certified by the bank under the Negotiable Instruments Law, is held also in *Pease v. State Nat. Bank* (1905) 114 Tenn. 693, 88 S. W. 172. It was accordingly held in this case that the drawer of the check could stop payment at any time before the check was presented to the bank. A similar holding appears in *Hunt v. Security State Bank* (1919) — Or. —, 179 Pac. 248.

It thus appears that the cases have generally followed the plain provision of the act, and denied to the holder of the check the right to sue the drawee bank. It has been held, however, that, notwithstanding the provisions of the Negotiable Instruments Law an equitable action may be maintained against the bank by the payee of a check for an entire deposit to whom a deposit slip representing the deposit was also assigned. *Hove v. Stanhope State Bank* (1908) 138 Iowa, 39, 115 N. W. 476. The dispute in this case was between the holder of the check and the landlord of the drawer. The deposit was made up of the proceeds of grain grown on the leased premises and sold by the tenant. The

landlord sought to impose his landlord's lien upon the amount of the deposit, but the right to do so was denied, and the court thus states the situation: "We then have this situation to deal with: the bank could not under well-settled rules of law deny Johnson's [the tenant's] ownership of the deposit. There has never been any legal transfer of the title to said money from Johnson to any person except as the same is evidenced by the check and deposit slip which he gave the plaintiff, and if the plaintiff may not maintain this action in equity, claiming either an equitable or specific assignment of this fund, the bank will be permitted to retain the same for its own use, so far as the purposes of this case are concerned. Such a situation might give the plaintiff, together with other creditors, the right to attach said money in the hands of the bank, but it seems to us that this would clearly deprive the plaintiff of the benefit he should have as a reward for his diligence." The provision of the Negotiable Instruments Act, set out in the reported case, is then referred to, and it is stated that "this section was undoubtedly enacted for the purpose of protecting banks against losses which might be occasioned by the double payment of checks on general deposit, and its only intent and purpose is undoubtedly to protect banks only when they are acting in good faith, and without any attempt to assist particular persons in the collection of their debts to the exclusion of others who are equally as much entitled to protection." This decision is based in part, however, upon the fact that there was an assignment of the fund in question other than by the check. The depositor wrote the payee of the check a letter in which he told him in substance that the money was in the bank for him and that he should get it and use it in paying certain debts. The payee of the check, doubting his ability to get the money from the bank on the letter alone, made out a check and sent it to the drawer for his signature, and requested also an assignment of the deposit slip. The court states that these transactions amounted to an as-

signment in fact, and it is well settled that such an assignment will be enforced in equity.

And the provision that a check shall not operate as an assignment has been held not to prevent an assignment by an agreement extraneous to the check, so that the bank may be sued by the holder of the check. *People's Nat. Bank v. Swift* (1915) 134 Tenn. 175, 183 S. W. 725, and *Gruenther v. Bank of Monroe* (1911) 90 Neb. 280, 133 N. W. 402, *infra*.

In accord with the theory adopted in the reported case (*McCLAIN v. TORRELSON*, ante, 1665) that only the right of the holder of a check to sue the bank was intended to be affected by the provision of the Negotiable Instruments Act there set out, it is there held that the holder acquires a right superior to that of a garnishing creditor of the drawer in the funds in the bank. Likewise the holder of a check who had paid the drawer in full therefor was held to acquire a right superior to an attaching creditor, in *Farrington v. F. E. Fleming Commission Co.* (1913) 94 Neb. 103, 47 L.R.A. (N.S.) 742, 142 N. W. 297. The theory of this case is not altogether clear. The court, after referring to the provision of the Negotiable Instruments Act set out in the reported case, ante, states that if the effect of this act is to adopt the rule that no action against the deposit bank can be maintained upon the check by the holder unless and until it accepts or certifies the check, "which it is not necessary now to decide, still that section is not applicable to the facts in this case. This plaintiff is not claiming under the Negotiable Instruments Act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty as garnishee is to pay the money to the party having the better right to it as determined by the court. The Commission Company had money on general deposit in the garnishee bank and procured that money from the St. Joseph Bank by drawing its check against that deposit in favor of the St. Joseph Bank. The

St. Joseph Bank clearly has a better right to the deposit than the Commission Company has, and this plaintiff by garnishment could obtain no better right than her debtor had."

It has also been held in a dispute between the holder of a check and the personal representative of the deceased drawer's estate, that the provision of the Negotiable Instruments Act set out in the reported case does not affect the rule that as between the drawer and payee of a check, the check operates as an assignment. Accordingly, the death of the drawer is held not to revoke the authority of the bank to pay the check, and if it has done so no recovery can be had by the drawer's estate against the payee to whom payment has thus been made. *Elgin v. Gross-Kelly & Co.* (1915) 20 N. M. 450, L.R.A.1916A, 711, 150 Pac. 922. The court, referring to the section of the Negotiable Instruments Act set out in the reported case, states that that section "is clearly designed for the protection of the bank rather than a provision affecting the relation between the maker of the check and the payee. This is borne out by the fact that the latter portion of the section provides that the bank is not liable to the holder unless and until it accepts or certifies the check."

It has been held that the Negotiable Instruments Law does not prevent an assignment or appropriation of the funds by an agreement extraneous to the check. Thus, in *People's Nat. Bank v. Swift* (1915) 134 Tenn. 175, 183 S. W. 725, it is stated that the section of the Negotiable Instruments Law referred to in the reported case "does not interfere with an appropriation of the fund by an outside arrangement between the parties which is brought to the attention of the bank before it has paid out the money." It was accordingly held in this case that the holder of the check could sue the drawee bank where, at the time the check was given, the drawer informed the payee that he would deposit draft with his bank and that the check would be paid out of the proceeds of such draft, an arrangement which was communicated to the bank by the payee

and agreed to by the bank. A similar theory appears in *Dolph v. Cross* (1911) 153 Iowa, 289, 133 N. W. 669, where the holder of a check was held to have a right superior to that of an attaching creditor, where the drawer of the check, at the time he deposited the money, stated to the bank that he made the deposit for the purpose of meeting checks which he had already issued against such deposit, and that the deposit was made to take care of the check. The court states that the section of the Negotiable Instruments Act set out in the reported case (*McCLAIN v. TORKELOSON*, ante, 1665) does not cover the situation thus presented, that "the intervener (holder of the check) is not relying upon the 'check of itself.' He bases his claim, not only upon the check, but upon the further fact that a special deposit was made to meet this very check after the issuance thereof. The bank having received the deposit for such specific purpose was bound by the conditions imposed." In *Gruenther v. Bank of Monroe* (1911) 90 Neb. 280, 133 N. W. 402, the holder of a check was held entitled to maintain an action thereon against the bank where, before accepting the check, he inquired of the bank if the same was good, and was informed by it that the check was good and would be paid upon presentation, and where it further appeared that the drawer, before the check was presented, withdrew his deposit from the bank, but directed the bank to withhold a sum equal to the amount of the check to meet and pay the check, which had thus been given. The court expressly refers only to the provision of the Negotiable Instruments Act that the acceptance of the bill must be in writing in order to bind the drawee, and, after stating that this does not prevent the holder from suing the bank under the facts of this case, states also that other sections of the Negotiable Instruments Law upon the "same or cognate subjects" are also obviated by these facts.

A check drawn for an amount larger than the sum the drawer has on deposit, and drawn with the intention of passing to the payee the entire deposit,

and made for the larger sum because the drawer did not know the exact amount of the deposit, which check was delivered to the payee as a gift causa mortis, was held to be valid as such gift in *First Nat. Bank v. O'Byrne* (1918) 177 Ill. App. 473. In the course of the opinion the court states that a check drawn for the entire amount of the deposit is an assignment of the fund, if so intended. There is no reference to the Negotiable Instruments Act in this case, although the check was delivered after the adoption of that act in this state. The payee of the check was accordingly held entitled to the deposit as against the executor of the drawer.

Other cases, however, in which the question was between the holder of the check and a creditor of the drawer, who had garnished the bank, have stated that under the Negotiable Instruments Act a check does not operate as an assignment, and the adoption of this theory has been regarded as settling the issue in favor of the attaching creditor. *Kaesemeyer v. Smith* (1912) 22 Idaho, 1, 43 L.R.A.(N.S.) 100, 123 Pac. 943; *Wileman v. King* (1919) — Miss. —, ante, 584, 82 So. 265. In *Boswell v. Citizens' Sav. Bank* (1906) 123 Ky. 485, 96 S. W. 797, an action involving the rights of a holder of a check and an attaching creditor, it is stated that the rule in that state was settled prior to the Negotiable Instruments Law, that a check did operate as an appropriation, pro tanto, of the sum to the credit of the drawer, but that, under the Negotiable Instruments Law, that is not the rule. The statement as to the rule under the Negotiable Instruments Law is obiter, as the case in question arose prior to the adoption of that statute. In *Jones v. Crumpler* (1916) 119 Va. 143, 89 S. E. 232, a bank which had cashed a draft upon commission merchants for the drawer was held to have a claim inferior to that of attaching creditors, the court stating that the draft did not operate as an assignment under the section of the Negotiable Instruments Law set out in the reported case (*McCLAIN v. TORKELESON*, ante, 1665).

A draft drawn for a sum of money

deposited with a railroad company and its agent was held not to be an assignment of the money under the Negotiable Instruments Law in *Fulton v. Gesterding* (1904) 47 Fla. 150, 36 So. 56; accordingly the funds in the hands of the railroad company were held liable to garnishment in a suit by a creditor of the drawer, who thus secured a lien superior to that of the holder of the draft.

And likewise the right of a receiver for the drawer has been held superior to that of the holder of the check. In *Clark v. Toronto Bank* (1905) 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582, an action which arose before the adoption of the Negotiable Instruments Act in this state, in which there was a contest between a receiver of a bank and the holder of a draft issued by the bank, the court states that the holder of the draft must fail unless it can be said that the issuance of the draft operated to transfer to him the equitable title to so much of the money of the drawer then on deposit in the drawee bank as it called for, in which case the receiver, who succeeded only to the rights of the failed bank and was entitled only to its assets, could have no valid claim upon that portion of the deposit. In denying this right to the holder of the draft, the court states the great weight of authority to be to the effect that an unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment in law or equity of any part of the drawer's deposit, and that this rule has frequently been enforced in controversies between the holder of a draft and the assignee or receiver of its insolvent drawer. It is then stated that since the action arose the Negotiable Instruments Act was adopted in this state in which the rule referred to has been incorporated in the statute. In *Bowker v. Haight & F. Co.* (1906) 146 Fed. 257, the receiver of a corporation was held entitled to the funds in the hands of a bank in preference to the holder of a check, who had the same certified after the receiver had been appointed and subsequently received payment thereof. In this case the check was given in New York after

a receiver had been appointed in Massachusetts, and was given by the corporation to an attorney who was retained by the corporation to represent it in the receivership proceedings. The check was not certified until after a receiver had been appointed in New York to the knowledge of the attorney. The court quotes the provision of the Negotiable Instruments Act set out in the reported case (*McCLAIN v. TORRELSON*, ante, 165), and states that this is but a statutory expression of what was before the well-settled law in both the state and Federal courts, and it disposes of the case.

In *Carmichael v. Tishomingo Bkg. Co.* (1917) — Mo. App. —, 191 S. W. 1043, a contest between the receiver of a bank and the holder of a draft issued by such bank, over the amount of deposit in the bank on which the draft was drawn, the court, in holding that the draft did not amount to an assignment and therefore the receiver had the better right to the fund, seems to imply that this rule is prescribed by the Negotiable Instruments Act, but does not expressly so state.

In a state which, previous to the adoption of the Negotiable Instruments Act, held that a check did not operate as an assignment and therefore the death of the drawer revoked the check, this rule has been announced in a case decided since the adoption of that act without referring to the act. It is stated in *Chrzanowska v. Corn Exch. Bank* (1916) 173 App. Div. 285, 159 N. Y. Supp. 385, affirmed without opinion in (1919) 225 N. Y. 728, 122 N. E. 877, that "a check is not the assignment of the funds on de-

posit to the credit of the drawer pro tanto, and the holder is merely the agent of the drawer for the purpose of collecting it, and upon the death of the drawer before presentation, the authority of the holder is revoked, and the bank is no longer authorized to pay, but, on principles of necessity incident to the banking business, if the bank pays in good faith and without notice of the death of the drawer, it is protected." The action in this case was one by the holder of a check, who had deposited with a branch of the defendant bank, and had received a credit thereon which had subsequently been canceled, when upon presentation to the branch upon which it was drawn, it was discovered that the drawer was dead.

In *Eastman Kodak Co. v. National Park Bank* (1916) 231 Fed. 320, affirmed without opinion in (1918) 159 C. C. A. 662, 247 Fed. 1002, an action (in New York) involving the rights of the purchaser of a draft, the drawer, his assignee, a receiver in bankruptcy, and an attaching creditor, it is stated not to be necessary "to cite authorities for the rule that the execution and delivery of a check effects no assignment of the fund, because that is now provided by § 325 [the section involved in the reported case] of the Negotiable Instruments Law." The holder of the draft claimed to have established a collateral agreement taking this case out of the general rule, and the court directed attention to this argument, but, finding that there was no such agreement, accordingly denied to the holder of the check any preference over other creditors. W. A. E.

## MARY CHAUDIER

v.

STEARNS & CULVER LUMBER COMPANY et al., Plffs.  
in Certiorari.

*Michigan Supreme Court—July 17, 1919.*

(206 Mich. 433, 173 N. W. 198.)

**Workmen's compensation — death from wood ashes — accident or suicide.**

1. Where one employed to remove wood ashes from the pit of a furnace is found at his home after several hours spent in his employment, in a

comatose condition, with a cupful of ashes in his stomach the lye from which kills him, and the evidence shows that others engaged in the same work were not injured, while an effort would be necessary to swallow that quantity of ashes, the theory of suicide is as reasonable as that of accident, and there can be no recovery under the Workmen's Compensation Act.

[See note on this question beginning on page 1680.]

**Evidence — burden of proof — workmen's compensation.**

2. The burden of establishing a claim under the Workmen's Compensation Act is upon the one seeking the award.

**Workmen's compensation — conflicting inferences — failure of award.**

3. Where two inferences equally con-

sistent with the facts arise out of facts established in a workmen's compensation case, one involving liability on the part of the employer and the other relieving him from liability, the applicant for the award must fail.

(Bird, Ch. J., and Kuhn and Moore, JJ., dissent.)

**CERTIORARI** to the Industrial Accident Board to review an award to claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Award vacated.*

**Statement by Brooke, J.:**

Claimant's decedent, a man forty-two years of age, was employed by respondent Stearns & Culver Lumber Company in its shingle mill, where he worked during the week. The lumber company maintained in connection with its business a large steel burner, in which was consumed the refuse from the mill. This burner was about 20 feet in diameter and 60 or 70 feet high. There were grates in the burner about level with the ground, and underneath the grates an ash pit about 3 or 4 feet deep, with a cement floor. It was customary to permit the fire to go out on Saturday, or to put it out, in order that the ashes might be removed on Saturday night or Sunday. The work of removing the ashes from the burner had been performed by claimant's decedent for many weeks prior to his death. On Saturday, June 30, 1917, he commenced the work of removing the ashes at about 6:30 P. M., and continued until about 1:30 Sunday morning. He then went home and slept until about 8 or 9 o'clock, when he resumed his work at the burner. He worked until about 2 o'clock Sunday afternoon, when he returned home, had his dinner, carried some potatoes to the field for his wife, and at

about 3 o'clock returned to the burner. He returned to his home some time before 6:30 Sunday evening, the exact hour being unknown, as his wife was away. When she reached home at 6:30 she testified that he was lying on the bed and felt sick, felt like vomiting; that he seemed to sleep until 10:30, when she woke him up to try and have him undress and go to bed; that he moaned, but did not seem to recognize her; that he was in a sort of stupor from then until 12 o'clock, at which time he got up and started to walk about the room, seeming to be in pain. This lasted for about an hour, during which time he fell to the floor. Claimant went for a doctor for him at 1 o'clock in the morning, but was unable to secure medical attendance at that time. She did, however, secure a doctor at about 6 o'clock in the morning. Claimant testified that when she first saw her husband at 6:30 he seemed to be in a drunken state. "I naturally thought when I came home at 6:30 that he was asleep; that during the afternoon he had met friends at the mill who had given him liquor." The doctor, upon examining him, found no temperature, and concluded that he was suffering from some stomach trouble.

He administered an emetic and later washed his stomach out six times with about a quart of water each time. He found the stomach full of alkali and about a teacupful of ashes.

Upon further examination the doctor testified:

Q. That would kill a man if he got it in his stomach?

A. Yes, sir.

Q. In your judgment, he died from that?

A. Yes, sir.

Q. How did he get it in his stomach?

A. He might have had a pail of water and a good deal of ashes fell in, and in a thirsty condition he might have drank that water.

Q. The stuff that you pumped out of his stomach was an alkaline poison derived from wood ashes?

A. Yes.

Q. Now, I suppose you are enough of a chemist to be able to say that the stuff that you found in using your stomach pump was a derivative of wood ashes, and in your judgment was in sufficient quantities to cause his death?

A. Yes.

Q. Now, suppose a man had a pail of water to drink from, and some of those ashes had gotten into the water and he had not noticed it, and had drunk the water, would he have drunk enough water to kill him?

A. By drinking enough.

Q. I take it that stuff he had in his stomach was lye. You take leached ashes would make lye. That would kill a man?

A. Yes, sir.

Q. Suppose a man was working in those ashes, Doctor, and got quite a lot of ashes in his mouth, in his nose and mouth, and he naturally would if he were working in a lot of it—suppose he drank copiously of water—don't you suppose he could drink enough water to create lye in his stomach?

A. I don't think of it that way.

Q. How do you figure it got in?

A. I can't tell; it got in in some way.

And on cross-examination he testified in part:

Q. Ordinarily, a man doesn't swallow any substance unless he wills it?

A. Ordinarily, no.

Q. Then the natural impulse, if a man gets something into his mouth that doesn't have a pleasant taste, the natural impulse is to spit it out?

A. Yes, sir.

Q. Do you think, Doctor, that a man could swallow dry wood ashes alone?

A. I don't know; I couldn't tell. I imagine it would require an effort—a considerable effort.

Q. Something like swallowing flour?

A. Not as hard.

Q. The tendency to swallow dry ashes would be to choke?

A. Yes, sir.

Q. Then isn't this a fair conclusion, that if a man got dry ashes into his stomach it would be through a positive effort of the will, and against the reactions of nature?

A. That would be my impression.

Q. Could only be gotten into his stomach by voluntary action on the part of the man?

A. I think so.

Q. And in spite of the efforts of nature to prevent them going down his throat?

A. Yes, sir.

Q. Do you suppose a man could swallow wood ashes at all without moistening them in some way?

A. I really don't know.

Q. I suppose by the natural moistening that they would receive from the saliva?

A. I suppose so.

Q. How large a quantity did you find in this man's stomach?

A. Of course, as I told you before, I couldn't say the quantity, and I didn't make a chemical analysis.

Q. What is your best judgment on it?

A. That is very hard to tell. I washed him out six times and four times I got alkali; the first stronger than the second; the second stronger

than the third; and the third stronger than the fourth.

Q. But I understand that you found ashes?

A. Yes; I suppose as much as an ordinary teacup.

Q. Were there enough ashes to produce alkali?

A. It seems strange that there was more alkali than ashes. There was some discrepancy there.

Q. You don't know how these ashes got into his stomach?

A. No, sir.

Q. Is it your judgment that the amount of alkali that you found there must have been generated outside of his stomach?

A. I don't want to form a real opinion of that.

Q. Think you said that the amount of ashes you found in his stomach was not sufficient to form alkali? That was the condition of his throat?

A. Well, his mouth and throat we didn't examine very much, for this reason, that he was unconscious and dying, and I didn't expect him to live as long as he did, and we didn't examine.

Q. Did you notice any indications in mouth or throat that an alkaline substance had come in contact with those tissues?

A. It would take a much stronger alkali to affect those tissues than to affect the lining of the stomach.

Q. You said something, you and Mrs. Chaudier, about him taking some poison from liquor?

A. We had some talk about whisky. He had been using some whisky, and Mrs. Chaudier brought me a bottle, and I was going to examine the bottle.

Q. What bottle?

A. The whisky bottle.

Q. He had been drinking that day?

A. I think I was told so.

Q. By Mrs. Chaudier?

A. We thought so, both of us.

Q. Was there some left in the bottle?

A. About a tablespoonful.

Q. Do you know from your exami-

nation whether he had been drinking liquor?

A. No; I couldn't tell either way.

Q. The other condition was so much more pronounced that you couldn't say?

A. Yes, sir.

Q. What did Mrs. Chaudier say?

A. Well, she thought he had been drinking some that day.

Q. And showed you the bottle?

A. Yes, sir.

Q. You said, I think, Doctor, that this man's death might possibly be accounted for by his having drank water from a pail into which ashes had been accumulating. You think that might be?

A. I think so. He might have brought some water with him and set it in a corner. I can't conceive of it in any other way.

Q. How many swallows of liquid would it require to get into this man's stomach the amount of alkaline substance that you found there?

A. How many swallows?

Q. Yes.

A. Well, a dozen large swallows of that stuff would account for it.

Q. One swallow wouldn't account for it?

A. No.

Q. You don't know where the drinking supply was down there?

A. No, sir.

Q. What sort of a taste would an alkaline substance such as this have? How would it taste if a man put it in his mouth?

A. It would taste a little burning.

Q. Not like ordinary water?

A. No, sir.

Q. A man taking that would know he had something other than ordinary water?

A. Yes, sir; it would burn and taste nasty.

Claimant's decedent died at about 3 o'clock Monday afternoon. One William Sterk, another employee of the respondent lumber company, testified that he had cleaned the ashes out of the burner about twenty-five times; that he usually took a jug of water with him, from which he would frequently drink. He said



that in drawing out the ashes he would get some in his nostrils and mouth, but that it did not bother him. There was a tank about 60 or 70 feet from the burner in which there was running water all the time. Sterk testified that some of the men brought water to the mill in pails, and some in jugs. The record does not disclose that claimant had a pail with him containing water, on the night in question. The board, on appeal from an award by the arbitration committee, after reciting much of the testimony, said: "It seems very clear that in some way the man got a lot of ashes into his stomach. Whether a lot of ashes fell into a pail of water and became dissolved and the substance was drunk by the deceased, or whether he got quantities of ashes into his mouth and nose and then drank quantities of water and washed the ashes down, does not appear, but it seems very clear that the ashes got into his stomach in one of these ways. It is, of course, possible that the man might have deliberately put ashes into water and drank the substance, and thus committed suicide, but there is no proof to that effect. The presumption of the law is against suicide in this kind of a case, and in favor of the theory of accident. We are impelled to hold that this man did suffer an accidental personal injury in being accidentally poisoned by the ashes he was handling, and that said accidental personal injury arose out of and in the course of his employment with the employer, and that said accidental personal injury was the proximate cause of his death."

Counsel for respondents claim that the facts proven are not capable of supporting either of the theories advanced by the board; that there is no proof whatever tending to show that claimant's decedent came to his death through any accidental personal injury received out of and in the course of his employment; that the manner in which decedent came to his death was a matter of pure conjecture; and that the facts

proven are as consistent with non-liability of respondents as with liability. It is claimed, further, that the only conclusion that can legitimately be drawn from the evidence is that the man committed suicide or was drunk.

**Mr. B. H. Halstead**, for appellants:

There is no competent evidence from which an inference can be drawn that deceased got quantities of ashes in his mouth and nose, and then drank quantities of water and washed them down.

*Bowsher v. Grand Rapids & I. R. Co.* 174 Mich. 344, 140 N. W. 524; *Hills v. Blair*, 182 Mich. 25, 148 N. W. 243, 7 N. C. C. A. 409; *Ginsberg v. Burroughs Adding Mach. Co.* 204 Mich. 180, 170 N. W. 15; *McCoy v. Michigan Screw Co.* 180 Mich. 454, L.R.A.1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455; *Blaess v. Dolph*, 195 Mich. 143, 161 N. W. 885; *DeMann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380; *Papinaw v. Grand Trunk R. Co.* 189 Mich. 441, 155 N. W. 545, 12 N. C. C. A. 243; *Balzer v. Saginaw Beef Co.* 199 Mich. 374, 165 N. W. 785; 17 Cyc. 820; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, 5 N. C. C. A. 917.

But, if it were shown by competent evidence that this man's death was caused in the manner suggested, such evidence would not support a finding that his death was the result of an accident, within the meaning of the law.

*Guthrie v. Detroit Shipbuilding Co.* 200 Mich. 360, 167 N. W. 37; *Roach v. Kelsey Wheel Co.* 200 Mich. 299, 167 N. W. 33.

If his death was in fact brought about in this manner, it was due to an occupational or industrial disease.

*Jerner v. Imperial Furniture Co.* 200 Mich. 265, 166 N. W. 943; *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482.

If it should be considered permissible to draw from the record an inference that he did have a pail of water with him, it must further be inferred, before recovery can be had, that he placed it close to the ashes he was handling. It must further be inferred that he left it uncovered, or that it became uncovered by accident.

*Manning v. John Hancock Mut. L. Ins. Co.* 100 U. S. 693, 697, 25 L. ed. 761, 762; *United States v. Ross*,

92 U. S. 281, 23 L. ed. 707; *Ratterbury v. Pere Marquette R. Co.* 172 Mich. 106, 137 N. W. 679; *Guthrie v. Detroit Ship-building Co.* 200 Mich. 359, 167 N. W. 37; *Ginsberg v. Burroughs Adding Mach. Co.* 204 Mich. 130, 170 N. W. 15.

If an actual drinking of this stuff were actually proved, it would not be an accidental injury within the terms of the Compensation Act, for the reason that, while it might occur in the course of his employment, it would not arise out of the employment.

*Hopkins v. Michigan Sugar Co.* 184 Mich. 91, L.R.A.1916A, 310, 150 N. W. 325; *Buvia v. Oscar Daniels Co.* 208 Mich. 73, 168 N. W. 1009; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Hutchison v. M'Kinnon* [1916] 1 A. C. 471, 85 L. J. P. C. N. S. 98, 114 L. T. N. S. 570, 32 Times L. R. 283, [1916] S. C. 111, 53 Scot. L. R. 232, 9 B. W. C. C. 147.

If either theory is found not to constitute an accidental personal injury, the award cannot be sustained.

*McCoy v. Michigan Screw Co.* 180 Mich. 454, L.R.A.1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455; *De Mann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380; *Ginsberg v. Burroughs Adding Mach. Co.* 204 Mich. 130, 170 N. W. 15.

*Messrs. Doyle & Barstow*, for appellee:

Where there is a known fact it is the duty of the tribunal to draw therefrom the most reasonable legitimate inferences, and an inference so drawn becomes a fact which may be the basis for further inferences.

*Indian Creek Coal & Min. Co. v. Calvert*, — Ind. App. —, 120 N. E. 709.

The unintentional swallowing of the ashes is within the terms of an "accident."

*Burnham v. Interstate Casualty Co.* 117 Mich. 142, 75 N. W. 445; *Wishcless v. Hammond, S. & Co.* 201 Mich. 192, 166 N. W. 993.

The ashes that were found in the deceased's stomach after death, and which the testimony shows were the cause of death, were taken into the stomach some way, at one time, while the deceased was working about or cleaning the burner.

*Dove v. Alpena Hide & Leather Co.* 198 Mich. 132, 164 N. W. 253; *Papinaw v. Grand Trunk R. Co.* 189 Mich. 441, 155 N. W. 545, 12 N. C. C. A. 243.

*Brooke, J.*, delivered the opinion of the court:

The facts upon which the Industrial Accident Board based its conclusion that claimant's decedent died from the effects of an accidental personal injury arising out of and in the course of his employment are extremely meager. They may be briefly summarized as follows:

(1) During the twenty-three hours preceding his death, decedent had been engaged at intervals in cleaning out wood ashes from the burner.

(2) At 6:30 in the evening he was found by claimant lying upon his bed, fully clothed, in a comatose condition, which continued until 6 o'clock the next morning, with the exception of about an hour at midnight when he walked about the room, being apparently in great distress.

(3) The physician called to attend him at 6:30 in the morning, with the aid of a stomach pump, removed from the stomach of the decedent a large quantity of alkaline liquid and about a teacupful of wood ashes.

(4) Decedent died from alkaline poisoning attributable to the presence in the stomach of lye and ashes.

The following conclusions would seem to be warranted by the record: Plaintiff's decedent did not die as the result of an occupational disease; in other words, the lye and ashes found in his stomach did not get there through the performance of his work in the ordinary way. This fact seems to be made clear by the testimony of the witness Sterk, who himself had removed the ashes from the burner at least twenty-five times. It is likewise to be noted that the work was done but once each week, so that the deleterious effect of the ashes taken into the stomach in the ordinary course of the employment, if any, could scarcely be said to be cumulative from period to period.

There is no evidence tending to show that on the night in question plaintiff's decedent had with him a

pail of water into which large quantities of ashes might have fallen in the course of the work. There is no evidence that decedent drank from a pail of water heavily impregnated with ashes. There is evidence of the physician to the effect that the liquid taken from the man's stomach would be "a little burning;" that "it would burn and taste nasty;" and that "to swallow something that hasn't a pleasant taste involves an effort of the will."

Counsel for claimant assert that the foregoing facts are sufficient to support the inference indulged in by the board to the effect that decedent swallowed the ashes and alkaline liquid accidentally. They pointed out that, it being undisputed the lye and ashes were in the stomach and caused his death, the only possible inferences are: (1) That they were taken into the stomach by the decedent accidentally; or (2) that they were so taken wilfully and with suicidal intent—and they rest upon the presumption against suicide, citing *Wishcaless v. Hammond, S. & Co.* 201 Mich. 192, 166 N. W. 993. This position is met by counsel for appellant with the argument that the presumption arises only where the facts and the logical deductions therefrom point with equal cogency to suicide or accidental death, and that in the case at bar the accidental theory is negatived by the testimony of the doctor that the substance found in the stomach of the decedent could not have been taken by decedent without a conscious effort, because of its unpleasant taste.

The rule to be adopted by the board is set out clearly in the case of *Ginsburg v. Burroughs Adding Mach. Co.* 204 Mich. 130, 170 N. W. 15, in the following language: "It is the province of the board to draw the legitimate inferences from the established facts, and to weigh the probabilities from such established facts. *Wilson v. Phoenix Furniture Co.* 201 Mich. 531, 167 N. W. 839. But the inferences drawn must be from established facts; inference

may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the appellant can only be arrived at by conjecture or speculation, the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail,"—citing many cases.

Applying that rule to the facts in the case at bar, and in further consideration of the rule which places the burden of establishing the claim for compensation on those seeking the award, we are constrained to the view that the inference that the liquid and ashes found in decedent's stomach, and which caused his death, were taken into the system by the decedent with suicidal intent, is at least as reasonable as that they found entrance to the stomach accidentally, and where two inferences equally consistent with the facts arise out of established facts, one involving liability on the part of the employer under the act, and the other relieving him from liability, the applicant must fail.

The award must be vacated.

Ostrander, Steere, Fellows, and Stone, JJ., concur with Brooke, J.

Moore, J., dissenting:

I do not agree with the conclusion reached by Justice Brooke. In *Wishcaless v. Hammond, S. & Co.* 201 Mich. 199, 166 N. W. 993, there is a collation of authorities to the effect that the presumption is against suicide. We have often held that, if there is competent testimony upon which to base the award, we would not disturb it. *Comp. Laws* 1915, § 5465; *Vogeley v. Detroit Lumber Co.* 196 Mich. 516, 162 N. W. 975, and cases cited therein.

Evidence—burden of proof—workmen's compensation.

Workmen's compensation—death from wood ashes—accident or suicide.

—conflicting inferences—failure of award.

When we consider the circumstances under which Mr. Chaudier did his work, his conduct at his home, and the condition found by the doctor in connection with the presumption against suicide, we

think there is testimony to justify the award, and that it should be affirmed, with costs to claimant.

Bird, Ch. J., and Kuhn, J., concur with Moore, J.

## ANNOTATION.

### Presumption against suicide in workmen's compensation cases.

The well-known rule that suicide will not be presumed, and that as between accident and suicide the law supposes accident, has been applied in a number of cases arising under Compensation Statutes.

California.—*W. R. Rideout Co. v. Pillsbury* (1916) 178 Cal. 132, 159 Pac. 435, 12 N. C. C. A. 1032.

Illinois.—*Humphrey v. Industrial Commission* (1918) 285 Ill. 372, 120 N. E. 816.

Maine.—*Westman's Case* (1919) — Me. —, 106 Atl. 532.

Massachusetts.—*Von Ette's Case* (1916) 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; *Sponatski's Case* (1915) 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

Michigan.—*Wishcaless v. Hammond, S. & Co.* (1918) 201 Mich. 192, 166 N. W. 993.

Minnesota.—*State ex rel. Oliver Iron Min. Co. v. District Ct.* (1917) 138 Minn. 138, 164 N. W. 582.

New Jersey.—*Henry Steers v. Dunnewald* (1914) 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676, affirmed in (1916) 89 N. J. L. 601, 99 Atl. 345; *De Fazio v. Goldschmidt Detinning Co.* (1915) — N. J. —, 88 Atl. 705, 4 N. C. C. A. 716, affirmed upon opinion below in (1915) 87 N. J. L. 317, 95 Atl. 549; *Manziano v. Public Service Gas Co.* (1918) 92 N. J. L. 322, 105 Atl. 484.

Wisconsin.—*Milwaukee Western Fuel Co. v. Industrial Commission* (1915) 159 Wis. 635, 150 N. W. 998; *Bekkedal Lumber Co. v. Industrial Commission* (1918) 168 Wis. 230, 169 N. W. 561.

"We think he [the trial judge] might properly find that the decedent came to his death by accident. It must have been either accident, suicide, or mur-

der. Suicide and murder involve criminal acts, and crime is not to be presumed." *Henry Steers v. Dunnewald* (1914) 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676.

As between accidents and suicides, the law supposes accident until the contrary is shown, and if the evidence is not conclusive of suicide it will sustain a finding of accident. *State ex rel. Oliver Iron Min. Co. v. District Ct.* (Minn.) supra.

So in *Von Ette's Case* (Mass.) supra, the court said: "There was no evidence of suicide, and therefore the presumption against the commission of a crime is enough to support the finding on that point."

And in *Manziano v. Public Service Gas Co.* (1918) 92 N. J. L. 322, 105 Atl. 484, the New Jersey court said that the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence showed him to have been insane, that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption.

And in *Westman's Case* (Me.) supra, in sustaining a finding that the death of the employee was accidental, the court said: "In the case at bar there is no circumstance or evidence which even hints at suicide or murder. There is no evidence tending to show that Westman was other than a well able-bodied man, with pleasant domestic environment. No financial or other trouble bore him down. To such men life is sweet, and its termination would not be naturally sought by design. By the testimony, by proper inference, and by legal presumptions, we think the finding of the commissioner upon

the question of accidental death was correct."

So a claimant for compensation is entitled to the presumption that a sane man probably would not commit suicide. *W. R. Rideout Co. v. Pillsbury (Cal.) supra.*

An accident may be inferred where an employee was found dead under a train of cars with a hole of about 6 inches in diameter in his abdomen, where there is nothing from which self-destruction can be inferred, and the size of the wound indicates that the injury was caused by some unknown happening. *De Fazio v. Goldschmidt Detinning Co. (1915) — N. J. —, 88 Atl. 705, 4 N. C. C. A. 716, affirmed on opinion below in (1915) 87 N. J. L. 317, 95 Atl. 549.*

It is error for the county court judge to find that a workman committed suicide while insane as the result of an injury, where the workman's body was found in a canal, and there was no evidence to show how he came to be in the canal, and there had been no symptoms of a suicidal tendency, although he had become depressed and irritable and restless as a result of the injury. *Southall v. Cheshire County News Co. (1912) 5 B. W. C. C. (Eng.) 251.*

The county court judge may find that a workman came to his death by accident arising out of the employment, where he was employed in an iron works and left the door of his furnace to go to the blacksmith's shop, which was five minutes' walk distance, the route being well lighted and lying along the bank of the canal, and he was found the next day drowned in the canal, and there was no direct evidence as to how he came to be in the canal. *Furnivall v. Johnston's Iron & Steel Co. (1911) 5 B. W. C. C. (Eng.) 43.*

The Pennsylvania statute expressly provides that the burden of proof of "intentionally self-inflicted death"

5 A.L.R.—106.

shall be upon the employer, and the supreme court cannot consider the question of suicide, where there is no finding supporting any such theory. *Flucker v. Carnegie Steel Co. (1919) 268 Pa. 113, 106 Atl. 192.*

The presumption against suicide frequently works to the advantage of the claimant for compensation, since, of course, death from voluntary suicide could not be considered as an unexpected event happening to the employee. Suicide has also been spoken of as wilful misconduct, which would bar recovery. *Milwaukee Western Fuel Co. v. Industrial Commission (1915) 159 Wis. 635, 150 N. W. 998.*

So in *Von Ette's Case (1916) 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551*, the court said, obiter, that it may be conceded that if an employee voluntarily took his life, no compensation can be awarded.

In the prevailing opinion in the reported case (*CHAUDIER v. STEARNS & C. LUMBER Co*, ante, 1673) the presumption against suicide is apparently ignored, and the court holds that, in the absence of any evidence as to how the ashes came to be in the stomach of the deceased employee, the inference that they were taken intentionally, to commit suicide, is as strong as the inference of accident, and consequently there is no liability upon the part of the employer. The dissenting opinion, in which three judges join, recognizes the force of the presumption against suicide, and, under all the circumstances of the case, would award compensation. It must be admitted that it is hard to conceive that an ordinary workman would know that he could swallow enough wood ashes to create lye in his stomach sufficient to cause his death. It is certainly a most unique way of committing suicide.

W. M. G.

PAT KENNEDY, Appt.,

v.

J. E. BURBIDGE, Respt.

*Utah Supreme Court—June 18, 1919.*

(— Utah, —, 183 Pac. 325.)

**Malicious prosecution — acting on false information.**

1. The mere fact that the information upon which a prosecution is started is false does not render the prosecutor liable for malicious prosecution, but it will do so if he knows that the information was false, or, having no personal knowledge as to its truth, he makes no investigation to determine its accuracy.

[See note on this question beginning on page 1688.]

**— grounds for action.**

2. To sustain an action for malicious prosecution it must appear that the action was without probable cause, the proceeding was malicious, and that it terminated in favor of defendant.

[See 18 R. C. L. 11, 68.]

**— probable cause — conviction.**

3. A conviction is at least prima facie evidence of probable cause for the prosecution, although it is afterwards reversed.

[See 18 R. C. L. 37.]

**— overcoming prima facie case.**

4. The effect as probable cause in an action for malicious prosecution of a conviction subsequently reversed can be overcome only by showing that the judgment was procured by perjury, fraud, or other undue means.

[See 18 R. C. L. 39.]

**Pleading — malicious prosecution — worthlessness of conviction.**

5. A complaint fails to state a cause of action for malicious prosecution which sets out a conviction subsequently reversed unless it alleges some

fact or facts the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause.

**Malicious prosecution — judgment procured by perjury — effect.**

6. A judgment procured by testimony that is admittedly false and untrue cannot be relied on as evidence of probable cause in an action for malicious prosecution.

[See 18 R. C. L. 38, 39.]

**Pleading — invalidity of judgment — sufficiency.**

7. The insufficiency of a conviction as evidence of probable cause in an action for malicious prosecution is sufficiently alleged by charging in effect that the whole proceeding against complainant had its foundation upon testimony which was false and untrue.

**On Rehearing.**

**— demurrer — truth of allegation.**

8. On demurrer the allegations of the complaint must be assumed to be true.

[See 21 R. C. L. 506.]

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County (Evans, J.) sustaining a demurrer to the complaint and dismissing an action brought to recover damages for alleged malicious prosecution. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Evans & Sullivan, for appellant:

The conviction of a party charged with crime is not conclusive in an action for malicious prosecution, upon the question of whether plaintiff had probable cause to prosecute.

Bowman v. Brown, 52 Iowa, 437, 8 N. W. 609; Moffatt v. Fisher, 47 Iowa,

473; Goodrich v. Warner, 21 Conn. 443.

Messrs. William H. Folland, H. H. Smith, and W. W. Little, for respondent:

A conviction before a justice of the peace having jurisdiction, although resulting in an acquittal on appeal, is conclusive evidence of probable cause,

and defeats the action of malicious prosecution.

*Whitney v. Peckman*, 15 Mass. 243; *Griffis v. Sellars*, 19 N. C. (2 Dev. & B. L.) 492, 31 Am. Dec. 422; *Price v. Stanley*, 128 N. C. 88, 38 S. W. 33; *Smith v. Thomas*, 149 N. C. 100, 62 S. E. 772; *Herman v. Brookerhoff*, 8 Watts, 240; *Saunders v. Baldwin*, 112 Va. 431, 34 L.R.A.(N.S.) 958, 71 S. E. 620, Ann. Cas. 1913B, 1049; *Crescent City, L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Bacon v. Towne*, 4 Cush. 217; *Burt v. Place*, 4 Wend. 591; *Spring v. Besore*, 12 B. Mon. 551; *Thomas v. Muehlmann*, 92 Ill. App. 571; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Carpenter v. Sibley*, 15 L.R.A.(N.S.) 1143, note; *Saunders v. Baldwin*, 112 Va. 431, 34 L.R.A.(N.S.) 958, 71 S. E. 620, Ann. Cas. 1913B, 1049; *Fones v. Murdock*, 80 Or. 340, 157 Pac. 148; *Haddad v. Chesapeake & O. R. Co.* L.R.A. 1916F, 196, note; *Spring v. Besore*, 12 B. Mon. 551.

A complaint in an action for malicious prosecution, which admits that complainant was convicted before a justice of the peace, though alleging that he was acquitted on appeal, is demurrable, where it does not further aver that such conviction was procured by fraud, collusion, perjury, or subornation of perjury.

*Thomas v. Muehlmann*, 92 Ill. App. 571; *Adams v. Bicknell*, 126 Ind. 210, 22 Am. St. Rep. 576, 25 N. E. 804; *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911; *Haddad v. Chesapeake & O. R. Co.* 77 W. Va. 710, L.R.A. 1916F, 192, 88 S. E. 1038.

The facts constituting the want of probable cause, or the fraud in obtaining the conviction, must be alleged distinctly or the complaint will be demurrable.

*Dennehey v. Woodsum*, 100 Mass. 195; *King v. Estabrooks*, 77 Vt. 371, 60 Atl. 84; *Schofield v. Thackaberry*, 115 Ill. App. 118; *Henderson v. McGruder*, 49 Ind. App. 682, 98 N. E. 137; *Carpenter v. Sibley*, 153 Cal. 215, 15 L.R.A.(N.S.) 1143, 126 Am. St. Rep. 77, 94 Pac. 879, 15 Ann. Cas. 484; *Topolewski v. Plankinton Packing Co.* 143 Wis. 52, 126 N. W. 554.

*Thurman, J.*, delivered the opinion of the court:

The plaintiff was convicted upon the complaint of defendant in the city court of Salt Lake City of the

offense of wilfully and knowingly having in his possession intoxicating liquor. Plaintiff appealed from the judgment to the district court of Salt Lake county, in which said court, upon motion of the city attorney, the plaintiff was found not guilty and the action dismissed. Plaintiff brought this action against the defendant, charging malicious prosecution in the above proceeding.

This appeal is from a judgment sustaining defendant's demurrer to plaintiff's complaint and dismissing the action.

The complaint, in substance, alleges that defendant maliciously, and without probable cause, procured a criminal complaint to be prepared against the plaintiff, and without probable cause swore to the same; that the said criminal complaint was sworn to by defendant charging plaintiff with unlawfully, wilfully, and knowingly having in his possession intoxicating liquor, to wit, cider containing an excess of  $\frac{1}{2}$  of 1 per centum of alcohol, contrary to the ordinances of said city; that thereafter defendant, by reason of said complaint, maliciously and without probable cause procured a warrant for the arrest of plaintiff, and caused him to be arrested and deprived of his liberty; that all of the material allegations set forth in the affidavit made by defendant were false and untrue, and were made by defendant maliciously, with no sufficient provocation, without probable cause therefor, and without any personal knowledge on the part of the defendant of the facts therein sworn to, and without sufficient investigation to obtain knowledge concerning the same; that said complaint was made by defendant for the sole and only purpose of embarrassing, humiliating, and distressing plaintiff, and injuring him in his person, his good name, and business. The plaintiff then, in substance, alleges that a trial was had on said complaint in the said city court, and that plaintiff was convicted of said alleged offense, but that the evidence upon which he was

convicted was incompetent, immaterial, and wholly failed to prove any intention on the plaintiff's part to violate any law of the state or ordinance of said city. Finally, it is alleged by plaintiff that he appealed from said judgment of conviction to the district court of Salt Lake county, in which said court, on motion of the city attorney, the jury was instructed to return a verdict of not guilty; that said verdict was rendered and judgment of acquittal entered thereon; that by reason of the wrongful acts of defendant in swearing falsely to the complaint, charging plaintiff with an offense, and otherwise causing plaintiff to be prosecuted thereon, plaintiff was damaged in the sum of \$1,400.

Defendant interposed a general demurrer to the complaint, specifying in particular the fact that it appeared from the complaint that plaintiff was convicted of the offense charged in the city court, and, notwithstanding it appeared that said conviction was reversed in the district court on appeal, it did not appear by any allegation that said conviction in the city court was procured by perjury or fraud.

The district court sustained the demurrer, and judgment was entered, dismissing the action. Plaintiff appeals.

The record presents but two questions for our consideration: (1) In an action for malicious prosecution, where the complaint alleges a conviction and afterwards an acquittal in the proceeding complained of, is it essential that the complaint should also allege that the conviction was procured by fraud or perjury, or other undue means? (2) If such allegation is essential, is the complaint in the case at bar fatally defective in this regard?

In an action for malicious prosecution, at least three distinct matters are necessary to be alleged and

Malicious  
prosecution—  
grounds for  
action.

proved: (1) That the proceeding complained of as ground for the action was without probable cause; (2) that

the proceeding was malicious; and (3) that the proceeding was finally terminated in favor of the plaintiff. In this case the defendant does not contend that the complaint is defective in failing to allege that the proceeding complained of by plaintiff was malicious. Neither is it contended that the complaint fails to show that the proceeding finally terminated in favor of the plaintiff. The question is narrowed down to the proposition as to whether or not the complaint on its face discloses a want of probable cause for the proceeding complained of. The complaint alleges the fact that plaintiff in the city court was convicted of the offense instituted against him by the defendant, and, under the authorities herein—  
after cited, such —probable cause  
conviction is at —conviction.

least prima facie evidence of probable cause for the prosecution, notwithstanding the conviction is afterwards reversed. Some of the authorities go so far as to hold that such evidence is absolutely conclusive, but in our opinion the weight of judicial opinion, as well as that of jurists and text-writers, is to the effect that evidence of a conviction is only prima facie, and may be rebutted by competent evidence which impeaches the validity of the judgment. As will be seen from the decisions to which we shall refer, the most common expression is that a judgment of conviction against the —overcoming  
prima facie case.  
plaintiff in a case of

this kind can be impeached and overthrown only by showing that the judgment was procured by perjury, fraud, or other undue means. The majority of the authorities brought to our attention by both of the parties to this litigation demonstrate that such is the case wherever this particular question is involved.

The authorities cited and relied on by respondent are as follows: *Whitney v. Peckham*, 15 Mass. 243; *Griffis v. Sellars*, 19 N. C. (2 Dev. & B. L.) 492, 31 Am. Dec. 422; *Price v. Stanley*, 128 N. C. 38, 38 S. E. 33;



Smith v. Thomas, 149 N. C. 100, 62 S. E. 772; Herman v. Brookerhoff, 8 Watts, 240; Olson v. Neal, 63 Iowa, 214, 18 N. W. 863; Saunders v. Baldwin, 34 L.R.A.(N.S.) 958, and note (112 Va. 431, 71 S. E. 620, Ann. Cas. 1913B, 1049); Crescent City, L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Bacon v. Towne, 4 Cush. 217; Burt v. Place, 4 Wend. 591; Spring v. Besore, 12 B. Mon. 551; Thomas v. Muehlmann, 92 Ill. App. 571; Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Carpenter v. Sibley, 15 L.R.A.(N.S.) 1143, and note (153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 Ann. Cas. 484); Fones v. Murdock, 80 Or. 340, 157 Pac. 148; annotated note in L.R.A. 1916F, 196-203; Adams v. Bicknell, 126 Ind. 210, 22 Am. St. Rep. 576, 25 N. E. 804; Blucher v. Zonker, 19 Ind. App. 615, 49 N. E. 911; Haddad v. Chesapeake & O. R. Co. 77 W. Va. 710, L.R.A.1916F, 192, 88 S. E. 1038; Dennehey v. Woodsum, 100 Mass. 195; King v. Estabrooks, 77 Vt. 371, 60 Atl. 84; Schofield v. Thackaberry, 115 Ill. App. 118; Henderson v. McGruder, 49 Ind. App. 682, 98 N. E. 137; Topolewski v. Plankinton Packing Co. 143 Wis. 52, 126 N. W. 554.

The following cases are relied on by appellant: Bowman v. Brown, 52 Iowa, 437, 3 N. W. 609; Moffatt v. Fisher, 47 Iowa, 473; Goodrich v. Warner, 21 Conn. 443.

In addition to these, the decisions that could be cited to the same effect are almost numberless, as will appear from the cases and notes specifically referred to. That the authorities are not in complete harmony will be found upon the most casual examination. The Minnesota court, in Skeffington v. Eylward, 97 Minn. 244, 114 Am. St. Rep. 711, 105 N. W. 638, divides the cases into three classes: (1) Those which hold that a conviction is conclusive evidence of probable cause, notwithstanding a reversal on appeal; (2) those in which it is held that a judgment of conviction, notwithstanding

a reversal, can only be impeached by evidence that it was procured by fraud or perjury; and (3) those which hold that a judgment of conviction, when reversed on appeal, is only *prima facie* evidence, which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the effect of the conviction in the first instance. The writer, after a somewhat careful review of a large number of cases, including those cited, is of the opinion that the above classification by the Minnesota court is substantially correct. Conceding this to be true, there is no escape from the conclusion that a judgment of conviction, followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least *prima facie* evidence of probable cause for the prosecution. It follows, therefore, that where the complaint itself in an action for malicious prosecution shows that plaintiff was convicted in the proceeding complained of, notwithstanding a reversal afterwards on appeal, the complaint fails to state a cause of action, unless it goes farther and alleges some fact or facts

**Pleading—  
malicious  
prosecution—  
worthlessness  
of conviction.**

the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause. The fact or facts so alleged should be to the effect that the judgment of conviction relied on as proof of probable cause was procured by fraud, perjury, or other undue or unfair means employed by the defendant.

This brings us to a consideration of the question as to whether or not the complaint in the present case is fatally defective in this respect. Before proceeding, however, to determine that question, it is pertinent to make one or two observations upon other matters intimately connected with the question under review. All of the authorities which we have examined permit evidence of conviction for the purpose of proving probable cause. This is so because when

one party is charged with prosecuting another without probable cause the most satisfactory evidence that there was probable cause would be a judgment of conviction, fairly obtained before an unbiased court or jury. This is so manifest as, in our judgment, to be uncontrovertible. But suppose the judgment of conviction was procured by perjury or fraud, or by any means which show that the judgment is invalid, unauthorized, and of no efficacy whatever as evidence of probable cause. Could it then be contended that such a judgment has probative value to establish probable cause? We have no hesitancy in holding that in such a case the probative effect of the judgment is entirely overcome, and that it stands in the case the same as if it had never been rendered. Suppose that the judgment was procured by testimony that was admittedly false and untrue. Should such a judgment in a case of this

**Malicious  
prosecution—  
judgment  
procured by  
perjury—effect.**

kind be given effect as proof of probable cause? Clearly not. And even though the testimony was not given wilfully and corruptly so as to make it a case of perjury as known to the criminal law, nevertheless its probative effect is just the same. It deceived and misled the court, and caused him to enter a judgment which, for the purpose of evidence in a case of this kind, should have no effect whatever. In *Nehr v. Dobbs*, 47 Neb. at page 870, 66 N. W. 866, a Nebraska case not cited in the briefs, the court said: "The reason that a conviction procured by perjury is not proof of the existence of probable cause for the prosecution is that the false testimony deceived the trial court, so that the inference naturally drawn from a judgment of that court is no longer a reasonable inference."

This states the proposition in a nutshell. It is the falsity of the testimony and its tendency to deceive and mislead the court that vitiates the judgment and render it

ineffective when offered as evidence of probable cause, whether the testimony was wilful and corrupt or given honestly and in good faith.

This brings us to a consideration of such portions of the complaint as are material to the question before us. After quoting in full the affidavit filed by the defendant against the plaintiff upon which the warrant of arrest was issued out of the city court, the complaint of plaintiff, in the fourth paragraph, alleges: "Plaintiff further alleges that all the material allegations of fact set forth in said affidavit of said defendant as hereinbefore set forth were false and untrue, and were made by defendant maliciously and with no sufficient provocation or probable cause therefor, and were made by defendant without any personal knowledge of the facts therein sworn to, and without sufficient investigation to obtain knowledge concerning the truth of the facts set out, contained, and sworn to in said complaint, and were made by said defendant for the sole and only purpose of embarrassing, humiliating, and distressing this plaintiff and injuring him in his person and good name, and in his property, and were made by said defendant, as plaintiff is informed and believes, and therefore alleges, with the object and purpose of injuring plaintiff's said business."

It is also alleged in the fifth paragraph of the complaint that a trial was had of said cause, and plaintiff was adjudged to be guilty of violating the law as charged in said complaint, and sentenced by the judge of said court. In the sixth paragraph it is alleged that the evidence in the district court to which the case was appealed showed that in truth and in fact all of the material allegations in the criminal complaint defendant filed in the city court were wholly false and untrue, and that the city attorney thereupon moved the said district court to instruct the jury to return a verdict of not guilty, which was accordingly done, and the judgment

of acquittal was thereupon made and entered.

Without commenting in detail as to the meaning and effect of these allegations, it is sufficient to say they charge in effect that the whole proceeding against the plaintiff in the city court had its foundation upon testimony which was false and untrue, and, for the purposes of this case, that fact is admitted by the demurrer. Therefore, in accordance with the views hereinbefore expressed, it seems to the court that the invalidity of the judgment of the city court, relied on by the

Pleading—  
invalidity of  
judgment—  
sufficiency.

defendant as a defense, is sufficiently alleged in plaintiff's complaint, and

that the court erred in sustaining the demurrer and dismissing the action.

In arriving at this conclusion we have not deemed it necessary to quote from or comment at length upon particular cases. They speak for themselves, and we are satisfied that the conclusion reached is within the spirit and intention of the best-reasoned opinions.

The case is therefore remanded to the District Court of Salt Lake county, with directions to said court to reinstate plaintiff's complaint, overrule the demurrer interposed thereto, permit defendant to file an answer to said complaint upon such terms as may be just, and proceed with the hearing of said cause. Appellant to recover costs on appeal.

Corfman, Ch. J., and Frick, Weber, and Gideon, JJ., concur.

An application for rehearing having been filed, Thurman, J., on August 27, 1919, handed down the following additional opinion:

In his application for a rehearing respondent cites many additional

cases to the same effect as those cited in his former brief. We find no reason, however, for modifying the opinion heretofore rendered, except to make more clear the principle upon which we decided the question involved. We are not disposed to hold that a prosecutor acts without probable cause merely because it turns out that the information upon which he acts was false. But where, in addition to this fact, it is shown that the prosecutor either knew that the information upon which he acted was false, or had no personal knowledge of its truth, and made no investigation to determine its accuracy before instituting the prosecution, a different question

Malicious  
prosecution—  
acting on false  
information.

is presented. A judgment obtained under either of said conditions should have no standing in a court of justice as evidence of probable cause, much less be treated as conclusive. While every reasonable allowance should be made for possible errors and mistakes, we know of no reason why in a case of this kind a judgment wrongfully or recklessly procured should be used as evidence by the wrongdoer to defeat the person injured in his efforts to obtain redress. Of course, we must assume the allegations of the complaint to be true. That is all that is before us. The complaint in this case not only alleges a judgment of conviction, but it also alleges other facts which in our opinion effectually impeached the judgment and rendered it worthless as evidence of probable cause.

Pleading—  
demurrer—  
truth of  
allegation.

The application for a rehearing is denied.

Corfman, Ch. J., and Frick, Weber, and Gideon, JJ., concur.

## ANNOTATION.

**Institution of prosecution on false information without investigation as showing lack of probable cause.****I. Introductory, 1688.****II. Failure to investigate held to show want of probable cause:**

- a. Generally, 1688.
- b. Information putting prudent person on inquiry, 1691.
- c. Information readily obtainable, 1692.
- d. Incriminating statement made by convict, 1694.
- e. Failure to make investigation suggested by accused, 1694.
- f. Failure to investigate reputation of accused, 1694.

**III. Failure to investigate held not to show want of probable cause:**

- a. Generally, 1695.

**I. Introductory.**

It is not the purpose of this note to discuss the question of what constitutes want of probable cause to sustain an action for malicious prosecution, but only to discuss one phase of that subject. The standard by which the justification of conduct for beginning or continuing any proceeding, whether civil or criminal, is to be determined, is that of a reasonable or ordinarily prudent man placed in the same situation as the one who instituted the proceeding. 18 R. C. L. § 20. This note discusses the question whether the institution of proceedings on false information, without making an investigation thereof, constitutes a want of probable cause.

**II. Failure to investigate held to show want of probable cause.****a. Generally.**

The failure of a person who has received information tending to show the commission of a crime to make such further inquiry or investigation as an ordinarily prudent man would have made under the same circumstances, before instituting a prosecution, renders him liable for proceeding without probable cause.

**United States.**—Blunk v. Atchison, T. & S. F. R. Co. (1889) 38 Fed. 311.

**III.—continued.**

- b. Effect of danger in investigation, 1697.
- c. Failure to exhaust all sources of information, 1699.
- d. Failure to inquire reason for dishonor of draft, 1699.
- e. Failure to verify each item of information, 1700.
- f. Failure to inquire whether suspected person can prove alibi, 1700.
- g. Failure to demand explanation of accused, 1701.
- h. Failure to investigate reputation of informant, 1702.
- i. Failure to investigate reputation of accused, 1703.

**California.**—Dunlap v. New Zealand F. & M. Ins. Co. (1895) 109 Cal. 365, 42 Pac. 29.

**Illinois.**—Hirsch v. Feeney (1876) 83 Ill. 548.

**Indiana.** — Hutchinson v. Wenzel (1900) 155 Ind. 49, 56 N. E. 845; Lacy v. Mitchell (1864) 23 Ind. 67.

**Iowa.** — Walker v. Camp (1884) 63 Iowa, 627, 19 N. W. 802; Wilson v. Thurlow (1912) 156 Iowa, 656, 137 N. W. 956.

**Louisiana.** — Bornholt v. Souillard (1884) 36 La. Ann. 103.

**Michigan.** — Thompson v. Price (1894) 100 Mich. 558, 59 N. W. 253.

**Minnesota.** — Boyd v. Mendenhall (1893) 53 Minn. 274, 55 N. W. 45; Taibert v. Cooley (1891) 46 Minn. 366, 13 L.R.A. 463, 49 N. W. 124; Norrell v. Vogel (1883) 39 Minn. 107, 38 N. W. 705.

**Missouri.** — Stubbs v. Mulholland (1902) 168 Mo. 47, 67 S. W. 650.

**Nebraska.**—Bechel v. Pacific Exp. Co. (1902) 65 Neb. 826, 91 N. W. 853.

**New York.**—Sweet v. Smith (1899) 42 App. Div. 502, 59 N. Y. Supp. 404.

**Ohio.**—Johnson v. McDaniel (1897) 5 Ohio S. & C. P. Dec. 717.

**Pennsylvania.**—Coyle v. Snellenberg (1906) 30 Pa. Super. Ct. 246; Bruff v. Kendrick (1902) 21 Pa. Super. Ct. 463.

**Canada.** — Fancourt v. Heaven

(1909) 18 Ont. L. Rep. 492, 14 Ont. Week. Rep. 230, 15 Ann. Cas. 153.

In *Wilson v. Thurlow* (Iowa) *supra*, it appeared that some colored man had made an indecent exposure of his person to some school girls while passing along the highway. A colored man who was working in a cornfield near by was arrested, without making any investigation to determine whether he was the man who had made the exposure. The grand jury found no indictment against him. Holding that the facts showed a want of probable cause, the court said: "Before commencing a criminal prosecution, the accusing person must use the means which an ordinarily reasonable and prudent man would exercise to learn the facts . . . and except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion therefrom, the question whether there was or was not probable cause must be determined by the jury. . . . There was evidence in this case from which the jury might rightly have concluded that the defendants did not exercise the degree of care required by the law, and that the charge was recklessly made."

In *Bornholdt v. Souillard* (La.) *supra*, it appeared that at the death of defendant's grandmother certain pieces of clothing, bedding, and jewelry were missing. A servant of the grandmother informed the defendant that they were taken by the plaintiff, who had been a close and intimate friend of the grandmother. Without further inquiry the defendant preferred a charge of larceny against the plaintiff and her daughters. On examination they were discharged as innocent. In an action for malicious prosecution the court held that there was a want of probable cause, since the defendant, on inquiry, could have found that the plaintiff was innocent of the charge. The court said: "We have examined the record very attentively, and we conclude that defendant has utterly failed to show a probable cause for the prosecution which he instituted against plaintiff and her daughters. The evidence shows that they are laborious and honest women,

and good and serviceable neighbors. It further appears that defendant's grandmother and Mrs. Bornholdt had been near neighbors for upwards of twenty years, during which time they had been good friends and had cultivated the closest social relations, and that the defendant himself had been a frequent visitor at her house. The record shows that during the grandmother's last illness Mrs. Bornholdt and her daughters had taken constant and great care of the infirm old lady, and that they were among the first at the house at the moment of death, in order to give such assistance as would be needed at that solemn moment. Under such circumstances it appears to us most extraordinary that, on hearing that Mrs. Bornholdt and her daughters had removed certain things from his grandmother's house, the defendant did not call on them for some explanation in the premises, and he should at once cause their arrest under such a grievous charge. Had he followed such a course and sought for direct information, he would have discovered precisely what the evidence on the trial of this cause fully disclosed, that Mrs. Bornholdt and her daughters had been unmercifully slandered by his informants, and that the better part of the things taken from his grandmother's house had been removed by one of his informants, his cousin, who was living with the old lady in the capacity of helpmate and servant; and that the rings taken from his grandmother's fingers had been claimed by and returned to a person from whom they had been borrowed."

In *Bechel v. Pacific Exp. Co.* (1902) 65 Neb. 826, 91 N. W. 853, the court held that a person who suspected another of having committed an offense was bound to verify his suspicions by such inquiry as reasonable care and prudence would suggest, before making complaint, and that if he failed to make such inquiry he was chargeable with notice of the facts which the inquiry would have disclosed.

In *Swaim v. Stafford* (1844) 26 N. C. (4 Ired. L.) 398, wherein it appeared that a girl was arrested on information that she was in possession of

property stolen by her sister, the court held that there was a want of probable cause, since no opportunity was given her of explaining how the possession of goods supposed to have been stolen was acquired.

In *Johnson v. McDaniel* (1897) 5 Ohio S. & C. P. Dec. 717, it appeared that the plaintiff was prosecuted for having maliciously destroyed property. In an action for malicious prosecution the court charged the jury that the persons who instituted the criminal prosecution had no reasonable cause if they failed to make such inquiries as an ordinarily reasonable person would have made under like circumstances, saying: "Again, if you should find from the evidence that the defendants omitted to make such inquiry and investigation into the conduct of the plaintiff as would have suggested itself to an ordinarily prudent person, and that such investigation would have discovered the fact that the plaintiff was not guilty of the offense charged in the affidavit, then the defendant cannot be absolved on the ground that there was reasonable cause to believe that she was guilty."

In *Fancourt v. Heaven* (1909) 18 Ont. L. Rep. 492, 14 Ont. Week. Rep. 230, 15 Ann. Cas. 153, it appeared that the plaintiff, an expressman, was arrested for obtaining leather by false pretenses. He had been hired to cart the goods from one leather dealer's to another by a third party. The defendant, on being told by the third party that two men delivered the leather to him, looked into a directory and found a name like plaintiff's. Without making further inquiries the defendant had the plaintiff arrested. In an action for malicious prosecution the court held that a reasonably prudent man would have made further inquiries under such circumstances.

In *Thompson v. Price* (1894) 100 Mich. 558, 59 N. W. 253, it appeared that a supervisor of a township was arrested for wilfully neglecting his duty in that he did not require a resident to furnish a statement of the taxable property owned by him. The resident told another person that he was not required to furnish such

statement. This third person informed defendant of that fact. The court held that the failure of the defendant to make inquiries direct of the only person cognizant of the facts was evidence from which the jury could find that there was a want of probable cause. It was said: "It is contended that the plaintiff did not establish a want of probable cause. But unless the defendant showed conclusively that probable cause existed, by the advice of the prosecuting attorney (a question which we will discuss later), we think there was testimony from which the jury could find that no probable cause existed. The only witness, aside from the plaintiff, who positively knew whether the plaintiff had endeavored to procure a statement from Mr. Enos, was Mr. Enos himself. Mr. Enos swears that he has no recollection of having had any conversation with the defendant, previous to the arrest of Mr. Thompson, relative to Mr. Thompson's having left a statement with him [Enos] to make out, and that he does not think that he did have such a conversation. It is true the defendant offered testimony tending to show that Enos had stated to one Knowles that he was not required by plaintiff to furnish a statement, but it was at least a question for the jury as to whether the defendant was justified in making the complaint without making inquiry direct of the only person who was cognizant of the facts."

It appeared in *Walker v. Camp* (1884) 63 Iowa, 627, 19 N. W. 802, that a mortgagor had the mortgagee prosecuted on a charge of larceny for having sold mortgaged property. There was evidence that the mortgagor had given the mortgagee permission to sell the property. In an action for malicious prosecution the court instructed the jury that if the mortgagor was informed that the mortgagee had sold property of the kind mortgaged, and without using the means which an ordinarily prudent man would have exercised to learn whether the property sold was the mortgaged property or other property, the mortgagor was not justified in instituting the criminal

proceedings. It was held that the instructions were correct.

In *Bruff v. Kendrick* (1902) 21 Pa. Super. Ct. 468, it appeared that the plaintiff had been prosecuted by the defendant for having fraudulently embezzled a sum of money. The defendant's partner had incorrectly informed him as to the relationship between plaintiff and the firm. In an action for malicious prosecution the court said: "Probable cause does not depend upon the guilt or innocence of the plaintiff, but upon the appearances deduced from facts known to the defendant, and information received by him and properly investigated, of a character to produce in the mind of a reasonably prudent and cautious person the honest belief that the crime charged had been committed."

*b. Information putting prudent person on inquiry.*

A failure to make an investigation before instituting proceedings constitutes a want of probable cause when the information received is such as to put an ordinarily prudent and cautious person on inquiry. *Dunlap v. New Zealand F. & M. Ins. Co.* (1895) 109 Cal. 365, 42 Pac. 29; *Coyle v. Snellenberg* (1906) 30 Pa. Super. Ct. 246.

In the case last cited it appeared that plaintiff was a helper to a driver on a delivery wagon of defendant's. He was given a certain number of packages to deliver and collect the amounts designated on the vouchers. There was no accounting until evening when the driver claimed that the boy turned in a shorter amount than he should have. When the boy contended that that was all he had collected, the driver turned the matter over to his superior, who turned the matter over to the store detective. The detective, without further investigation, obtained a warrant for the boy's arrest. In an action for malicious prosecution the court held that representations of third persons as to matters not tending to establish the guilt of the suspected person do not amount, without further investigation or inquiry, to probable cause. It was said: "No investigation was made to ascertain whether Lee was mistaken

or not; nor was the advice of counsel taken as to the advisability of a prosecution. The defendants have no cause to complain that the court submitted the question of probable cause to the jury. The plaintiff denied that he had failed to account for all the money he received, and Lee and Slook had knowledge of this fact before the case was given to the detective. The latter took it for granted that Lee was not mistaken and was telling the truth, and without further investigation proceeded with the case. On the evidence the court might have said to the jury that a man exercising ordinary prudence and caution would not have made an important criminal charge on the uncorroborated testimony of an interested party, who did not communicate any fact from which an inference of guilt would arise. The appellants contend that it appears from the testimony of the plaintiff himself that probable cause existed. The part of the evidence referred to is the statement of the plaintiff, on cross-examination, that Lee claimed that the witness should be charged with the \$53.60, and that he had handed in a smaller sum, and this is, indeed, the substance of what was claimed by the defense as the probable cause leading to the prosecution; but this, as we have seen, was not a charge of embezzlement, and was a condition that would have arisen as well in case of a mistake by Lee or the plaintiff in the delivery of the goods. The representations of third parties have been held, in some instances, to justify a prosecution, as in *Smith v. Ege* (1866) 52 Pa. 419, where repeated investigations were made and the facts submitted to counsel on whose advice the prosecution was instituted; and in *Bernar v. Dunlap* (1880) 94 Pa. 329, where the prosecution was commenced on the information by a reputable witness, to the prosecutor and the magistrate who issued the warrant, that he saw the stolen property in the possession of the person accused. In *Bryant v. Kuntz* (1901) 25 Pa. Super. Ct. 102, the prosecutor was notified by an alderman of the city that the plaintiff had been guilty of cruelty to ani-

mals, and the source of his information was given at the same time, with the request that an investigation be made. The prosecutor, who was acting as agent for the Society for the Prevention of Cruelty to Animals, made an investigation and as a result of that investigation made the complaint. These cases do not go far enough to sustain the proposition that the representations of a third party as to matters not tending to establish the guilt of the accused amount, without further investigation or inquiry, to probable cause."

In *Dunlap v. New Zealand F. & M. Ins. Co. (Cal.)* supra, it was said: "It may be that the facts within his [prosecuting witness's] knowledge are such as to put him upon inquiry with reference to other facts by which he would be chargeable with a knowledge of all that such inquiry would have shown, or it may be that his own relation to the facts brought to his knowledge would make him presumptively cognizant of other facts. These circumstances, however, would bear upon his good faith in making the statement in that particular case, rather than establish the rule that he must, in all cases, exercise any diligence or effort for the purpose of ascertaining whether there are other facts than those which have come to his knowledge, and fall within the rule requiring him to state, without any suppression, all the facts actually or presumptively within his knowledge."

*c. Information readily obtainable.*

When the facts are easily obtainable, a failure to make an inquiry before instituting a prosecution constitutes a want of probable cause. *Lacy v. Mitchell* (1864) 23 Ind. 67; *Lawrence v. Leathers* (1903) 31 Ind. App. 414, 68 N. E. 179; *Boyd v. Mendenhall* (1893) 53 Minn. 274, 55 N. W. 45; *Sweet v. Smith* (1899) 42 App. Div. 502, 59 N. Y. Supp. 404. And see the cases cited supra, in II. a.

In *Lacy v. Mitchell* (Ind.) supra, it appeared that the daughter of a landlord saw the tenant feed his chickens with some shelled corn. Both the tenant and the landlord kept shelled corn in the same barn. The daugh-

ter also thought that her father's pile of corn looked as if a bushel had been taken therefrom. The landlord thereupon prosecuted the tenant. The court held that, as the landlord could easily have learned the truth by speaking with the tenant, there was a want of probable cause. The court said: "Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and in a civil case, that a cause of action existed. . . . We do not think probable cause for the prosecution was shown, considering all the circumstances. Lacy could have easily learned the facts of the case by speaking with Mitchell who was near him. He should have made more inquiry, under the circumstances of this case. If he really believed that Mitchell had stolen his corn, the belief arose from his own negligence."

In *Talbert v. Cooley* (1891) 46 Minn. 366, 13 L.R.A. 463, 49 N. W. 124, it appeared that the plaintiff went to the defendant's barn in a small village where he was well known, took an animal out, and rode the same through the village to his farm some 14 miles distant. The defendant knew where the plaintiff resided and had been personally acquainted with him for years. The defendant immediately made a complaint before the justice of the peace, charging the plaintiff with the larceny of the horse, procured a warrant, and placed it in the hands of a deputy sheriff. On the trial of the malicious prosecution action, the court admitted testimony of the deputy sheriff who arrested plaintiff, to the effect that the plaintiff was openly using the horse at the time of his arrest. The defendant objected to this testimony on the ground that his acts and conduct were to be weighed in view of what appeared to him when he made the complaint, and not in the light of facts appearing subsequently. The court held that the admission of such tes-



timony was proper, as the plaintiff may show a want of probable cause by proof of the existence of such open and notorious facts as the defendant could have ascertained, had he, before instituting the proceedings, made such inquiry and investigation as any man with honest motives would have made.

In *Lawrence v. Leathers* (1903) 81 Ind. App. 414, 68 N. E. 179, it appeared that a person registered at a hotel owned by defendants, and left without paying his bill, but left some of his baggage in his room. The baggage consisted of sample cases containing shoes and an order book bearing the name of a shoe company. After getting into communication with the shoe company, the proprietors of the hotel were informed that a salesman had beat the company out of a lot of money, and that the shoe company would give them the salesman's name if the matter of getting back the samples should be adjusted to its satisfaction. Prior to the receipt of this information, they were informed of the name of a salesman, and how he could be located from another source. The name so given was different from that of the person registered. On making inquiries of the merchant designated in that information, the salesman so named was located. Without making further inquiries one of the proprietors consulted a prosecuting attorney, and had the man arrested. The hotel clerk, instead of identifying the man arrested as the person who had left without paying his bill, stated that he had never seen the man before. In an action for malicious prosecution, the court held that if a person who had the means of obtaining the truth failed to do so there was no probable cause. It was said: "The identity of Leathers with De Lury was the important fact. Goods once in the possession of Leathers had been left at the hotel by De Lury. White had the means of identification at hand. He had only to call upon his employee in order to be certain. Instead of taking any steps to learn the truth, he assumed the identity of the person, notwithstanding the difference of name. Appellee was entitled to the presumption

of innocence, and such facts as White had learned regarding him did not tend to weaken such presumption. The belief that justifies accusation and arrest must be founded upon facts and circumstances that would induce a reasonable and prudent man, mindful of the right of individual security possessed by every citizen, to act. Had White been arrested himself under exactly the same circumstances, he would likely not be satisfied with the inquiry made. It is believed he did not exercise that degree of reasonable inquiry that the circumstances and situation suggested, and the court should have so instructed the jury."

In *Boyd v. Mendenhall* (1898) 53 Minn. 274, 55 N. W. 45, it appeared that two members of a partnership obtained permission from the office of an improvement company to cut and remove some cedar timber from their land. While they were cutting and removing the timber a passer-by notified the president and manager of the improvement company that the timber was being cut and removed. Immediately, without making any inquiries, the president and manager caused those engaged in the cutting of the timber to be arrested. After being held for about two hours the facts were learned, and they were discharged and the prosecution dismissed. At the time the president and manager were informed they could easily have obtained the information that the partnership had been given permission to cut the timber. The court held that since the corporate officers could easily have obtained the information that no crime had in fact been committed, by making proper inquiries, but did not do so, they were chargeable with the information which inquiry would have developed.

In *Sweet v. Smith* (1899) 42 App. Div. 502, 59 N. Y. Supp. 404, it appeared that defendant was the agent of the owner of a house, part of which was leased to plaintiff. The plaintiff had cut off some limbs of a tree belonging to the owner so as to give more light to his apartment. The owner had given the plaintiff permission to do this, and was in her own apart-

ment, which was below that of plaintiff, when it was done. About three weeks later the defendant procured plaintiff's arrest for mutilating the tree. The court held that inasmuch as the only fact known to defendant was that the tree had been trimmed, and as he sought no explanation from plaintiff, although he could have easily done so, there was a want of probable cause on defendant's part.

*d. Incriminating statement made by convict.*

A failure to investigate the authenticity of a convict's statement before instituting a prosecution thereon constitutes a want of probable cause. *Blunk v. Atchison, T. & S. F. R. Co.* (1889) 38 Fed. 311. In that case it appeared that plaintiff was prosecuted for being implicated in a train robbery and the murder of the engineer. A convict then in the penitentiary gave testimony implicating plaintiff and some others in the offense. In an action for malicious prosecution the court charged the jury, among other things, that when a convict makes a statement in respect to crime, not merely in reference to himself, but implicating others, then the truth of that statement should be investigated before charging anyone with crime.

*e. Failure to make investigation suggested by accused.*

A failure to make inquiry into reasonable and convenient sources pointed out to the accuser by the accused that would have established the accused's innocence constitutes a want of probable cause, when the belief of the accuser was based on a single item of information. Thus in *Hutchinson v. Wenzel* (1900) 155 Ind. 49, 56 N. E. 845, it appeared that a writer of insurance took in payment of a policy of insurance an assignment of a note from the insured. Later on, demanding payment from the maker, he received a letter from the maker stating that the note was not genuine, but a forgery. The writer of insurance immediately had the assignor of the note arrested. The accused, on being brought before the chief of police and the writer of insurance, earnestly as-

serted the genuineness of the note, and detailed the circumstances under which the note was given, and offered double the face value of the note as security pending investigation of its genuineness. This the informant refused to accept and made out an affidavit for a warrant, whereupon the accused was arrested and indicted. But later the prosecuting attorney entered a *nolle prosequi*, as the maker of the note acknowledged its genuineness. In an action for malicious prosecution the court held that the belief of the accuser counted for nothing when carelessly or recklessly formed on a single item of information, if it was shown that he failed to inquire into other reasonable and convenient sources pointed out to him that would have established the innocence of the accused.

In *Norrell v. Vogel* (1888) 39 Minn. 107, 38 N. W. 705, it appeared that some lumber was stolen from the defendant. He was informed by third persons that they thought that the plaintiff stole it. The defendant had handled his lumber so that he was in a position to identify it. He went to plaintiff's house and accused him of stealing the lumber. Plaintiff then asked defendant to look at the lumber which he had in his possession, but defendant refused. The court held that the defendant was not justified in commencing the prosecution of plaintiff without further investigation, saying: "From a consideration of the whole case, we conclude, although not without some hesitation, that it does not satisfactorily show that the defendant was justified in commencing the prosecution without further investigation."

*f. Failure to investigate reputation of accused.*

Where the circumstances are such that a person of ordinary prudence or care would make inquiries as to the character or reputation of the accused, before instituting a prosecution, a failure to do so constitutes a want of probable cause. *Hirsch v. Feeney* (1876) 83 Ill. 548; *Stubbs v. Mulholland* (1902) 168 Mo. 47, 67 S. W. 650.

In *Hirsch v. Feeney* (Ill.) *supra*, it

appeared that the plaintiff was arrested for burglary at the instance of the defendant. The plaintiff had gone into the defendant's store to pay a small debt, and a little later a burglary was found to have been committed. Later it was found that the plaintiff was not the felon. In an action for malicious prosecution, the court held that there was an entire want of probable cause, as the defendant did not make inquiries as to plaintiff's character. It was said: "Appellee seems to have sustained a good character, and in determining whether his character was good or bad he should have applied to his employers, or those with whom he was intimate, and not to persons who knew him but slightly. He and the officers, it seems, referred to the city directory to find his residence, and we presume they there found his occupation, and with whom he was employed, and if so, he should have been apprised of the fact that he was respectable, and was trusted by business men, and knowing that, he had no right to believe, because appellee had entered his store the evening before in such a manner as to attract no attention, that he was therefore a burglar notwithstanding he was employed and trusted by men engaged in business in the city. The officers were, no doubt, largely influenced in forming their opinion and in giving advice by what appellant had told them. The fact that appellee was a householder, had a good character, and was trusted by business men should have prevented appellant from supposing him guilty, except on strong evidence of the fact. It was appellant's duty to have used reasonable efforts to learn and know appellee's true character, especially when the directory pointed him to the sources of information. . . . There was an entire want of probable cause. Appellant did not go to the employers of appellee, or to his immediate neighbors, to make inquiries as to his character."

In *Stubbs v. Mulholland* (Mo.) supra, it appeared that the plaintiff was prosecuted for forging the name of one of his copartners to a check. The check had been cashed by a bank, the

president of which, on being notified that the indorsement thereon was a forgery, gave a description of the man who had it cashed to the drawer's detective. At the time the forgery was committed the plaintiff was a member of a partnership composed of plaintiff and his brother, and the payee of the check, and his father. The payee of the check and his father had private postoffice boxes to which the plaintiff had no access. The firm also had a private postoffice box. The drawer's detective, after learning that the plaintiff was in partnership with the payee, and that the firm and the drawer had separate boxes, and that the plaintiff answered the description of the person who had had the check cashed, made no inquiries as to the plaintiff's character, nor asked the payee if he recognized the indorsement on the check as that of one of his copartners, although he was in the town where the payee lived, and had received a letter from the payee offering any assistance that he might be able to render. Instead, the detective told the president of the bank that he thought he had the man who answered his description. The president thereupon sent one of his employees to arrest the plaintiff. After the arrest the president and the cashier of the banking company recognized the plaintiff as the man. On the trial the payee of the note testified that the indorsement was not in the handwriting of the plaintiff. After the criminal prosecution against the plaintiff was dismissed, the forger was found to be a person in the employ of the drawer, who had access to the mail. In an action for malicious prosecution, it was held that as there were no inquiries made as to the character of the plaintiff, or his reputation in the community where he lived, or of the person whose name was alleged to have been forged, it was error to take the question of probable cause from the jury.

*III. Failure to investigate held not to show want of probable cause.*

*a. Generally.*

If there are sufficient facts to war-

rant an ordinarily prudent person in believing that another has committed a crime, failure to make further investigation before instituting a prosecution does not constitute a want of probable cause.

**United States.**—*Widmeyer v. Felton* (1899) 95 Fed. 926; *Miller v. Chicago, M. & St. P. R. Co.* (1890) 41 Fed. 898.

**Alabama.**—*Jordan v. Alabama G. S. R. Co.* (1886) 81 Ala. 220, 8 So. 191.

**Arkansas.**—*Kansas & T. Coal Co. v. Galloway* (1903) 71 Ark. 351, 100 Am. St. Rep. 79, 74 S. W. 521.

**California.**—*Johnson v. Southern P. Co.* (1910) 157 Cal. 333, 107 Pac. 611; *Booraem v. Potter Hotel Co.* (1908) 154 Cal. 99, 97 Pac. 65; *Dunlap v. New Zealand F. & M. Ins. Co.* (1895) 109 Cal. 365, 42 Pac. 29.

**District of Columbia.**—*Spitzer v. Friedlander* (1899) 14 App. D. C. 556.

**Illinois.**—*Gardiner v. Mays* (1887) 24 Ill. App. 286.

**Indiana.**—*Fisher v. Hamilton* (1874) 49 Ind. 341.

**Maine.**—*McGurn v. Brackett* (1851) 33 Me. 331.

**Michigan.**—*Birdsall v. Smith* (1909) 158 Mich. 390, 122 N. W. 626.

**Missouri.**—*Christian v. Hanna* (1894) 58 Mo. App. 37; *Smith v. Glynn* (1912) — Mo. App. —, 144 S. W. 149.

**Nebraska.**—*Bechel v. Pacific Exp. Co.* (1902) 65 Neb. 826, 91 N. W. 853.

**New York.**—*Davenport v. New York C. & H. R. R. Co.* (1912) 149 App. Div. 432, 134 N. Y. Supp. 458.

**Ohio.**—*Miles v. Salisbury* (1895) 21 Ohio C. C. 333, 12 Ohio C. D. 7.

**South Dakota.**—*Malloy v. Chicago, M. & St. P. R. Co.* (1914) 34 S. D. 330, 148 N. W. 598.

**Canada.**—*Renton v. Gallagher* (1910) 19 Manitoba L. R. 478.

In *Miles v. Salisbury* (Ohio) *supra*, holding that a charge of the court requiring an investigation on the part of the prosecuting witness before instituting criminal proceedings was erroneous, the court said: "So that I suppose, in determining whether one who instituted a criminal prosecution had reasonable ground or probable cause to institute such proceedings, we consider the surroundings of that individual exactly as they were at the

time, and if he really did believe in the facts as charged, and from the information he then had it was reasonable for him to rely upon those facts, he might institute the proceedings without making further inquiry. But the court said: 'You are to determine as to whether or not Mrs. Salisbury acted maliciously in thus instituting this criminal proceeding by the facts and circumstances known to her and the surroundings at the time of the arrest, and in determining both of these questions (that is, probable cause and malice) you have a right to take into consideration, and charge Mrs. Salisbury with knowing, not only such facts as she actually knew, but such facts as she might, by the exercise of ordinary care, have ascertained by way of an investigation of the matter, and so in determining malice you are to take into consideration the facts and circumstances known to her, and such facts as she might have ascertained by the exercise of ordinary care in inquiring into and investigating the subject or truth of the charge which she made against the plaintiff, and, from these facts and circumstances, say as to whether she acted maliciously, and acted without probable cause.' In determining whether the party had probable cause, the inquiry should be, What did she know at the time, and what did she know or believe, and was it sufficient to sustain such a belief? We hold that this part of the charge was misleading."

In *McGurn v. Brackett* (Me.) *supra*, the court said: "One may rashly and hastily cause the arrest and prosecution of another for a crime which has not been committed, and which, by the use of proper deliberation, care, and inquiry, he could have ascertained had not been committed,' and yet have probable cause for the prosecution. He may have been induced to prosecute by the wilful misconduct or the procurement of the supposed offender; and if he proceeded with ordinary care and prudence, and without malice, he is not responsible, as for the want of probable cause, if he did not use proper or sufficient deliberation. If deliberation, inquiry, and care were

required, it would be only such as persons of ordinary care and prudence would use under like circumstances."

In *Kansas & T. Coal Co. v. Galloway* (Ark.) *supra*, it appeared that a strike of the employees of the defendant company occurred. An injunction was procured restraining the striking miners from interfering with the business of the defendant company, and from intimidating its employees. It appeared that plaintiff, a striker, had been arrested for having violated the order. In an action for malicious prosecution, the trial court instructed the jury that "probable cause is defined to be such a state of facts known to and influencing the prosecutor as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon facts within the knowledge of the prosecutor, or which he could have ascertained by reasonable diligence, which would lead him to believe or entertain a strong suspicion, supported by circumstances sufficiently strong to warrant in the mind of the prosecutor an honest belief that the person accused was guilty." The court held that the instruction was erroneous because a prosecutor would only be held to have knowledge of such facts as inquiry would have disclosed when the facts or circumstances known to the prosecutor were of such a nature as to put the prosecutor on inquiry. In *Swaim v. Stafford* (1844) 26 N. C. (4 Ired. L.) 392, it appeared that the plaintiff was prosecuted for having stolen a parcel of belt ribbons. After the plaintiff, with some of her friends, had been in the store looking at ribbons and other goods, the defendant missed the parcel of belt ribbons. He instituted two searches for the ribbon, but failed to find it. Some time later the plaintiff was seen wearing a new belt ribbon. On the trial of an action for malicious prosecution the plaintiff offered testimony to the effect that about a month later the ribbon was found in the folds of a bolt of cloth. This testimony was rejected. The court held that the effect of the testimony was only to show that the defendant did not use rea-

sonable diligence in ascertaining whether a theft had been committed. It would not have established that the defendant did not have probable cause, and was therefore properly rejected.

*b. Effect of danger in investigation.*

A person need not make an investigation before beginning a prosecution when he has reason to believe that he will be exposed to danger in so doing. *Fisher v. Hamilton* (1874) 49 Ind. 341; *Kansas & T. Coal Co. v. Galloway* (1903) 71 Ark. 351, 100 Am. St. Rep. 79, 74 S. W. 521.

In *Fisher v. Hamilton* (Ind.) *supra*, it appeared that the plaintiff and the defendant had, for some years previous to the commencement of a prosecution for surety of the peace, quarreled about a road. The defendant was the president of a turnpike company that was engaged in the construction of a road over the plaintiff's land. The plaintiff was opposed to the construction of the road. There was an award of a certain sum of money as damages. The president delivered this sum of money to a third person to deliver to the plaintiff. While on the premises of the plaintiff the president of the turnpike company passed along the road near the plaintiff's house. Afterwards, the third person informed the president that he had come very near being shot; that while he was passing along the road near plaintiff's residence the plaintiff had a gun pointed at him, but was prevented from shooting by his daughter. Whereupon plaintiff was prosecuted. In an action for malicious prosecution the court held that while a person who instituted a prosecution on information should use due and reasonable diligence to ascertain the truth of the charge preferred, still the failure to do so did not constitute want of probable cause, especially where the inquiry would expose him to danger. It was said: "The law is quite well settled that, where a prosecution is commenced upon information, the person instituting it should use due and reasonable diligence to ascertain the truth of the charge preferred; and there are cases where the law would require the

person preferring the charge to make inquiry of the accused party. Such was the rule laid down in *Lacy v. Mitchell* (1864) 23 Ind. 67, which was a prosecution for larceny of corn. But we do not think that such a rule should be applied in a case like the present.

. . . The prosecution for surety of the peace was based upon the grounds that appellant feared that appellee would injure him by violence, and would injure his property. While it was the duty of the appellant, by reasonable inquiry to satisfy himself that he was in danger of being injured by violence, or of having his property injured, we think he was not required to expose himself to danger by inquiring of the man whom he feared whether he had attempted to shoot him, and whether he intended to injure him by violence, or injure his property. Such a requirement would be unreasonable and dangerous. The appellant was not thus required to hazard his person, life, or property. This would render nugatory a prosecution for surety of the peace, which was designed to prevent, and not to incite, violence. . . . The material and controlling question in the case was whether the appellant had probable cause for instituting the prosecution for surety of the peace. It is very obvious that the second instruction injuriously affected the appellant; for by that the jury were told that, in determining the question of whether there was probable cause, they should consider whether the appellant had ascertained by inquiry of plaintiff whether he had threatened to injure him or his property, and whether he had attempted to shoot him and was prevented from so doing by the interference of the daughter of the appellee. As we have seen, the appellant was only required to use such diligence as a reasonably prudent man would use under such circumstances, to ascertain the truth of his suspicions, and that it would be an act of foolhardiness, which means courage without sense or judgment, and mad rashness, for a person who apprehended personal violence from another to go to such person and inquire what

his intentions were. If he should go unarmed, he would place himself at the mercy of his enemy, and if he went armed, the chances would be that he would precipitate a difficulty, instead of avoiding one, as was the manifest purpose of the statute."

In *Kansas & T. Coal Co. v. Galloway* (Ark.) supra, it was held that a prosecuting witness was under no duty to go to the enemy's camp to gain information. The court said: "It is implied in the seventh instruction given by the trial court that the prosecutor in the former case before the Federal court could have ascertained additional facts, that is, facts going to show that the town marshal and his posse, in their encounter with Evans and Battles at the bridge on the night of the 3d of July, were acting in the performance of official and public duty in this, that they were endeavoring to arrest Evans for then and there carrying a pistol, and that Evans and his friend Battles were resisting the arrest. The instruction is manifestly given on the theory that by reasonable diligence the prosecution in the contempt case could have ascertained these facts from the marshal, and probably one Willis, a bystander. The marshal and those acting with him were alleged to have been in a conspiracy to maltreat Evans because he was in the employ of the prosecutor company, and in this way what one did the other did, in furtherance of the common purpose, and all were jointly responsible for the unlawful acts of each other. This being the state of the case, it seems that it was not incumbent upon the prosecutor to go into the enemy's camp as a spy to either ascertain his defense or gain information for his own use in the contemplated prosecution. . . . There is nothing in the evidence to show that the prosecutor in the contempt case had any information as to what the man Willis, who appears to have been the only disinterested looker-on at the affair of the 3d of July, knew or would testify in that trial, and nothing that made it their duty to make further inquiries. In fact, Willis's presence on the occasion seems not to have been known to the

prosecution until the trial. The prosecutors, therefore, were under no obligation to inquire of him."

*c. Failure to exhaust all sources of information.*

It does not show a want of probable cause for a person to fail to exhaust all sources of information before instituting a proceeding. *Johnson v. Southern P. Co.* (1910) 157 Cal. 333, 107 Pac. 611; *Dunlap v. New Zealand F. & M. Ins. Co.* (1895) 109 Cal. 365, 42 Pac. 29.

In *Johnson v. Southern P. Co.* (Cal.) supra, it appeared that the plaintiff was criminally prosecuted by the defendant company for altering a railway ticket with the intent of defrauding the company. On a certain line of the defendant there were certain stop-over privileges granted on request to the conductors on that line. On request, the conductor would insert in the blank space for that purpose, the name of the town where the passenger wished to stop over. There was also a custom that the passengers who did not wish to use the tickets further could sell them. On the occasion in question the plaintiff had sold the ticket to another, who was forced to pay the fare on the train because the conductor took up the ticket on the ground that the insertion of the stop-over was made to defraud the company. In an action for malicious prosecution it was held that the person instituting a criminal prosecution need not exhaust all sources of information before instituting the proceedings, if the facts be such as to induce in the mind of an ordinarily reasonable person the honest belief that a crime had been committed.

In *Dunlap v. New Zealand F. & M. Ins. Co.* (Cal.) supra, it appeared that plaintiff had been criminally prosecuted for embezzlement by defendants, and at the hearing had been discharged. In an action for malicious prosecution the court instructed the jury that if a person made a full and careful statement of all the facts in such case as were with due diligence obtainable to counsel, and was advised by him to institute proceedings, there was probable cause. Holding

that such instructions were erroneous, as a person was not required to make an investigation of the facts of the crime committed, or to exhaust all sources of information bearing upon the facts within his knowledge, it was said: "It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it. There are expressions in some opinions to the effect that, in addition to the facts within his knowledge, he must also have exercised reasonable diligence to ascertain whether there were any other facts bearing upon the charge, but in an extended examination of the authorities we have not been able to find any case in which it has been decided that such diligence must be exercised, or where the prosecuting witness has been held liable for failure to ascertain whether there were any other facts bearing upon the case."

*d. Failure to inquire reason for dishonor of draft.*

A failure to make further inquiries of a bank which dishonored a draft before prosecuting the drawer does not constitute a want of probable cause. *Booraem v. Potter Hotel Co.* (1908) 154 Cal. 99, 97 Pac. 65. In that case it appeared that plaintiff purchased a letter of credit from a bank and, while staying at a hotel in another city, asked if they would accept a draft on the letter of credit. This they agreed to do, and on his leaving to go to another city he paid them by draft on the letter of credit. When he left he gave the name of the hotel he would be at in the other city. On presentation of the draft to the bank on which the letter of credit was drawn it was dishonored, with the indorse-

ment, "Has no account." Thinking that they had made a mistake the hotel authorities sent word to the plaintiff, asking on what bank the letter of credit was drawn. On receipt of the answer that the letter of credit was drawn on the bank to which the hotel's bank had presented the draft, they turned the matter over to the public authorities, who secured the plaintiff's arrest and incarceration. Later the hotel authorities received word from the bank on which the letter of credit was drawn that there had been a mistake and that there were funds to meet the draft. Whereupon plaintiff was ordered to be released. In an action for malicious prosecution it was contended on behalf of the plaintiff that the hotel company should have communicated with the bank and asked why the check had been dishonored before resorting to criminal proceedings. The court held that there was no want of probable cause because the defendant's bank did not communicate with the bank on which the letter of credit was drawn and request an explanation of the reason for the dishonor of the draft.

*e. Failure to verify each item of information.*

It does not show a want of probable cause for a person to fail to verify each item of information received, before proceeding thereon. *Gardiner v. Mays* (1887) 24 Ill. App. 286; *Birdsall v. Smith* (1909) 158 Mich. 398, 122 N. W. 626.

In *Gardiner v. Mays* (Ill.) *supra*, it appeared that the father of the informant had been assaulted and robbed. Later the father told the informant that another person had told him that the plaintiff had confessed to this other person that he was the perpetrator of the offense. The plaintiff was acquitted of the charge. In an action for malicious prosecution, the court held that in determining whether there was reasonable or probable cause for instituting a criminal prosecution, it was not necessary to verify the correctness of each item of information, but it was sufficient to act with reasonable prudence and caution in that direction. The court said:

"If he [the informant] believed the statements of his father he was warranted in relying upon the information as to what Camron would swear. . . . In determining whether or not there is sufficient probable cause for instituting a criminal prosecution, it is not necessary to verify the correctness of each item of information, but it is sufficient to act with reasonable prudence and caution in that regard. It was not, therefore, necessary that appellant should have gone in person to Camron and interrogated him as to what he would swear before acting on what he had learned as to that fact."

In *Birdsall v. Smith* (Mich.) *supra*, it appeared that an employee in the office of the Dairy and Food Commission was directed to make a complaint against a dairyman based on a report of an analysis of a certain quantity of milk sold by him. The report stated that the milk was contained in a half-pint bottle, and also stated that the analysis made by the state analyst showed the milk to be adulterated. The milk submitted to the analyst was in fact contained in a pint bottle. In an action for malicious prosecution the court held that as the certificate reporting the analysis was *prima facie* evidence of adulteration, the employee was not required to make an investigation before prosecuting the accused.

*f. Failure to inquire whether suspected person can prove alibi.*

A failure to make inquiries of the suspected person or members of his family as to whether the suspect could prove an alibi does not constitute a want of probable cause. *Miller v. Chicago, M. & St. P. R. Co.* (1890) 41 Fed. 898. In that case it was contended, among other things, that the prosecuting witness should have gone to the plaintiff's house and inquired of him whether he burned the house, and whether he could prove an alibi by his two daughters. The court held that it was not incumbent upon the prosecuting witness to make such inquiry, saying: "The law of self-preservation, the instinct of human nature itself, would lead a man to believe that the party thus accused, even if guilty, would say he was not guilty, and that



he might resort to the common defense, in such cases, of an alibi. The law would not exact of the prosecuting witness such diligence and vigilance as to do a thing which no reasonable man under like circumstances would do. No man, in working up a case, goes to the party accused to see if he is guilty, but ordinarily keeps his investigation to himself. He does not let the party suspected know of the investigation, for fear he may escape, until he is ready to have the *capias* served upon him."

*g. Failure to demand explanation of accused.*

A prosecutor is under no duty to call on the accused and demand an explanation before instituting a prosecution. A failure to do so, therefore, does not show a want of probable cause. *Spitzer v. Friedlander* (1899) 14 App. (D. C.) 556; *Bechel v. Pacific Exp. Co.* (1902) 65 Neb. 826, 91 N. W. 853; *Davenport v. New York C. & H. R. R. Co.* (1912) 149 App. Div. 432, 134 N. Y. Supp. 458; *Renton v. Gallagher* (1910) 19 Manitoba L. R. 478.

In *Spitzer v. Friedlander* (D. C.) *supra*, it appeared that a trusted employee of the defendant had been prosecuted by him for embezzlement. The employee had been playing the races and associating with a woman of questionable character. The receipt of this knowledge aroused the defendant's suspicions, who thereafter kept a strict watch on the employee, and finally lodged the complaints here complained of. The court held that, while there may be certain cases where in a person instituting a prosecution should make inquiries or demand an explanation of the person suspected, such duty would not be imposed when the knowledge thus obtained would have no effect on the mind of an ordinarily cautious man as to the suspected person's guilt.

In *Bechel v. Pacific Exp. Co.* (1902) 65 Neb. 826, 91 N. W. 853, it appeared that there were gross irregularities in the department under plaintiff's charge, and that the plaintiff took no steps to investigate them. The prosecuting witness knew also that plain-

tiff was a promoter of a mining venture in which some of the company's money had been diverted by a clerk under the plaintiff. A change in the company's office was followed by a corresponding change in the officers of the mining venture. It also appeared that plaintiff testified that he knew that one of the clerks was a defaulter, but the clerk had promised to adjust the matter with the president of the company, and that he thought that the abstractions made by another clerk to use in the mining venture were only temporary, and that they were being made good by that clerk. The court held that while there might be cases in which it would be necessary to call upon the person suspected for an explanation before instituting criminal prosecutions, still such is not the case where there was no reason to believe that the explanation of the suspected person, when obtained, would materially alter the opinion produced by the information already received. It was said: "There may be cases in which it would be necessary, under this requirement, to call upon the person suspected to give an explanation. But such course need not be taken as a general rule. In many cases it would obviously be unreasonable to suppose that any good could result, and unless such an inquiry would be reasonable under the particular facts, it is not necessary. Thus one who contemplates proceedings to bind another over to keep the peace is not required first to go to such person and inquire as to his intentions.

. . . The same view must be taken where there is no reason to believe that the explanation of the person suspected of a crime, when obtained, would materially alter the opinion produced by information already acquired."

In *Davenport v. New York C. & H. R. R. Co.* (1912) 149 App. Div. 432, 134 N. Y. Supp. 458, it appeared that for some time articles of clothing and other things had been stolen from freight cars in defendant's yards. An employee engaged in the investigation of such thefts obtained confessions from some of the thieves. These con-

fessions implicated the plaintiff, whereupon the plaintiff, a brakeman in the employ of the defendant railroad, was criminally prosecuted. It was held that the investigator was not called upon to call on the plaintiff and demand an explanation.

In *Renton v. Gallagher (Manitoba)* supra, it appeared that there was a considerable loss in a store managed by plaintiff and controlled by a firm of which defendant was a member. In other stores operated by the same firm there were large profits. In order to ascertain the cause of the loss in this store the firm employed a firm of detectives, who placed a detective in the store as a salesman. Daily reports were made to the firm, which laid the facts before its counsel. By the detective's reports it appeared that plaintiff sold food to persons to whom no credit was to be extended. Plaintiff kept a record of these credit sales on a pad which he kept in his pocket. The persons to whom a credit was extended in this way settled periodically, but no money was turned over to the cashier. In an action for malicious prosecution it was contended that defendant should have called on plaintiff for an explanation. It was held that the failure to demand an explanation of plaintiff did not impair defendant's right to rely on probable cause.

*h. Failure to investigate reputation of informant.*

If information is sufficient to constitute probable cause, the fact that the prosecutor fails to inquire into the informant's reputation for veracity does not deprive him of justification. *Widmeyer v. Felton* (1899) 95 Fed. 926; *Miller v. Chicago, M. & St. P. R. Co.* (1890) 41 Fed. 898; *Jordan v. Alabama G. S. R. Co.* (1886) 81 Ala. 220, 8 So. 191.

In *Widmeyer v. Felton (Fed.)* supra, it appeared that for some time cars at a certain station had been broken into and materials were stolen therefrom. A person was hired as a special detective to hunt up the perpetrators of the crime. The special detective thereafter obtained information involving the plaintiff herein, and

laid it before the division superintendent, who directed him to lay the matter before the company counsel. The company counsel thought there were reasonable grounds for a prosecution of the plaintiff, but, to be sure, directed the special detective to lay the matter before the county attorney, and inquire if he thought it sufficient to institute a prosecution. The county attorney, after questioning the detective, decided that there was sufficient ground to prosecute plaintiff, whereupon criminal proceedings were instituted against the plaintiff, and followed up until the plaintiff was acquitted. In an action for malicious prosecution against the receiver of the railroad, it was held that the attorney was not in fault in failing to investigate the character of the detective, and that a verdict for the defendant should be directed.

In *Miller v. Chicago, M. & St. P. R. Co.* (1890) 41 Fed. 898, it appeared that an official of the defendant railroad had prosecuted the plaintiff for arson. A station of defendant's was set afire, and there was certain evidence implicating the plaintiff. The bill, on presentation to the grand jury, was ignored. In an action for malicious prosecution it was contended that if the prosecuting witness had used reasonable diligence he would have discovered that the informant's reputation as to veracity in the neighborhood was bad. The court held that there was no duty on the prosecuting witness to make investigation of the informant's reputation for truthfulness.

In *Jordan v. Alabama G. S. R. Co.* (Ala.) supra, it appeared that the plaintiff had been criminally prosecuted by the defendant for attempting to wreck a train by tearing up a portion of the rail. In an action for malicious prosecution the plaintiff requested the court to charge, among other things, that if the defendants could, by the exercise of reasonable diligence and prudence, have ascertained that the informants who implicated the plaintiff in the offense were men of bad character for truth and veracity, and that there was a failure to exercise

such diligence and prudence before communicating such facts to counsel, there was therefore want of probable cause. The court held that, in the absence of some fact or circumstances calculated to arouse suspicion, a person's reputation as to truth and veracity is good, and therefore the defendant's failure to investigate the informants' veracity did not constitute lack of probable cause.

*4. Failure to investigate reputation of accused.*

Where an inquiry into the character of the accused would not be more favorable to him than the information already received, a failure to make an inquiry or an investigation of the accused's character does not constitute a want of probable cause. *Smith v. Glynn* (1912) — Mo. App. —, 144 S. W. 149; *Malloy v. Chicago, M. & St. P. R. Co.* (1914) 34 S. D. 330, 148 N. W. 598.

In *Smith v. Glynn* (Mo.) supra, it appeared that the day after the defendant and his wife were divorced in Kansas she married the plaintiff in Missouri. By the laws of Kansas a divorce did not become effective until six months after the decree, and a divorced person who married within that time was guilty of bigamy. The defendant thereupon, on the advice of a reputable attorney, prosecuted his former wife and the plaintiff. The trial resulted in an acquittal of the woman, and the action was dismissed against the plaintiff. On a motion for rehearing of an action for malicious prosecution, it was contended that defendant should have made inquiries as to the plaintiff's character. The

court held that inasmuch as a further inquiry into the plaintiff's character could not be favorable to him, as such information would not have persuaded a reasonable man that plaintiff was incapable of committing a crime, the failure to make the investigation did not charge the defendant with proceeding without probable cause.

In *Malloy v. Chicago, M. & St. P. R. Co.* (1914) 34 S. D. 330, 148 N. W. 598, it appeared that an employee of a railroad company was charged with the theft of coal. In an action for malicious prosecution it was contended that the detective of the company should have investigated the accused's character before instituting the proceedings. It was held that the detective was not at fault for not making further inquiries, having made some which showed that the plaintiff was a drinking man.

In *Christian v. Hanna* (1894) 58 Mo. App. 37, it appeared that coal had for some time been stolen from a coal dealer's cars. The coal dealer directed one of his employees to keep watch. On being informed by the employee that a person was then taking coal from the yard, the coal dealer followed the plaintiff, who was then hauling coal from the yard to his house. The coal dealer then learned his name and had him prosecuted. The court held that the failure of the coal dealer to investigate the character of the plaintiff did not constitute a want of probable cause, when he was informed by one upon whom he had a right to rely that his property had been stolen, who had then shown the alleged thief with the property in his possession.

R. C. L.



# COMBINED INDEX TO NOTES AND CASES.

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## ABANDONMENT.

Of operation of street railway, see **CARRIERS**.

Of homestead, see **HOMESTEAD**.

*Criminal responsibility of one aiding and abetting abandonment of child.* 5-786.

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## ABATEMENT.

Of nuisance, see **NUISANCES**.

---

## ABATEMENT AND REVIVAL.

Necessity of plea in abatement to raise question of jurisdiction. 5-951.

Abatement by death of action for personal injuries. 5-990.

---

## ABORTION.

*Criminal responsibility of one on whom abortion is committed for conspiring to commit the crime.* 5-788.

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## ABSTRACTS.

*Liability of attorney passing defective title.* 5-1389 (case p. 1385).

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## ABUSE.

As ground for divorce, see **DIVORCE AND SEPARATION**.

## ABUSE OF PROCESS.

Measure of damages for, see **DAMAGES**.

As to malicious prosecution, see **MALICIOUS PROSECUTION**.

---

## ABUSIVE LANGUAGE.

*Civil liability for using.* 5-1286 (case p. 1283).

---

## ABUTTING OWNERS.

Liability for injury by defect in street or sidewalk, see **HIGHWAYS**.

---

## ACCELERATION.

Acceleration clause in mortgage, see **MORTGAGE**.

Of remainder, see **WILLS**.

---

## ACCEPTANCE.

Of dedication, see **DEDICATION**.

Of gift, see **GIFT**.

---

## ACCESS.

*Right of one whose access by means of a right of way or branch road to a highway is interfered with by an obstruction in the latter.* 5-200 (case p. 198).

**ACCOUNTING.**

By personal representative, see **EXECUTORS AND ADMINISTRATORS**.  
By guardian, see **GUARDIAN AND WARD**.  
Between partners, see **PARTNERSHIP**.

**ACCOUNTS.**

Interest on, see **INTEREST**.

**ACQUIESCENCE.**

Estoppel by, see **ESTOPPEL**.

**ACTION OR SUIT.**

Abatement of, see **ABATEMENT AND REVIVAL**.  
Assignability of right of action, see **ASSIGNMENT**.  
Right of action by or against executor or administrator, see **EXECUTORS AND ADMINISTRATORS**.  
By husband or wife, see **HUSBAND AND WIFE**.  
Against receiver, see **RECEIVERS**.  
Venue of, see **VENUE**.  
Action as one on contract or in tort. 5-1100, 1117.

**ADJOINING LANDOWNERS.**

Respective rights as to oil in ground, see **MINES**.  
Duty of property owner to protect neighbor from loss. 5-411.  
Right to deprive owner of legitimate use of his property because it may cause an injury to his neighbor. 5-411.

**ADMINISTRATION.**

Of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**.

**ADMISSIONS.**

As evidence, see **EVIDENCE**.  
By demurrer, see **PLEADING**.

**ADOPTED STATUTES.**

Construction of, see **STATUTES**.

**ADOPTION.**

Of child, see **PARENT AND CHILD**.

**ADULTERY.**

*Holding single person who has carnal intercourse with married person of the opposite sex guilty of aiding and abetting adultery. 5-783.*  
*Veneral disease as evidence of adultery. 5-1020.*

**AD VALOREM TAX.**

See **TAXES**.

**ADVERSE POSSESSION.**

Easement by prescription, see **EASEMENTS**.  
Establishment of highway by prescription or user, see **HIGHWAYS**.  
Sufficiency of evidence to establish adverse possession of real estate. 5-423.  
Possession under color of title. 5-423.  
Sufficiency of mere lapse of time without proof of hostile holding. 5-1385.

**ADVERTISING.**

Permitting revocation of dentist's license for advertising with view to deceiving public. 5-84.

**AFFIDAVIT.**

For arrest in extradition proceeding, see **EXTRADITION**.

**AFTER-ACQUIRED PROPERTY.**

As subject to mortgage. 5-391.

**AIDING AND ABETTING.**

See **CRIMINAL LAW**.

**AMBIGUITY.**

In insurance contract, see **INSURANCE**.  
In statutes, see **STATUTES**.

**AMENDMENTS.**

Of Constitution, see CONSTITUTIONAL LAW.  
 Of record in criminal case, see CRIMINAL LAW.  
 Of statutes, see STATUTES.

**ANIMALS.**

Transportation of, see CARRIERS.  
 Fright of horse, see HORSES.  
 Measure of damage for injury to, resulting in death. 5-149.

**ANNUAL RESTS.**

See INTEREST.

**ANSWER.**

See PLEADING.

**ANTENUPTIAL CONTRACT.**

See HUSBAND AND WIFE.

**ANTICIPATED INJURY.**

Injunction to prevent. 5-915.

**ANNULMENT.**

Of marriage, see MARRIAGE.

**APPEAL AND ERROR.**

In general; right to appeal.

For certified questions, see CASES CERTIFIED.

*Right to appeal from order releasing one in extradition proceedings. 5-1156 (case p. 1152).*

Finality of rulings on demurrer. 5-358.

Jurisdiction of particular courts.  
 Jurisdiction of circuit court upon appeal from county court. 5-1585.

Transfer of cause; effect; time.

*Pendency of appeal from judgment as affecting right to enforce it in another state. 5-1269 (case p. 1261).*

What law determines status of judgment during pendency of appeal where attempt is made to enforce it in other state. 5-1261.

Effect on time for appeal of statute giving appellant ten days in which to serve notice of appeal after service on him of written notice of order from which the appeal is taken. 5-1152.

**Record.**

Deciding questions on appeal upon what appears in the record regardless of view by jury. 5-275.

Refusal to consider error in submitting question of probable cause to jury when instructions are not in the record. 5-1090.

**Objections and exceptions.**

Refusal to consider disallowance of commissions to administrator based upon a commissioner's report to which no exceptions were taken. 5-619.

**Presumptions.**

Presumption on review of extradition proceedings, of sufficiency of showing upon which warrant for arrest was issued. 5-1152.

Right of plaintiff nonsuited at close of case to most favorable inferences deducible from evidence. 5-1396.

**Discretionary matters.**

*Refusal of continuance in criminal trial, asked for on account of occurrence during trial, as abuse of discretion. 5-914 (case p. 908).*

**Questions not raised below.**

Refusal to consider question not raised in lower court. 5-155.

Right of appellate court to consider question of jurisdiction where evidence relating to it was admitted, though no plea in abatement was filed. 5-951.

Right of bank sued for amount of checks paid on forged indorsements, to raise for first time on appeal objection that checks were not returned to it. 5-1193.

**Errors waived or cured below.**

Waiver of motion for nonsuit because of insufficiency of evidence. 5-1090.

**Review of facts.**

Right of appellate court to compare testimony of different witnesses to determine disputed fact. 5-805.

Refusal to disturb finding on conflicting evidence. 5-1013.

Effect of verdict to conclude question whether one used abusive language as alleged in complaint. 5-1283.

Finding as to negligence of maker with respect to checks which will absolve bank from liability for paying them on forged indorsements. 5-1193.

Findings of fact by chancellor. 5-1426.  
Review of refusal to make requested findings of fact in equity case. 5-1426.

**What errors warrant reversal.**

*Refusal of continuance in criminal case asked for on account of occurrence during trial as prejudicial error. 5-914 (case p. 908).*

Rulings on demurrer. 5-102.

— as to evidence.

Error without prejudice. 5-805.

Admission of unnecessary evidence to establish truth of allegation which statute required to be taken as true in absence of verified denial. 5-1637.

Exclusion of question to defendant as to admissions made by him, where he had already denied facts assumed in the question, and persons to whom admissions were alleged to have been made were not questioned. 5-1237.

— as to instructions.

Instruction embodying applicable law in an abstract form. 5-201.

Instruction directing jury to find accused guilty if certain state of facts is true and excluding from their consideration a good defense relied on by him. 5-1247.

Failure to instruct, where no instruction is requested. 5-1121.

— as to jury.

Permitting photographs excluded from evidence to go into the jury room. 5-1320.

— as to findings or verdict.

Effect of wrong reason. 5-1152.

**Judgment.**

Opinion handed down in case remanded for further proceedings as the law of the case. 5-1213.

---

#### APPOINTMENT.

Of administrator, see EXECUTORS AND ADMINISTRATORS.

Power of, see POWERS.

---

#### APPORTIONMENT.

Of election districts, see ELECTION DISTRICTS.

---

#### APPROPRIATIONS.

Of public money, for what purpose allowed, see PUBLIC MONEYS.

*Absence of appropriation as defense to mandamus to compel payment of salary of public officer or employee. 5-579.*

---

#### ARRAIGNMENT.

Of accused, necessity of. 5-1121.

Entry nunc pro tunc upon record of criminal case after expiration of term, to show arraignment of accused. 5-1121.

---

#### ARREST.

Of passenger, see CARRIERS.

Measure of damages for illegal arrest, see DAMAGES.

Of fugitive from justice, see EXTRADITION.

*Entry and search of premises for purpose of arresting one without search warrant. 5-263 (case p. 261).*

Wrongful arrest of owner of property left in exposed position as proximate cause of its loss through theft. 5-358.

---

#### ARSON.

*Criminal responsibility of one co-operating in offense of arson which he is incapable of committing personally. 5-783.*

---

#### ASSETS.

Of decedent's estate, see EXECUTORS AND ADMINISTRATORS.

---

#### ASSIGNMENT.

**In general.**

Validity of assignment by bankrupt, see BANKRUPTCY.

Of negotiable paper, see BILLS AND NOTES.

Check as assignment, see CHECKS.

Of corporate stock, see CORPORATIONS.

Of insurance policy, see INSURANCE.

Of mortgage, see MORTGAGE.

Effect of, on right of action, see PARTIES.

*Assignability of right of action ex delicto for injury to property, as affected by statute. 5-130 (case p. 124).*

Sufficiency as against general demurrer of allegation of assignment of choses in action. 5-124.



**Equitable assignment.**

*Effect of Negotiable Instruments Law upon the theory as to a check being an equitable assignment of the drawer's funds.* 5-1667 (case p. 1665).

**Rights and liabilities of parties.**

Liability of assignee of negotiable paper, see **BILLS AND NOTES**.

Assignee's right of action, see **PARTIES**.

Rights of assignee or receiver of insolvent corporation. 5-79.

Estoppel of one who avoids liability on a contract to an alleged assignee on the ground that no assignment had been made to set up the alleged assignment as a defense in a subsequent action. 5-1502.

**ASSIGNMENTS FOR CREDITORS.**

As to bankruptcy matters, see **BANKRUPTCY**.

**ASSOCIATIONS.**

Capacity of voluntary associations to act as trustee. 5-1172.

**ATTACHMENT.**

Right of creditors of seller to attach property sold without complying with the requirements of Bulk Sales Law. 5-1507.

**ATTAINDER.**

Act providing for abatement of bawdy-houses, forfeiture of personal property used in maintaining them, closing of premises, and imposition of money exaction against the property. 5-1449.

**ATTORNEY GENERAL.**

Right to appear for the establishment of charitable trust. 5-303.

**ATTORNEYS.**

Confidential communications to, see **EVIDENCE**.

*Rights of surviving members and of estate of deceased member of law firm in respect to business unfinished at time of latter's death.* 5-1290 (case p. 1288).

*Liability of attorney passing defective title.* 5-1389 (case p. 1385).

Provision in contract of law partnership that in case of dissolution certain members are to have no interest in the outstanding accounts. 5-1288.

Competency of attorney as witness for or against client. 5-972.

Evidence of declarations of attorney for or against his principal. 5-972.

Right of party seeking an accounting from a trustee to relief from consequences of neglect of his attorneys. 5-655.

**ATTORNEYS' FEES.**

Necessity of previous demand to recovery of. 5-1216.

Discretion of court as to allowance of attorneys' fees provided for in mortgage, and amount thereof. 5-1216.

Effect on right to recover attorneys' fees provided for in mortgage, of lulling mortgagor into inaction by assurance that he need not worry about payment. 5-1216.

Disallowance of, although amount tendered was slightly less than was in fact due. 5-1216.

**AUTOMOBILES.****In general.**

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxation.* 5-759 (case p. 731).

Injunction against use of motor trucks on highway. 5-765.

Liability for injury to highway by unreasonable use of motor vehicles thereon. 5-765.

Provision of motor vehicle license act conferring upon secretary of state power to employ agents and incur expense as delegation of legislative power. 5-731.

Forfeiture of automobile used by employee without knowledge of owner in violation of law. 5-211.

**Injuries by; negligence in use of.**

*Res ipsa loquitur as applied to automobile accidents.* 5-1240 (case p. 1237).

*Liability of owner under "family-purpose" doctrine, for injuries by automobile while being used by member of his family.* 5-226 (case p. 216).

Judicial notice as to possibility of accident by blowing out of tire. 5-1237.

Evidence in action for injury resulting from fright of horse by excessive speed of automobile. 5-936.

Sufficiency of evidence in action for injury to passenger to take case to jury. 5-1237.

Operating upon highway motor car loaded in such a manner as to frighten horse. 5-936.

Duty of driver meeting horse to stop car. 5-936.

Automobile as dangerous agency. 5-216.  
Liability of owner for injury done by servant at time when servant was engaged in his own business. 5-216.

— **contributory negligence.**

Attempt to drive horse which would take fright at any automobile. 5-936.

---

**BAD FAITH.**

See **GOOD FAITH.**

---

**BAGGAGE.**

Of passenger, see **CARRIERS.**

---

**BANKRUPTCY.**

As to assignments for creditors, see **ASSIGNMENTS FOR CREDITORS.**

*Criminal responsibility for conspiring with bankrupt to conceal his property.* 5-789.

Validity of assignment in good faith to secure present debts made more than four months before bankruptcy. 5-1381.

---

**BANKS.**

**In general.**

Criminal liability for drawing checks without sufficient funds to meet them, see **FRAUD AND DECEIT.**

Drawee bank which credits check to account of the payee as a holder in due course. 5-1561.

Right of purchaser of bank stock to rely on accuracy of the books and reports of the bank. 5-250.

**Deposits generally.**

*Printed statement of rules in pass book as affecting rights of bank and depositor.* 5-1203 (case p. 1193).

*Rights of holder of check as affected by garnishment of drawer's bank account.* 5-587 (case p. 584).

**Payment of checks; forgeries.**

*Printed statement of rules in pass book as affecting rights of bank and depositor.* 5-1203 (case p. 1193).

*Right of drawee bank to charge back a credit given on a forged check.* 5-1566 (case p. 1561).

*Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds.* 5-1667 (case p. 1665).

Duty of bank to pay out depositor's money only on his order and in accordance with the order. 5-1193.

Right of bank to charge back check proving to be an overdraft. 5-1561.

Right of bank to charge against depositor's account check paid on forged indorsement. 5-1193.

When check is drawn to fictitious payee so as to be payable to bearer. 5-1193.

Effect of negligence in drawing check to absolve bank from liability for payment on forged indorsement. 5-1193.

Duty of depositor to examine indorsements on returned checks. 5-1193.

Necessity that depositor return to bank checks paid on forged indorsements in order to hold it liable. 5-1193.

Right of bank sued for amount of checks paid on forged indorsements, to raise for first time on appeal objection that checks were not returned to it. 5-1193.

**Insolvency.**

*Right of one indebted to insolvent bank to set off deposits which he has made as trustee.* 5-83 (case p. 79).

Right of depositor to set off amount of his deposit against debt to a bank in hands of receiver or assignee. 5-79.

---

**BASTARDS.**

See **ILLEGITIMACY.**

---

**BAWDYHOUSES.**

See **DISORDERLY HOUSES.**

---

**BEANS.**

Negligence in preparing or canning of. 5-242.

Injury to patron of restaurant by stones in beans. 5-1100.

Judicial notice that pebbles are often found in uncleaned beans. 5-242.

**BENEVOLENT SOCIETIES.**

Insurance by, see **INSURANCE**.

*Gift to fraternal order as a valid charitable gift.* 5-1175 (case p. 1172).

**BIAS.**

Effect of, to disqualify judge, see **JUDGES**.

**BIBLE.**

Reading of, in schools, see **SCHOOLS**.

**BIGAMY.**

*Criminal responsibility of single person who marries one already married.* 5-783.

**BILL OF ATTAINDER.**

See **ATTAINDER**.

**BILLS AND NOTES.**

In general.

*Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds.* 5-1667 (case p. 1665).

Rights of transferees; bona fide holders.

*Effect of Negotiable Instruments Law upon availability of defense of usury against bona fide purchaser.* 5-1447 (case p. 1444).

Rights of one taking note after maturity. 5-1216.

— who are bona fide holders.

Drawee bank which credits check to account of the payee as a holder in due course. 5-1561.

Defense to action on.

Estoppel of maker of note to deny corporate existence of the payee. 5-1578.

**BLOCKADE.**

*Forfeiture of vessel unauthorizedly used by servant in violating blockade.* 5-216.

**BOATING.**

*Right of boating on inland lakes.* 5-1050 (case p. 1052).

**BONA FIDE PURCHASERS.**

Of bills or notes, see **BILLS AND NOTES**.

At judicial sale, see **JUDICIAL SALE**.

Of land, see **VENDOR AND PURCHASER**.

**BONDS.**

Corporate bonds.

*Power of Public Service Commission with respect to issuance of bonds by street railway companies.* 5-66.

Municipal bonds.

Effect on validity of bonds of fact that sale thereof was not concluded by officers signing them, but by their successors in office. 5-519.

Effect of statute requiring approval of state tax commission to proposed increase of rate of taxation of municipality, to make necessary such approval of tax rate to provide for payment of principal and interest on bonds issued to purchase waterworks system. 5-519.

Statutory requirement as to publication of notice of sale of bonds. 5-519.

— elections.

*Proposition submitted to people with reference to erection or purchase of plant or other public utility as single or double proposition.* 5-538 (cases pp. 510, 519).

Effect of mere irregularities. 5-519.

Notice of election. 5-516, 519.

**BOOTHES.**

Validity of ordinance prohibiting booths in restaurants. 5-960.

**BREACH.**

Of contract, generally, see **CONTRACTS**.

Of covenant, see **COVENANTS AND CONDITIONS**.

**BRIDGES.**

*Power of Public Service Commission with respect to bridges used by street railways.* 5-65.

*Liability for damaging bridge by nature or weight of vehicles or loads transported over it.* 5-768.

Question for jury as to substantial performance of contract to build bridge. 5-1168.

Effect on right of contractor to recover price of bridge, of failure to submit it to test of strength referred to by statute. 5-1168.

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## BUILDING AND CONSTRUCTION CONTRACTS.

Contracts for construction of bridge, see BRIDGES.

---

## BUILDINGS.

Mortgage of real estate as attaching to building subsequently erected. 5-391.

---

## BULK SALES.

See FRAUDULENT CONVEYANCES.

---

## BUSINESS.

Charges injurious to, see LIBEL AND SLANDER.

---

## BY-LAWS.

Of corporations, see CORPORATIONS.

---

## CAPACITY.

Of trustee, see TRUSTS.

---

## CAPITA.

Distribution by, under will, see WILLS.

---

## CARRIERS.

Damages in action against, see DAMAGES.

Arrest of passenger.

Arrest of passenger re-entering train after having been unlawfully ejected. 5-346.

Measure of damages for. 5-346.

Measure of care required; negligence generally.

Presumption of negligence from injury to passenger, see EVIDENCE.

Question for jury as to negligence, see TRIAL.

*Liability of street railway company to passenger on account of crowded condition of cars.* 5-1257 (case p. 1255).

Duty to trespasser on train. 5-951.

Failure to maintain adequate lookout over entire track when running a train into a station. 5-201.

— contributory negligence.

Negligence of passenger in crossing track to reach train. 5-201.

Ejection of passenger or trespasser.

*Right of passenger who has been ejected to re-enter car or train.* 5-352 (case p. 346).

Question for jury as to wilful negligence in forcing boy off moving train. 5-951.

Question for jury as to whether ejection from moving train was direct cause of injury. 5-951.

Authority of trainman to remove trespasser. 5-951.

Right of passenger tendering void ticket to reasonable time to determine his course of action. 5-346.

Effect of subsequent tender of fare by passenger holding invalid ticket. 5-346.

Conductor as judge of validity of ticket tendered. 5-346.

Arrest of passenger re-entering train after having been unlawfully ejected. 5-346.

Baggage.

Effect of limitation of amount of liability for loss of baggage where baggage is stolen by carrier's agent. 5-983.

Freight carriers.

*Validity of special contract in emergency.* 5-1120 (case p. 1117).

— loss of or injury to property.

Measure of damages for, see DAMAGES.

*Carrier's liability where shipper furnishes or selects car.* 5-108 (case p. 102).

Carrier as insurer. 5-979.

Right to sue in tort or conversion for negligent performance of carrier's contract. 5-1117.

— carrying live stock.

Measure of damages for injury to animal resulting in death. 5-149.

**— stipulation as to liability.**

As to baggage, see *supra*.

*Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employees. 5-986 (cases pp. 979, 988).*

Right of carrier to contract against its own negligence. 5-102.

Upholding agreements limiting liability where loss is due to ordinary negligence or wrongful act of another. 5-979.

Power to contract for limitation of liability for loss due to carrier's wrongdoing. 5-979.

**— duty to furnish cars.**

Duty of carrier to furnish suitable cars for transportation of commodities. 5-102.

**Governmental control; rates; discrimination; operation of road.**

*Power of Public Service Commission with respect to regulation of street railways. 5-36 (cases pp. 1, 13, 20, 24, 30).*

Right of public to street car service which will meet its needs rather than its convenience. 5-30.

Requiring carrier to route cars during rush hours from cross-town line to center of city to avoid transfers. 5-30.

**— rates.**

*Power of Public Service Commission with respect to regulation of street railway fares. 5-60 (cases pp. 1, 13, 20, 24, 30).*

Encroachment on judicial power by statute requiring submission to Public Service Commission of question of reasonableness of change of rates by street railway company. 5-20.

Power of municipality to fix street railway rates of fare. 5-1.

Regulation of street railway fares as exercise of police power. 5-1.

Effect of contract with municipality on right of Public Service Commission to regulate street railway fares. 5-1, 13, 24.

Requiring street railway company operating several lines to establish through service on payment of single fare. 5-13.

Right to reasonable compensation for service. 5-30.

How question whether rates are confiscatory is determined. 5-13.

**— duty to operate road.**

*Necessity of securing approval of Public Service Commission before abandonment of street railway line. 5-55.*

**CARS.**

Carrier's duty to furnish, see **CARRIERS**.

Loss of property during transportation because of use of improper car, see **CARRIERS**.

*Power of Public Service Commission with respect to equipment of street railway cars. 5-63.*

**CASE.**

Right of action for injury caused by freight, see **FRIGHT**.

**CAUSE.**

Sufficiency of proof of, see **EVIDENCE**.

Proximate cause, see **PROXIMATE CAUSE**.

Question for jury as to, see **TRIAL**.

**CENSUS.**

*Criminal responsibility for conspiring with census enumerator to insert fictitious names in schedule. 5-790.*

**CERTIFICATION.**

Of checks, see **CHECKS**.

**CERTIFIED QUESTIONS.**

See **CASES CERTIFIED**.

**CHAIN OF TITLE.**

*Presumption of identity of persons from identity of name in chain of title to real property. 5-428 (case p. 428).*

**CHANGE OF GRADE.**

Of highway, see **HIGHWAYS**.

**CHARITIES.**

*Right to minerals underlying land conveyed "for charitable purposes." 5-1502.*

*Gift to fraternal order as valid charitable gift. 5-1175 (case p. 1172).*

*Want of trustee as invalidating charitable trust. 5-314 (case p. 303).*

The dash in each citation stands for **A.L.R.**

**CHARTER.**

Of municipality, see **MUNICIPAL CORPORATIONS.**

**CHECKS.**

In general; nature of.

As to duties and liability of bank with respect to, see **BANKS.**

Fraud in drawing, see **FRAUD AND DECEIT.**

Payment by, see **PAYMENT.**

*Rights of holder of check as affected by garnishment of drawer's bank account. 5-587 (case p. 584).*

*Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds. 5-1667 (case p. 1665).*

Effect of check as an assignment. 5-584.

**Presentation.**

Effect of delay of payee in presenting check on liability of drawer to indictment for obtaining property by giving check without having sufficient funds to meet it. 5-1247.

Effect of delay of creditor in presenting check, where, before check is presented, maker's account has been garnished by another creditor. 5-584.

**Certification.**

*Garnishment of bank in suit against the payee or other holder of a certified check. 5-589 (case p. 587).*

When liability on accepted or certified check is due. 5-587.

**CHILDREN.**

In general, see **INFANTS.**

Meaning of term as used in will, see **WILLS.**

**CHOSES IN ACTION.**

Assignability of, see **ASSIGNMENT.**

**CHURCHES.**

In general, see **RELIGIOUS SOCIETIES.**

**CIRCUIT COURT.**

Jurisdiction on appeal, see **APPEAL AND ERROR.**

**CIRCUMSTANTIAL EVIDENCE.**

Establishing negligence by. 5-1333.

**CLAIMS.**

Against decedent's estate, see **EXECUTORS AND ADMINISTRATORS.**

**CLASSIFICATION.**

In license tax, see **LICENSE.**

By statute, see **STATUTES.**

In taxation, generally, see **TAXES.**

**CLOUD ON TITLE.**

As breach of covenant against encumbrances. 5-1081.

Void deed as cloud. 5-1081.

**CLUBS.**

*Dispensing liquor as within charter power of club. 5-1192 (case p. 1185).*

**COAL.**

As to mines generally, see **MINES.**

**COERCION.**

See **WILLS.**

**COLLATERAL ATTACK.**

On judgment, see **JUDGMENT.**

On legal existence of municipality. 5-519.

**COLLOQUIUM.**

Pleading facts by way of colloquium in libel case. 5-1349.

**COLOR OF TITLE.**

See **ADVERSE POSSESSION.**

**COMMERCIAL BONDS.**

See **BONDS.**

**COMMISSIONER'S REPORT.**

Refusal to consider disallowance of commissions to administrator based upon a commissioner's report to which no exceptions were taken. 5-619.

**COMMISSIONS.**

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**.

Of guardian, see **GUARDIAN AND WARD**.

Public service commissions, see **PUBLIC SERVICE COMMISSIONS**.

**COMMON CARRIERS.**

See **CARRIERS**.

**COMMON LAW.**

Adoption of, from England. 5-1100.

Existence at common law of ways of necessity. 5-1552.

**COMPENSATION.**

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**.

Of guardian, see **GUARDIAN AND WARD**.

Of public officers, see **OFFICERS**.

*Of legatees disappointed by another's election against the will. 5-1628 (cases pp. 1617, 1621).*

**COMPETITION.**

Validity of contract to restrain, see **CONTRACTS**.

**COMPLAINT.**

In criminal prosecution, see **INDICTMENT, ETC.**

**COMPROMISE AND SETTLEMENT.**

*Compromise or settlement of controversy as to will as changing nature of interest or estate under will. 5-1884 (case p. 1881).*

Validity of settlement as to disposition of property received under will by the legatees, heirs at law, and others having pecuniary interest therein. 5-1426.

Ratification by infant of settlement of claim for personal injuries. 5-943.

**COMPUTATION.**

Of interest, see **INTEREST**.

**CONCEALMENT.**

As a fraud, see **FRAUD AND DECEIT**.

**CONCLUSION.**

Averment of, see **PLEADINGS**.

**CONCURRENT SENTENCES.**

See **CRIMINAL LAW**.

**CONDITIONAL SALE.**

See **SALE**.

**CONDITIONS.**

Relating to real property, see **COVENANTS AND CONDITIONS**.

In insurance contract, see **INSURANCE**.

Conditions precedent to mandamus suits, see **MANDAMUS**.

In will, see **WILLS**.

Of right of one entitled to insurance to recover it from one wrongfully receiving it. 5-831.

**CONFIDENTIAL COMMUNICATIONS.**

Admissibility in evidence, see **EVIDENCE**.

**CONFIRMATION.**

Of judicial sale, see **JUDICIAL SALE**.

Of marriage induced by fraud. 5-1018.

**CONFLICT OF LAWS.**

Action on judgment. 5-1261.

**CONGRESSIONAL DISTRICTS.**

See **ELECTION DISTRICTS**.

**CONSENT.**

Of stockholders to sale by corporation, see **CORPORATIONS**.

To jurisdiction of court. 5-1426.

**CONSIDERATION.**

For mortgage, see **MORTGAGE**.

**CONSORTIUM.**

Right of action for loss of, see **HUSBAND AND WIFE**.

**CONSPIRACY.**

*Effect of death of one party to conspiracy before trial or conviction of another.* 5-373 (case p. 370).

*Criminal responsibility of conspiring to commit offense of one who is personally incapable of committing the offense.* 5-787.

Admissibility against him of whatever testimony is extracted from a conspirator offered as a witness. 5-370.

Effect of grant of new trial to one of two conspirators on rights of the other. 5-370.

Conviction of one conspirator as acquittal of the other. 5-370.

**CONSTITUTIONAL LAW.**

**In general; amendments.**

As to voters and elections, see **ELECTIONS**.

As to use of public funds, see **PUBLIC MONIES**.

As to special and local legislation, see **STATUTES**.

*Effect of mistake in reference in statute to Constitution.* 5-996.

*Ratification of amendments to Federal Constitution as subject to state referendum.* 5-1417 (case p. 1412).

What governs ratification of proposed amendment to Federal Constitution. 5-1412.

Question whether Congress in proposing amendment to Federal Constitution acts strictly in exercise of ordinary legislative power. 5-1412.

Question whether state legislature in ratifying amendment to Federal Constitution acts strictly in discharge of legislative duties. 5-1412.

Necessity that proposed amendment to Federal Constitution be presented to President for approval or veto. 5-1412.

Right of people to pass on amendment to Federal Constitution. 5-1412.

Form of submitting amendments; double proposition. 5-731.

**Construction.**

Question whether legislative act granting women right to vote for presidential electors is within constitutional provision as to referendum of legislative measures to voters. 5-1407.

**Curative acts.**

*Constitutionality of curative provisions of taxing statutes where sale is irregular.* 5-164 (case p. 155).

**Delegation of power.**

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions regulating legislature's delegating power to municipality.* 5-763.

Provision of motor vehicle license act conferring upon secretary of state power to employ agents and incur expense as delegation of legislative power. 5-731.

To municipality. 5-1060.

Vesting in state boards authority to investigate and try charges for revocation of dentist's license. 5-84.

**Encroachment on judicial power.**

Legislative power as to courts, see **COURTS**.

*Encroachment on judicial power by statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge.* 5-1275 (case p. 1272).

Statute requiring submission to Public Service Commission of question of reasonableness of change of rates by street railway company. 5-20.

**Rights of persons and property; equal protection; due process; police power — in general.**

As to right to jury trial, see **JURY**.

As to search and seizure, see **SEARCH AND SEIZURE**.

Power of legislature or municipality by ordinance or contract to abridge police power. 5-1.

**— carriers.**

Regulation of street railway fares as exercise of police power. 5-1.

**— contracts; impairing obligation of.**

*Power of Public Service Commission with respect to regulation of street railways as affected by contract.* 5-44.



Forbidding sale of produce except in containers of a certain size and capacity. 5-1060.

— criminal matters.

As to bills of attainder, see **ATTAINDER**.  
Cruel and unusual punishment, see **CRIMINAL LAW**.

Matters as to procedure on criminal trial generally, see **CRIMINAL LAW**.

Right to meet witnesses, see **CRIMINAL LAW**.

Self-crimination, see **CRIMINAL LAW**.

Right to jury trial, see **JURY**.

Act providing for abatement of bawdy-houses, forfeiture of personal property used in maintaining them, closing of premises, and imposition of money exaction against the property, as an ex post facto law. 5-1449.

— dentists.

License of, see *infra*, **License**.

— freedom of worship.

Reading from Bible or religious instruction in schools generally, see **SCHOOLS**.

— judges.

*Statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge.* 5-1275 (case p. 1272).

— license.

*Constitutionality of statute providing for revocation of license of physician, surgeon, or dentist.* 5-94 (case p. 84).

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxes.* 5-759.

— physicians and surgeons.

License of, see *supra*, **License**.

— remedies and procedure.

*Constitutionality of statute conferring on chancery courts power to abate public nuisance.* 5-1474 (cases pp. 1449, 1453, 1463).

Notice. 5-155, 1449.

— sale.

*Validity of statute or ordinance as to "containers."* 5-1068 (case p. 1060).

— taxes.

*Constitutionality of curative provisions of taxing statutes where sale is irregular.* 5-164 (case p. 155).

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxes.* 5-759.

Statute providing that no tax sale shall be invalidated except upon ground that taxes were paid before sale or that property was not subject to taxes. 5-155.

Notice in tax proceedings. 5-155.

— weights and measures.

*Validity of statute or ordinance as to "containers."* 5-1068 (case p. 1060).

---

## CONSTRUCTION.

Of contracts, see **CONTRACTS**.

Of insurance policy, see **INSURANCE**.

Of ordinance, see **MUNICIPAL CORPORATIONS**.

Of statutes, see **STATUTES**.

Of will, see **WILLS**.

---

## CONTAGIOUS DISEASES.

See **INFECTIOUS AND CONTAGIOUS DISEASES**.

---

## CONTAINERS.

*Validity of statute or ordinance as to "containers."* 5-1068 (case p. 1060).

---

## CONTEST.

Of title to office, see **OFFICERS**.

Of will, see **WILLS**.

---

## CONTINGENT REMAINDER.

Acceleration of, see **WILLS**.

---

## CONTINUANCE OR ADJOURNMENT.

Review of discretion as to, see **APPEAL AND ERROR**.

Presumption of, see **EVIDENCE**.

---

## CONTRACTS.

In general.

Question whether action is on contract or in tort, see **ACTION OR SUIT**.

Impairing obligation of, see **CONSTITUTIONAL LAW**.

Power of president of corporation as to, see **CORPORATIONS**.

As to covenants, see **COVENANTS AND CONDITIONS**.

Antenuptial contract, see **HUSBAND AND WIFE**.

Of infants, see **INFANTS**.

Injunction to protect rights in, see **INJUNCTION**.

*Libel and slander in charging one with failure to keep his contracts. 5-1362 (case p. 1349).*

*Agreement that one's share in estate shall be equal to share of certain other person as affected by gift to latter during lifetime of decedent. 5-1436 (case p. 1426).*

**Implied agreements.**

Implication that neither party to contract will interfere to prevent performance by the other. 5-1426.

**Statute of Frauds.**

*Oral agreement as to restrictions upon the use of real property as within the Statute of Frauds. 5-448 (case p. 440).*

Negative easement. 5-440.

— effect of fraud or part performance.

Refusal of equity to grant relief in all cases where it would appear to be fraudulent to set up Statutes of Fraud. 5-440.

Mere nonperformance by grantor of agreement to restrict remaining lots in tract as fraud. 5-440.

Erection of residence on restricted lot as part performance entitling one to specific performance of oral promise to restrict other lots. 5-440.

**Construction.**

Construction of insurance policy, see **INSURANCE**.

Effect of custom. 5-234.

Duty of one contracting to dig well who inserts casing belonging to owner, to draw the casing upon owner's demand even if demand is accompanied with illegal condition. 5-234.

Contract for extra pay for "reaming" a drilled well. 5-240.

Clause in contract for digging well that, if it is abandoned by the owner, the contractor shall draw the casings and plug the well. 5-234.

— entirety.

*Effect of violation of warranty or condition of sole and unconditional ownership in insurance contract as regards one or more of several pieces of property covered by policy. 5-808 (case p. 805).*

**Validity; public policy.**

Validity of compromise and settlement, see **COMPROMISE AND SETTLEMENT**.

Separation agreements, see **DIVORCE AND SEPARATION**.

Contracts of infants, see **INFANTS**.

*Validity of special contract by carrier in emergency. 5-1120 (case p. 1117).*

*Right of public officer to purchase tax certificate or tax titles. 5-969 (case p. 966).*

General rule as to public policy. 5-881.

— gambling and wager contracts.

Wagering assignment of life insurance policy. 5-831.

— contracts in restraint of trade.

Contract not to engage in particular business in particular place not connected with sale of business. 5-1180.

— remedies.

*Rights of parties to sale in violation of Bulk Sale Law. 5-1517 (cases pp. 1507, 1512).*

**Performance.**

Implication that neither party to contract will interfere to prevent performance by the other. 5-1426.

Question for jury as to substantial performance of contract. 5-1168.

**Breach.**

Breach of covenant, see **COVENANTS AND CONDITIONS**.

Measure of compensation for breach, see **DAMAGES**.

Injunction against breach, see **INJUNCTION**.

**Rescission.**

*Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books. 5-255 (case p. 250).*

For mistake. 5-250.

## CONTRADICTION.

Of witness, see **WITNESSES**.

## CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE**.

## CONVERSION.

See **TROVER**.

**CONVEYANCES.**

See **DEMES.**

---

**CORPORATIONS.****In general.**

Bonds of, see **BONDS.**

Estoppel as to corporate existence, see **ESTOPPEL.**

Appointment of receiver for, see **RECEIVERS.**

*Libel or slander by communications between different offices of corporation.* 5-455 (case p. 451).

Capacity to act as trustee. 5-1172.

**By-laws.**

*Effect of by-laws on power of president of corporation to employ, control, or discharge agents or subordinates.* 5-1492.

**Officers and agents.**

Preference to officers in case of insolvency, see *infra*.

*Corporation officer as within rule that owner of property may testify to value thereof.* 5-1171.

**— powers.**

*Power of directors to sell property of corporation without consent of stockholders.* 5-930 (case p. 927).

*Power of president of a corporation to employ, control, or discharge agents or subordinates.* 5-1485 (case p. 1483).

**Stock and stockholders.**

Stock or stockholders in bank, see **BANK.**

Conclusiveness against stockholder of judgment affecting corporation, see **JUDGMENT.**

*Power of Public Service Commission with respect to issuance of stock by street railway companies.* 5-66.

**— transfer of stock.**

As to sale of bank stock, see **BANKS.**

*Rescission of sale of corporate stock on the ground of mutual mistake due to error in corporate books.* 5-255 (case p. 250).

**— rights of shareholders.**

Preference to stockholders in case of insolvency, see *infra*.

*Power of directors to sell property of corporation without consent of stockholders.* 5-930 (case p. 927).

Right of minority stockholders to control discretion of directors. 5-363.

Right of minority stockholders to require monthly statements from officers. 5-363.

**Insolvency; preferences.**

*Power of directors to sell property of insolvent corporation without consent of stockholders.* 5-932.

*Preference of wages over lien creditors of corporation in hands of receiver in absence of statutory provision therefor.* 5-690 (cases pp. 675, 685).

*Right of insolvent corporation to secure officers, directors, or stockholders for a contemporaneous loan to the corporation.* 5-561 (case p. 557).

Validity of mortgage to secure a present advance of money to meet obligations. 5-557.

**COSTS.**

Liability of attorney who passes unmarketable title for costs of attempting to establish the title as marketable as against a person on resale. 5-1385.

**COUNTERCLAIM.**

See **SET-OFF AND COUNTERCLAIM.**

**COUNTIES.**

Rights and powers as to highways, see **HIGHWAYS.**

**COUNTY COURT.**

Power to restrict use of highway. 5-765.

**COURTS.**

Encroachment on judicial power, see **CONSTITUTIONAL LAW.**

Judicial notice by, see **EVIDENCE.**

**Jurisdiction.**

Presumption of jurisdiction. 5-284.

Duty of court to consider question of jurisdiction of its own motion. 5-1426.

— over nonresidents; territorial limitations.

As to venue of action, see **VENUE.**

Jurisdiction to enjoin establishment of nuisance where subject-matter and property threatened with injury are within jurisdiction, though defendant is without. 5-915.

Relation to other departments of government.

Review of decisions of Public Service Commission, see PUBLIC SERVICE COMMISSIONS.

Interference with school officers. 5-841.

— legislative department.

Encroachment on judicial power, see CONSTITUTIONAL LAW.

General rule as to. 5-731.

Power to determine reasonableness of municipal ordinance. 5-1060.

Legislative power as to.

*Constitutionality of statute conferring on chancery courts power to abate public nuisance. 5-1474 (cases pp. 1449, 1458, 1463).*

Power of legislation to deprive a court of jurisdiction conferred by Constitution. 5-1463.

Power of legislature to extend jurisdiction of equity. 5-1463.

State courts; transfer of cause.

Statute providing for transfer of cause from district to circuit court in only one county of the state upon filing an affidavit of bias. 5-1272.

Rules of decision.

Effect of decision limited by facts and circumstances of case decided. 5-1283.

Rules of property. 5-303.

## COVENANTS AND CONDITIONS.

*Oral agreement as to restrictions upon the use of real property as within the Statute of Frauds. 5-448 (case p. 440).*

*Unfounded outstanding claims to or against real property as breach of covenants of deed. 5-1084 (case p. 1081).*

## CREDIBILITY.

Of witnesses, see WITNESSES.

## CRIMINAL LAW.

Ex post facto law, see CONSTITUTIONAL LAW.

Violation of election laws, see ELECTIONS.

As to extradition, see EXTRADITION.

Criminal liability for drawing check without sufficient funds to meet it, see FRAUD AND DECEIT.

Injunction against criminal acts, see INJUNCTION.

As to violation of liquor laws, see INTOXICATING LIQUORS.

Civil liability for bringing prosecution, see MALICIOUS PROSECUTION.

Violation of navigation laws, see NAVIGATION.

See also ABORTION; ADULTERY; ARSON; BIGAMY; EMBEZZLEMENT; FALSE PERSONATION; HOMICIDE; INCEST; LARCENY; RAPE.

Parties to offense.

*Criminal responsibility of one co-operating in offense which he is incapable of committing personally. 5-782 (case p. 778).*

Liability as principal. 5-773.

Procedure; rights and protection of accused.

Reversible error in criminal case, see APPEAL AND ERROR.

Continuance or adjournment, see CONTINUANCE AND ADJOURNMENT.

Evidence in criminal case, see EVIDENCE.

Criminal searches and seizures, see SEARCH AND SEIZURE.

*Right of one charged with unlawful sale of intoxicating liquor to be informed before trial of name or identity of purchaser. 5-409 (case p. 407).*

Effect of failure to instruct on presumption of innocence where no instruction is requested. 5-1121.

Instruction as to reasonable doubt. 5-1247.

Necessity of arraignment and plea. 5-1121.

Right of accused to have guilt determined by a fair and impartial trial. 5-908.

Effect on fairness of trial of presence of crowd threatening to lynch prisoner. 5-908.

Right of accused to present defense and have issue determined by jury under circumstances enabling it to exercise its independent judgment. 5-908.

Crimination of self. 5-1449.

Right to meet witnesses. 5-1449.

— necessity of indictment or presentment.

Giving equity jurisdiction to punish and abate nuisances punishable by indictment as deprivation of right to presentment by grand jury. 5-1463.

— pleading.

Necessity that accused plead or refuse to plead. 5-1121.

Entry nunc pro tunc after expiration of term upon record to show arraignment and plea. 5-1121.

**Sentence and imprisonment.**

*Sentences by different courts as concurrent.* 5-380 (cases pp. 374, 377).

Cruel and inhuman punishment for maintaining bawdyhouse. 5-1449.

**Record.**

*Power to amend record in criminal case after term, on evidence dehors record.* 5-1127 (case p. 1121).

**CRIMINATION OF SELF.**

See CRIMINAL LAW.

**CROSS-EXAMINATION.**

Of witness, see WITNESSES.

**CROSSINGS.**

Obstruction of, by train, see HIGHWAYS.  
Railroad crossings generally, see RAILROADS.

Street railway crossings, see STREET RAILWAYS.

**CROWD.**

*Homicide by firing into crowd without express intent to inflict injury.* 5-608.

*Liability of street railway company to passenger on account of crowded condition of cars.* 5-1257 (case p. 1255).

**CRUEL AND UNUSUAL PUNISHMENT.**

See CRIMINAL LAW.

**CRUELTY.**

As ground for divorce, see DIVORCE AND SEPARATION.

**CUMULATIVE SENTENCES.**

See CRIMINAL LAW.

**CURATIVE ACTS.**

Validity of, see CONSTITUTIONAL LAW.

**CUSTOM AND USAGE.**

*Inference from usage, custom, or habit of power of president of corporation to employ, control, or discharge agents or subordinates.* 5-1491.

Effect of, on construction of contract. 5-234.

**CUSTOMS DUTIES.**

See DUTIES.

**DAMAGES.**

Necessity and propriety of instructions as to, see TRIAL.

**Exemplary or punitive.**

For personal injuries or death. 5-990.

**On contracts.**

Loss of profits from breach, see *infra*.

*Measure of damages for defective performance of contract to bore or case well.* 5-240 (case p. 234).

Damages recoverable from well driller who wrongfully puts the owner's casing into the well after being notified of intention to abandon well. 5-234.

**- of employment.**

Damages for breach by property owner of contract employing insurance adjuster. 5-1488.

**Failure in duty to passenger.**

Illegal arrest of passenger. 5-346.

**In respect of freight or baggage.**

Limitation of liability, see CARRIERS.

*Freight as an element of damage where contract fixes value or limits carrier's liability for property lost or damaged.* 5-152 (case p. 149).

**Torts generally.**

*Measure of damages for negligence of attorney in passing defective title.* 5-1389 (case p. 1385).

**Wrongful arrest.**

Arrest of passenger, see *supra*.

*Liability for loss of property left unprotected when owner was wrongfully arrested.* 5-362 (case p. 358).

#### **Death of animal.**

Including in damages for injury to animal resulting in its death money spent in unsuccessful effort to restore it to usefulness. 5-149.

#### **Mental anguish.**

Right to recover for fright or injury due thereto, see **FRIGHT**.

Propriety of instruction as to. 5-201.

#### **Loss of profits.**

Liability of attorney who passes an unmarketable title for lost profits in case a resale fails because of such title. 5-1385.

Recovery of lost profits for defective performance of contract to bore well where loss of profits resulted from contractor's failure to do something which his contract did not require him to do. 5-234.

In case of breach of exclusive selling contract. 5-1502.

Necessity of absolute certainty of data upon which to estimate lost profits. 5-1502.

---

### **DANGEROUS AGENCY.**

Automobile as. 5-216.

---

### **DATE.**

*Effect of mistake in reference in statute to date of another statute.* 5-1008.

---

### **DEATH.**

#### **In general.**

Punitive damages for, see **DAMAGES**.

Right of one sought to be made liable for negligent death of another to attack jurisdiction of court to appoint administrator. 5-284.

Eliminating from statute giving right of action for death reference to sections of other statutes which are erroneously alleged to prescribe the procedure. 5-990.

#### **Effect of.**

*Effect of death of one party to conspiracy before trial or conviction of another.* 5-378 (case p. 370).

Effect on domicile of accidental killing of person traveling from one domicile to another. 5-284.

### **DEBTOR AND CREDITOR.**

Insolvency of debtor, see **ASSIGNMENTS FOR CREDITORS; BANKRUPTCY**.

As to attachment by creditor, see **ATTACHMENT**.

Creditors of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Transfers in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

---

### **DECLARATIONS.**

Evidence of, see **EVIDENCE**.

---

### **DEDICATION.**

#### **In general.**

*Effect of dedication of fee to land for use as a street or highway on right to subterranean deposits of minerals.* 5-1498.

Common-law dedication by platting highway in unincorporated town. 5-1532.

#### **Acceptance.**

*Necessity of acceptance of dedicated street to relieve it from taxation.* 5-1537 (case p. 1532).

Necessity and sufficiency of acceptance. 5-1532.

---

### **DEEDS.**

#### **In general.**

Covenant or condition in, see **COVENANTS AND CONDITIONS**.

Conveyance by infants, see **INFANTS**.

Execution of power by, see **POWERS**.

Void deed as cloud on title. 5-1081.

#### **Delivery.**

*Deposit of deed in mail as a delivery.* 5-1664 (case p. 1660).

Sufficiency of delivery generally. 5-1660.

#### **What property passes.**

*Effect of conveyance specifying purpose for which the property is to be used to pass mineral rights in land.* 5-1493 (case p. 1495).

#### **Estate or interest created.**

*Oil and gas or other natural rights in land as affected by language in conveyance specifying purpose for which the property is to be used.* 5-1493 (case p. 1495).

**DE FACTO.**

Officers, see OFFICERS.

**DEFAULT.**

In payment authorizing foreclosure of mortgage, see MORTGAGE.

**DEFENSES.**

To action for divorce, see DIVORCE AND SEPARATION.

*Defenses to mandamus suit to compel payment of salary of public officer or employee.* 5-579.

**DEFINITENESS.**

Of pleading, see PLEADING.

**DEFINITIONS.**

See WORDS AND PHRASES.

**DELAY.**

In presenting check, see CHECKS.  
In exercising option under acceleration clause in mortgage, see MORTGAGE.

**DELEGATION OF POWER.**

Constitutionality of, see CONSTITUTIONAL LAW.

**DELIVERY.**

Of deed, see DEEDS.

**DEMAND.**

*As prerequisite to mandamus to compel payment of the salary of a public officer or employee.* 5-574.

Necessity of previous demand to recovery of attorneys' fees provided by mortgage. 5-1216.

As condition precedent to suit to foreclose mortgage. 5-1216.

**DEMURRER.**

In general, see PLEADING.  
To evidence, see TRIAL.

**DENTIST.**

*Validity of statute providing for revocation of license of.* 5-94 (case p. 84).

Statute permitting revocation of license for certain kinds of advertising. 5-84.  
Uncertainty or ambiguity of statute as to grounds for revocation of license. 5-84.

Indefiniteness of statute stating grounds for revocation of license. 5-84.

Vesting in state boards power to try charges for revocation of dentist's license. 5-84.

**DESCENT AND DISTRIBUTION.**

Effect of giving adopted child a right to inherit to make him a child in fact or change his identity. 5-1277.

**DIRECTION OF VERDICT.**

See TRIAL.

**DIRECTORY PROVISIONS.**

Of statute. 5-155.

**DISABILITIES.**

Of infants, see INFANTS.

**DISCHARGE.**

Of servant, see MASTER AND SERVANT.

**DISCRETION.**

Review of, on appeal, see APPEAL AND ERROR.

*Effect of discretion as to payment on right to mandamus to compel payment of salary of public officer or employee.* 5-578.

Abuse of discretion by school officers which will justify court in interfering. 5-841.

Injunction to control discretionary action.  
5-841.

---

### DISCRIMINATION.

In license tax, see LICENSE.  
In taxes generally, see TAXES.

---

### DISEASE.

Infectious and contagious diseases, see  
INFECTIOUS AND CONTAGIOUS DIS-  
EASES.

---

### DISORDERLY HOUSES.

*Constitutionality of statute conferring  
on chancery courts power to abate  
bawdyhouses as nuisance. 5-1474  
(cases pp. 1449, 1463).*

Right to jury trial in case of equitable  
attack upon property of those engaged  
in maintaining or abetting bawdy-  
houses. 5-1449.

Partial invalidity of statute for suppres-  
sion of. 5-1449.

Jurisdiction of equity to abate, at suit of  
individual. 5-1463.

Power of legislature to extend equity ju-  
risdiction to abatement of bawdy-  
houses. 5-1449.

Question whether act giving equity power  
to abate bawdyhouses is civil or penal.  
5-1449.

Penalty for maintaining, as cruel and un-  
usual punishment. 5-1449.

---

### DISQUALIFICATION.

Of judge, see JUDGES.

---

### DISSOLUTION.

Of partnership, see PARTNERSHIP.

---

### DISTRIBUTION.

Of decedent's estate, see EXECUTORS AND  
ADMINISTRATORS.

---

### DIVIDENDS.

See CORPORATIONS.

### DIVORCE AND SEPARATION.

#### Grounds for.

*Venereal disease as ground for divorce  
or separation. 5-1016.*

*Conduct amounting to treatment endan-  
gering life within statute defining  
grounds for divorce. 5-712 (case  
p. 710).*

#### Defenses.

*Misconduct of complainant defeating  
divorce on ground of threat endan-  
gering life. 5-719.*

#### Agreements for support.

*Validity of separation agreement as af-  
fected by fraud, coercion, unfair-  
ness, or mistake. 5-823 (case p.  
817).*

*Ratification of separation agreement by  
retaining fruits of. 5-817.*

*Effect of fact that woman was represent-  
ed by counsel in negotiations with her  
husband for a separation agreement.  
5-817.*

---

### DOCUMENTARY EVIDENCE.

See EVIDENCE.

---

### DOMICIL.

Power of infant to change domicile, see  
INFANTS.

*Domicil while in itinere from old to  
new home. 5-296 (case p. 284).*

Definition of. 5-284.

What is necessary to establish. 5-280.

Presumption of continuance of domicile  
once acquired. 5-284.

Effect of imprisonment to change domicile.  
5-256.

Necessity of actual residence at the new  
place with purpose of remaining there  
to effect change of domicile. 5-284.

Of minor child, generally. 5-943.

Of emancipated minor, for jurisdictional  
purposes. 5-943.

Necessity of pursuing statutory method  
to remove disabilities of minor with  
respect to domicile. 5-943.

---

### DONATION.

Of public money, see PUBLIC MONEYS.



**DOUBLE TAXATION.**

See TAXES.

---

**DOWER.**

Election between legacy and dower, see WILLS.

*Failure or renunciation of the precedent life estate given by will as accelerating the vesting of a remainder limited thereon, where the enjoyment is postponed by the allotment of dower.* 5-480 (case p. 477).

*Liability of one having inchoate right of dower in property condemned.* 5-1347 (case p. 1343).

---

**DRAINS AND SEWERS.**

Municipal liability for injury by defects in, see MUNICIPAL CORPORATIONS.

*Injunction to prevent establishment or maintenance of sewage disposal plant.* 5-920.

---

**DUE PROCESS OF LAW.**

See CONSTITUTIONAL LAW.

---

**DURESS.**

*Validity of separation agreement as affected by coercion.* 5-827 (case p. 817).

---

**DUTIES.**

*Forfeiture of property unauthorizedly used by servant in violating customs law.* 5-215.

---

**DWELLING HOUSE.**

*Homicide by firing into dwelling house without express intent to inflict injury.* 5-605.

---

**EASEMENTS.**

In general.  
Statute of Frauds as to, see CONTRACTS.  
Definition of easement. 5-440.

**By prescription.**

*What will disprove acquiescence by owner essential to easement by prescription in case of known use.* 5-1325 (case p. 1320).

Necessity of knowledge and acquiescence by owner or of facts from which acquiescence may be presumed. 5-1320.  
What constitutes acquiescence on part of owner. 5-1320.

**As appurtenant; by necessity.**

*Right of one whose access by means of a right of way or branch road to a highway is interfered with by an obstruction in the latter.* 5-200 (case p. 193).

*Easement of way of necessity as affected by common ownership of parcels which are not accessible one from the other.* 5-1557 (case p. 1552).

Sufficiency of petition for laying out way of necessity. 5-1552.  
Existence at common law of ways of necessity. 5-1552.

---

**EATING PLACES.**

Liability for injury to patron by unfit food, see FOOD.

---

**EJECTION.**

Of passenger or trespasser from train, see CARRIERS.

---

**EJECTMENT.**

Refusal of injunction against trespass until title has been established in ejectment. 5-1052.

---

**ELECTION.**

As to taking under will, see WILLS.

---

**ELECTION DISTRICTS.**

*Act of state legislature redistricting the state for congressional purposes as subject to state referendum.* 5-1417.

---

**ELECTIONS.**

On question of issuance of municipal bonds, see BONDS.

As to election districts, see **ELECTION DISTRICTS**.

#### **Qualifications of voters.**

Legislative power under Federal Constitution to determine qualifications of voters for election of President. 5-1407.

Necessity that legislative grant to women of right to vote for presidential electors be submitted to referendum of the voters. 5-1407.

#### **Violation of election laws.**

*Criminal responsibility of one aiding and abetting violation of election laws.* 5-786.

---

### **ELEVATED RAILROADS.**

*Presumption of negligence from fall of article from elevated railroad train.* 5-1188.

---

### **ELIGIBILITY.**

To office, see **OFFICERS**.

---

### **EMANCIPATION.**

*Of infant as affecting right to change domicile or settlement.* 5-949 (case p. 948).

---

### **EMBARGO.**

*Forfeiture under embargo law of vessel unauthorizedly used by servant in violation of law.* 5-215.

---

### **EMBEZZLEMENT.**

Indictment for, see **INDICTMENT, ETC.**

*Criminal responsibility of one co-operating in offense of embezzlement which he is incapable of committing personally.* 5-784 (case p. 778).

---

### **EMERGENCY.**

*Validity of special contract by carrier in emergency.* 5-1120 (case p. 1117).

### **EMINENT DOMAIN.**

#### **Parties.**

*Wife as necessary party to proceeding to condemn husband's real property.* 5-1347.

To whom compensation must be paid.

*Liability to one having inchoate right of dower.* 5-1347 (case p. 1348).

---

### **EMPLOYEES.**

See **MASTER AND SERVANT**.

---

### **ENCUMBRANCES.**

Conveyance of land subject to, see **MORTGAGE**.

---

### **ENFORCEMENT.**

Of judgment, see **JUDGMENT**.

---

### **ENGINES.**

See **STEAM ENGINE**.

---

### **ENTIRETY.**

Of contract, see **CONTRACTS**.

---

### **EQUALITY.**

Of license tax, see **LICENSE**.  
In taxation, generally, see **TAXES**.

*Validity of separation agreement as affected by inequality.* 5-828.

---

### **EQUITABLE ASSIGNMENT.**

See **ASSIGNMENT**.

---

### **EQUITABLE CONVERSION.**

By will, see **WILLS**.

**EQUITY.**

Review on appeal of findings in equity, see **APPEAL AND ERROR**.

As to injunction, see **INJUNCTION**.

Limitation of actions in, see **LIMITATIONS OF ACTIONS**.

Set-off in equity, see **SET-OFF AND COUNTERCLAIM**.

Subrogation in, see **SUBROGATION**.

*Failure to perform the duty which rests upon one because of trust or confidential relation as fraud for which equity in an independent suit will relieve against a judgment. 5-673 (case p. 655).*

Power of legislature to extend jurisdiction of equity. 5-1449, 1458, 1463.

Jurisdiction of suit to construe will in case of controversy as to reconversion into real estate of a remainder devised as personalty. 5-456.

Right of equity court, having assumed jurisdiction, to grant full relief. 5-655, 1449.

**ESCAPE.**

*Entry and search of premises for purpose of rearrest of escaped prisoner without warrant. 5-273.*

*Criminal responsibility of one conspiring to commit offense of aiding prisoner to escape. 5-789.*

**ESTATE.**

In real property generally, see **DEEDS; WILLS**.

**ESTATE TAIL.**

See **WILLS**.

**ESTOPPEL.**

Of insurer, see **INSURANCE**.

As to corporate existence.

*What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence. 5-1580 (case p. 1578).*

By laches or acquiescence.

As bar to right of patron or taxpayer to seek aid of courts to stop use of public money in aid of sectarian school. 5-841.

**By inconsistency.**

*Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party. 5-1505 (case p. 1502).*

Estoppel of one who avoids liability on a contract to an alleged assignee on the ground that no assignment had been made, to set up the alleged assignment as a defense in a subsequent action. 5-1502.

**EVIDENCE.**

Compelling accused to furnish, see **CRIMINAL LAW**.

On motion for new trial, see **NEW TRIAL**.

Reception of, on trial, see **TRIAL**.

On probate or contest of will, see **WILLS**.

Judicial notice.

Of public laws. 5-563.

That person on trial was then serving a term upon a prior conviction. 5-374.

Of omission of personal property from tax rolls. 5-731.

Of fact that blowout of front tire of Ford automobile running 15 miles per hour cannot cause car to leave smooth roadway and plunge into ditch. 5-1237.

That pebbles are often found in raw and uncleaned beans. 5-242.

**Presumptions and burden of proof.**

Validity of statutes. 5-1449.

Validity of ordinance. 5-960.

Burden of establishing claim under Workmen's Compensation Act. 5-1673.

— concerning persons.

*Venereal disease as prima facie evidence of adultery. 5-1020.*

*Presumption of identity of persons from identity of name in chain of title to real property. 5-428 (case p. 428).*

*Presumption against suicide in workmen's compensation cases. 5-1680 (case p. 1673).*

*Effect of mere fact that one spouse is found to have a venereal disease to raise presumption that it was communicated by the other spouse. 5-1024.*

Refusal to presume that one suing for injuries through threat was not a person of ordinary reason and firmness. 5-1283.

Survivorship where two persons perish in the same disaster. 5-791, 794.

Knowledge; notice. 5-275, 1646.

Probable cause. 5-1090, 1682.

Good faith of one seeking to probate later will which will avoid operation of provision in the earlier one against contest. 5-1363.

Presumption of continuance of domicil once acquired. 5-284.

Error in failing to instruct on presumption of innocence in criminal case. 5-1121.

**- negligence.**

*Res ipsa loquitur* as applied to automobile accidents. 5-1240 (case p. 1237).

Applicability of *res ipsa loquitur* to fall of person. 5-282 (case p. 275).

Presumption of negligence from throwing passenger from seat. 5-1034 (case p. 1028).

Presumption of negligence from injury to one other than passenger or employee from fall of trolley pole or other part of street car. 5-1386 (case p. 1330).

Presumption of negligence of railroad company interfering with fire department while attempting to extinguish fire. 5-1651.

General rule as to. 5-1333.

Sufficiency of maxim "*Res ipsa loquitur*" to take case to jury. 5-1237.

Presumption of negligence from fall of trolley pole from street car, to injury of person in street. 5-1330, 1333.

**- jurisdiction; official acts.**

Presumption of jurisdiction. 5-284.

Burden of establishing want of jurisdiction. 5-951.

Presumption that chief executive of state will perform his duty. 5-1152.

**- gifts; wills.**

Presumption of acceptance of gift. 5-1660.

Presumption as to intent of testator in construction of will. 5-1617.

**- possession.**

Presumption of possession of one having record title to real estate. 5-423.

**Documentary evidence.**

Printed volume of statutes of state as evidence of what the law is on a given subject. 5-990.

Consulting record in action to determine ground of decision. 5-1502.

**Parol and extrinsic.**

To show how a mistake in reference in a statute occurred. 5-990.

**Opinions and conclusions.**

*Public or corporate officer as within rule that owner of property may testify to value thereof.* 5-1171 (case p. 1168).

**Hearsay; declarations.**

*Privilege of communication to attorney by client in attempt to establish false claim.* 5-977 (case p. 972).

*Privilege of communication to attorney as affected by termination of employment.* 5-728 (case p. 723).

Statements made to attorney by either of two clients in the presence of the other as privileged. 5-972.

Communications to attorney by client seeking advice as to liability for crime already committed. 5-972.

Communication by one contemplating crime to attorney in seeking advice as to how to succeed. 5-972.

Conversations and communications between attorneys representing different parties to suit. 5-972.

Admissions of co-conspirator. 5-370.

**Relevancy and materiality.**

Relevancy and materiality under pleadings, see *infra*.

Wagering intent in assignment of life insurance contract. 5-831.

Evidence of adoption of system of inspection on question of negligence in permitting fall of trolley pole from street car, to injury of pedestrian. 5-1333.

Evidence of speed of car some time before the accident in case of fright of horse by excessive speed of automobile. 5-936.

Admissibility against him of whatever testimony is extracted from a conspirator offered as a witness. 5-370.

In prosecution for obtaining property by means of check without funds to pay it. 5-1247.

In suit to enjoin continuance of sectarian school with public money. 5-841.

Admissibility in action for malicious prosecution of lunacy proceeding, of certificates admitting plaintiff to practise medicine in other states. 5-1090.

**Weight, effect, and sufficiency.**

Sufficiency of evidence to go to jury, see TRIAL.

Waiver of motion for nonsuit because of insufficiency of evidence. 5-1090.

Sufficiency of evidence to justify finding that fire had attacked insured stock before explosion occurred. 5-805.

Sufficiency of proof that city's contaminated water supply was the source of typhoid fever. 5-1396.

Sufficiency of evidence to overcome presumption of identity of persons from identity of name in change of title. 5-423.

Sufficiency of evidence to overcome *prima facie* case of probable cause in action for malicious prosecution. 5-1682.

Establishing negligence by circumstantial evidence. 5-1333.

Sufficiency of proof to show inspection of a particular street car so as to negative inference of negligence arising from fall of trolley pole. 5-1333.

Sufficiency of evidence to justify finding of substantial performance of contract. 5-1168.

When state is bound by a statement of accused which it introduces in evidence. 5-600.

Adverse possession of real estate. 5-423.

Fraud. 5-655.

Knowledge. 5-1646.

#### **Admissibility under pleadings.**

Sufficiency of mere plea, in justification of trespass for working a road over another's property of a right of way by user, to admit evidence of repairs. 5-1320.

---

### **EXCESSIVE SPEED.**

Of automobile frightening horse. 5-836.

---

### **EXCHANGE.**

Power to sell and distribute the proceeds as including power to exchange. 5-1385.

---

### **EXCLUSIVE AGENCY.**

Measure of damages for breach of contract conferring. 5-1502.

---

### **EXECUTION.**

Sale on execution, see JUDICIAL SALE.

Levy under, see LEVY AND SEIZURE.

---

### **EXECUTORS AND ADMINISTRATORS.**

#### **Appointment.**

Lack of jurisdiction to appoint, shown on face of record. 5-284.

Who may question jurisdiction to appoint. 5-284.

#### **Rights, powers, and duties.**

Power to sell and distribute the proceeds as including power to exchange. 5-1385.

Duty of executors to present and seek probate of will. 5-1426.

### **Assets.**

*Rights of estate of deceased member of law firm in respect to business unfinished at time of latter's death. 5-1290 (case p. 1288).*

### **Suits affecting estate.**

Survivability of action, see ABATEMENT AND REVIVAL.

Right of one taking out letters of administration in the proper county upon estate of one negligently killed, to be admitted as a party to an action brought for the negligent killing under letters taken out in another county, after limitations have run against the cause of action. 5-284.

Right of devisee of real estate to maintain action to require executor to discharge mortgage debt out of personal estate. 5-483.

### **Claims against estate; payment.**

*Right of heir or devisee to have real property exonerated from lien thereon at expense of personal estate. 5-483 (case p. 483).*

Effect of failure of holder of mortgage debt to present it against estate within period limited to bar a devisee of the land of his right to exoneration of the land by payment of the debt from personalty. 5-483.

Right to have debts of testator paid out of personal estate rather than realty. 5-483.

### **Distribution; accounting.**

Crediting an administrator with money paid by him in good faith to widow before discovery of will. 5-619.

Refusal to consider disallowance of commissions to administrator based upon a commissioner's report to which no exceptions were taken. 5-619.

---

### **EXEMPLARY DAMAGES.**

See DAMAGES.

---

### **EXEMPTIONS.**

From taxation, see TAXES.

Provision in statutes making subject to execution lands "not exempt" as including exemptions under Federal laws. 5-385.

---

### **EXPENDITURES.**

By guardian, see GUARDIAN AND WARD.

The dash in each citation stands for A.L.R.

**EXPLOSIONS AND EXPLOSIVES.**

As nuisance, see **NUISANCES**.  
Proximate cause of loss or injury by, see **PROXIMATE CAUSE**.

*Liability for damage to other premises from fire in building where inflammable materials are stored.* 5-1373 (case p. 1376).

Loss of insured goods by explosion. 5-805.

**EXPLOSIVES.**

See **EXPLOSIONS AND EXPLOSIVES**.

**EX POST FACTO LAWS.**

See **CONSTITUTIONAL LAW**.

**EXTRADITION.**

*Right to appeal from order releasing one in extradition proceedings.* 5-1156 (case p. 1152).

Presumption by court that showing upon which governor issued his warrant was legally sufficient. 5-1152.

Sufficiency of affidavit for arrest on information and belief. 5-1152.

Effect of wrong reason for grant of order discharging persons arrested in extradition proceedings. 5-1152.

**FACTS.**

Review of, on appeal, see **APPEAL AND ERROR**.

**FALL.**

*Applicability of res ipsa loquitur to fall of person.* 5-282 (case p. 275).

*Presumption of negligence from fall of passenger from seat.* 5-1034 (case p. 1028).

**FALLING OBJECTS.**

*Injury to one other than passenger or employee by fall of trolley pole or other part of street car.* 5-1336 (cases pp. 1330, 1333).

**FALSE IMPRISONMENT.**

Liability of carrier for arrest of passenger, see **CARRIERS**.

**FALSE PERSONATION.**

*Criminal responsibility of one aiding and abetting the offense.* 5-784.

**FAMILY PURPOSE DOCTRINE.**

*Liability of owner under, for injuries by automobile while being used by member of his family.* 5-226 (case p. 216).

**FARE.**

Ejection for refusal to pay, see **CARRIERS**.

**FARM CROSSING.**

Over railroads, see **RAILROADS**.

**FICTITIOUS PAYEE.**

When check is drawn to fictitious payee so as to be payable to bearer. 5-1193.

**FIDUCIARY RELATION.**

Failure of fiduciary to make disclosures as fraud, see **FRAUD AND DECEIT**.

**FINALITY OF DECISION.**

For purpose of appeal, see **APPEAL AND ERROR**.

**FINDINGS.**

Review of, on appeal, see **APPEAL AND ERROR**.

**FIREARMS.**

*Homicide by wanton or reckless use of firearms without express intent to inflict injury.* 5-603 (case p. 600).

**FIRE DEPARTMENT.**

Liability for interfering with fire apparatus on way to fire, see **FIRES**.

**FIRE INSURANCE.**

See **INSURANCE**.

**FIRES.**

Liability for damage to other premises from fire in building where inflammable materials are stored. 5-1373 (case p. 1376).

Liability of railroad company for interference with fire department while attempting to extinguish fire. 5-1651 (cases pp. 1646, 1648).

**FISCAL MANAGEMENT.**

Power of Public Service Commission with respect to fiscal management of street railways. 5-66.

**FISHERIES.**

Right of fishing on inland lakes. 5-1056 (case p. 1052).

**FITNESS.**

Warranty of, see **SALE**.

**FLOOD.**

Validity of special contract between common carrier and shipper made in view of an unusual flood. 5-1117.

**FOOD.**

Implied covenant of fitness by one serving food. 5-1115 (case p. 1100).

Implied warranty by one other than packer of fitness of food sold in sealed cans. 5-248 (case p. 242).

Implied duty of keeper of eating house to furnish patrons with fit food. 5-1100.

Nature of action for injury by unfit food served in eating places. 5-1100.

Preparing beans for food with pebbles among them. 5-242.

Serving beans containing stones similar in size and appearance to the beans. 5-1100.

Effect of failure of patron to exercise due care in partaking of food on liability of keeper of restaurant for injury to patron from unfit food. 5-1100.

Question for jury as to contributory negligence of one injured by unfit food. 5-1100.

Meaning of words "victuals" and "victualer." 5-1100.

**FORECLOSURE.**

Of mortgage, see **MORTGAGE**.

**FOREIGN JUDGMENT.**

See **JUDGMENT**.

**FORFEITURE.**

Of insurance, see **INSURANCE**.

Forfeiture of property unauthorisedly used by servant in violating law. 5-213 (case p. 211).

Act providing for forfeiture and sale of personal property used in maintaining disorderly houses. 5-1449.

**FORGERY.**

Payment by bank of forged paper, see **BANKS**.

**FORMER TESTIMONY.**

Admissibility in evidence, see **EVIDENCE**.

**FRANCHISE.**

Of street railway companies, see **STREET RAILWAYS**.

**FRATERNAL ORDERS.**

See **BENEVOLENT SOCIETIES**.

**FRAUD AND DECEIT.**

**In general.**

Sufficiency of proof as to, see **EVIDENCE**.

Transfers in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Pleadings as to, see **PLEADING**.

*Privilege of communication to attorney by client in attempt to establish false claim.* 5-977 (case p. 972).

*Criminal responsibility of one conspiring with others to commit offense involving fraud.* 5-789, 790.

*Validity of separation agreement as affected by.* 5-825.

*Concealment of venereal disease as fraud justifying annulment of marriage.* 5-1022 (case p. 1018).

*Confirmation of marriage induced by.* 5-1013.

*Nonperformance by grantor of his agreement to restrict remaining lots in tract.* 5-440.

*Concealment; failure to disclose facts.*

*Failure to perform the duty which rests upon one because of trust or confidential relation as fraud for which equity in an independent suit will relieve against a judgment.* 5-672 (case p. 655).

*Failure of person occupying a trust relation to another to speak.* 5-655.

*In respect to negotiable paper.*

*Violation of criminal statute against drawing checks without sufficient funds to meet them as affected by deposit of money, or a statutory provision permitting payment within specified time.* 5-1254 (case p. 1247).

*Evidence in prosecution for obtaining property by means of check without funds to pay it.* 5-1247.

*Indictment in form prescribed by statute for procuring property by issuance of check therefor without funds to meet it.* 5-1247.

*Remedies.*

*Power of equity in case of, see EQUITY.*

## FRAUDS, STATUTE OF.

See CONTRACTS.

## FRAUDULENT CONVEYANCES.

*Preference by insolvent corporation, see CORPORATIONS.*

*Rights between parties to sale in violation of Bulk Sales Law.* 5-1517 (cases pp. 1507, 1512).

*Main purpose of Bulk Sales Law.* 5-1512.

*Right of creditors of seller to attach property sold without complying with the requirements of Bulk Sales Law.* 5-1507.

*Liability of officer levying attachment, at suit of creditor of vendor, upon property sold without complying with provisions of Bulk Sales Law.* 5-1507.

## FREIGHT.

*As an element of damage where contract fixes value or limits carriers' liability for property lost or damaged.* 5-152 (case p. 149).

## FREIGHT CARRIERS.

See CARRIERS.

## FRIGHT.

Of horse, see HORSES.

*Civil liability for using threatening or abusive language.* 5-1286 (case p. 1283).

*Question whether threat accompanied by profanity and abuse was such as to put person of ordinary reason and firmness in fear of bodily harm.* 5-1283.

## FUGITIVES.

*Extradition of, see EXTRADITION.*

## FURNITURE.

*Sending one's household furniture into county as establishing domicile there.* 5-284.

## FUTURE ADVANCES.

*Priority as between mortgage for future advances and mechanics' liens.* 5-398 (case p. 391).

*Garnishment of.* 5-391.

*Validity of mortgage to secure.* 5-391.  
*When value attaches to mortgage to secure future advances.* 5-391.



**GARBAGE.**

*Injunction to prevent establishment or maintenance of garbage plant.* 5-920 (case p. 915).

**GARNISHMENT.**

*Garnishment of bank in suit against the payee or other holder of a check upon the bank.* 5-589 (case p. 587).

*Rights of holder of check as affected by garnishment of drawer's bank account.* 5-587 (case p. 584).

*Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds as between holder of check and creditor of the drawer garnishing the bank.* 5-1672 (case p. 1665).

*Effect of delay of creditor in presenting check, where, before check is presented, maker's account has been garnished by another creditor.* 5-584.

*Of money not yet advanced under mortgage to secure future advances.* 5-391.

*When liability of bank on an accepted or certified check becomes subject to garnishment.* 5-587.

**GAS.**

*As to gas in mines generally, see MINES.*

**GASOLENE.**

*See EXPLOSIONS AND EXPLOSIVES.*

**GIFT.**

*Of public money, see PUBLIC MONIES.*

*Right of one to give away his property.* 5-1660.

*Acceptance of gift after death of the donee.* 5-1660.

*Presumption of acceptance of gift.* 5-1660.

**GOING CONCERN.**

*Priority of expenses incurred to keep railroad a going concern.* 5-675.

**GOLF CLUB.**

*Dispensing liquor as within powers of.* 5-1185.

**GOOD FAITH.**

*Presumption and burden of proof as to, see EVIDENCE.*

**GOOD WILL.**

*Power of partner to dispose of good will of business.* 5-1182 (case p. 1180).

**GOVERNOR.**

*Presumption as to performance of duty by.* 5-1152.

**GRADE.**

*Change of, see HIGHWAYS.*

**GRAND JURY.**

*Necessity of presentment by, see CRIMINAL LAW.*

**GUARANTY.**

*Of right to jury trial, see JURY.*

**GUARDIAN AND WARD.**

*Right of guardian to expend principal of ward's estate for maintenance and support.* 5-652 (case p. 619).

*Accounting; allowance for expenditures.* 5-619.

*Charging guardian for money value of assets coming to his ward from an estate where they were never converted into money and the guardian never charged himself with their receipt.* 5-619.

*Charging guardian with dividends received on securities of ward during each current year, interest thereon to be debited by charging interest on yearly balances.* 5-619.

*Allowance of commissions to guardian failing to present his account within specified time.* 5-619.

*Right of guardian to interest on small individual items of expenditure from the date thereof.* 5-619.

**GUEST.**

*At hotel or tavern, see INNKEEPERS.*

**HABEAS CORPUS.**

Appealability of judgment or order in.  
see **APPEAL AND ERROR**.

**HEARSAY.**

Evidence of, see **EVIDENCE**.

**HIGHWAYS.**

**In general.**

Establishment by dedication, see **DEDICATION**.

Injunction as to, see **INJUNCTION**.

*Title to subterranean deposits of minerals where fee to land is conveyed for use as a street or highway. 5-1498.*

*Liability for damaging highway or bridge by nature or weight of vehicles or loads transported over it. 5-768 (case p. 765).*

Definition of. 5-765.

Establishment by prescription or user. 5-198.

**Use and obstruction.**

Right to exclude any member of public from reasonable use of highway. 5-765.

Restricting size and weight of vehicles used on highway. 5-765.

— **obstruction generally.**

*Right of one whose access by means of a right of way or branch road to a highway is interfered with by an obstruction in the latter. 5-200 (case p. 198).*

— **use and obstruction by railroads.**

Municipal regulation of street railways, see **MUNICIPAL CORPORATIONS**.

*Liability of railroad company for interference with fire department while attempting to extinguish fire. 5-1651 (cases pp. 1646, 1648).*

General rule as to rights of railway companies occupying city streets. 5-1648.

**Improvements; fixing and changing grade.**

Liability of city for hastening flow of surface water by street improvement, see **MUNICIPAL CORPORATIONS**.

Building and repair of pavement, sidewalk, and other public improvements generally, see **PUBLIC IMPROVEMENTS**.

Right of one owning land on a branch road to damages for alteration of the grade of a highway which cuts off access to it by means of that branch. 5-198.

**Defects; liability for injuries to travelers.**

Measure of damages for injury in defective highway, see **DAMAGES**.

*Duty of abutting owner to continue safeguard against injury which he has voluntarily furnished. 5-936 (case p. 933).*

*Liability of person transporting or conducting on highway an object which frightens horse. 5-940 (case p. 936).*

Ice on sidewalk. 5-933.

— **contributory negligence.**

Effect of previous knowledge of defect. 5-933.

**HOLDING OVER.**

By officers, see **OFFICERS**.

**HOLOGRAPHIC WILL.**

See **WILLS**.

**HOMESTEAD.**

**In general.**

Effect of confirmation of judicial sale on right to show that land sold was a government homestead. 5-385.

Collateral attack on erroneous adjudication that homestead land was subject to execution. 5-385.

**Abandonment.**

*Imprisonment as affecting abandonment of homestead. 5-259 (case p. 256).*

Necessity of actual removal from the premises to constitute abandonment. 5-256.

**Sale.**

Effect of lack of consent of wife of grantor to sale where she files deed in consummation of contract. 5-483.

**HOMICIDE.**

*Homicide by wanton or reckless use of firearm without express intent to inflict injury. 5-603 (case p. 600).*

Malice as element of. 5-600.

**HORSES.**

Fright of, in highway. 5-986.

**HOTELS.**

See INNKEEPERS.

**HOUSE OF ILL FAME.**

See DISORDERLY HOUSES.

**HUSBAND AND WIFE.**

*In general.*

Liability of owner of car for injury while spouse is using car, see AUTOMOBILES.

As to divorce or separation, see DIVORCE AND SEPARATION.

As to dower, see DOWER.

Rights on condemnation of property, see EMINENT DOMAIN.

As to marriage, see MARRIAGE.

Effect of fact that woman was represented by counsel in negotiations with her husband for a separation agreement. 5-817.

**Antenuptial agreement.**

Right of man who has by antenuptial agreement promised woman who becomes his spouse to give her by will a certain part of his estate, to make gifts which defeat his agreement. 5-1426.

Restraining widow from interfering with probate of her husband's will in violation of her antenuptial agreement. 5-1426.

**Actions by wife.**

Wife's right of action for loss of consortium. 5-1049 (case p. 1045).

Right of wife to maintain action for negligent injuries to husband. 5-1045.

**HYMNS.**

Singing of, in schools, see SCHOOLS.

**ICE.**

On sidewalk, liability for injury by. 5-933.

**IDENTITY.**

Presumption and burden of proof as to, see EVIDENCE.

*Right of one charged with unlawful sale of intoxicating liquor to be informed before trial of name or identity of purchaser. 5-409 (case p. 407).*

**IGNORANCE.**

*Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority. 5-137 (case p. 138).*

**ILL FAME.**

Houses of, see DISORDERLY HOUSES.

**IMPAIRMENT OF OBLIGATIONS.**

See CONSTITUTIONAL LAW.

**IMPEACHMENT.**

Of witness, see WITNESSES.

**IMPLIED AGREEMENTS.**

See CONTRACTS.

**IMPLIED WARRANTY.**

See SALE.

**IMPRISONMENT.**

*As effecting abandonment of homestead. 5-259 (case p. 256).*

Judicial notice as to. 5-374.

Effect of imprisonment to change domicile. 5-256.

**IMPROVEMENTS.**

Public improvements, see PUBLIC IMPROVEMENTS.

**IMPURE WATER.**

Liability for furnishing, see WATERS.

**IMPUTED NEGLIGENCE.**

See NEGLIGENCE.

**IMPUTED NOTICE.**

See NOTICE.

**INCEST.**

*Criminal responsibility of one aiding and abetting incestuous intercourse.*  
5-784.

**INCINERATOR PLANT.**

See GARBAGE.

**INCOMPETENT PERSONS.**

Domicil of, see DOMICIL.

*Action for malicious prosecution for instituting lunacy proceedings.*  
5-1097 (case p. 1090).

**INCONSISTENCY.**

Estoppel by, see ESTOPPEL.

**IDIOTMENT, INFORMATION, AND COMPLAINT.**

Necessity of, see CRIMINAL LAW.

Following language of the statute. 5-778, 1247.

For procuring property by issuance of check therefor without funds to meet it. 5-1247.

For embezzlement. 5-778.

For larceny in stealing saw logs. 5-1121.

**INDORSEMENT.**

Payment by bank on forged indorsement, see BANKS.

**INDUCEMENT.**

Pleading facts by way of inducement in libel case. 5-1349.

**INEQUALITY.**

See EQUALITY.

**INFANTS.**

In general.

Abandonment of, see ABANDONMENT.

Guardian for, see GUARDIAN AND WARD.

Relation of, to parents generally, see PARENT AND CHILD.

Adoption of, see PARENT AND CHILD.

Enjoining man who has debauched minor girl and induced her to abandon her home from associating and communicating with the girl. 5-1041.

Liability of carrier for injury to boy trespassing on train. 5-951.

Support.

*Right of guardian to expend principal of ward's estate for maintenance and support.* 5-632 (case p. 619).

Disabilities.

*Emancipation by parent as affecting right of infant to change domicil or settlement.* 5-949 (case p. 943).

*Approximation to maturity as affecting the rule that an infant cannot change his domicil.* 5-958 (case p. 951).

General rule as to power to change domicil. 5-951.

Necessity of pursuing statutory method to remove disabilities of minor with respect to domicil. 5-943.

Meaning of word "resides" in statute providing that proceedings to remove disabilities of minor shall be instituted in the county where he resides. 5-943.

What constitutes change of residence of infant within meaning of statute that proceedings to remove disabilities of minor must be brought in the county of his residence. 5-943.

— contracts.

*Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority.* 5-187 (case p. 183).

Ratification; what constitutes. 5-943.

**INFECTIOUS AND CONTAGIOUS DISEASE.**

As to venereal disease, see VENEREAL DISEASE.

*Right to recover damages from municipality or water company for disease resulting from furnishing impure water.* 5-1403 (case p. 1396).  
*Liability of physician for permitting exposure to.* 5-926 (case p. 922).

---

### INFORMATION.

For criminal offense, see INDICTMENT, ETC.

---

### INFORMATION AND BELIEF.

Sufficiency of affidavit for arrest in extradition proceedings on information and belief. 5-1152.

---

### INHERITANCE TAX.

See TAXES.

---

### INHUMAN TREATMENT.

As ground for divorce, see DIVORCE AND SEPARATION.

---

### INITIATIVE, REFERENDUM, AND RECALL.

*Ratification of amendments to Federal Constitution, or other acts of the state legislature under provision of Federal Constitution, as subject to state referendum.* 5-1417 (cases pp. 1407, 1412).

---

### IN ITINERE.

*Domicil while in itinere from old to new home.* 5-296 (case p. 284).

---

### INJUNCTION.

Right to.

*Injunction to prevent one person from associating with another.* 5-1044 (case p. 1041).

Refusal of application for injunction because it is too broad. 5-915.  
 Threatened or anticipated injury. 5-915.  
 Mandatory injunction. 5-841.

— to protect contract rights.

Restraining widow from interfering with probate of her husband's will in violation of her antenuptial agreement. 5-1426.

— illegal or tortious acts; crimes.

Injunction against criminal proceedings, see *infra*.

Injunction against nuisance, generally, see NUISANCES.

*Constitutionality of statute conferring on chancery courts power to abate public nuisance which is also a crime.* 5-1474 (cases pp. 1449, 1463).

Enjoining man who has debauched minor girl and induced her to abandon her home from associating and communicating with the girl. 5-1041.

Against dispensing of liquor by golf club. 5-1185.

— against trespass upon or injury to real property.

Refusal of injunction against trespass until title has been established in ejectment. 5-1052.

Injunction against leaving open unproducing oil well causing injury to adjoining owner. 5-411.

— water rights.

Refusal of injunction to prevent city from casting surface water upon private property where injury is not shown. 5-1523.

— as to corporate matters; associations.

To prevent sectarian society from giving religious instruction in school maintained at its own expense. 5-841.

— against legal proceedings.

Injunction to restrain interference with probate of will. 5-1426.

Against enforcement of judgment. 5-655.  
 Criminal proceedings. 5-1060.

— against officers.

Refusal to enjoin municipality from doing an act which it is authorized to do. 5-915.

Against act by municipality which is essential to health and comfort of public. 5-915.

To control discretion of directors of school district. 5-841.

Against reading of Scriptures and recitation of Lord's Prayer in public school. 5-841.

As to use of public funds. 5-841.

— as to highways.

Against operation of motor trucks upon highway. 5-765.

Procedure.

Evidence in injunction suit, see EVIDENCE.  
 Pleading in, see PLEADING.

**INNKEEPERS.**

Relation between guest and host. 5-1100.

**INNOCENCE.**

Presumption and burden of proof as to, see EVIDENCE.

**INNUENDO.**

Pleading by way of, in libel case. 5-1849.

**INSANITY.**

See INCOMPETENT PERSONS.

**INSOLVENCY.**

As to assignments for creditors, see ASSIGNMENTS FOR CREDITORS.

As to bankruptcy, see BANKRUPTCY.

Of banks, see BANKS.

Of corporations, see CORPORATIONS.

**INSPECTION.**

Sufficiency of proof of inspection of street car. 5-1333.

Evidence of adoption of system of inspection on question of negligence in permitting fall of trolley pole from street car, to injury of pedestrian. 5-1333.

Question whether fee was a license or an inspection fee. 5-1305.

**INSTRUCTION.**

In schools, see SCHOOLS.

**INSTRUCTIONS.**

See TRIAL.

**INSURABLE INTEREST.**

See INSURANCE.

**INSURANCE.**

In general.

Power of president of corporation to contract for service of insurance adjuster. 5-1483.

Measure of damages for breach of contract to employ insurance adjuster. 5-1483.

**Agents.**

Binding effect on company of act of agent within general scope of his apparent authority though in actual excess of his authority. 5-1569.

**Insurable interest.**

Insurable interest of purchaser under conditional sale. 5-805.

**Construction of policy generally.**

Interpreting contracts in light of the fact that they are drawn by the insurer and are rarely understood by the people who pay the premiums. 5-805.

Construing ambiguous provision in favor of insured. 5-1637.

**Warranties; representations.**

Effect of violation of warranty or condition of sole and unconditional ownership as regards one or more of several items of property covered by policy. 5-808 (case p. 805).

**Forfeiture.**

Forfeiture not favored. 5-1569.

Provision for forfeiture for nonpayment of premium as material element of contract. 5-1569.

**Premiums.**

Forfeiture for nonpayment of premiums, see supra.

Construction of provision for payment of premiums by insurer. 5-1643 (case p. 1637).

**Transfer of policy.**

Effect on insurance contract of wagering assignment thereof. 5-837 (case p. 831).

Evidence on question of wagering intent in assignment of policy. 5-831.

Assignment to one having no insurable interest. 5-831.

**Waiver; estoppel.**

Waiver of provision in contract of mutual benefit association against reception or initiation of applicant while ill. 5-1575 (case p. 1569).

Effect of fact that enforcement of waiver of forfeiture clause of mutual benefit certificate may impair the principle of mutuality between the members of the society. 5-1569.

By denial of liability. 5-1637.

**Risks and causes of loss.**

Question whether loss was caused by explosion or fire. 5-805.

**Extent of disability.**

Waiver of provision requiring proof of total disability. 5-1637.

**Interest in proceeds.**

*Disposition of life insurance which, by terms of policy, is dependent upon survivorship, where there is no presumption or proof of survivorship.* 5-797 (cases pp. 791, 794).

*Effect of wagering assignment of contract.* 5-837 (case p. 831).

Right of one entitled to insurance to proceed against one wrongfully receiving it. 5-831.

**Actions.**

Evidence in action on policy of communications to his attorney by insured, who had burned his house to secure the insurance. 5-972.

**INSURANCE ADJUSTER.**

Power of president of corporation to contract for service of insurance adjuster. 5-1483.

Measure of damages for breach of contract to employ. 5-1483.

**INTENT.**

Relevancy of evidence as to, generally, see EVIDENCE.

Of testator, see WILLS.

Of legislature as guide to interpretation of statute. 5-1309, 1512.

**INTEREST.**

In general; right to.

Stipulation in mortgage for maturity of debt on default in payment of, see MORTGAGE.

As to usury, see USURY.

*Effect of tender of less than full amount to stop the running of interest.* 5-1230 (case p. 1213).

Charging guardian with interest on yearly balances. 5-619.

Right of guardian to interest on small individual items of expenditure from the date thereof. 5-619.

Liability of defendant in foreclosure suit for interest on amount tendered and deposited in court. 5-1216.

**Computation.**

Annual rests on book accounts. 5-551 (case p. 549).

**INTERNAL REVENUE.**

Forfeiture of property used by employee without knowledge of owner in violation of internal revenue laws. 5-211.

**INTERPLEADER.**

Right of lessee of oil and gas under tract of land which is subdivided and sold to different persons, to have all interested parties interpleaded and adverse claims to royalties on oil and gas produced determined. 5-1157.

**INTERVENTION.**

Of parties in action generally, see PARTIES.

**INTOXICATING LIQUORS.**

*Constitutionality of statute conferring on chancery courts power to prevent sale of liquors as a nuisance.* 5-1474 (case p. 1453).

*Forfeiture of property unauthorizedly used by servant in violation of liquor laws.* 5-218 (case p. 211).

*Dispensing liquor as within power of clubs.* 5-1192 (case p. 1185).

*Right of one charged with unlawful sale of intoxicating liquor to be informed before trial of name or identity of purchaser.* 5-409 (case p. 407).

*Criminal responsibility of purchaser of liquor sold in violation of law.* 5-786.

*Liability for license fee of one who has conducted business without required license.* 5-1812 (case p. 1809).

Sufficiency of title of statute providing for abatement of liquor nuisance. 5-1463.

Dispensing of liquor by golf club to its members as within statute forbidding sale of liquor without license. 5-1185.

**IRREGULARITY.**

In tax sale, see TAXES.

**ISSUE.**

Meaning of term as used in will, see WILLS.

**JERK.**

Injury to passenger by, see CARRIERS.

**JOINDER.**

Of parties plaintiff, see **PARTIES**.

**JOLT.**

Injury to passenger by, see **CARRIERS**.

**JUDGES.**

*Waiver of disqualification of judge.* 5-1588 (case p. 1585).

*Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge.* 5-1275 (case p. 1272).

Statute providing for transfer of cause in only one county of the state upon filing an affidavit of bias as special legislation. 5-1272.

**JUDGMENT.**

Judicial notice of judicial records and decisions, see **EVIDENCE**.

On foreclosure of mortgage, see **MORTGAGE**.

**Non obstante veredicto.**

Right to judgment non obstante veredicto on a construction of the evidence. 5-590.

Right of surety to judgment non obstante veredicto where jury decides against him and in favor of principal. 5-590.

**Effect and conclusiveness; collateral attack.**

On appeal, see **APPEAL AND ERROR**.

Collateral attack on erroneous adjudication that homestead land was subject to execution. 5-385.

Who may attack collaterally. 5-284.

Conclusiveness of judgment as to question not considered in the action. 5-1502.

— as to parties.

*Right of judgment against surety where action fails against principal.* 5-594 (case p. 590).

Judgment against corporation as res judicata against stockholder in his individual capacity. 5-1502.

**The lien.**

*Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment.* 5-1072 (case p. 1070).

**Judgment of sister state.**

*Pendency of appeal from judgment as affecting right to enforce it in another state.* 5-1269 (case p. 1261).

*What law determines status of judgment during pendency of appeal where attempt is made to enforce it in other state.* 5-1261.

**Enforcement.**

Enforcement in other state, see *supra*.

Injunction against enforcement. 5-655.

Right to maintain action to prevent enforcement of judgment because of happenings after its rendition. 5-655.

Right of equity which has acquired jurisdiction to restrain enforcement of judgment, to deal with question whether judgment should not be enforced because of happenings subsequent to its rendition. 5-655.

**Relief from.**

*Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment.* 5-672 (case p. 655).

Who may apply to have judgment stricken from record. 5-284.

Right to maintain action to prevent enforcement of judgment because of happenings after its rendition. 5-655.

**JUDICIAL NOTICE.**

See **EVIDENCE**.

**JUDICIAL POWER.**

Encroachment on, see **CONSTITUTIONAL LAW**.

**JUDICIAL SALE.**

**In general; validity.**

Foreclosure of mortgage, see **MORTGAGE**.

By receiver, see **RECEIVERS**.

Sale for taxes, see **TAXES**.

Sheriff as agent of the court. 5-385.

Actual or presumptive adjudication by court of every matter essential to the propriety and validity of decree. 5-385.

Attack on validity. 5-385.

**Purchasers and their rights.**

Purchaser at sheriff's sale as an innocent purchaser. 5-385.



**Confirmation.**

*Confirmation of execution sale of land as adjudication that the land was not exempt.* 5-390 (case p. 385).

**JURISDICTION.**

Raising question of, for first time on appeal, see **APPEAL AND ERROR**.

In general, see **COURTS**.

Of equity, see **EQUITY**.

To appoint administrator, see **EXECUTORS AND ADMINISTRATORS**.

Presumption and burden of proof as to. 5-284, 951.

Necessity of plea in abatement to raise question of. 5-951.

**JURY.**

Prejudicial error in matters as to, see **APPEAL AND ERROR**.

View by, see **VIEW**.

*Statute conferring on chancery courts power to abate public nuisance as invasion of constitutional guaranty of jury trial.* 5-1474 (case pp. 1449, 1463).

Right of juror to testify as to what did or did not influence him in reaching his conclusion. 5-1320.

Constitutional right to jury limited to such right as existed when the Constitution was adopted. 5-1449.

Right to jury trial in equity. 5-1449.

When act is penal so as to entitle one accused of violating it to jury trial. 5-1449.

**KEROSENE.**

See **EXPLOSIONS AND EXPLOSIVES**.

**KNOWLEDGE.**

Presumption and burden of proof as to, see **EVIDENCE**.

Sufficiency of proof of, see **EVIDENCE**.

**LACHES.**

See **LIMITATION OF ACTIONS**.

**LAKES.**

*Rights of boating and fishing on inland lakes.* 5-1056 (case p. 1052).

**LARCENY.**

Indictment for, see **INDICTMENT, ETC.**

*Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee.* 5-986 (case p. 979).

*Criminal responsibility of one co-operating in offense of larceny which he is incapable of committing personally.* 5-785.

Wrongful arrest of owner of property left in exposed position as proximate cause of its loss through theft. 5-358.

Timber as subject of. 5-1121.

Question whether offense of cutting and removing timber is within scope of statute punishing larceny of timber or of another statute punishing wilful cutting or removal of timber. 5-1121.

**LAW.**

Judicial notice of, see **EVIDENCE**.

**LAWYERS.**

See **ATTORNEYS**.

**LEGAL PROCEEDINGS.**

Injunction against, see **INJUNCTION**.

**LEGISLATURE.**

Delegation of power by, see **CONSTITUTIONAL LAW**.

Relation of courts to, see **COURTS**.

Power as to courts, see **COURTS**.

Control by legislature of taxing power of municipalities. 5-731.

**LEVY AND SEIZURE.**

Levy of tax, see **TAXES**.

Liability of officer levying attachment, at suit of creditor of vendor, upon property sold without complying with provisions of Bulk Sales Law. 5-1507.

**LIBEL AND SLANDER.**

What actionable generally.

Question for jury as to, see **TRIAL**.

*Charging one with failure to keep his contracts. 5-1362 (case p. 1349).*

Classification of words charged to be libelous. 5-1349.

Construing words used in their natural and obvious meaning. 5-1349.

Necessity that words alleged to injure business be spoken of plaintiff in relation to trade or business and be such as impeach his skill or knowledge or attack his conduct in such business. 5-1349.

Publication that the publisher has a bond of a merchant to give away because the latter would not accept it for merchandise at face value. 5-1349.

#### **Privileged communications.**

*Communications between different offices of corporation. 5-455 (case p. 451).*

#### **Publication.**

*Publication by communicating between different offices of corporation. 5-455 (case p. 451).*

Writing and mailing libelous letter to person libeled. 5-451.

#### **Actions.**

Complaint in action for, see **PLEADING**.

What admitted by demurrer to petition for libel. 5-1349.

---

### **LICENSE.**

#### **In general.**

License tax on automobiles, see **AUTOMOBILES**.

Of dentist, see **DENTISTS**.

For sale of liquor, see **INTOXICATING LIQUORS**.

Of physician or surgeon, see **PHYSICIANS AND SURGEONS**.

Question whether fee was a license or an inspection fee. 5-1305.

#### **Equality and uniformity.**

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions as to uniformity and discrimination in taxes. 5-761.*  
*Applicability to license tax on automobiles of constitutional provisions in relation to ad valorem tax. 5-759.*

#### **Enforcement of license tax.**

*Liability for license fee or occupation tax of one who has conducted business without required license or payment. 5-1312 (cases pp. 1305, 1309).*

Action to collect license fee where license has not been applied for or granted, in absence of express legislative authority. 5-1309.

Effect of statute imposing penalty for doing business without a license, to authorize a civil action to collect the license tax from one doing business without license. 5-1309.

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### **LIENS.**

Of judgment, see **JUDGMENT**.

Of mortgage, see **MORTGAGE**.

Of vendor, see **VENDOR AND PURCHASER**.

---

### **LIFE ESTATE.**

Creation of, by will, see **WILLS**.

---

### **LIFE INSURANCE.**

See **INSURANCE**.

---

### **LIFE TENANTS.**

Creation of fixed or contingent remainder by will, see **WILLS**.

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### **LIMITATION OF ACTIONS.**

#### **In general.**

Adverse possession, see **ADVERSE POSSESSION**.

Easements acquired by prescription, see **EASEMENTS**.

Right of one taking out letters of administration in the proper county upon estate of one negligently killed, to be admitted as a party to an action brought for the negligent killing under letters taken out in another county, after limitations have run against the cause of action. 5-284.

#### **Laches.**

*Laches as defense to mandamus to compel payment of salary of public officer or employee. 5-583.*

#### **When limitations begin to run.**

*When limitations begin to run in favor of attorney guilty of negligence in passing defective title. 5-1895.*

#### **When action is barred.**

Action for malicious prosecution. 5-1090.

**LIMITATION OF LIABILITY.**

By carrier, see **CARRIERS**.

---

**LOAN.**

*Right of insolvent corporation to secure officers, directors, or stockholders for a contemporaneous loan to the corporation. 5-561 (case p. 557).*

---

**LOCAL IMPROVEMENTS.**

See **PUBLIC IMPROVEMENTS**.

---

**LOCAL LAWS.**

See **STATUTES**.

---

**LOGS AND LOGGING.**

Indictment for larceny of logs. 5-1121.

---

**LOOKOUT.**

Duty of railroad company as to. 5-201.

---

**LOSS.**

Of freight during transportation, see **CARRIERS**.

---

**LOSS OF PROFITS.**

As element of damages, see **DAMAGES**.

---

**LUNACY.**

See **INCOMPETENT PERSONS**.

---

**LYNCHING.**

Reversible error in refusing adjournment where mob attempts to lynch accused. 5-908.

---

**MAIL.**

See **POSTOFFICE**.

**MALICE.**

As element of homicide, see **HOMICIDE**.  
Definition of. 5-600.

---

**MALICIOUS PROSECUTION.**

*Action for malicious prosecution for instituting lunacy proceedings. 5-1097 (case p. 1090).*  
*Institution of prosecution on false information without investigation as showing lack of probable cause. 5-1688 (case p. 1682).*

Grounds for action generally. 5-1682.  
Limitation of time for action for. 5-1090.  
Sufficiency of complaint in action for. 5-1682.  
Admissibility of evidence in action for. 5-1090.  
Presumption and burden of proof as to probable cause. 5-1090, 1682.  
Sufficiency of evidence to overcome presumption of probable cause. 5-1682.  
Refusal of appellate court to consider error in submitting question of probable cause to the jury when instructions are not in the record. 5-1090.  
Judgment procured by perjury as evidence of probable cause. 5-1682.

---

**MANDAMUS.**

*Mandamus to compel payment of salary of public officer or employee. 5-572 (cases pp. 563, 568).*

---

**MANDATORY INJUNCTION.**

See **INJUNCTION**.

---

**MANDATORY PROVISIONS.**

Of statute. 5-155.

---

**MANSLAUGHTER.**

See **HOMICIDE**.

---

**MAP.**

Dedication by, see **DEDICATION**.

---

**MARKETABLE TITLE.**

What constitutes. 5-1385.

**MARRIAGE.**

As to divorce, see **DIVORCE AND SEPARATION**.  
 As to husband and wife generally, see **HUSBAND AND WIFE**.

*Veneral disease as ground for annulment of marriage. 5-1016 (case p. 1018).*

What constitutes confirmation of marriage induced by fraud. 5-1013.

**MASONIC LODGE.**

*Gift to, as a valid charitable gift. 5-1175 (case p. 1172).*

**MASTER AND SERVANT.**

**In general.**

Preference to wages in assets in hands of receiver, see **RECEIVERS**.

*Power of president of corporation to make contract of employment. 5-1485 (case p. 1483).*

**Discharge.**

*Power of president of corporation to discharge agents or subordinates. 5-1485.*

**Liability of master for acts of employees.**

*Forfeiture of property unauthorisedly used by servant in violating law. 5-213 (case p. 211).*

**Question for jury as to scope of authority. 5-951.**

**Liability for injury done by servant using owner's automobile in his own business. 5-216.**

**MAXIMS.**

*Res ipsa loquitur, see EVIDENCE.*

*Fraud vitiates everything. 5-655.*

*Interest republicæ ut sit finis litium. 5-655.*

*Nemo debet bis vexari pro una et eadem causa. 5-655.*

*There is no wrong without a remedy. 5-655.*

**MEASLES.**

See **INFECTIOUS AND CONTAGIOUS DISEASES**.

**MECHANICS' LIENS.**

*Priority as between mortgage for future advances and mechanics' liens. 5-393 (case p. 391).*

**Determination of validity and dignity of lien. 5-391.**

**What is actual notice which will subordinate a mortgage to the lien of a materialman. 5-391.**

**MENTAL SUFFERING.**

Recovery of damages for, see **DAMAGES**.

**MINES.**

*Oil and gas or other mineral rights in land as affected by language in conveyance specifying purpose for which the property is to be used. 5-1493 (case p. 1495).*

*Respective rights of owners of different parcels into which land subject to an oil and gas lease has been subdivided. 5-1162 (case p. 1157).*

*Respective rights of adjoining owners as to pumping oil. 5-421 (case p. 411).*

**Ownership of fugitive oil beneath land. 5-411.**

**Injunction against leaving open unproducing oil well causing injury to adjoining owner. 5-411.**

**MINORITY STOCKHOLDERS.**

**Rights of, see CORPORATIONS.**

**MINORS.**

See **INFANTS**.

**MISTAKE.**

**As ground for rescission of contract, generally, see CONTRACTS.**

*Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books. 5-255 (case p. 250).*

*Power to correct mistake in record in criminal case after term on evidence dehors records. 5-1127 (case p. 1121).*

**Validity of separation agreement as affected by. 5-330.**

*Effect of mistake in reference in statute to another statute, constitution, public document, record, or the like.* 5-996 (case p. 990).

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### MOBS AND RIOTS.

Reversible error in refusing adjournment where mob attempts to lynch accused. 5-908.

---

### MONEY.

As to public money, see PUBLIC MONIES.

---

### MORTGAGE.

Sufficiency of tender, see TENDER.

What property covered.  
After-acquired property. 5-391.

#### Validity.

*Validity of mortgage given by insolvent corporation to secure officers, directors or stockholders for a contemporaneous loan to the corporation.* 5-561 (case p. 557).

Mortgage to secure future advances; failure to state consideration. 5-391.

When value attaches to mortgage to secure future advances. 5-391.

#### Priority.

*Priority as between mortgage for future advances and mechanics' liens.* 5-393 (case p. 391).

What is actual notice which will subordinate a mortgage to the lien of a materialman. 5-391.

Priority as between operating expenses of railroad in hands of receiver and mortgage. 5-675.

Vendee of mortgagor; assumption of debt.

Personal liability of grantee assuming mortgage. 5-483.

Right of mortgagee to acknowledge grantee assuming debt as his debtor or to rely alone upon the mortgage. 5-483.

What constitutes acknowledgment of grantee by mortgagee as his debtor. 5-483.

Right of vendee of land subject to mortgage to redeem. 5-141.

#### Assignment.

Right of assignee of mortgage to attorney's fees provided by the mortgage where mortgagor was lulled into inaction by assurance of the mortgagee, who later assigned to a stranger, who brought immediate suit for foreclosure. 5-1216.

#### Satisfaction; payment.

*Right of heir or devisee to have real property exonerated from mortgage lien thereon at expense of personal estate.* 5-488 (case p. 483).

#### Enforcement.

*Effect on acceleration clause in mortgage of delay in declaring mortgage due.* 5-437 (case p. 434).

Demand for payment as condition precedent to foreclosure; effect of assurance by mortgagee that mortgagor need not worry about making payment. 5-1216.

What constitutes a tender where mortgagee has exercised an option to declare whole amount due in case of default in payment. 5-434.

Meaning of words "immediately due" in mortgage providing that upon default in payment of principal debt or instalment of interest and taxes whole amount shall become immediately due. 5-434.

Effect on judgment in favor of cross petitioner seeking foreclosure of second mortgage in suit to foreclose first mortgage, as mere recognition of fact that second mortgage had not been satisfied rather than establishment of a new lien. 5-141.

Necessity of previous demand to recovery of attorneys' fees provided by mortgage. 5-1216.

Discretion of court as to allowance of attorneys' fees provided for in mortgage, and amount thereof. 5-1216.

Effect on right to recover attorneys' fees provided for in mortgage, of lulling mortgagor into inaction by assurance that he need not worry about payment. 5-1216.

Liability of defendant in foreclosure suit for interest on amount tendered and deposited in court. 5-1216.

#### Redemption.

Sufficiency of tender, see TENDER.

*Effect on subordinate lien of redemption by owner or his grantee from sale under prior lien.* 5-145 (case p. 141).

Right of vendee of land subject to mortgage to redeem. 5-141.

What is intended by statute giving exclusive right of redemption for twelve months to the "defendant owner." 5-141.

**MOTIVE POWER.**

*Power of Public Service Commission with respect to motive power of street railways.* 5-65.

**MOTOR VEHICLES.**

See AUTOMOBILES.

**MUNICIPAL CORPORATIONS.**

*In general.*

Bonds of, see BONDS.

Injunction against, see INJUNCTION.

Public improvements by, see PUBLIC IMPROVEMENTS.

*Power of Public Service Commission with respect to regulation of street railways as affected by powers of municipality.* 5-37 (cases pp. 1, 13).

Attacking legal existence of municipality. 5-519.

*Charter.*

*Effect of mistake in reference in statute to municipal charter.* 5-1010.

*Powers generally.*

Delegation of legislative power to, see CONSTITUTIONAL LAW.

Strict construction of grant of power to municipality. 5-1.

Power to abridge police power. 5-1.

*Ordinances.*

*Effect of mistake in reference in statute to ordinance.* 5-1010.

Sufficiency of compliance with statute requiring mayor to indorse the word "approved" on a resolution, ordinance, or other legislative action of the city council and to sign the same. 5-519.

Taking evident meaning of ordinance as it reads, though counsel for both parties have construed it differently. 5-1060.

*- validity.*

Power to fix rates of fare, see CARRIERS.

Courts' power as to, see COURTS.

*Validity of ordinance as to "containers"* 5-1068 (case p. 1060).

*Validity of ordinance interfering with privacy in restaurants.* 5-965 (case p. 960).

Presumption of validity. 5-960.

Effect of ordinance passed without authority. 5-1.

Power to contract as to conditions upon which street railway may use streets. 5-1.

Delegation to municipality of power to regulate weights and measures. 5-1060.

Oppressive and arbitrary interference with business. 5-960.

Prohibiting booths in restaurants. 5-960.

*Power as to water supply.*

Election on question of issuing bonds to purchase or construct waterworks, see BONDS.

Right to purchase waterworks system. 5-519.

*Liability for damages.*

Liability for negligence as to water supply, see WATERS.

*Right to hasten by improvement of street or highway the flow of surface water along natural drainways.* 5-1530 (case p. 1523).

Liability for nuisance. 5-915.

Liability to citizen for consequences following doing of something which city has statutory authority to do. 5-1523.

*Taxes.*

Control by legislature of taxing power of municipalities. 5-731.

Effect of statute requiring approval of state tax commission to proposed increase of rate of taxation of municipality to make necessary such approval of tax rate to provide for payment of principal and interest on bonds issued to purchase waterworks system. 5-519.

Constitutional right of local taxing districts to retain upon their tax lists all of the property within such districts. 5-731.

**MURDER.**

See HOMICIDE.

**MUTUAL BENEFIT SOCIETIES.**

See BENEVOLENT SOCIETIES.

**MUTUALITY.**

As affecting set-off, see SET-OFF AND COUNTERCLAIM.

**NAME.**

Presumption of identity of persons from identity of name, see **EVIDENCE**.

*Right of one charged with unlawful sale of intoxicating liquor to be informed before trial of name or identity of purchaser.* 5-409 (case p. 407).

*What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence.* 5-1580 (case p. 1578).

**NATURAL GAS.**

In mines, see **MINES**.

**NAVIGATION.**

*Criminal responsibility for aiding and abetting violation of navigation laws.* 5-786.

**NECESSITY.**

Easements by, see **EASEMENTS**.

**NEGLECTANCE.**

In general.

Of attorney, see **ATTORNEYS**.

In payment of checks, see **BANKS**.

Of carrier, see **CARRIERS**.

Presumption and burden of proof as to, see **EVIDENCE**.

Relevancy of evidence as to, see **EVIDENCE**.

Sufficiency of proof of, see **EVIDENCE**.

As to explosives, see **EXPLOSIONS AND EXPLOSIVES**.

In sale or serving of food, see **FOOD**.

In causing fright, see **FRIGHT**.

Negligent homicide, see **HOMICIDE**.

Of infant, parent's liability, see **PARENT AND CHILD**.

Of physician or surgeon, see **PHYSICIANS AND SURGEONS**.

As to proximate cause, see **PROXIMATE CAUSE**.

In operation of railroad train, see **RAILROADS**.

As question for jury, see **TRIAL**.

Of water company, see **WATERS**.

*Duty and liability of one who voluntarily undertakes to care for injured person.* 5-513 (case p. 507).

Right of party to relief from consequences of negligence of his attorneys. 5-655.

Conclusiveness on appeal of finding as to negligence of maker of check which will absolve bank from liability for payment on forged indorsement. 5-1193.

Liability for direct consequences of negligent acts. 5-922.

Duty of railroad company undertaking to care for injured trespasser. 5-507.

**Contributory negligence.**

Of person injured by automobile, see **AUTOMOBILES**.

Of passenger, see **CARRIERS**.

As to injuries from defects in highways, see **HIGHWAYS**.

On railroad track or right of way, see **RAILROADS**.

Question for jury as to. 5-1100.

Of bank depositor as to forged checks. 5-1193.

Effect of failure of patron to exercise due care in partaking of food on liability of keeper of restaurant for injury from unfit food. 5-1100.

—imputed.

*Imputability to rescuer of antecedent negligence of rescued person.* 5-206 (case p. 201).

—last clear chance.

Effect of negligence of passenger in crossing track to reach his train without looking for approach of trains to absolve company from negligence in failing to maintain lookout. 5-201.

**NEGOTIABLE INSTRUMENTS LAW.**

See **BILLS AND NOTES**.

**NERVOUS SHOCK.**

See **FRIGHT**.

**NEW TRIAL.**

For error as to instructions. 5-201.

Effect of grant of new trial to one of two conspirators on rights of the other. 5-870.

Right of juror to testify as to what did or did not influence him in reaching his conclusion. 5-1820.

**NON OBSTANTE VEREDICTO.**

See **JUDGMENT**.

**NONRESIDENTS.**

Jurisdiction of, see **COURTS.**

**NONSUIT.**

See **TRIAL.**

**NOTICE.****In general.**

Of election as to bond issue, see **BONDS.**  
 Necessity of, to constitute due process of law, see **CONSTITUTIONAL LAW.**  
 Presumption and burden of proof as to, see **EVIDENCE.**  
 Sufficiency of proof of, see **EVIDENCE.**  
 Of tax sale, see **TAXES.**  
 Of facts putting purchaser of real property on inquiry, see **VENDOR AND PURCHASER.**

*Printing of rules in pass book as notice to depositor.* 5-1203.

*Necessity that diseased spouse must have known of his condition to make communication of venereal disease cruelty justifying divorce.* 5-1018.

Of lien claim. 5-391.  
 Of sale of municipal bonds. 5-519.  
 Of facts dependent upon inquiry. 5-391.  
 What is actual notice which will subordinate a mortgage to the lien of a materialman. 5-391.

Imputed by knowledge of agent.  
 Of officer or agent of corporation. 5-1193.  
 Of agent's own wrong. 5-1193.

**NUISANCES.**

What are.  
 Explosives. 5-1376.

**Remedies.**

*Injunction to prevent establishment or maintenance of garbage or sewage disposal plant.* 5-920 (case p. 915).  
*Constitutionality of statute conferring on chancery courts power to abate public nuisances.* 5-1474 (cases pp. 1449, 1458, 1468).

Jurisdiction of equity independent of statute, to abate nuisances. 5-1449.

Giving equity jurisdiction to punish and abate nuisance punishable by indictment as deprivation of right to presentment by grand jury. 5-1463.

Power of legislature to extend equity jurisdiction to abatement of bawdy houses. 5-1449.

Injunction against legitimate business which is a threatened nuisance. 5-915.

Jurisdiction of equity to abate public nuisances at suit of individual. 5-1463.  
 Sufficiency of title of statute providing for abatement. 5-1463.

**— who liable.**

Liability of municipality. 5-915.

**NUNC PRO TUNC.**

Right of court after expiration of term, to order an entry nunc pro tunc upon record of criminal case. 5-1121.

**OATH.**

Of office, see **OFFICERS.**  
 Verification of pleading, see **PLEADING.**

**OBJECTIONS.**

To raise question for review on appeal, see **APPEAL AND ERROR.**

**OBSTRUCTION.**

Of highways, see **HIGHWAYS.**

**ODD FELLOWS.**

*Gift to, as a valid charitable gift.* 5-1175.

**OFFICERS.****In general.**

Of private corporations, see **CORPORATIONS.**  
 Presumption and burden of proof as to acts of, see **EVIDENCE.**  
 Injunction against, see **INJUNCTION.**  
 Of schools, see **SCHOOLS.**

*Right of public officer to purchase tax certificates or tax titles.* 5-969 (case p. 966).

*Public officer as within rule that owner of property may testify as to value thereof.* 5-1171 (case p. 1168).

**Eligibility.**

*Resignation of one office as affecting eligibility to another office during term of former office.* 5-117 (case p. 113).

**Qualifying; oath.**

Failure to take oath of office for new term after having served one term. 5-113.



**Term; holding over.**  
Effect of holding over. 5-118.

**Resignation.**

*Resignation of one office as affecting eligibility to another office during term of former office. 5-117 (case p. 113).*

**Right of officer to resign his office. 5-118.**

**Contest of title.**

*Fact that title to office is in dispute as defense to mandamus to compel payment of salary of public officer. 5-581.*

**Liabilities.**

Liability of officer making levy, see **LEVY AND SEIZURE**.

**Compensation.**

*Mandamus to compel payment of salary. 5-572 (cases pp. 563, 568).*

**Effect of payment to de facto officer. 5-568.**

**Officers de facto.**

Payment to de facto officer as affecting right to salary, see *supra*.

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## OFFSETS.

See **SET-OFF AND COUNTERCLAIM**.

---

## OIL.

As to oil in mines, see **MINES**.

In general, see **EXPLOSIONS AND EXPLOSIVES**.

---

## OPERATING EXPENSES.

**Priority of operating expenses of railroad in hands of receiver. 5-675, 685.**

---

## OPINIONS.

As evidence, see **EVIDENCE**.

---

## ORAL CONTRACTS.

In general, see **CONTRACTS**.

## ORAL EVIDENCE.

See **EVIDENCE**.

---

## ORDINANCES.

See **MUNICIPAL CORPORATIONS**.

---

## OVERDRAFT.

**Right of bank to charge back check proving to be an overdraft. 5-1561.**

---

## OWNERSHIP.

Sufficiency of proof of, see **EVIDENCE**.

---

## PARENT AND CHILD.

**In general.**

Liability of parent for negligence of child in use of automobile, see **AUTOMOBILES**.

Disabilities and liabilities of infants generally, see **INFANTS**.

Liability of parent for tort of minor child generally. 5-216.

Enjoining man who has debauched minor girl and induced her to abandon her home from associating and communicating with the girl. 5-1041.

**Adoption.**

*Right of child adopted after testator's death to take under will. 5-1280 (case p. 1277).*

**Effect of giving adopted child a right to inherit to make him a child in fact or change his identity. 5-1277.**

---

## PAROL CONTRACTS.

In general, see **CONTRACTS**.

---

## PAROL EVIDENCE.

As to writings, see **EVIDENCE**.

---

## PARTIAL TESTACY.

See **WILLS**.

**PARTIAL INVALIDITY.**

Of statutes, see **STATUTES**.

**PARTIES.**

To criminal offense, see **CRIMINAL LAW**.

**Parties plaintiff.**

Action by husband or wife, see **HUSBAND AND WIFE**.

Assignee as one in whose name action for tort affecting property which has been assigned should be brought. 5-124.

**—joinder.**

Joining assignor of action ex delicto for injury to property in action by assignee. 5-124.

**Parties defendant.**

In eminent domain proceedings, see **EMINENT DOMAIN**.

Suits against receiver, see **RECEIVERS**.

*Wife or widow as necessary party to proceeding to condemn her husband's real property. 5-1347.*

**Intervention.**

Right of one taking out letters of administration in the proper county upon estate of one negligently killed, to be admitted as a party to an action brought for the negligent killing under letters taken out in another county, after limitations have run against the cause of action. 5-284.

**PARTITION.**

*Respective rights of owners of different parcels into which land subject to oil and gas leases is divided on partition. 5-1165.*

**PARTNERSHIP.**

*Power of partner to dispose of good will of business. 5-1182 (case p. 1180).*

*Right to set off claim of individual partner against claim against partnership. 5-1541 (case p. 1537).*

*Rights of surviving members and of estate of deceased member of law firm in respect to business unfinished at time of latter's death. 5-1290 (case p. 1288).*

Provision in contract of law partnership that in case of dissolution certain members are to have no interest in the outstanding accounts. 5-1288.

**PART PERFORMANCE.**

Under Statute of Frauds, see **CONTRACTS**.

**PASS BOOK.**

See **BANKS**.

**PASSENGER CARRIER.**

See **CARRIERS**.

**PAUPERS.**

See **POOR AND POOR LAWS**.

**PAVEMENT.**

In general, see **PUBLIC IMPROVEMENTS**.

*Power of Public Service Commission over street railways with respect to tracks or pavements. 5-63.*

**PAYMENT.**

Of depositor's check, see **BANKS**.  
Of claims against decedent's estate, see **EXECUTORS AND ADMINISTRATORS**.  
Mandamus to compel, see **MANDAMUS**.  
Of mortgage, see **MORTGAGE**.  
Subrogation for, see **SUBROGATION**.  
Of legacy or devise, see **WILLS**.  
By check. 5-584.

**PEBBLES.**

Presence of, in canned beans as evidence of negligence. 5-242.

**PENAL LAW.**

Question whether legislature intended act to be a civil or a penal one. 5-1449.

**PER CAPITA.**

See **WILLS**.

**PERFORMANCE.**

Part performance of oral contract, see **CONTRACTS**.

Of contracts, generally, see **CONTRACTS**.

**PERSONAL INJURIES.**

Survivability of cause of action for, see **ABATEMENT AND REVIVAL**.  
 To passenger, see **CARRIERS**.  
 Punitive damages for, see **DAMAGES**.  
 From eating of unfit food, see **FOOD**.  
 Wife's right of action for, see **HUSBAND AND WIFE**.  
 On railroad track, see **RAILROADS**.  
 Question for jury as to cause of, see **TRIAL**.  
 Sufficiency of evidence to take case to jury, see **TRIAL**.  
 In general, see **NEGLIGENCE**.  
 Ratification by infant of settlement of claim for personal injuries. 5-943.

**PER STIRPES.**

See **WILLS**.

**PETROLEUM.**

In mines generally, see **MINES**.

**PHOTOGRAPHS.**

Permitting photographs which have been excluded from evidence to go into the jury room. 5-1320.

**PHYSICIANS AND SURGEONS.**

As to dentists, see **DENTISTS**.

*Validity of statute providing for revocation of license of physician, surgeon, or dentist. 5-94 (case p. 84).*  
*Liability of physician for permitting exposure to infectious or contagious disease. 5-926 (case p. 922).*

**PLACE.**

Place of trial, see **VENUE**.

**PLAINTIFFS.**

Parties plaintiff, see **PARTIES**.

**PLAT.**

Dedication by, see **DEDICATION**.

**PLEADING.**

Prejudicial error as to, see **APPEAL AND ERROR**.  
 In criminal prosecution, see **CRIMINAL LAW; INDICTMENT, ETC.**  
 Evidence admissible under, see **EVIDENCE**.

**Verification.**

Necessity of verification of denial of authority of agent. 5-1637.

**Definiteness.**

Fraud. 5-655.

**Conclusions.**

Fraud. 5-655.

**Declaration or complaint.**

Rule for testing sufficiency of complaint. 5-655.

Sufficiency of petition for laying out way of necessity. 5-1552.

In injunction suit. 5-915.

**—for libel.**

Disregarding improbable construction placed upon publication by plaintiff in determining whether petition states a cause of action. 5-1349.

What constitutes an "inducement." 5-1349.  
 Purpose served by "colloquium." 5-1349.

**—for torts.**

Allegations of fraud. 5-655.

In action for malicious prosecution. 5-1682.

**Pleas and answer.**

Verification of answer, see *supra*.

Mode of raising objections. 5-79.

**Demurrer.**

Sufficiency as against general demurrer of allegation of assignment of chose in action. 5-124.

Sufficiency of allegations of fraud as against general demurrer. 5-655.

Demurrer on ground that pleading is vague, indefinite, uncertain, and insufficient. 5-102.

Overruling demurrer to answer where facts stated with inference to be drawn therefrom constitute good defense. 5-79.

Truth of allegations of complaint admitted by demurrer. 5-1682.

What admitted by demurrer to petition for libel. 5-1349.

Appealability of ruling on demurrer. 5-358.

Prejudicial error in rulings on demurrer. 5-102.

**PLEA IN ABATEMENT.**

Necessity of, to raise question of jurisdiction. 5-951.

**POLICE POWER.**

See CONSTITUTIONAL LAW.

**POOR AND POOR LAWS.**

*Emancipation by parent as affecting right of infant to acquire for himself a poor settlement. 5-950.*

**POSSESSION.**

Adverse, see ADVERSE POSSESSION.  
Presumption and burden of proof as to, see EVIDENCE.

**POSTOFFICE.**

*Criminal responsibility of one aiding and abetting postmaster in making false return. 5-784.*

*Deposit of deed in mail as delivery. 5-1664 (case p. 1660).*

**POWERS.**

*Succession tax on property appointed by deed under power of appointment. 5-188 (case p. 177).*

**PRAYERS.**

In schools, see SCHOOLS.

**PREFERENCES.**

By insolvent corporation, see CORPORATIONS.

**PREJUDICIAL ERROR.**

See APPEAL AND ERROR.

**PREMIUMS.**

Insurance premiums, see INSURANCE.

**PRESCRIPTION.**

Title by, see ADVERSE POSSESSION.

Easement by, see EASEMENTS.

Establishment of highway by, see HIGHWAYS.

**PRESENTMENT.**

Of check, see CHECKS.

Necessity of presentment by grand jury, see CRIMINAL LAW.

**PRESIDENT.**

Of corporation, powers of, see CORPORATIONS.

Who may vote at election for, see ELECTIONS.

Necessity that proposed amendment to Federal Constitution be presented to President for approval or veto. 5-1412.

**PRESIDENTIAL ELECTORS.**

Who may vote for, see ELECTIONS.

**PRESUMPTIONS.**

On appeal, see APPEAL AND ERROR.

In general, see EVIDENCE.

**PRINCIPAL AND AGENT.**

In general.

As to agents of corporation, see CORPORATIONS.

Insurance agents, see INSURANCE.

Proof of agent's declaration, see EVIDENCE.

*Power of president of a corporation to employ, control, or discharge agents. 5-1435 (case p. 1433).*

*Measure of damages for breach of contract conferring exclusive sales agency. 5-1502.*

*Powers of; liability of principal.*

Power of insurance agent, see INSURANCE.

*Forfeiture of property unauthorisedly used by agent in violating law. 5-218 (case p. 211).*

Necessity of verification of denial of authority of agent. 5-1637.

Imputing to principal notice of agent's own wrong. 5-1193.

*Liabilities of agent.*

Liability for illegal sale of liquor, see INTOXICATING LIQUORS.

**PRINCIPAL AND SURETY.**

*Right to judgment against surety where action fails against principal. 5-594 (case p. 590).*

**PRIORITY.**

*Of judgment, see JUDGMENT.  
Of mechanics' liens, see MECHANICS' LIENS.  
Of mortgage, see MORTGAGE.*

**PRIVACY.**

*Validity of statute or ordinance interfering with privacy in restaurants. 5-965 (case p. 960).*

**PRIVATE CROSSING.**

*Over railroads, see RAILROADS.*

**PRIVATE ROADS.**

*Easement of way of necessity, see EASEMENTS.*

**PRIVATE SCHOOLS.**

*Injunction to prevent sectarian society from giving religious instruction in. 5-841.*

**PRIVILEGE.**

*Of witnesses, see WITNESSES.*

**PRIVILEGED COMMUNICATIONS.**

*Admissibility in evidence, see EVIDENCE.  
In libel case, see LIBEL AND SLANDER.*

**PROBABLE CAUSE.**

*For prosecution, see MALICIOUS PROSECUTION.*

**PROBATE.**

*Of will, see WILLS.*

**PRODUCE.**

*Validity of statute or ordinance as to "containers." 5-1068 (case p. 1060).*

**PROFITS.**

*Loss of, as element of damages, see DAMAGES.*

**PROPERTY.**

*Liability for loss of property left unprotected when owner was wrongfully arrested. 5-362 (case p. 355).  
Assignability of right of action ex delicto for injury to property as affected by statute. 5-180 (case p. 124).*

*Presumption that owner of property knows the business conducted thereon. 5-1449.*

*Right to deprive owner of legitimate use of his property because it may cause an injury to his neighbor. 5-411.*

**PROPOSITION.**

*Submission to voters of proposition to issue bonds, see BONDS.*

**PROSTITUTION.**

*As to disorderly houses, see DISORDERLY HOUSES.*

**PROXIMATE CAUSE.**

*Proximate cause of damage to other premises from fire in building where inflammable materials are stored. 5-1878 (case p. 1876).*

*Wrongful arrest of owner of property left in exposed position as proximate cause of its loss through theft. 5-358.*

*Of injury received in rescuing person placed in danger by negligence of another. 5-201.*

**PUBLICATION.**

*Of libel, see LIBEL AND SLANDER.*

*Of notice of sale of municipal bonds. 5-519.*

*Of notice of election as to bond issue. 5-516, 519.*

**PUBLIC CHARITIES.**

See CHARITIES.

**PUBLIC IMPROVEMENTS.**

Municipal liability for hastening flow of surface water by street improvement, see MUNICIPAL CORPORATIONS.

*Priority as between liens for public improvements. 5-1301 (case p. 1296).*

**PUBLIC MONEYS.**

*Public aid of sectarian school. 5-379 (case p. 841).*

Injunction against use of. 5-841.  
Distinguishing between statutory offense of wilful embezzling of public money and statutory offense of failing to remit state money to proper custodian and failing to obey directions by such custodian to account for money collected. 5-773.

What constitutes a sect which is denied right to use public funds. 5-841.

Effect of consent of people of district to continuance of sectarian school as a public school. 5-841.

Evidence in suit to enjoin continuance of sectarian school with public money. 5-841.

Estoppel to complain of use of public money in aid of sectarian school. 5-841.

**PUBLIC NUISANCES.**

See NUISANCES.

**PUBLIC OFFICERS.**

See OFFICERS.

**PUBLIC POLICY.**

As affecting contracts, see CONTRACTS.

**PUBLIC PROPERTY.**

Exemption of, from taxation, see TAXES.

**PUBLIC SCHOOLS.**

See SCHOOLS.

**PUBLIC SERVICE COMMISSION.**

Regulation of carriers by, generally, see CARRIERS.

*Power of Public Service Commission with respect to regulation of street railways. 5-36 (cases pp. 1, 13, 20, 24, 30).*

**PUBLIC UTILITIES.**

*Proposition submitted to people with reference to erection or purchase of public utility as a single or double proposition. 5-538 (cases pp. 516, 519).*

**PUBLIC WATER SUPPLY.**

See WATERS.

**PUNITIVE DAMAGES.**

See DAMAGES.

**PURCHASE MONEY.**

Lien for, see VENDOR AND PURCHASER.

**PURPOSE.**

*Oil and gas or other mineral rights in land as affected by language in conveyance specifying purpose for which property is to be used. 5-1493 (case p. 1495).*

**QUALIFICATIONS.**

Of voters, see ELECTIONS.

**QUALITY.**

Implied warranty as to, see SALE.

**QUIETING TITLE.**

See CLOUD ON TITLE.

**RAILROADS.****In general.**

Use and obstruction of highway by, see **HIGHWAYS.**

*Effect of grant of land in fee to be used for railroad purposes on right to underlying minerals.* 5-1501.

**Crossings.**

Obstruction of railway crossing, see **HIGHWAYS.**

*Power of Public Service Commission with respect to crossing of steam road by street railway.* 5-56.

*Easement of way of necessity for private or farm crossing as affected by common ownership of parcels which are not accessible one from another.* 5-1560.

**Injuries to persons on or near track.**

*Duty and liability of railroad company voluntarily undertaking to care for injured person.* 5-513 (case p. 507).

Injury to trespasser. 5-507.

Duty as to lookout. 5-201.

**— contributory negligence.**

Negligence of passenger at station in crossing track to reach train. 5-201.

Recovery notwithstanding contributory negligence. 5-201.

**RAPE.**

*Criminal responsibility of one co-operating in offense of rape which he is incapable of committing personally.* 5-785.

**RATES.**

Of carriers, see **CARRIERS.**

Of taxation, see **TAXES.**

**RATIFICATION.**

Of constitutional amendment, see **CONSTITUTIONAL LAW.**

Of contract by infant, see **INFANTS.**

Of separation agreement. 5-817.

**REAL PROPERTY.**

Oral contract as to, see **CONTRACTS.**

Of corporations, see **CORPORATIONS.**

Covenants and conditions as to, see **COVENANTS AND CONDITIONS.**

Dedication of, see **DEDICATION.**

Deeds of, see **DEEDS.**

Easements in, see **EASEMENTS.**

Of decedent, power of personal representative as to, see **EXECUTORS AND ADMINISTRATORS.**

Injunction against injury to, see **INJUNCTION.**

Powers as to, see **POWERS.**

Rights and liabilities generally on sale of, see **VENDOR AND PURCHASER.**

**REASONABLE DOUBT.**

Instruction as to. 5-1247.

**REASONABLENESS.**

Of ordinance, power of courts to determine. 5-1060.

**RECEIVERS.**

*Appointment of receiver for solvent corporation at instance of minority stockholders under statute permitting appointment of receiver when the court deems it necessary to secure ample justice to the parties.* 5-368 (case p. 363).

*Preference of wages over lien creditors of corporation in hands of receiver, in absence of statutory provision therefor.* 5-690 (cases pp. 675, 685).

Rights of assignee or receiver of insolvent corporation. 5-79.

Asset in hands of receiver as subject to same equities available against corporations. 5-79.

Priority as between operating expenses and mortgage. 5-675.

**RECORD AND RECORDING LAWS.**

Record on appeal, see **APPEAL AND ERROR.**

Record in criminal case, see **CRIMINAL LAW.**

Records as evidence generally, see **EVIDENCE.**

**REDEMPTION.**

From foreclosure sale, see **MORTGAGE.**

**REDUCTION PLANT.**

See **GARBAGE**.

**RE-ENTRY.**

*Right of passenger who has been ejected to re-enter car or train. 5-353 (case p. 346).*

**REFERENDUM.**

See **INITIATIVE, REFERENDUM, AND RECALL**.

**RELIGION.**

Teaching of religion in schools, see **SCHOOLS**.

**RELIGIOUS GARB.**

*Wearing of, by teachers in school. 5-377.*

**RELIGIOUS LIBERTY.**

Reading from Bible or religious instruction in schools, see **SCHOOLS**.

**RELIGIOUS SOCIETIES.**

*Effect of language in conveyance that grant is for religious purposes on right to minerals in the land. 5-1502.*

**RELIGIOUS TEACHING.**

In schools, see **SCHOOLS**.

**REMAINDERS.**

Acceleration of, see **WILLS**.

**REMEDIES.**

Conflict of laws as to, see **CONFLICT OF LAWS**.

Due process as to, see **CONSTITUTIONAL LAW**.

For nuisance, see **NUISANCES**.

For breach of duty as to water supply, see **WATERS**.

**REMOVAL OF CAUSE.**

Transfer of cause between different courts of the same state, see **COURTS**.

**RENUNCIATION.**

Effect of renunciation of life estate to accelerate remainder, see **WILLS**.

**REPEAL.**

Of statutes, see **STATUTES**.

**RESCISSION.**

Of contracts generally, see **CONTRACTS**.  
Of contract of sale, see **SALE**.

**RESCUE.**

*Imputability to rescuer of antecedent negligence of rescued person. 5-206 (case p. 201).*

Proximate cause of injury received in making. 5-201.

**RESIDENCE.**

See **DOMICIL**.

**RESIGNATION.**

Of office, see **OFFICERS**.

**RES IPSA LOQUITUR.**

See **EVIDENCE**.

**RESTAURANTS.**

Injury from serving of unfit food, see **FOOD**.

*Validity of statute or ordinance interfering with privacy in restaurants. 5-965 (case p. 960).*

**RESTRAINT OF TRADE.**

Validity of contracts in restraint of trade, see **CONTRACTS**.



**RESTRICTIONS.**

On use of real property, see **COVENANTS AND CONDITIONS.**

**RETAINING JURISDICTION.**

See **EQUITY.**

**REVERSIBLE ERROR.**

See **APPEAL AND ERROR.**

**REVIEW.**

On appeal, see **APPEAL AND ERROR.**

In extradition proceeding, see **EXTRADITION.**

Of judgment, see **JUDGMENT.**

Of decision of Public Service Commission, see **PUBLIC SERVICE COMMISSIONS.**

**REVOCATION.**

Of license of dentist, see **DENTISTS.**

Of license of physician or surgeon, see **PHYSICIANS AND SURGEONS.**

Of wills, see **WILLS.**

**ROADS.**

See **HIGHWAYS.**

**ROUTE.**

Validity of order of Public Service Commission as to routing of street cars. 5-30.

**RULES**

In bank pass books, see **BANKS.**

**RULES OF DECISION.**

See **COURTS.**

**RULES OF PROPERTY.**

See **COURTS.**

**RUNNING EXPENSES.**

See **OPERATING EXPENSES.**

**SAFEGUARD.**

*Duty of abutting owner to continue safeguard against injury which he has voluntarily furnished. 5-936 (case p. 938).*

**SALARY.**

Of public officers, see **OFFICERS.**

**SALE.**

In general.

Of corporate stock, see **CORPORATIONS.**

Sale as a fraud on creditors, see **FRAUDULENT CONVEYANCES.**

Sales in bulk, see **FRAUDULENT CONVEYANCES.**

Of homestead, see **HOMESTEAD.**

Judicial sale, see **JUDICIAL SALE.**

Tax sale, see **TAXES.**

*Validity of statute or ordinance as to "containers." 5-1068 (case p. 1060).*

**Conditional sale.**

Insurable interest of purchaser under conditional sale. 5-805.

Effect of provision in insurance policy requiring title of insured to be in fee simple where one article covered was bought under conditional sale. 5-805.

**Warranty.**

*Implied warranty of fitness by one serving food. 5-1115 (case p. 1100).*

*Implied warranty by other than packer of fitness of food sold in sealed cans. 5-248 (case p. 242).*

**Rescission.**

Mistake as to attributes, quality, or value of subject-matter of sale as ground for rescission. 5-250.

**SALES AGENCY.**

Measure of damages for breach of contract as to. 5-1502.

**SANITY.**

See **INCOMPETENT PERSONS.**

**SCARLET FEVER.**See **INFECTIOUS AND CONTAGIOUS DISEASES.****SCHOOLHOUSE.**See **SCHOOLS.****SCHOOLS.****Officers.**Injunction against, see **INJUNCTION.**

Mandamus to compel county board of education to pay de jure county superintendent salary which has already been paid to de facto superintendent. 5-568.

Interference by court with action of school officer. 5-841.

**Districts and property.**

*Permitting use of schoolhouse for religious meetings.* 5-886.

*Effect of statement in conveyance of land that it is to be used for school purposes on right to minerals underlying the land.* 5-1501 (case p. 1495).

**Instruction.**

Use of public funds in aid of sectarian school, see **PUBLIC MONEYS.**

*Sectarianism in schools.* 5-866 (case p. 841).

Injunction against reading of Scriptures and recitation of Lord's Prayer. 5-841.

**SEARCH AND SEIZURE.**

*Entry and search of premises for purpose of arresting one without search warrant.* 5-263 (case p. 261).

**SECTARIANISM.**

In schools, see **PUBLIC MONEYS; SCHOOLS.**

**SECRETARY OF STATE.**

Illegal delegation of power to, by motor vehicle license act. 5-731.

**SEIZURE.**

See **LEVY AND SEIZURE; SEARCH AND SEIZURE.**

**SELF-CRIMINATION.**See **CRIMINAL LAW.****SENATORIAL DISTRICTS.**See **ELECTION DISTRICTS.****SENTENCE.**For crime, see **CRIMINAL LAW.****SEPARATION.**Of powers, see **CONSTITUTIONAL LAW.**

Of husband and wife, see **DIVORCE AND SEPARATION.**

**SET-OFF AND COUNTERCLAIM.**

*Right to set off claim of individual partner against claim against partnership.* 5-1541 (case p. 1537).

*Right of one indebted to insolvent bank to set off deposits which he has made as trustee.* 5-83 (case p. 79).

Right of depositor to set off amount of his deposit against debt to a bank in hands of receiver or assignee. 5-79.

**SETTLEMENT.**Of pauper, see **POOR AND POOR LAWS.**

In general, see **COMPROMISE AND SETTLEMENT.**

**SEVERABILITY.**Of contract, see **CONTRACTS.****SHERIFF.**Sheriff's sale, see **JUDICIAL SALE.**

Liability growing out of levy, see **LEVY AND SEIZURE.**

**SIDEWALK.**

Liability of abutting owner for injury due to defect in, see **HIGHWAYS.**

**SKIDDING.**

*Res ipsa loquitur as applied to accident caused by skidding of automobile.* 5-1246.

**SLANDER.**

See LIBEL AND SLANDER.

**SMALLPOX.**

See INFECTIOUS AND CONTAGIOUS DISEASES.

**SOCIAL CLUBS.**

See CLUBS.

**SPECIFIC LEGATEES.**

*Right of heir or devisee to have real property exonerated from lien thereon at expense of personal estate as against specific legatee.* 5-492.

**SPECIFIC PERFORMANCE.**

As to mandatory injunction, see INJUNCTION.

**SPEED.**

Of automobile frightening horse. 5-936.

**STALE DEMANDS.**

See LIMITATION OF ACTIONS.

**STATE.**

Mandamus to officers of, see MANDAMUS.  
Public funds of, see PUBLIC MONEYS.

**STATED ACCOUNTS.**

See ACCOUNTS.

**STATIONS.**

Carrier's duty as to, see CARRIERS.

**STATUTE OF FRAUDS.**

See CONTRACTS.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTIONS.

**STATUTES.**

Judicial notice of, see EVIDENCE.  
Admissibility of, in evidence, see EVIDENCE.

**Validity generally.**

Construing a statute so as to uphold it, see *infra*.

Validity of curative act, see CONSTITUTIONAL LAW.

Review of, by courts, see COURTS.

Presumption and burden of proof as to, see EVIDENCE.

*Ambiguity of statute providing for revocation of license of physician, surgeon, or dentist.* 5-94 (case p. 84).

General rule as to partial invalidity. 5-731.  
Invalidity of section of statute as to right of owner of premises to obtain release thereof by giving bond and paying cost on other sections of act for abatement of disorderly houses. 5-1449.

**Title.**

Statute for abatement of liquor nuisance. 5-1463.

**Local and special legislation.**

Statute providing for transfer of cause from district to circuit court in only one county of the state upon filing an affidavit of bias. 5-1272.

As to establishing a special court for a single county of the state. 5-1272.

**Construction.**

*Effect of mistake in reference in statute to another statute, constitution, public document, or the like.* 5-996 (case p. 990).

Legislative intent. 5-1309, 1512.

Determining legislative intent from context and contemporaneous and antecedent history. 5-113.

To uphold statute. 5-1449.

Looking to purpose of entire statute. 5-990.

Statutes in pari materia. 5-1507.

Eliminating from statute giving right of action reference to sections of other statutes which are erroneously alleged to prescribe the procedure. 5-990.

Admissibility on question of construction, of parol evidence to show how a mistake in reference in a statute occurred. 5-990.

Construction, when used in later statute, of words which have been construed by the courts. 5-1507.

Meaning of word "resides" in statute providing that proceedings to remove disabilities of minor shall be instituted in the county where he resides. 5-943.

Directory and mandatory provisions. 5-155.

Distinguishing between statutory offense of wilful embezzling of public money and statutory offense of failing to remit state money to proper custodian and failing to obey directions by such custodian to account for money collected. 5-773.

Question whether act is a civil or a penal one. 5-1449.

—adopted statute.

Effect of decisions of foreign court construing statute which is subsequently adopted. 5-242.

Amendment; repeal.

Effect of statute making applicable to procedure to recover damages for death from defect in highway provisions of another act permitting allowance of punitive damages, as an amendment of the act creating the cause of action. 5-990.

Repeals by implication not favored. 5-731.

---

### STEAM ENGINE.

*Liability for fright of horse in highway by.* 5-941.

---

### STIPULATION.

Giving jurisdiction by. 5-1426.

---

### STIRPES.

Distribution by, under will, see **WILLS**.

---

### STOCK.

Of corporations, see **CORPORATIONS**.

---

### STOCKHOLDERS.

In corporation generally, see **CORPORATIONS**.

### STREET RAILWAYS.

As carriers, see **CARRIERS**.

Relevancy of evidence on question of negligence, see **EVIDENCE**.

Sufficiency of proof of negligence, see **EVIDENCE**.

Municipal regulation of, see **MUNICIPAL CORPORATIONS**.

Question for jury as to negligence, see **TRIAL**.

*Power of Public Service Commission with respect to regulation of.* 5-36 (cases pp. 1, 13, 20, 24, 30).

*Injury to one other than passenger or employee from fall of trolley pole or other part of street car.* 5-1336 (cases pp. 1330, 1333).

---

### STREETS.

See **HIGHWAYS**.

---

### SUBMISSION.

Of proposed constitutional amendment to vote, see **CONSTITUTIONAL LAW**.

---

### SUBROGATION.

Subrogation of one advancing money to pay purchase money note to rights of payee as against persons performing labor or furnishing materials for building on the property. 5-391.

---

### SUBSTITUTIONARY REMAINDER.

Remainder to one after a life estate to another and, if he be dead, to his heirs, as substitutionary and not contingent. 5-465.

---

### SUCCESSION TAX.

See **TAXES**.

---

### SUFFRAGE.

Right of, see **ELECTIONS**.

---

### SUICIDE.

Presumption and burden of proof as to, see **EVIDENCE**.

**SUPPORT.**

Of infants, see **INFANTS**.

**SURFACE WATER.**

Municipal liability as to, see **MUNICIPAL CORPORATIONS**.  
In general, see **WATERS**.

**SURVIVORSHIP.**

Presumption and burden of proof as to, see **EVIDENCE**.

*Disposition of life insurance which by terms of policy is dependent upon survivorship where there is no presumption or proof of survivorship.* 5-797 (cases pp. 791, 794).

Time of determining beneficiaries in case of devise to survivors preceded by a life estate or other prior interest. 5-456.

**TARIFF.**

See **DUTIES**.

**TAVERNS.**

See **INNKEEPERS**.

**TAX COLLECTOR.**

Indicting as principal one assisting tax collector in embezzling public funds. 5-773.

**TAXES.**

In general.

Matters peculiar to municipal taxation, see **MUNICIPAL CORPORATIONS**.

Judicial notice as to tax matters. 5-731.  
Indicting as principal one assisting tax collector in embezzling public funds. 5-773.

What constitutes a tax. 5-731.

**Equality; uniformity.**

Application of uniformity and equality rule to succession or inheritance tax, see *infra*.

Uniformity and equality as to license, see **LICENSE**.

*Validity of statutes imposing license tax on automobiles as affected by constitutional provisions as to uniformity and discrimination in taxes.* 5-761.

*Applicability to license tax on automobiles of constitutional provisions in relation to ad valorem taxes.* 5-750

Submitting as one proposition amendments to two sections of the constitution relating to uniformity of taxation. 5-731.

**Exemptions.**

*Necessity of acceptance of dedicated street to relieve it from taxation.* 5-1537 (case p. 1532).

**Levy; rate.**

Effect of statute requiring approval of state tax commission to proposed increase of rate of taxation of municipality, to make necessary such approval of tax rate to provide for payment of principal and interest on bonds issued to purchase waterworks system. 5-519.

**Sale.**

*Right of public officer to purchase tax certificate or tax titles.* 5-969 (case p. 966).

*Constitutionality and applicability of curative provisions of taxing statutes where sale is irregular.* 5-164 (case p. 155).

**Necessity and sufficiency of notice.** 5-155.  
**Statutory requirement of notice to record owner.** 5-966.

**Question whether provision of statute as to time of sale is directory or mandatory.** 5-155.

**Necessity of judgment of district court before sale of property to unknown owner.** 5-155.

**Statute providing that no tax sale shall be invalidated except upon ground that taxes were paid before sale or that property was not subject to taxes.** 5-155.

**Succession tax.**

*Succession tax on property appointed by deed under power of appointment.* 5-183 (case p. 177).

**Attack on constitutionality of tax upon transfer of property by exercise of power of appointment because applicable only to such form of transfer.** 5-177.

**TENDER.**

*Tender as affected by insufficiency of amount offered. 5-1226 (case p. 1213).*

Liability for interest on amount tendered. 5-1216.

What constitutes a tender where mortgagee has exercised an option to declare whole amount due in case of default in payment. 5-434.

**TERMS.**

Of office, see OFFICERS.

**TERRITORIAL LIMITATIONS.**

As to jurisdiction, see COURTS.

**THEFT.**

See LARCENY.

**THREATENED INJURY.**

Injunction to prevent. 5-915.

**THREATS.**

Fright caused by, see FRIGHT.

*Civil liability for using threatening language. 5-1286 (case p. 1283).*

Definition of. 5-1283.

Threats of trainman causing boy trespassing on train to fall from it. 5-951.

Threat by man to alienate his property as coercion of wife to sign separation agreement. 5-817.

**TIMBER.**

As subject of larceny. 5-1121.

Question whether offense of cutting and removing timber is within scope of statute punishing larceny of timber or of another statute punishing wilful cutting or removal of timber. 5-1121.

**TIME.**

For taking appeal, see APPEAL AND ERROR.  
For tax sale, see TAXES.

Of determining beneficiaries under will. 5-456.

**TITLE.**

Chain of title, see CHAIN OF TITLE.

Of insured, see INSURANCE.

Contest of title to office, see OFFICERS.

Of statute, see STATUTES.

*Liability of attorney passing defective title. 5-1389 (case p. 1385).*

Refusal of injunction to prevent trespass upon real estate until title has been established in ejectment. 5-1052.

**TORTS.**

Question whether action is on contract or in tort, see ACTION OR SUIT.

Injunction against tortious acts, see INJUNCTION.

Pleadings as to, see PLEADINGS.

*Assignability of right of action ex delicto for injury to property as affected by statute. 5-130 (case p. 124).*

Parent's liability for torts of child. 5-216.

**TOWNS.**

Common-law dedication by platting highway in unincorporated town. 5-1532.  
Right to purchase waterworks system. 5-519.

**TRADE.**

Validity of contracts in restraint of trade, see CONTRACTS.

**TRAIN.**

*Homicide by firing into, without express intent to inflict injury. 5-606 (case p. 600).*

**TRANSFER.**

Of corporate stock, see CORPORATIONS.

Of cause, see COURTS.

Of insurance policy, see INSURANCE.

**TRANSFER TAX.**

See TAXES.

**TRESPASS.**

Injunction against, see **INJUNCTION**.

Admissibility of evidence under defendant's pleadings. 5-1320.

**TRESPASSERS.**

Injury to, on or near railroad track, see **RAILROADS**.

Carrier's duty to trespasser on train. 5-951.

Question whether fall of trespassing boy from moving train was caused by threats of trainman. 5-951.

Question for jury as to wilful negligence in forcing boy off moving train. 5-951.

Duty of railroad company undertaking to care for injured trespasser. 5-507.

**TRIAL.**

Procedure peculiar to criminal case, see **CRIMINAL LAW**.

As to new trial, see **NEW TRIAL**.

Place of, see **VENUE**.

As to witnesses, see **WITNESSES**.

Sufficiency of evidence to go to jury.

Negligence; personal injuries. 5-1237.

Questions of law and fact.

Question whether injury was direct result of act of trainman in forcing boy off moving train. 5-951.

Question whether fall of trespassing boy from moving train was caused by threats of trainman. 5-951.

Scope of authority of servant. 5-951.

Duty of court to determine whether language used can fairly be construed to have the meaning imputed to it in the petition. 5-1349.

Negligence of street railway company where its trolley pole is hurled against passing automobile, to injury of occupant. 5-1330.

Wilful negligence of trainman in forcing boy off moving train. 5-951.

Contributory negligence of patron injured by eating of unfit food in restaurant. 5-1100.

Negligence of railway company in obstructing crossing and delaying fire department in reaching fire. 5-1648.

Question of substantial performance of contract to build bridge. 5-1168.

**Nonsuit.**

Right of plaintiff nonsuited at close of case to most favorable inferences deducible from evidence. 5-1396.

Waiver of motion for nonsuit. 5-1090.

**Direction of verdict.**

Accepting the evidence and legitimate inferences from established facts most favorable to other party, on motion to direct verdict. 5-1333.

**Demurrer to evidence.**

Adopting inferences from evidence most favorable to demurree. 5-346.

**Instructions.**

Prejudicial error as to, see **APPEAL AND ERROR**.

Error in instructions requiring new trial, see **NEW TRIAL**.

Limiting to issues and proof. 5-201.

Instruction as to reasonable doubt. 5-1247.

**Verdict.**

Direction of verdict, see *supra*.

Judgment notwithstanding verdict, see **JUDGMENT**.

Right of juror to testify as to what did or did not influence him in reaching his conclusion. 5-1320.

**TROLLEY POLE.**

*Injury to one other than passenger or employee by fall of. 5-1336 (cases pp. 1330, 1333).*

Question for jury as to negligence where person in street is hit by trolley pole broken from car. 5-1330.

Presumption of negligence from fall of trolley pole from street car, to injury of person in street. 5-1330, 1333.

**TROVER.**

Right to sue in conversion for negligent performance of carrier's contract. 5-1117.

Liability as for a conversion of officer levying illegal attachment. 5-1507.

**TRUSTEES.**

Of charities, see **CHARITIES**.

In general, see **TRUSTS**.

**TRUSTS.**

Assignment in trust to pay creditors, see **ASSIGNMENTS FOR CREDITORS**.

Charitable trusts, see **CHARITIES**.

Failure of trustee to make disclosures as fraud, see **FRAUD AND DECEIT**.

*Right of one indebted to insolvent bank to set off deposits which he has made as trustee. 5-88 (case p. 79).*

Turning over fund to trustee appointed by the court where trustee named by author of trust is not competent to administer it. 5-1172.  
 Right to commit administration of trust to corporation or voluntary associations. 5-1175.

---

### **TYPHOID FEVER.**

See **INFECTIOUS AND CONTAGIOUS DISEASES.**

---

### **UNCERTAINTY.**

Of statutes, see **STATUTES.**

---

### **UNDUE INFLUENCE.**

*Validity of separation agreement as affected by.* 5-327.

---

### **UNFAIRNESS.**

*Validity of separation agreement as affected by.* 5-328.

---

### **UNFOUNDED CLAIM.**

*As breach of covenant of deed.* 5-1084 (case p. 1081).

---

### **UNIFORMITY.**

Of license tax, see **LICENSE.**  
 In taxation, generally, see **TAXES.**

---

### **USAGE.**

See **CUSTOM AND USAGE.**

---

### **USER.**

*As acceptance of dedication of highway.* 5-1532.

---

### **USURY.**

*Negotiable Instrument Law as affecting defense of usury.* 5-1447 (case p. 1444).

### **VALUE.**

Opinion evidence as to, see **EVIDENCE.**  
 Duty to tax according to value, see **TAXES.**

---

### **VENDOR AND PURCHASER.**

#### **In general.**

Oral contracts for land, see **CONTRACTS.**  
 Covenants between, see **COVENANTS AND CONDITIONS.**

Deeds, see **DEEDS.**

Sale of homestead, see **HOMESTEAD.**

Sale under execution or attachment, see **JUDICIAL SALE.**

Rights and liabilities of purchaser of land subject to mortgage, see **MORTGAGE.**

Sale for taxes, see **TAXES.**

*Respective rights of purchasers of different parcels of land subject to oil and gas leases.* 5-1162 (case p. 1157).

What constitutes a marketable title. 5-1385.

#### **Vendor's lien.**

*Right of heir or devisee to have real property exonerated from vendor's lien at expense of personal estate.* 5-503.

Rights of parties as to third persons; bona fide purchasers.

*Priority of judgment over conveyance made to bona fide purchaser after beginning of term but prior to rendition of judgment.* 5-1078 (case p. 1070).

Notice of facts putting on inquiry. 5-391.

---

### **VENDOR'S LIEN.**

See **VENDOR AND PURCHASER.**

---

### **VENEREAL DISEASE.**

*As ground for annulment of marriage or divorce.* 5-1016 (case p. 1013).

---

### **VENUE.**

As to jurisdiction of nonresidents generally, see **COURTS.**

What constitutes change of residence of infant within meaning of statute that proceedings to remove disabilities of minor must be brought in the county of his residence. 5-943.



Meaning of word "resides" in statute providing that proceedings to remove disabilities of minor shall be instituted in the county where he resides. 5-943.

---

### VERDICT.

See TRIAL.

---

### VERIFICATION.

Of pleading, see PLEADING.

---

### VIEW.

Deciding questions on appeal upon what appears in the record regardless of view by jury. 5-275.

---

### VIOLATION OF LAW.

*Forfeiture of property unauthorisedly used by servant in violating law. 5-218 (case p. 211).*

*Presumption from violation of statute of negligence of railroad company interfering with fire department while attempting to extinguish fire. 5-1656.*

---

### VOLUNTEER.

*Duty and liability of one who voluntarily undertakes to care for injured person. 5-518 (case p. 507).*

---

### VOTERS AND ELECTIONS.

See ELECTIONS.

---

### WAGERS.

Wagering assignment of insurance policy, see INSURANCE.

---

### WAGES.

Preference to, in assets in hands of receiver, see RECEIVERS.

---

### WAIVER.

Of error in trial court, see APPEAL AND ERROR.

By insurer, see INSURANCE.

Of disqualification of judge, see JUDGES.

Of right to take advantage of acceleration clause in mortgage, see MORTGAGE.

*Of right of heir or devisee to have real property exonerated from lien thereon at expense of personal estate. 5-498.*

---

### WAR.

As to blockade, see BLOCKADE.

---

### WARDS.

See GUARDIAN AND WARD.

---

### WARRANT.

For extradition, see EXTRADITION.

Search warrant, see SEARCH AND SEIZURE.

---

### WARRANTY.

In insurance policies, see INSURANCE.

Of goods sold, see SALE.

---

### WATERS.

In general.

*Rights of boating and fishing on inland lakes. 5-1056 (case p. 1052).*

Surface water.

Liability of city as to surface water, see MUNICIPAL CORPORATIONS.

Injunction against injury from. 5-1523.

Diverting water from its natural course. 5-1523.

Hastening flow of. 5-1523.

Right of landowner to tile his land into a natural channel. 5-1523.

Right to concentrate water at one point and discharge it in a body on lower land. 5-1523.

Public water supply.

Municipal purchase or ownership of water-works, see MUNICIPAL CORPORATIONS.

*Right to recover damages from municipality or water company for injuries resulting from furnishing impure water. 5-1402 (case p. 1396).*

Sufficiency of proof that city's contaminated water supply was the source of typhoid fever. 5-1396.

**WAY.**

Of necessity, see **EASEMENTS.**

**WEIGHTS AND MEASURES.**

*Validity of statute or ordinance as to "containers."* 5-1068 (case p. 1060).

Delegation to municipality of power to regulate. 5-1060.

**WELLS.**

*Measure of damages for defective performance of contract to bore gas well.* 5-240 (case p. 234).

Construction of contract for digging of well. 5-234.

**WHITE SLAVERY.**

See **PROSTITUTION.**

**WIDOW.**

Election between legacy and dower, see **WILLS.**

Crediting an administrator with money paid by him in good faith to widow before discovery of will. 5-619.

**WILLS.**

Equitable jurisdiction over, see **EQUITY.**

**Revocation.**

Effect of codicil to revoke will. 5-303.

**Probate contest.**

Condition in will against contest, see *infra*.

*Compromise or settlement of controversy over will as changing nature of interest or estate under will.* 5-1384 (case p. 1381).

Duty of executors to present and seek probate of will. 5-1426.

Injunction to restrain interference with probate of will. 5-1426.

**Codicil.**

Effect of codicil to revoke will. 5-303.

Gift made by codicil as subject to conditions imposed by the will on testamentary gifts generally. 5-1363.

**Holographic will.**

Applicability of provision in will for forfeiture of interest in case of attempt to contest will, to subsequent holographic will making a specific pecuniary bequest. 5-1363.

**Devise and legacy generally; construction.**

*Agreement that one's share in estate shall be equal to share of certain other person as affected by gift to latter during lifetime of decedent.* 5-1436 (case p. 1426).

Validity of settlement as to disposition of property received under will by the legatees, heirs at law, and others having pecuniary interest therein. 5-1426.

Effect of waiver by widow of provision in her favor on construction of will. 5-1617.

Effect of statutory provision that all testamentary instruments executed by the same testator are to be construed together as one instrument. 5-1363.

Considering circumstances under which will was made. 5-185.

Intent of testator. 5-185, 465, 1277, 1617.

**Description of beneficiaries; who may take.**

*Meaning of term "issue" where used as a word of purchase.* 5-195 (case p. 185).

*Right of child adopted after testator's death to take under will.* 5-1280 (case p. 1277).

Construing word "issue" as used as word of purchase. 5-185.

Meaning of word "issue" used as word of limitation. 5-185.

Effect of statute providing for interpretation of the word "issue" in case of a devise of one for life with remainder to his issue, in case of a devise to one and his issue. 5-185.

Time of determination. 5-456.

**Partial intestacy.**

Effect of death before final distribution by one to whom a share of residue created by widow's election against will had been given. 5-1617.

**Nature of estate or interest created.**

Effect of subsequent words to cut down estate in fee simple. 5-185.

Construing language which in a devise of real estate would create an estate tail as giving an absolute estate where the property is personalty. 5-185.

Construing gift to one and his issue as a limitation giving first taker estate tail in the real estate and an absolute estate in the personalty. 5-185.

Bequest to one and his issue as an absolute gift to the first taker. 5-185.

Estate of widow under will bequeathing to her a sum to be used by her during her life and at her death to be divided among others. 5-1621.

— estate or gift upon condition.

*What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary.* 5-1370 (case p. 1363).

Strict construction of clause of will providing for forfeiture in case of attempt to contest will. 5-1363.

Applicability of provision in will for forfeiture of interest in case of attempt to contest will, to subsequent holographic will making a specific pecuniary bequest. 5-1363.

Gift made by codicil as subject to conditions imposed by the will on testamentary gifts generally. 5-1363.

Burden of proving good faith of one seeking to probate a later will to avoid operation of provision in the earlier one against contest. 5-1363.

— interest of several.

Per stirpes or per capita. 5-185.

— vested or contingent interest.

Remainder to one after a life estate to another and, if he be dead, to his heirs, as substitutionary rather than contingent. 5-465.

Remainder to children as contingent and not vested under devise to wife for life or until remarriage and then to testator's children then living and the decedents per stirpes of such as may be dead. 5-465.

Payment; acceleration.

*Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substitutional gift.* 5-460 (case p. 456).

*Effect of premature termination of precedent estate to accelerate contingent remainder.* 5-473 (case p. 465).

*Failure or renunciation of the precedent life estate given by a will, as accelerating the vesting of a remainder limited thereon where enjoyment is postponed by the allotment of dower or the necessity of compensating disappointed legatees.* 5-480 (case p. 477).

*Conflict between doctrine of acceleration and claim to compensation of legatees disappointed by another's election against the will.* 5-1632 (cases pp. 1617, 1621).

Definition of acceleration. 5-465.

Refusal to apply doctrine of acceleration to defeat testator's intention. 5-465.

Election.

Effect of election to accelerate remainder, see *supra*.

*Compensation of legatees disappointed by another's election against the will.* 5-1628 (cases pp. 1617, 1621).

Effect of waiver by widow of provision in her favor on construction of will. 5-1617.

Upon whom loss caused by election of widow against the will must fall. 5-1617.

Effect of death before final distribution of one to whom a share of residue created by widow's election against will had been given. 5-1617.

Equitable conversion.

Direction to sell real estate after death of life tenant and deposit money as a devise of money and not of land. 5-456.

Right of legatees who receive the cash payments to which they are entitled under will to contest reconversion of money into realty by other devisees. 5-456.

Suit to construe will.

*Action to construe will as a contest thereof within provision forfeiting share of contesting beneficiary.* 5-1372.

---

WITNESSES.

In general; competency.

Admissibility of testimony in former suit, see EVIDENCE.

Opinions and conclusions of, see EVIDENCE.

Privileged communications to, see EVIDENCE.

Right of accused to meet. 5-1449.

Competency of attorney as witness for or against client. 5-972.

Examination.

Privilege of accused against self-crimination, see CRIMINAL LAW.

Prejudicial error in excluding question on cross-examination. 5-1237.

Impeaching; discrediting.

Contradicting one's own witness. 5-723.

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WOMAN SUFFRAGE.

See ELECTIONS.

**WORDS AND PHRASES.**

Abetting. 5-786 note.  
 Acceleration. 5-465.  
 Acquiescence. 5-1320.  
 Act. 5-1422 note.  
 Appoint. 5-1407.  
 Bill. 5-1422 note.  
 Children. 5-1281 note.  
 Color of law. 5-519.  
 Construction. 5-546 note.  
 Contest. 5-1370 note.  
 Cruelty justifying divorce, *see* DIVORCE  
 AND SEPARATION.  
 Domicil. 5-284.  
 Easement. 5-440.  
 Establish. 5-541 note.  
 Heirs at law. 5-1282 note.  
 Immediately due. 5-434.  
 Inducement. 5-1349.  
 Inhuman treatment. 5-710.  
 Issue. 5-185; 5-195 note; 5-1281 note.  
 Law. 5-1424.  
 Lawful heirs. 5-1281 note.  
 Legislature. 5-1420 note.  
 Libel. 5-1349.  
 Malice. 5-600.

Marketable title. 5-1385.  
 Ownership. 5-411.  
 Probable cause. 5-1697 note.  
 Publican. 5-1100.  
 Public road. 5-765.  
 Reaming. 5-234.  
 Resides. 5-943.  
 Tax. 5-731.  
 Threat. 5-1283.  
 Victualer. 5-1100.  
 Victuals. 5-1100.  
 Void. 5-1507, 1512; 5-1518 note.

**WORKMEN'S COMPENSATION.**

*Compensation to workmen injured  
 through smoking. 5-1521 (case p.  
 1518).*  
*Presumption against suicide. 5-1680  
 (case p. 1673).*  
 Burden of establishing claim under Work-  
 men's Compensation Act. 5-1673.  
 Conflicting inferences arising out of estab-  
 lished facts. 5-1673.

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**Heavy italic type is used for annotations; roman type for cases.**







